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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 -<br>Table for MS comments on document ST 8576/21 - Articles 1-16, Articles 34,<br>Articles 36 to 39 |

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Delegations will find attached the MS comments on Articles 1-16, Articles 34 and Articles 36 to 39 of the document ST 8576/21.

*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)*

| <b>Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21</b> | <b>AT - DK - MT - HU - SK - FI - FR - PL - LV - CZ - SE - NL - PT - LU<br/>- ES</b><br><br><b>MS Drafting suggestions and comments</b>                                                                                                                                                                                                                                                         |
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| Chapter 1: General provisions                                                                                                                     | CZ<br><br>(Comments):<br><br>To achieve a better clarity, we would suggest adding a new article with a list of definitions of terms and concepts used frequently in the regulation. The definitions should be aligned to the extent possible with existing EU legislation dealing with EU or foreign subsidies but also with international treaties and agreements applicable in this context. |
| Article 1                                                                                                                                         | AT<br><br>(Comments):<br><br>No comment so far; will depend on further questions on other articles.                                                                                                                                                                                                                                                                                            |
| Subject matter and scope                                                                                                                          | LU<br><br>(Drafting):<br><br>Subject matter, <del>and</del> scope <b><u>and objective</u></b><br>LU                                                                                                                                                                                                                                                                                            |

**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)**

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|                                                                                                                                                                                                                                                                                                          | <p>(Comments):</p> <p>Article 1 of the DFS regulation should explain its ultimate objectives and the link to its legal basis, namely, among others, article 114 TFEU. The current wording of Article 1 only summarises the “what” of the DFS regulation. We propose an additional subparagraph to explain the “why”. The wording of the additional paragraph is based on recital 3. Specifying the objectives of the DFS regulation would also provide useful guidance to the EU’s trade partners and foreign investors.</p> |
|                                                                                                                                                                                                                                                                                                          | <p>LU</p> <p>(Drafting):</p> <p><b><u>The objective of this Regulation is to improve the proper functioning of the internal market by addressing distortions caused by foreign subsidies, with a view to strengthen the level playing field for various economic activities in the Union.</u></b></p> <p>LU</p> <p>(Comments):</p> <p>See comment above.</p>                                                                                                                                                                 |
| <p>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.</p> | <p>FR</p> <p>(Drafting):</p> <p>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 notably <del>in particular</del> in concentrations and public procurement procedures.</p>                                                                                                                                                                     |

**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)**

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|  | <p>FR</p> <p>(Comments):</p> <p>The references to "marches publics" alone in the French version of the regulation raise questions insofar as its scope (Art. 27) also covers concession contracts within the meaning of Directive 2014/23.</p> <p>There is therefore a risk of misinterpretation in French. Indeed, the notion of "public procurement" used in the English version may identify only public contracts or may more broadly include concession contracts in the sense of "commande publique". We therefore wonder whether the problem is limited to the French translation of the regulation.</p> <p>Consequently, we modify only the French version (not the English version) and all the other versions which can suffer from said misinterpretation by adding an explicit reference to "concessions" or "commande publique" to avoid any confusion in French.</p> <p>PL</p> <p>(Comments):</p> <p>We would like to ask the Commission to present specific examples of economic activities covered by this Regulation (apart from concentration and public procurement procedures). It would be advisable to include such examples in the provisions of the preamble.</p> <p>NL</p> <p>(Drafting):</p> <p><b><u>NL:</u></b> This Regulation lays down rules and procedures for investigating foreign subsidies, <b>financial relations with public undertakings and</b></p> |
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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)*

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|  | <p><b><u>exclusive or special rights granted to one or more undertakings</u></b> 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.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: The proposed amendment extends the scope and impact of the Regulation by taking into account that distortion of competition on the internal market may also result from forms of support which may not directly qualify as a foreign subsidy as defined in this regulation, but provide a major competitive advantage to the undertakings concerned. The proposed amendment aligns with article 106 TFEU and directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.</u></p> <p>LU</p> <p>(Drafting):</p> <p>This Regulation lays down <b>harmonised</b> 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.</p> <p>LU</p> <p>(Comments):</p> <p>We are still assessing the scope of the DFS regulation, especially in light of a possible risk of deteriorating the EU's attractiveness for FDIs.</p> |
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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)**

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| <p>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.</p> | <p>FR</p> <p>(Drafting):</p> <p>This Regulation addresses foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. <b>Among others</b>, 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.</p> <p>FR</p> <p>(Comments):</p> <p>This precision aims to clarify that the term of “economic activity” is not restricted to the establishment of an undertaking in the Union or its participations in a public procurement.</p> <p>PL</p> <p>(Comments):</p> <p>Bearing in mind the possibility of the Commission to examine each type of economic activity of subsidised undertakings on the internal market, the provision of Article 1(2) is too narrow and conducting business activity in the internal market should not only involve acquiring control or merging with an undertaking established in the Union or participating in public procurement procedures, but also establishing companies, offering services on the internal market.</p> <p>NL</p> |
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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)**

(Drafting):

**NL:** This Regulation addresses foreign subsidies and certain other financial and competitive advantages 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.

NL

(Comments):

NL: Text suggestion has been added to reflect the addition in scope as indicated in the proposed amendment of the first paragraph (see above).

LU

(Drafting):

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 **in the Union** is considered to be engaging in an economic activity in the internal market.

LU

(Comments):

According to the jurisprudence of the ECJ, an undertaking is *by definition* engaging in an economic activity. We believe that the wording of this paragraph as well as other articles of the DFS regulation should aim to reflect that.

**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)**

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|                                                                                                                                                                                                                                                                                                                                                                      | Clarification. In line with the wording on concentrations.                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Article 2                                                                                                                                                                                                                                                                                                                                                            | <p>CZ</p> <p>(Comments):</p> <p>Principles set out in Article 2 to evaluate should be in line with international rules given by the Agreement on Subsidies and Countervailing Measures (ASCM). At this point, the draft regulation refers to the ASCM in very loose way and the regulation should respect the provisions given in this agreement. In particular, the criterion of specificity should be elaborated and explained in the regulation in more detail, preferably in line with ASCM.</p> |
| Existence of a foreign subsidy                                                                                                                                                                                                                                                                                                                                       | <p>CZ</p> <p>(Comments):</p> <p>Moreover, we would suggest using language of ASCM (Article 1 Definition of a Subsidy, and Article 2 Specificity) to the extent possible in Article 2 of the Regulation. It would ensure consistency with EU Regulation on protection against subsidised imports from countries not members of the EU (AS Regulation) and avoid doubts about scope of the definition.</p>                                                                                             |
| 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. | <p>AT</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |



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|  | <p>For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country <u>directly or indirectly</u> 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.</p> <p>AT</p> <p>(Comments):</p> <p>In para 1, the wording “directly or indirectly” should be added after “a third country”.</p> <p>Could the Commission clarify the “limit” to one or several undertakings in para 1? By referring to several undertakings, this limitation seems to become meaningless. Furthermore, it is unclear whether the undertaking(s) or industry/industries also have to be from a third country (country or origin of the subsidy or another country).</p> <p>HU</p> <p>(Comments):</p> <p><b>Although the language of the Regulation consciously uses terms different from State aid terminology (contribution vs. aid, benefit vs. advantage, imputable vs. attributable etc.), it would be advisable to refer to it in the Regulation (in the recitals or in this Article whether, when the Regulation is applied, the associable/corresponding terms of State aid law can be taken into account. As the purpose of the Proposal is similar to State aid law, i.e. the protection of the internal market from distortive subsidies, we believe a reference to State aid terminology would help the practical application of the Regulation and close possible loopholes.</b></p> |
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|  | <p><b>This would also allow the EU Courts to interpret the text of the regulation in the light of the existing State aid law jurisprudence and reduce the risk of different interpretation.</b></p> <p>FI</p> <p>(Comments):</p> <p>In order to ensure legal certainty for the undertakings concerned, <u>key concepts</u> of the regulation, such as "foreign subsidy" , "distortion in the single market" (art. 3) and "balancing" needs to be <u>further clarified</u> for example in the Guidelines after the regulation is adopted. We propose that this issue addressed in the recitals for example in a following manner:</p> <p>In order to ensure legal certainty and predictability for the beneficiaries of foreign subsidies, the Commission shall issue Guidelines to specify further, among others, how the internal market distortions and balancing are assessed.</p> <p>Besides, it should be further clarified that only selling goods to the EU area (provision of goods or services or purchase of goods and services, for example import) can be seen as “engaging in an economic activity” even though an undertaking is not otherwise established in the EU (Art 2(1) and Art 1).</p> <p>PL</p> <p>(Comments):</p> <p>We agree with the view of foreign subsidies proposed in the article. Nevertheless, going beyond the scope of this Regulation, it should be remembered that the factors distorting the conditions of equal competition are not only financial transfers, but also all other forms of easing the requirements for domestic producers and service providers used by third</p> |
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|  | <p>countries, including those in the field of protection of workers' rights and environmental standards. Therefore, such easing of requirements by third countries on their domestic producers has the effect of lowering their costs and, in effect, acts as a subsidy because it administratively relieves their traders of costs that must be borne by EU traders. Moreover, the easing of requirements in third countries results in the removal of production and services from the territory of the EU. In the case of easing environmental standards, which are strictly required and respected in the EU, it additionally increases the emission of harmful factors and CO2 into the atmosphere, influencing the global increase of their level.</p> <p>CZ</p> <p>(Comments):</p> <p>We kindly ask the Commission to explain differences with relevant definitions under EU rules (state aid, protection against subsidised imports) and ASCM. Especially the wording “<i>is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries</i>” deviates from relevant definitions in AS Regulation and ASCM.</p> <p>LU</p> <p>(Drafting):</p> <p>For the purpose of this Regulation, a foreign subsidy <del>shall be deemed to exist</del><u>s</u> 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.</p> <p>LU</p> |
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|                                         | <p>(Comments):</p> <p>Even though it stems from article 1 of the SCM Agreement, we do not see the benefit of the current wording, which seems unnecessarily complicated.</p> <p>In addition, it should be clarified if the notion of “financial contribution which confers a benefit” is congruent with the notion of “economic advantage” under EU State Law. Referring to a “financial contribution” may at first glance lead to the conclusion that advantages in kind are excluded from the scope of the DFS regulation.</p>                                                                                                       |
| For the purpose of this Regulation,     | <p>SE</p> <p>(Comments):</p> <p>Definitions need to be further outlined, for example in article 2 or in the recitals, to cover wording borrowed from different legislative fields and outline the meaning of the wording under this regulation, accompanied by cross references where appropriate. Similar treatment of undertakings must be ensured, and a common understanding is then vital. Examples of concepts that need to be defined in this context are: (i) economic activity, (ii) benefit, (iii) state, (iv) distortion, (v) competition, (vi) control, (vii) reasonable suspicion, (viii) unduly advantageous tender.</p> |
| a financial contribution shall include: | <p>AT</p> <p>(Comments):</p> <p>We are wondering whether the focus on financial contributions in the definition of a third-party subsidy is too narrow in certain cases. A foreign subsidy may, for example, also exist where a third country does not</p>                                                                                                                                                                                                                                                                                                                                                                             |

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|                                                                                                                                                                                                                                  | <p>intervene against violations of international minimum labor standards or environmental standards, thereby giving such undertakings a competitive advantage over its competitors.</p> <p>DK</p> <p>(Comments):</p> <p>It should be stated more clearly that the list is non-exhaustive.</p> <p>FR</p> <p>(Drafting):</p> <p>a financial contribution shall include <i>inter alia</i> :</p> <p>FR</p> <p>(Comments):</p> <p>This precision aims to clarify that the definition of “financial contribution” is not restrictive.</p> <p>ES</p> <p>(Comments):</p> <p>It should be clarified if intangible assets, patents or intellectual property elements should be included in the concept of financial contribution, to the extent that they are instruments that can confer a benefit and, consequently, an advantage to the beneficiary company.</p> |
| (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 | DK                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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| <p>forgiveness, debt to equity swaps or rescheduling;</p> | <p>(Comments):</p> <p>It should be clarified that article 2(a)(i) should also include temporary or permanent tax benefits, tax exemptions or the like which an undertaking receives in a third country.</p> <p>NL</p> <p>(Drafting):</p> <p><b><u>NL:</u></b> (i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, <b>tax exemptions</b>, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;</p> <p>NL</p> <p>(Comments):</p> <p><b><u>NL: explicit inclusion of tax exemptions as a form of financial contribution.</u></b></p> <p>LU</p> <p>(Comments):</p> <p>Are tax advantages covered by the concept of “fiscal incentives”? Is this concept also meant to include "tax incentives" such as a tax exemption for R&amp;D activities?</p> <p>When referring to the “setting off of operating losses”, it should be specified that a loss carryover in tax law is legitimate and therefore does not necessarily constitute a financial contribution within the meaning of the DFS regulation.</p> |
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| (ii) the foregoing of revenue that is otherwise due; or                         | <p>NL</p> <p>(Drafting):</p> <p>LU</p> <p>(Comments):</p> <p>It should be specified that the “foregoing of revenue that is otherwise due” is to be determined in relation to the national framework of the third country concerned, in line with EU State Aid rules.</p>                                                                                                                                                                                                                                                                                                                                                                            |
| (iii) the provision of goods or services or the purchase of goods and services; | <p>AT</p> <p>(Comments):</p> <p>Regarding para 2 point a) iii), we suggest to phrase this provision more precisely as regards to whom goods/services should be provided or purchased from.</p> <p>Furthermore, it should be clarified, that only “irregular” provisions/purchases are relevant: if the provision/purchase is made under regular market conditions, no benefit is conferred. Is the reference supposed to be made to any provision of goods or services, regardless of the relevant public procurement procedure? If so, how is this supposed to be checked in practice by the European Commission?</p> <p>CZ</p> <p>(Drafting):</p> |

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NL

(Drafting):

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|  | <p>NL</p> <p>(Comments):</p> <p><u>1. NL would like confirmation that companies which are established in a third country and can buy resources such as minerals or energy at advantageous prices which are not available to EU companies (even if they have a subsidiary in that country) are deemed to be beneficiaries of a foreign subsidy.</u></p> <p><u>NL: In public procurement tenders, private entities who won the tender may privately purchase goods in order to execute the project. The goods as such may be purchased from a subsidized firm. Buying goods from a subsidized firm may provide a direct advantage in winning the tender and hence distort competition in the procurement procedure. This was recently the case (and much reported on) in the Netherlands: the winner of a public transport concession bought buses from a Chinese firm that was allegedly subsidized, which (allegedly) allowed the firm to win the tender. How would such a case fall under the definition of article 2 (sub 2.b.iii)? We suggest to make this more explicit, either in this recital or the according article. Important to note that this situation does not seem to fall under the future IPI.</u></p> <p>LU</p> <p>(Comments):</p> <p>Point (iii) seems to imply that benefits in kind that have an economic value are seen as a financial contribution under article 2. We believe that this should be clarified.</p> |
|  | <p>FR</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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|                                                                                                                | <p>(Drafting):</p> <p>(iv) any regulatory intervention which favors certain undertakings or the production of certain goods on their profitability of some actors on their domestic markets.</p> <p>FR</p> <p>(Comments):</p> <p>This proposed addition aims to take into account the situation in which the beneficiary has privileged access to its domestic market (notably, through measures equivalent to special or exclusive rights), leading to an artificial competitive advantage that could be leveraged in the EU internal market and thereby exacerbates the distortive effect of any subsidy.</p> <p>NL</p> <p>(Drafting):</p> <p><b><u>NL: (iv) any financial advantage in any form whatsoever funded directly or indirectly through state resources of the third country;</u></b></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: the scope of “financial contribution” as defined in article 2 points (i) to (iii) seems to be exhaustive. However there is always a risk that some type of financial contribution is structured in such a way as to escape the definition. In line with the very broad scope of the EU state aid definitions, the Netherlands suggest a catch all to cover this eventuality.</u></p> |
| the financial contribution provided by the third country shall include the financial contribution provided by: |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| (i) the central government and government 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 | <p>PL</p> <p>(Comments):</p> <p>Can the Commission explain:</p> <ul style="list-style-type: none"> <li>• the concept of linkage between a foreign public entity and a third country and linkage between any private entity and a third country;</li> <li>• whether only formal links are covered by this Regulation;</li> <li>• if also informal, what degree of affiliation will be treated as a financial transfer by a third country;</li> <li>• how far they will be monitored in successive degrees of ownership, ie to which next level of the “parent company”;</li> </ul> <p>what steps does the Commission intend to take if there is no information/data on the private/public entity's link with the third country providing a financial contribution and there is only a presumption of such a link.</p> |
| (iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.                                                                                                                                                                         | <p>AT</p> <p>(Drafting):</p> <p>(iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances, <a href="#">such as the elements listed under point b) ii).</a></p> <p>AT</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

**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)**

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|  | <p>(Comments):</p> <p>In para 2 point b) iii), the reference to “all relevant circumstances” should be specified, for example by a reference to the circumstances listed in point b) ii).</p> <p>CZ</p> <p>(Drafting):</p> <p>(iii) any private entity <u>entrusted or directly or indirectly managed by government of the third country to carry out such actions</u> <del>whose actions can be attributed to the third country, taking into account all relevant circumstances.</del></p> <p>CZ</p> <p>(Comments):</p> <p>As regards the Art. 2 (2b iii) we are of the opinion that the definition is not entirely clear. Therefore, we would suggest clarification as drafted.</p> <p>PT</p> <p>(Comments):</p> <p>Concerning the definition of financial contribution provided by a third country, the proposal includes "<i>any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances</i>". We consider this inclusion of private entities not aligned with what is established in several international and European instruments that deal with foreign subsidies, namely:</p> <ul style="list-style-type: none"> <li>• General Agreement on Tariffs and Trade - article XVI;</li> <li>• Agreement on Subsidies and Countervailing measures of the WTO</li> </ul> |
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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)**

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|  | <p>- article 1;</p> <ul style="list-style-type: none"> <li>• Regulation EU 2016/103 - protection against subsidized imports from countries not members of the European Union - article 3.</li> </ul> <p>None of these instruments refer only to private entities, but to private entities that are subsidized by governmental entities.</p> <p>For the reasons stated above, we suggest the harmonization of the definition of private entity on this proposal with the abovementioned instruments and this article should only mention state-owned or state-influenced entities.</p>                                                                                                                                                                                                                                                                                                             |
|  | <p>NL</p> <p>(Drafting):</p> <p><u>NL: For the purpose of this Regulation, other financial and competitive advantages shall be deemed to exist when:</u></p> <p><u>(i) financial relations with public undertakings are not structured at arms' length or are not in line with normal market conditions in the market concerned; or</u></p> <p><u>(ii) exclusive or special rights have been granted explicitly or de facto to one or more undertakings who subsequently leverage those exclusive or special rights by off-setting costs or losses incurred on the European internal market by increased turnover or profits on the captive markets where those exclusive or special rights apply.</u></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: in line proposed amendments regarding the scope of this regulation further clarification is needed when other financial and competitive</u></p> |

**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)**

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|                                                                                                                                                                                                                                                                                                                                                                                                                                        | <u>advantages are deemed to exist. These concepts are in line with EU legislation, state aid practice and EU jurisprudence with regard to competition, state aid and SGEL.</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 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: | <p>HU</p> <p>(Drafting):</p> <p><b>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, <u>among other indicators</u>, the following:</b></p> <p>HU</p> <p>(Comments):</p> <p><b>The factors of distortive character should not appear to be exhaustive in the text as other indicators might arise that are not covered by the list in Article 3.</b></p> <p>FR</p> <p>(Drafting):</p> <p>A distortion on the internal market shall be deemed to exist where a</p> |

**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)**

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|  | <p>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, <i>inter alia</i>, the following:</p> <p>FR</p> <p>(Comments):</p> <p>This precision aims to clarify that the “basis of indicators” are not restrictive.</p> <p>CZ</p> <p>(Drafting):</p> <p>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 <u>significantly</u> 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:</p> <p>SE</p> <p>(Comments):</p> <p>Necessary conditions for assessment should be further outlined. Parameters for assessing distortion are not fully predictable for concerned parties.</p> <p>The reference system and data from third countries could also become vital for the assessment of benefits conferred to an undertaking. The</p> |
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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)**

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|                            | <p>undertaking does not necessarily have information regarding these aspects.</p> <p>Can a simplified procedure concerning notifications be considered in those cases where limited effect on the single market is expected?</p> <p>NL</p> <p>(Drafting):</p> <p><b><u>NL:</u></b> 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, <b><u>but is not limited to,</u></b> the following:</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: the relationship with distortion on the internal market should be strengthened and made more explicit by referring to economic indicators regarding the effects on competition on the internal market itself. The indicators are mostly focused on the foreign subsidy itself and not on how the foreign subsidy in its anti-competitive effects is transmitted through the beneficiary onto the internal market.</u></p> <p><u>Further, we believe that this list of indicators should not be exhaustive so as not to exclude possible other relevant acts. We would like to see that added.</u></p> |
| the amount of the subsidy; |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| the nature of the subsidy; |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |



**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)**

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| the situation of the undertaking and the markets concerned;                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                                                     | <p>FR</p> <p>(Drafting):</p> <p>the sectors concerned ;</p> <p>FR</p> <p>(Comments):</p> <p>This proposed addition aims to take into account the case of the sectors which are massively subsidized (such as strategic sectors / critical technologies relating to AI, semiconductors, <i>etc.</i>), due to ambitious industrial strategies of certain States.</p> <p>PL</p> <p>(Drafting):</p> <p><a href="#">the situation of other undertakings in the same sector;</a></p> <p>PL</p> <p>(Comments):</p> <p>The addition of this indicator would make it possible to compare the situation of subsidised and non-subsidised undertakings operating within a single sector and to assess the real benefit gained by subsidised undertakings.</p> |
| the level of economic activity of the undertaking concerned on the internal market; | CZ                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

**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)**

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|  | <p>(Drafting):</p> <p>NL</p> <p>(Drafting):</p> <p>the level of economic activity of the undertaking concerned on the internal market, <u>including the establishment of a subsidiary on the internal market;</u></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: in line with the general remarks above, a relevant indicator is how the financial benefit provided by the foreign subsidy to the beneficiary in practice impacts competition on the internal market. The presence of a subsidiary established in the European Union which receives the financial benefit provided by the foreign subsidy to beneficiary, increases the likelihood of distortion of competition. Such a subsidiary and the financial benefit that is provided to the subsidiary, cannot be deemed to fall within the jurisdiction of the granting authority of third country as dealt with by the SCM-Agreement (see article 2 of the SCM-agreement). This is therefore also one of the obvious methods to circumvent trade defence measures. This regulation should cover this possibility.</u></p> |
|  | <p>FR</p> <p>(Drafting):</p> <p>the level of economic activity on its domestic market ;</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

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|                                                                                                       | <p>FR</p> <p>(Comments):</p> <p>This proposed addition aims to take into account the situation in which the beneficiary has privileged access to its domestic market (notably, through measures equivalent to special or exclusive rights), leading to an artificial competitive advantage that could be leveraged in the EU internal market and thereby exacerbates the distortive effect of any subsidy.</p>                                                                                                                             |
| the purpose and conditions attached to the foreign subsidy as well as its use on the internal market. | <p>CZ</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                                                                                                       | <p>PL</p> <p>(Drafting):</p> <p><a href="#">level of subsidy negative impact on micro, small and medium-sized enterprises</a></p> <p>PL</p> <p>(Comments):</p> <p>SMEs represent 99% of the EU economic activity, employ nearly 100 million people and make up more than half of the EU GDP. The protection of SMEs should be an important criterion for assessing the negative effects of foreign subsidies on the EU economy. SMEs have little ability to protect themselves against the effects of subsidized foreign undertakings.</p> |

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|                                                                                                                                                                   | <p>CZ</p> <p>(Drafting):</p> <p><u>size of the undertaking.</u></p> <p>CZ</p> <p>(Comments):</p> <p>To avoid excessive administrative burden particularly for SMEs, size of undertakings should be considered. Therefore, we suggest adding between the indicators the criterion of size of the undertaking concerned and add a new paragraph referring to the fact that foreign subsidies to SMEs are unlikely to distort internal market.</p>                                                                                                                                                                                                    |
| <p>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.</p> | <p>AT</p> <p>(Comments):</p> <p>Regarding para 2, we should discuss an option that gives third countries the possibility to (pre-)notify to the EC their third-country subsidies and have them checked for DFS compatibility in advance.</p> <p>FI</p> <p>(Comments):</p> <p>We find the <u>5 MEUR ceiling appropriate.</u></p> <p>It could be <u>clarified</u> for example in the recitals that the 5 MEUR include <u>foreign subsidies from all foreign countries altogether</u> (if that is the case). It could also be further clarified the period of three years covers the current and two preceding fiscal years (if that is the case)</p> |

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|  | <p>FR</p> <p>(Comments):</p> <p>We understand that the main argument for setting a higher threshold (EUR 5 million) than under EU State aid rules (EUR 200 000) is that large categories of EU State aid are exempted from scrutiny by block exemptions and other secondary legislation: only about 5 % of the aid granted, in the EU, needs to be submitted to the Commission for clearance. By analogy to State aid and pursuant to the impact assessment, the threshold of EUR 5 million would capture at least 5 % of the highest and more distortive aid amount in the EU.</p> <p><u>However, the assessment impact does not include detailed information or data, justifying this approach. It would be necessary to make sure that this high threshold does not exclude an important part of foreign subsidies granted in some sectors in which the regular amount of the subsidies is lower. Therefore, during the discussions on the Council, cases studies can be conducted by the Commission in order to have a map of the several foreign subsidies granted by sectors (critical technologies, renewable energy, transport, etc.). For this case studies, and because of the lack of transparency, a sample of countries can be taken as an example.</u></p> <p><u>Furthermore, it would be necessary to introduce in the chapter 7 a possibility to revise all the thresholds included in the regulation: “On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs [ ] and [ ] by [ ] and may present proposals pursuant to paragraph [ ]. 5. Following the report referred to in paragraph [ ] and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph [ ].</u></p> |
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|  | <p>PL</p> <p>(Comments):</p> <p>What arguments (apart from trying to capture the most distortive subsidies) guided the Commission in choosing the EUR 5 million threshold as the one above which foreign subsidies are to be considered to distort the internal market? The Impact Assessment shows that the White Paper consultation (and the EUR 200,000 threshold proposed therein) revealed a wide diversity of views on the question of the appropriate threshold below which subsidies are unlikely to distort the market.</p> <p>CZ</p> <p>(Drafting):</p> <p>A foreign subsidy is <del>unlikely</del><u>deemed not</u> to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three fiscal years.</p> <p>CZ</p> <p>(Comments):</p> <p>We believe “de minimis” threshold should be firmly set in order to avoid excessive administrative burden on companies. In this respect, wording “unlikely to distort” is too vague and does not provide legal certainty.</p> <p>NL</p> <p>(Drafting):</p> <p><b><u>NL: A foreign subsidy to an undertaking established in the internal market is unlikely to distort the internal market if its total amount is</u></b></p> |
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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)*

below EUR 200.000 to a single undertaking over any consecutive period of three fiscal years.

A foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 5 million to a single undertaking established in a third country -over any consecutive period of three fiscal years.

NL

(Comments):

NL: Within the EU State aid regime aids less than EUR 200.000 over three consecutive fiscal years, to a single undertaking are unlike to distort competition on the internal market (the general de minimis). The same threshold should apply to foreign subsidies to subsidiaries established in the EU owned or controlled by foreign undertakings. This ensures a level playing field and equal treatment of economic actors established in the EU.

The threshold amount of EUR 5.000.000 (over three consecutive fiscal years) to a single undertaking can be used for other foreign subsidies not directed towards subsidiaries established in the EU owned or controlled by foreign undertakings .

NL: the wording in this paragraph and article 15 should be consistent. In article 15 the concept of “business year” is used, while in this paragraph “fiscal year” is used. (Also applies to Article 25 – although not in scope of this request)

LU

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|                                                                            | <p>(Comments):</p> <p>We support any modification of this paragraph that provides more legal certainty both for undertakings possibly concerned and Member States.</p> <p>It would be useful to provide further information as to possible situations below the EUR 5 million threshold that could lead to distortions in the internal market.</p> <p>It should be clarified if the threshold has to be respected at the level of the group (EU or MS level) or at the level of the undertaking.</p> |
|                                                                            | <p>CZ</p> <p>(Drafting):</p> <p><u>A foreign subsidy is unlikely to distort the internal market if it is granted to small and medium-sized undertakings.</u></p>                                                                                                                                                                                                                                                                                                                                     |
| Article 4                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Categories of foreign subsidies most likely to distort the internal market | <p>CZ</p> <p>(Comments):</p> <p>The categories of foreign subsidies most likely to distort the internal market should be in line with EU state aid legislation. The regulation should not pose more discriminatory conditions and rules on the entities concerned by it than the EU state aid rules.</p> <p>SE</p> <p>(Comments):</p> <p>Is this a presumption? Presumptions should be described further in recitals</p>                                                                             |



**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)**

|                                                                                                             | (not only in article 14.3)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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| A foreign subsidy falling in any of the following categories is most likely to distort the internal market: | <p>AT</p> <p>(Drafting):</p> <p>A foreign subsidy falling in any of the following categories is <del>most likely</del> <u>presumed</u> to distort the internal market:</p> <p>AT</p> <p>(Comments):</p> <p>The first sentence of Article 4 should be worded as a legal presumption instead of the wording “most likely” (this term is legally very ambiguous and the consequences are unclear as it implies an assessment of which subsidies are less or not likely to distort the internal market).<br/>The burden of proof would then rest on the undertaking concerned and would make it easier for the Commission and national authorities to evaluate the situation.</p> <p>Under the current wording: Is it possible for the undertaking to attempt to prove that there is no or no sufficient distortion of the internal market?</p> <p>CZ</p> <p>(Comments):</p> <p>To ensure legal certainty of the proposal for all parties involved, it is necessary to respect given thresholds for investigation – in this case the de minimis threshold of EUR 5 million. Ultimate possibility to intervene below thresholds damages predictability of rules on the internal market and thus harms all undertakings engaging in an economic activity on the internal market.</p> |

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|                                                                                                                                                                                                                                                                                                                                                          | <p>NL</p> <p>(Comments):</p> <p><u>NL: The listed categories mostly relate to either a) the type of the foreign subsidy or b) the intent of the granting authority of the third country itself. The focus on the intent of the granting authority of a third country could lead to more retaliatory measures as it could easily be construed as interfering with a sovereign decision of that third country. Similarly the focus on the type of subsidy does not automatically provide a clear cut answer if it would negatively affect competition on the internal market. NL would rather see more focus on categories of distortions of the internal market as this could not easily be construed as impinging on the sovereignty of third country concerned.</u></p> <p>LU</p> <p>(Comments):</p> <p>We support any modification of this paragraph that provides more legal certainty both for undertakings possibly concerned and Member States.</p> |
| <p>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;</p> | <p>DK</p> <p>(Comments):</p> <p>It should be further clarified – for instance in a recital – what lies in the concept “short or medium term”.</p> <p>NL</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

**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)**

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|                                                                                                                                                                                                       | <p>a foreign subsidy granted to an ailing undertaking <b>active on the internal market</b>, that is to say which will likely go out of business in the short or medium term, <b>or retrench to its home market</b> 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;</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: it should be clear that such subsidies are only relevant for the purposes of this regulation if it affects competition on the internal market. It should also take into account that the subsidy could explicitly be provided to maintain the presence of the beneficiary on the internal market and prevent retrenchment to its home market.</u></p> |
| <p>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;</p> | <p>NL</p> <p>(Drafting):</p> <p>a foreign subsidy in the form of an unlimited guarantee – <b>that is to say without any limitation as to the amount or the duration of such guarantee</b> – for debts or liabilities of the undertaking <b>active on the internal market which allows that undertaking to ignore inhibitory market incentives</b>, that is to say without any limitation as to the amount or the duration of such guarantee;</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: it should be clear that such subsidies are only relevant for the purposes of this regulation if it affects competition on the internal market.</u></p>                                                                                                                                                                                    |

**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)**

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|                                                          | <u>The wording should clarify what the impact of this type of subsidy is on competition on the internal market.</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| a foreign subsidy directly facilitating a concentration; | <p>NL</p> <p>(Drafting):</p> <p>a foreign subsidy directly facilitating a concentration <u>of the beneficiary with an undertaking active on the internal market, which results in the application of either the EC Merger Regulation or the merger control of a Member State of the Union;</u></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: it should be clear that such subsidies are only relevant for the purposes of this regulation if it affects competition on the internal market. Therefore not all concentrations are relevant.</u></p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 3.</p> <p>ES would like further clarification regarding what does “directly” mean, maybe in a recital, i.e. if it is not necessary that the subsidy is ultimately earmarked for the merger, this should be expressly stated in the recitals.</p> <p>If, on the contrary, there must be a link between the aid received and the merger, this should be indicated.</p> |

**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)**

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|                                                                                                                                                                | <p>LU</p> <p>(Comments):</p> <p>We can support the idea of FR to add a category for foreign subsidies granted to undertakings of industrial sectors with structural excess capacities.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 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. | <p>AT</p> <p>(Drafting):</p> <p>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.</p> <p><a href="#"><u>An undertaking can in any event prove that the foreign subsidy in question does not distort the internal market in the specific circumstances of the case.</u></a></p> <p>AT</p> <p>(Comments):</p> <p>Furthermore, the last sentence of Recital 15 on the burden of proof should be expressly included in Article 4 as new last subparagraph under para (4).</p> <p>Moreover, the concept of “unduly advantageous tender” in para 4 should, at least in a recital, be further explained. The reference in Recital 36 to Recitals 13 and 14 – at least for the area of public procurement – doesn’t clarify the concept. The explanations given by the Commission in the CWG should be incorporated in the text: according to the Commission a foreign subsidy establishing the financial capacity of the undertaking (under unfair market conditions) which enables the undertaking to submit</p> |

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|  | <p>a bid is covered by the concept. AT agrees that this should be the case, the wording (of the text and the recitals) is however not clear in this regard).</p> <p>In addition to Article 4, it could be thought of a new article with a final catalogue of categories of third-country subsidies that are presumed not to distort the internal market. EU primary law too recognizes aid granted by Member States that is or may be compatible with the internal market (Article 107 (2) TFEU).</p> <p>DK</p> <p>(Drafting):</p> <p>a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking <del>could</del>would be awarded the public contract.</p> <p>DK</p> <p>(Comments):</p> <p>A clarification</p> <p>FI</p> <p>(Drafting):</p> <p>Additional category could be considered:</p> <ul style="list-style-type: none"> <li>• "foreign subsidy creating additional capacity in a sector that is suffering from the structural overcapacity"</li> </ul> <p>FI</p> |
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|  | <p>(Comments):</p> <p>It should be considered to introduce an <u>additional category</u> to this article which addresses situations where a foreign subsidy distort the internal market by creating <u>additional capacity</u> in sectors that already suffer from the <u>structural overcapacity</u>. As a general rule, investment aid under these circumstances is not allowed under EU's State aid rules.</p> <p>CZ</p> <p>(Drafting):</p> <p>SE</p> <p>(Comments):</p> <p>The possibility to exclude low bids due state aid in line with public procurement directives is difficult to apply. Balancing in line with what is outlined in article 5 would essentially be needed to establish an unduly low bid.</p> <p>NL</p> <p>(Drafting):</p> <p>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;</p> <p>NL</p> <p>(Comments):</p> |
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|  | <p><u>NL: technical amendment to take into account the following amendment.</u></p> <p><u>NL clarifying question: Does this phrase only concentrate on the subsidy, or should the Commission also show that the firms has had an advantage (i.e. ‘enabling’), if so: how will the Commission show that.</u></p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 3.</p> <p>ES considers that the term “unduly advantageous tender” should be further clarified.</p> <p>ES would like further clarification regarding what does “enabling” mean, maybe in a recital, i.e. if it is not necessary that the grant is ultimately earmarked for the public procurement procedure, this should at least be expressly stated in the recitals. If, on the contrary, there must be a link between the aid received and the public procurement procedure, this should be indicated.</p> |
|  | <p>PL</p> <p>(Drafting):</p> <p><u>a foreign subsidy intended to support a foreign direct investment.</u></p> <p>PL</p> <p>(Comments):</p> <p>Article 4 contains a list of foreign subsidies that may distort the internal</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |



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market. However, it cannot be ruled out that other types of subsidies may also cause such a distortion. For example, also foreign subsidy intended to support a foreign direct investment should be included in Article 4. The provision of Article 4 focuses on foreign subsidies granted to a company in difficulty, to cover debts, to concentrate or as part of a public procurement procedure. However, it does not mention the issue of supporting foreign direct investment under foreign subsidies.

NL

(Drafting):

**NL:**

**(5) a foreign subsidy providing compensation to the beneficiary for operating costs allowing that beneficiary to offset operating losses and market its goods and services at levels which do not allow the beneficiary to break even.**

**(6) the transmission of a subsidy to a subsidiary of the beneficiary established in a Member State of the Union,**

NL

(Comments):

**NL:**

**Ad 5 - foreign subsidies which provide compensation for operating costs of the beneficiary allows that beneficiary to price its goods and services below normal market prices and allows it to maintain competitive pressure on EU companies, without applying fair market pricing.**

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|           | <p><u>Ad 6 - in line with the general remarks above, a relevant indicator is how the financial benefit provided by the foreign subsidy to the beneficiary in practice impacts competition on the internal market. The presence of a subsidiary established in the European Union which receives the financial benefit provided by the foreign subsidy to beneficiary, increases the likelihood of distortion of competition. Such a subsidiary and the financial benefit that is provided to the subsidiary, cannot be deemed to fall within the jurisdiction of the granting authority of third country as dealt with by the SCM-Agreement (see article 2 of the SCM-agreement). This is therefore also one of the obvious methods to circumvent trade defence measures. This regulation should cover this possibility.</u></p> |
| Article 5 | <p>FR</p> <p>(Comments):</p> <p>As stated in the trade defence instruments and in keeping of the adversarial principle, it would be interesting to establish a mechanism which allow the interested parties to provide information to the Commission and request a hearing (decision) (for this, the scope of the article 38 could be extend).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Balancing | <p>PL</p> <p>(Comments):</p> <p>It is necessary to clarify the concept of the balancing test, in particular how it will be used and its results will be interpreted. In the text of the Regulation and in the Impact Assessment, information on this is laconic.</p> <p>SE</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

**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)**

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|                                                                                                                                                                                                                           | <p>(Comments):</p> <p>How balancing is to be done has great impact on outcome and needs to be clarified in article 5.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: it is of great importance that the test follows clear and objective criteria which are predefined and is politically independent. A clarification (and specification) of the text is therefore needed, it is now formulated too broadly; which positive and negative effects will the Commission take into account and how will the Commission quantify these?</u></p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 5.</p> <p>ES understands that foreign investments can affect strategic interests and can have different impacts depending on the MS. Therefore, it would be needed to ensure enough communication channels in the proposal. In this sense, Art. 5 should guarantee an efficient participation of a MS especially affected by a foreign subsidy during the balancing test.</p> <p>Besides, in order to ensure legal certainty, the procedure to carry out the balancing test could be further specified. In the same manner, further precisions on the criteria that is to be used for the balancing tests could be included.</p> |
| <p>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.</p> | <p>AT</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

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|  | <p>(Drafting):</p> <p>The Commission shall, <del>where warranted</del>, 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.</p> <p>AT</p> <p>(Comments):</p> <p>The balancing test should in any case balance the negative effects with the positive ones of a foreign subsidy. Therefore, para 1 should be amended accordingly.</p> <p>Furthermore, such a balancing test should be implemented in a transparent, comprehensive and objective way. The Commission should consider long-term aspects, such as the effects on innovation, quality, Europa as a production site, jobs in Europe, the competitiveness of EU undertakings, other important national interests. These criteria should at least be reflected in the respective recital (Recital 16) - see our comment in the Recitals document.</p> <p>In addition, we kindly ask for further explanation on the methods of the balancing test according to para 1 and how the effects are taken into account according to para 2 in the context of public procurement procedures. It is unclear how the “balancing” through commitments (see below comments regarding Article 6) should be incorporated in a PP procedure: For example in an open/restricted procedure each and every amendment of an offer is strictly forbidden (see constant jurisprudence of the ECJ). In a negotiated procedure this possibility (offered only to a specific undertaking) will raise serious issues as regards the fundamental principle of equal treatment. We expect, that each possibility offered by the Commission to an undertaking to offer commitments for balancing</p> |
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|  | <p>which have a direct or indirect effect to a tender submitted in a PP procedure will most likely trigger a review procedure! We kindly ask the Commission to explain how this balancing is supposed to work in a PP procedure.</p> <p>If Article 5 is not applicable in the area of public procurement, this should be made explicit in the text itself.</p> <p>In Chapter 2 (ex officio review), we would like to ask the Commission what are the relevant remedies in the context of public procurement procedures?</p> <p>DK</p> <p>(Comments):</p> <p>What does “where warranted” mean in this context?</p> <p>FI</p> <p>(Comments):</p> <p>It is vital for the predictability and clarity of the proposal that the “positive effects on the development of the relevant market” and <u>balancing exercise</u> altogether (including wording "where warranted") will be <u>described more clearly</u> in the article or at least in the recitals and in the future guidelines.</p> <p>As the background of the balancing is in EU State Aid rules, it could be elaborated to what extent the balancing is similar according this proposal. We consider it crucial that the Commission gives further guidance on balancing by issuing guidelines on this topic (please see our comment to article 2).</p> <p>It would be informative if the Commission could state in the recitals that</p> |
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|  | <p>the balancing concerns also concentrations and public procurement procedures.</p> <p>CZ</p> <p>(Drafting):</p> <p>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 <u>and on other EU policy objectives</u>.</p> <p>CZ</p> <p>(Comments):</p> <p>As the subsidy may have broader positive effect than only to the relevant economic activity (i.e. positive effects on environment or broader EU interests), we would like to suggest an amendment of Article 5. This will also make the Regulation more future-proof.</p> <p>PT</p> <p>(Comments):</p> <p>We consider that the MS concerned should share some competence with the Commission in analyzing these issues.<br/>It is essential that the MS where investments are taking place always follow/participate in the process, especially in the investigation phase.</p> <p>The proposal, as it stands, leaves a large margin of discretion as to what are the positive and negative effects of a subsidy and to what constitutes "the development of the relevant economic activity". It seems important that these concepts are clarified in order to make them - and their application - more transparent and with more legal certainty.</p> |
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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)***

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|                                                                                                                                                                                                                                                           | <p>LU</p> <p>(Comments):</p> <p>Balancing the negative and positive effects of foreign subsidies is a delicate exercise and it should be clarified how it will be applied. The notion of “development of the relevant economic activity” should be interpreted in a broad way. We support any move to add precise criteria, also making sure that e.g. European policy objectives can be fulfilled (green and digital transformation), more in line with the EU interest test.</p> <p>ES</p> <p>(Comments):</p>                                                                                                    |
| <p>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.</p> | <p>DK</p> <p>(Comments):</p> <p>It is important for the Danish Government that the balancing exercise also takes into consideration any possible positive effects in order to prevent protectionism and secure a level playing field.</p> <p>The proposal should state more clearly (e.g. in a recital) how the Commission intends to carry out the balancing exercise, especially in relation to a possible distortion of the internal market. E.g. which positive effects do the Commission expect could be taken into consideration in order to “compensate” for the negative effects by way of distortion?</p> |

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|  | <p>PT</p> <p>(Comments):</p> <p>It is important to know the criteria that will be used in this context.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|  | <p>AT</p> <p>(Drafting):</p> <p><a href="#">(3) The Commission shall inform the Member States concerned of its preliminary balancing test conclusions and invite them to express their views in writing within XX days/weeks.</a></p> <p>AT</p> <p>(Comments):</p> <p>Moreover, it is important to involve Member States. Member States should have the possibility to express their views during the balancing test, e.g. in cases which have the most effects on their territory. A new para 3 should be added.</p> <p>PL</p> <p>(Drafting):</p> <p><a href="#">The Commission when deciding whether to impose redressive measures or to accept commitments shall particularly consider subsidy negative impact on SMEs which have at their disposal very limited measures for counteracting foreign subsidy.</a></p> <p>PL</p> |



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|           | <p>(Comments):</p> <p>When applying the balancing test particular account should be taken of the negative effects of subsidies on micro, small and medium-sized enterprises with limited ability to deal with market distortions on their own.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Article 6 | <p>SK</p> <p>(Drafting):</p> <p><u>Based on the comments section (in the right column)</u><br/> <u>We propose an <b>addition to the recital</b> for the Article 6, or wherever more appropriate. <b>Proposed text is as follows:</b></u></p> <p><u>“Powers established by this regulation (such interim or redressive measures) are based on the exclusive competence of the EU for the competition rules necessary for the functioning of internal marker (Article 3, para 1, section (b) TFEU). These powers towards undertakings are therefore exercised as an exclusive competence of the EU.”</u></p> <p>SK</p> <p>(Comments):</p> <p><u>We reiterate written comments made by the Slovak Republic for Article 6. We would advise European Commission for an express delimitation of financial responsibility for measures as an act of the European Union or European Commission in case of initiated investment arbitration against member state or the EU. From our experience (Slovak Republic as a respondent in arbitration) foreign investor (in this case a recipient of foreign subsidies) will try to use all legal means possible (outside the</u></p> |

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realm of EU law) to claim damages for state/EU measure, irrespective of attribution of responsibility according to the EU law.

Therefore, if foreign investor will not have fruitful opportunity to claim financial damages against the EU (e. g. no existing investment treaty between EU and home country of the foreign investor, or for satisfactory EU administrative law action) it can be expected, that foreign investor will reach out for other instrument - bilateral investment treaty of EU member state concluded with the home country of the foreign investor.

In this event, all relevant measures may be attributed to the member state to defend acts of the EU or to argue before arbitral tribunal that conduct of the EU cannot be attributed to the member state.

Thus, foreign investor would reason that member state by its EU membership enabled measures against the foreign investor to take place.

In conclusion, such an outcome is problematic since member state will not have a control over decision of the arbitral tribunal, which is constituted according the rules of international public law and choice of law clause in bilateral investment treaty.

We would therefore propose an addition to recital for the Article 6, or wherever more appropriate in recital (see the centre column).

FR

(Comments):

It would be important to specify some points concerning the commitments and redressive measures' monitoring. For this purpose, a general disposition may be included in the chapter 1 in order to specify how the Commission will ensure the respect, by the undertakings, of its different

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|                                                                                                                                                                                                           | decisions which may be taken (for example, nomination of a mandatory, report's communication, etc.).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Commitments and redressive measures                                                                                                                                                                       | <p>NL</p> <p>(Comments):</p> <p><u>NL: to what extent can the commitments be applied on public procurement procedures?</u></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 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. | <p>FR</p> <p>(Drafting):</p> <p>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.</p> <p><b>Commitments and redressive measures may be imposed cumulatively.</b></p> <p>FR</p> <p>(Comments):</p> <p>This precision aims to clarify that even if an undertaking offers commitments, it does not exclude the possibility for the Commission to impose redressive measures.</p> <p>CZ</p> <p>(Drafting):</p> <p><u>On the basis of the conclusions reached during the in-depth investigation,</u></p> |

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|  | <p><del>the Commission may impose redressive measures t</del>To remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, <del>the Commission may impose redressive measures</del>. The undertaking concerned may also offer commitments.</p> <p>CZ</p> <p>(Comments):</p> <p>In order to avoid any protectionist impression and to ensure, that Commission follows its conclusions based on the facts established during the in-depth investigation, it is important to link imposition of redressive measures to this.</p> <p>SE</p> <p>(Comments):</p> <p>As conveyed during presentations of the proposal commitments and redressive measures should not affect public procurement contracts. This should be clarified in the regulation.</p> <p>PT</p> <p>(Comments):</p> <p>Same comment as for article 5. The involvement of the concerned MS in the assessment process should be extended to the decision of application of redressive measures and in the commitments proposed by the entities concerned, that will be deemed as acceptable by the Commission.</p> <p>LU</p> <p>(Comments):</p> |
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|                                                                                                                                            | For the sake of legal certainty, the notion of “undertaking concerned” should be clarified.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Commitments or redressive measures shall fully and effectively remedy the distortion caused by the foreign subsidy in the internal market. | <p>AT</p> <p>(Drafting):</p> <p>Commitments or redressive measures shall <u>be proportionate and</u> fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.</p> <p>AT</p> <p>(Comments):</p> <p>Redressive measure must be dissuasive to be effective but have to remain proportional at the same time. This should be reflected in the wording of Article 6, e.g. in para 2.</p> <p>PL</p> <p>(Drafting):</p> <p>Commitments or redressive measures shall fully and effectively remedy the distortion caused by the foreign subsidy in the internal market <u>and shall also equalize market opportunities for non-subsidised undertakings.</u></p> <p>PL</p> <p>(Comments):</p> <p>The market disruption caused by the activity of the subsidised undertakings may reduce the chances of other companies operating in the sector. The mere imposition of redressive measures or the acceptance of</p> |

**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)**

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|  | <p>commitments will not, in Poland's opinion, make up for lost opportunities for non-subsidised companies. It is therefore important to level the chances of those companies lost as a result of disruptions.</p> <p>ES</p> <p>(Drafting):</p> <p>Commitments or redressive measures shall <b>be proportionate and</b> fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 4.</p> <p>A direct reference to the fact that commitments or redressive measures shall be proportionate could be included in this provision.</p> |
|  | <p>CZ</p> <p>(Drafting):</p> <p><u>Redressive measures or commitments should be proportional to the actual or potential distortion. They should be also limited by the means of duration, quantity, frequency or other relevant criteria depending on the nature of the redressive measure or commitment.</u></p> <p>CZ</p> <p>(Comments):</p> <p>Proportionality of redressive measures (including but not limited to their</p>                                                                                                                                                                                                         |

*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)*

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|                                                                  | temporality) is an important element and therefore should be stated clearly in the regulation.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Commitments or redressive measures may consist of the following: | <p>AT</p> <p>(Drafting):</p> <p>Commitments or redressive measures may consist <u>inter alia</u> of the following:</p> <p>AT</p> <p>(Comments):</p> <p>In para 3, the term “inter alia” should be added to make it clear that the measures are only listed in a non-exhaustive manner.</p> <p>HU</p> <p>(Drafting):</p> <p><b>Commitments or redressive measures may consist <u>among other measures</u> of the following:</b></p> <p>HU</p> <p>(Comments):</p> <p><b>The list of possible commitments should not be exhaustive in the text. In particular cases, the Commission might consider or the undertaking might offer acceptable commitments or redressive measures that are not covered by the list in Article 6(3) but should still offer a solution.</b></p> <p>FR</p> |

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|  | <p>(Drafting):</p> <p>Commitments or redressive measures may consist, <i>inter alia</i>, of the following:</p> <p>FR</p> <p>(Comments):</p> <p>This precision aims to clarify that the list of the “redressive measures” is not restrictive</p> <p>PL</p> <p>(Comments):</p> <p>There shall also be implemented a compensation system for indemnification to those EU undertakings which suffered from losses due to market distortions caused by foreign subsidies.</p> <p>LU</p> <p>(Comments):</p> <p>For the sake of legal certainty, we believe the list of redressive measures should be exhaustive.</p> <p>ES</p> <p>(Comments):</p> <p>ES considers that the wording of the Article should further clarify some aspects such as:</p> <ul style="list-style-type: none"> <li>▪ Hierarchy between the different redressive measures.</li> </ul> |
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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)*

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|                                                                                                                                                                                                                                                                   | <ul style="list-style-type: none"> <li>▪ Time reference in the application of the measures.</li> <li>▪ Indication of whether the measures are mutually exclusive or can be adopted complementarily in the same procedure.</li> </ul> <p>It would be also appropriate to assess the compatibility of measures under this Article with the WTO Agreement on Subsidies and Countervailing Measures.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 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; | <p>DK</p> <p>(Comments):</p> <p>It should be clarified whether access to other important services or products are also included here? E.g. gatekeeper platform services, key technologies, critical medicines or raw materials?</p> <p>NL</p> <p>(Drafting):</p> <p>offering access under fair and non-discriminatory conditions to an infrastructure, <b>research facility, production capability or any other essential facility</b> 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;</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: the text should be clarified that this commitment or redressive measure can apply not only to “infrastructure” in a narrow sense, but should also cover research facilities or production capabilities or any other essential facility whose availability for competitors on the internal market</u></p> |

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|                                                                                                                                | <u>is essential to ensure a level playing field. This is in line with concepts as developed in the jurisprudence in the context of abuse of a dominant market position (e.g. ECJ 26<sup>th</sup> of November 1998, Case C-7/97, Oscar Bronner, par. 38) as well as in state aid legislation such as article 26 GBER regarding aid for research infrastructures and article 52 regarding aid for broad band infrastructures.</u> |
| reducing capacity or market presence;                                                                                          | CZ<br><br>(Drafting):                                                                                                                                                                                                                                                                                                                                                                                                           |
| refraining from certain investments;                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies; |                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| publication of results of research and development;                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| divestment of certain assets;                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| requiring the undertakings concerned to dissolve the concentration;                                                            | SE<br><br>(Comments):<br><br>Which measures are most appropriate depending on the length of time passed could be clarified in recitals.                                                                                                                                                                                                                                                                                         |
|                                                                                                                                | NL                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|                                                                           | (Drafting):                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| repayment of the foreign subsidy, including an appropriate interest rate. | <p>HU</p> <p>(Comments):</p> <p><b>Article 42 (implementing acts) should empower the Commission to regulate the rate of the appropriate interest.</b></p> <p>FR</p> <p>(Drafting):</p> <p>repayment of the foreign subsidy, including an appropriate interest rate;</p> <p>FR</p> <p>(Comments):</p> <p>Due to the next proposed addition, we have just adapted the punctuation.</p> <p>PT</p> <p>(Comments):</p> <p>How would this repayment take place? To whom? How would the appropriate interest rates be established?</p> <p>LU</p> <p>(Comments):</p> <p>We wonder what is meant by an “appropriate interest rate”.</p> |

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|  | <p>FR</p> <p>(Drafting):</p> <p>restraining to participate, directly or indirectly, in new public procurement or concession contract procedures in the internal market.</p> <p>FR</p> <p>(Comments):</p> <p>The prohibition of participation in public procurement and concession procedures may be useful to complete the list of commitments and redressive measures (Article 6(3)), in particular during an ex-post review of a public contract or concession already awarded to a bid that has benefited from foreign subsidies distorting the internal market.</p> <p>This hypothesis was raised by the Commission during the working group of 7 June 2021.</p> <p>PL</p> <p>(Drafting):</p> <p><u>implementing a formula of so called „comparable price” i.e. the price that the undertaking would have to offer if has not been granted a foreign subsidy.</u></p> <p>PL</p> <p>(Comments):</p> <p>We propose to add the use of the formula of so-called comparable price, i.e. the price that the enterprise would have to offer if it did not receive</p> |
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subsidies. The comparable price would significantly mitigate distortions in the market where the disruptions resulting from the subsidies received occurred at the time of the disturbance. Redressive measures, such as the return of subsidies, are important in the long run but do not remove the distortion when it occurs. The time of reaction to disturbance plays an important role. The comparable price works immediately and reacts immediately to the disturbance that arises.

NL

(Drafting):

NL:

(i) As the case may be:

- i. the establishment in accordance with the company law of a Member State of a subsidiary or holding company, which governs all activities on the internal market and which has an independent supervisory board or in the case of a one tier board a majority of independent non-executive board members; or
- ii. the introduction of independent supervisory board or the case of a one tier board a majority of independent non-executive board members within existing legal persons established in a Member State;

(i) withdrawal from the internal market;

NL

(Comments):

NL:

Ad (i): by introducing the possibility of allowing commitments or

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|                                                                                                                                                                                                                                                  | <p><u>redressive measures regarding the governance of the beneficiary, both transparency and effectiveness of the supervision of the EC is increased and the beneficiary would be better placed to respect competition on the internal market by allowing it the dissociate its activities on the internal market from the overall undertaking and the foreign subsidy the beneficiary received. This type of approach is already followed in the Horizon program and in the EDF-regulation.</u></p> <p><u>Ad (j): in case of repeated distortions of competition on the internal market by foreign subsidies provided to the same beneficiary, the ultimate redressive measure of removing market access to the internal market with regard to that specific beneficiary should be possible. This option allows the Union to take into account that the beneficiary itself may be protected from the negative impact of other redressive measures as long as a third country jurisdiction continues to compensate or guarantee the beneficiary and its business.</u></p> |
| The Commission may impose reporting and transparency requirements.                                                                                                                                                                               | <p>LU</p> <p>(Comments):</p> <p>For reasons of legal certainty, it should be clarified which information “reporting and transparency requirements” would cover?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 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). | <p>CZ</p> <p>(Drafting):</p> <p>If an undertaking offers commitments which fully and effectively remedy the distortion on the internal market <u>and which are not contrary to EU interest</u>, the Commission <del>may</del><u>shall</u> accept them and make them binding on the undertaking in a decision with commitments according to Article</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

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|                                                                                                                                                                                                                                                                                                         | <p>9(3).</p> <p>CZ</p> <p>(Comments):</p> <p>If the undertaking offers commitments which fully and effectively remedy the distortion, the EU should accept them.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <p>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.</p> | <p>AT</p> <p>(Drafting):</p> <p>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 <u>fully remedies the distortion</u>, is transparent and effective, while taking into account the risk of circumvention.</p> <p>AT</p> <p>(Comments):</p> <p>In para 6, the wording should be aligned to Recital 19.</p> <p>PL</p> <p>(Drafting):</p> <p>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 <u>in a strictly limited timeframe</u> is transparent and effective, while taking into account the risk of circumvention.</p> |

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|  | <p>PL</p> <p>(Comments):</p> <p>Too long time period and a proposal to spread repayment of obtained subsidies for e.g. 5 years may put the subsidised undertaking in a more advantageous position in a given market sector in relation to non-subsidised undertakings that may lose their market position as a result of distortions.</p> <p>NL</p> <p>(Drafting):</p> <p><u>NL:</u> Where the undertaking concerned proposes to repay the foreign subsidy including an appropriate interest rate, the Commission <del>shall</del><u>may</u> accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL feels that in many cases the repayment of a subsidy combined with guarantees to avoid circumvention is not very realistic. Therefore, we would like to propose replacing ‘shall’ in article 6.6 with ‘may’.</u></p> |
|  | <p>AT</p> <p>(Comments):</p> <p>Furthermore, we have several questions regarding this article and kindly ask for clarification:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |



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|                                                   | <ul style="list-style-type: none"> <li>– Which of the measures listed in para 3 are considered to be commitments and which are considered to be redressive measures?</li> <li>– Under which circumstances the Commission will use which of these measures? Which criteria will be applicable?</li> <li>– How (i.e. in which comitology procedure) and when are MS' views ascertained?</li> <li>– Who will monitor commitments and how will they be monitored?</li> <li>– AT wonders on which (current) wording the ECs understanding that Article 6 para 3 is not relevant for the area of public procurement is based. Article 6 is part of the General Provisions of Chapter 1 which are obviously applicable to the following Chapters. AT therefore considers it necessary that an explicit provision concerning the non-applicability of Article 6 para 3 as regards Chapter 4 is added. The Commission referred in the CWG to Article 30 but AT points out that Article 30 refers to the offering of “commitments”. Which commitments are addressed by Article 30, if not “commitments” according to Article 6? In its Power Point presentation for the CWG (page 14) the Commission referred – in the context of Article 6 and procurement – to “commitments”. What kind of commitments does the Commission envisage in the context of procurement? AT points again to the difficulties and legal problems if “offered commitments” alter bids during the course of a procurement procedure (see comments regarding Article 5).</li> <li>– What will be considered to be an “appropriate interest rate”?</li> <li>– Should the repayment be made to the third country or to the European Union?</li> </ul> <p>How will the Commission ascertain that a repayment is effective? Which criteria will be used?</p> |
| Chapter 2: Ex Officio review of foreign subsidies |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Article 7                                         | PL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|                                                                                                                              | <p>(Comments):</p> <p>We have doubts about the Commission's freedom to decide whether to investigate an individual case of potential distortion caused by a foreign subsidy. This raises the question of when such action should be taken. We would like to ask about examples of cases that would require ex officio investigation. In our view mandatory prerequisites for the Commission to take such action should be created. Otherwise complete freedom and the lack of clear prerequisites for ex officio action raise legal questions.</p> <p>Moreover, we would like to consider creating a procedure for competitors whose interests may be affected by the actions of a privileged entity supported by foreign subsidies to notify the Commission (the institution of a complaint) and a procedure for Member States to notify the Commission. Currently, Article 7 does not provide for such possibilities.</p> <p>NL</p> <p>(Comments):</p> |
|                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Ex officio review of foreign subsidies                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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| The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies. | <p>AT</p> <p>(Comments):</p> <p>In the context of the ex officio tool (Chapter 2), Member States should play a role in the Commission's enforcement proceedings. Therefore, Member States concerned should have the right to file a request to the Commission to investigate a certain case below the thresholds as well as cases in other market situations. This right should be added in Article 7.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

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|  | <p>FI</p> <p>(Comments):</p> <p>If possible, it could be useful to describe more clearly when the Commission can start an investigation.</p> <p>FR</p> <p>(Comments):</p> <p>Furthermore, to facilitate the investigation of the Commission, it would be interesting if the Member States and the concerned EU undertakings have the possibility to alert the Commission about a potential distortive foreign subsidy. For this purpose, a general disposition may be included in this chapter 1, in order to permit the implementation of a communication channel.</p> <p>For example :</p> <ul style="list-style-type: none"> <li>– <u>when a Member State is in possession of evidence of the existence of a potential distortive subsidy</u>, it may communicate such evidence to the Commission. To that end, each Member State and the Commission shall establish a contact point for the implementation of this Regulation. A secure system shall be provided by the Commission to support direct cooperation and exchange of information between the contact points and the Commission;</li> </ul> <p><u>when a concerned undertaking is in possession of evidence of the existence of a potential distortive subsidy</u>, it may communicate such evidence to the Commission, by replying to a standard questionnaires, released by the Commission in all official languages of the Union.</p> |
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|  | <p>CZ</p> <p>(Drafting):</p> <p>The Commission may <u>upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Union industry, or in exceptional cases</u> on its own initiative, examine <u>the accuracy and adequacy of the information to determine whether there is sufficient evidence to justify the initiation of an investigation</u><del>from any source regarding alleged distortive foreign subsidies.</del></p> <p>CZ</p> <p>(Comments):</p> <p>CZ considers ex officio review of the foreign subsidies too vaguely formulated and therefore unpredictable for business operators. We believe the review should be in principle based on sufficient evidence (accurate information) and initiated by companies suffering from the negative effects of foreign subsidies and distortions.</p> <p>Ex officio review should be reserved only for exceptional cases (similarly to anti-subsidy investigations).</p> <p>CZ considers ex officio review of the foreign subsidies without any threshold too burdensome and entirely unpredictable. It should be clear, that the de minimis threshold is binding for the Commission to initiate the investigation.</p> <p>SE</p> <p>(Drafting):</p> <p>The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies <u>in case of an indication or suspicion of a distortive foreign subsidy.</u></p> |
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|  | <p>PT</p> <p>(Comments):</p> <p>The proposal is too broad. It would be important to limit what can constitute the trigger for ex-officio and to ensure that the source is reliable.</p> <p>LU</p> <p>(Comments):</p> <p>We do not question the Commission's role as sole competent authority but are still assessing the usefulness of involving Member States or national authorities as part of the <i>ex officio</i> review.</p>                                                                                                                                     |
|  | <p>PL</p> <p>(Drafting):</p> <p><a href="#"><u>Member States may submit a request to initiate by the Commission a preliminary review on financial contribution provided an undertaking by entities indicated in Article 2 paragraph 2 point (b).</u></a></p> <p>PL</p> <p>(Comments):</p> <p>New paragraph is to underline role of Member States in the process of monitoring their markets. This paragraph should be read together with our proposal to Article 8 paragraph (3) to add obligation inform Member States on results of preliminary review.</p> <p>NL</p> |

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|           | <p>(Drafting):</p> <p><u>NL: Such sources include, but are not limited to, authorities from Member States such as competition authorities, national regulatory authorities or other authorities involved in the monitoring of market behaviour. Such sources also include undertakings established in the European Union.</u></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: the regulation should clarify that for the ex officio review of foreign subsidies both authorities of Member States as well as undertakings established in the European Union.</u></p>                                                                                          |
| Article 8 | <p>CZ</p> <p>(Comments):</p> <p>Regarding articles 8 and 9 we believe the EC should act only if it has reliable information about foreign subsidy and impose redressive measures only in case a foreign subsidy considerably distorts the internal market. Otherwise the EU market might become too unpredictable and thus unattractive for foreign companies.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: We would suggest to make the specific research steps under the preliminary review more explicit. It is also desirable to make the criteria for decision making (whether or not an in depth investigation is legitimate) more explicit.</u></p> |
|           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

**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)**

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| Preliminary review | <p>HU</p> <p>(Comments):</p> <p><b>The Regulation should include a deadline for conducting the preliminary review. An open-ended review phase with no deadline might be seen as an infringement of legal certainty. For this reason, the Regulation should at least include a rule according to which the Commission must endeavour to complete the review within e.g. one year (cf. Article 9(6) of Council Regulation (EU) 2015/1589). Alternatively, the Regulation could empower the Commission to regulate the deadlines in Article 42. As the Commission is allowed to take a final decision even if the beneficiary or the third state not concerned does not provide information, we feel that having a final deadline is better than not having any deadline at all.</b></p> <p>CZ</p> <p>(Comments):</p> <p>The preliminary review is not limited anyhow in time. We would suggest adding a timeframe in which the preliminary review should be concluded to bring more clarity and predictability in the process.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 1:</p> <p>ES considers that the involvement of MS in the preliminary review procedure should be clarified in this Article.</p> <p>See general comment number 4.</p> |
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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)***

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|                                                                                                                                                                                                                                                                                               | <p>ES understand that it is necessary to provide enough flexibility for the COM in the enforcement of the Regulation. Nevertheless, some aspects of the preliminary review procedure should be detailed on the basis of the principle of legal certainty. For example, the act initiating the investigation procedure should, like the act terminating it, be notified. Moreover, there are no deadlines in Articles 8 and 9, whereas in Chapters 3 and 4 of the Regulation include specific deadlines.</p> <p>More involvement of Member States should be foreseen. An express reference to the possibility for Member States to provide information at any stage of the procedure would be welcomed.</p> <p>It is considered appropriate to refer explicitly to Articles 3 to 4 of the Regulation when assessing whether there is sufficient evidence that an undertaking has received a foreign subsidy that distorts the internal market, as is done in Articles 9(2) and 9(3).</p> |
|                                                                                                                                                                                                                                                                                               | <p>HU</p> <p>(Comments):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>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:</p> | <p>MT</p> <p>(Comments):</p> <p>Malta would like to propose the insertion of a grandfathering clause so that the provision has limited retrospectivity. It is recommended that this clause is closely linked to the FDI screening provision that the Commission had introduced in 2020.</p> <p>The concept of grandfathering clause is important to safeguard our current</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |



**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)**

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|                                                                                                                                                                                                           | <p>foreign direct investment in the European Union hence we recommend that foreign subsidies directly work in tandem with the foreign screening dossier.</p> <p>CZ</p> <p>(Drafting):</p> <p>The Commission shall, <u>where appropriate with regards to the established thresholds</u>, 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:</p> <p>CZ</p> <p>(Comments):</p> <p>In our view, “the financial contribution under examination” should respect the de minimis threshold of 5 mil provided for in Article 3 (2). In the original formulation it is not clear to us how the EC would envision the initiation of a review when the size of the subsidy is potentially not yet known.</p> |
| 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 | CZ                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

**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)**

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|                                                                                                                                                                                                                                                                                                                            | <p>(Drafting):</p> <p>Where the Commission, based on the preliminary review, <u>has -reliable information</u><del>considers</del> that there are sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it shall</p> <p>CZ</p> <p>(Comments):</p> <p>Regarding articles 8 and 9 we believe the EC should act only if it has reliable information about foreign subsidy and impose redressive measures only in case a foreign subsidy considerably distorts the internal market. Otherwise the EU market might become too unpredictable and thus unattractive for foreign companies.</p> <p>PT</p> <p>(Comments):</p> <p>The concept “Sufficient indications” should be better defined, maybe considering aligning it with other concepts such as “incentive effect”.</p> |
| adopt a decision to initiate an in-depth 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; | <p>AT</p> <p>(Drafting):</p> <p>adopt <u>without undue delay</u> a decision to initiate an in-depth 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;</p>                                                                                                                                                                                                                                                                                                                                                                                                                                          |

*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)*

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|                                       | <p>AT</p> <p>(Comments):</p> <p>Reasonable timeframes for investigative activities according to Article 7 and 8 should be defined in order to avoid lengthy investigations. At least those investigations should be carried out without undue delay (para 2 a) and para 3).</p> <p>Furthermore, the Commission should also inform the Member States, especially with regards to public procurement procedures, if it concludes, that there are no sufficient grounds to initiate an in-depth investigation (para 3).</p> <p>Moreover, if there is no difference, legally speaking, between “sufficient indications” in Article 8 para 2 and “sufficient grounds” in Article 8 para 3, the wording should be aligned.</p> |
| inform the undertaking concerned; and | <p>LU</p> <p>(Drafting):</p> <p>inform the undertaking <b><u>and Member States</u></b> concerned; and</p> <p>LU</p> <p>(Comments):</p> <p>Member States should immediately and directly be informed by the Commission when an in-depth investigation is launched that concerns undertaking(s) established in their Member State.</p>                                                                                                                                                                                                                                                                                                                                                                                     |
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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)**

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| <p>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.</p> | <p>AT</p> <p>(Drafting):</p> <p>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 <del>XX days/weeks a prescribed period of time.</del></p> <p>AT</p> <p>(Comments):</p> <p>In para 2 point c), the prescribed period of time should be specified in terms of maximum and minimum.</p> <p>CZ</p> <p>(Comments):</p> <p>We do not consider the MS to be sufficiently informed about the opening of in-depth investigation. In paragraph 2 (c), the MS is informed only by publication in the Official Journal. In addition, paragraph 3 provides that the Commission shall inform the undertaking concerned of the conclusion of the preliminary examination. However, there is no obligation to inform the Member State concerned, especially if the Commission has requested information from it under Article 11 or carried out an inspection under Article 12. The CZ considers that the involvement of MS should be higher and that they should be informed of the findings on an ongoing basis and of the initiation of an in-depth investigation in advance of publication in Official Journal of the EU.</p> |
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| <p>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.</p> | <p>AT</p> <p>(Drafting):</p> <p>Where the Commission, after a preliminary assessment, concludes that there are no sufficient <del>grounds</del> <u>indications</u> 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 <u>without undue delay</u> and inform the undertaking <u>and the Member States</u> concerned.</p> <p>AT</p> <p>(Comments):</p> <p>See comment regarding para 2 a).</p> <p>PL</p> <p>(Drafting):</p> <p>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 <u>and Member State in case a preliminary review has been conducted on the request of the Member State.</u> -</p> <p>PL</p> <p>(Comments):</p> <p>Adding this phrase is to underline role of Member States in the process of</p> |
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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)**

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|  | <p>monitoring their markets (this phrase can also be phrased as one of subparagraphs of paragraph (3) if there was a will to list obligations of the Commissions in separate subparagraphs).</p> <p>NL</p> <p>(Drafting):</p> <p>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 <b>adopt a decision to</b> close the preliminary review and inform the undertaking concerned <b>and publish the decision</b>.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: If a preliminary assessment allows the Commission to conclude 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 should be possible for both the authorities of Member States as well as undertakings established in the European Union to be able to take note of the assessment and analysis of the European Commission.</u></p> <p>LU</p> <p>(Drafting):</p> <p>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 <b>adopt a</b></p> |
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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)*

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|                        | <p><b><u>decision to</u></b> close the preliminary review and inform the undertaking concerned.</p> <p>LU</p> <p>(Comments):</p> <p>The closing of a preliminary review should be handled along the procedures applicable under EU state aid law, namely by adopting a formal decision. This would be coherent with a formal decision being adopted when proceeding from the preliminary review to an in-depth investigation (paragraph 2) and provide further (legal) clarity for undertakings concerned, not least the possibility for competitors to challenge the decision to close the preliminary review before the ECJ.</p> |
| Article 9              | <p>HU</p> <p>(Comments):</p> <p><b>The Regulation should include a deadline for conducting the preliminary review. An open-ended review phase with no deadline might be seen as an infringement of legal certainty. For this reason, the Regulation should at least include a rule according to which the Commission must endeavour to complete the in-depth investigation within e.g. two years (cf. Article 9(6) of Council Regulation (EU) 2015/1589). Alternatively, the Regulation could empower the Commission to regulate the deadlines in Article 42.</b></p>                                                              |
| In-depth investigation | <p>NL</p> <p>(Comments):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

**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)**

NL: it is understood that the Commission adopts a decision with regard to the results of the in-depth review. Under article 8(2) interested parties, Member States and the third country involved can express their views on a case after the preliminary investigation leads to the conclusion that an in-depth investigation is needed. Is a similar possibility foreseen during the in-depth investigation and prior to the adoption of the final decision (or finding) by the European Commission?

We would suggest to make the specific research steps under the in depth investigation more explicit.

It is also desirable to be make the criteria for decision making (whether or not a subsidy is deemed distortive) more explicit through guidelines to be developed and published by the European Commission.

ES

(Comments):

See general comment number 1:

ES considers that the involvement of MS in the decision-making procedure should be clarified in this Article.

See general comment number 4:

ES understands that it is necessary to provide enough flexibility for the COM in the enforcement of the Regulation. Nevertheless, some aspects of the preliminary review procedure should be detailed on the basis of the principle of legal certainty. For example, the act initiating the investigation procedure should, like the act terminating it, be notified. Moreover, there are no deadlines in Articles 8 and 9, whereas in Chapters



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|                                                                                                                                                                                                                                                                                                          | 3 and 4 of the Regulation include specific deadlines.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 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-depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13. | <p>AT</p> <p>(Drafting):</p> <p>During the in-depth investigation, the Commission shall further assess the foreign subsidy <del>distorting the internal market</del> that has been identified in the decision to initiate the in-depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13. <u>Such in-depth investigation shall be carried out by the Commission without undue delay.</u></p> <p>AT</p> <p>(Comments):</p> <p>As already mentioned under Article 8, reasonable timeframes for in-depth investigations should be defined, at least they should be carried out without undue delay.</p> <p>Moreover, the conclusion, that a foreign subsidy distorts the internal market, can only be drawn at the end of the in-depth investigation. Therefore, the wording in para 1 should be amended.</p> <p>Furthermore, Member States must be involved adequately in the decision making process of the Commission.</p> <p>CZ</p> <p>(Drafting):</p> <p>.</p> |

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|                                                                                                                                                                                                                                                                                                                                                           | <p>PT</p> <p>(Comments):</p> <p>In this in-depth investigation process, the MS concerned should be involved ab initio, since the company operates in its territory.</p>                                                                                                                                                                                                                                                                                          |
| 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').                                                                                                                                                                      | <p>CZ</p> <p>(Drafting):</p> <p>Where the Commission finds that a foreign subsidy <u>considerably</u> distorts the internal market pursuant to Articles 3 to 5, it may impose redressive measures ('decision with redressive measures').</p> <p>CZ</p> <p>(Comments):</p> <p>The redressive measures should be taken only in cases when the subsidy considerably distorts the internal market.</p> <p>PT</p> <p>(Comments):</p> <p>See comment in article 5.</p> |
| 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 | <p>CZ</p> <p>(Drafting):</p> <p>Where the Commission finds that a foreign subsidy distorts the internal</p>                                                                                                                                                                                                                                                                                                                                                      |

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| <p>commitments'). A decision accepting the repayment of a foreign subsidy in accordance with Article 6(6) shall be considered a decision with commitments.</p> | <p>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 <u>and which are not contrary to EU interest</u>, it <del>may</del> <u>shall</u> 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.</p> <p>CZ</p> <p>(Comments):</p> <p>Also, in line with the commentary made in Article 6, we are of the opinion that the commitments offered by the undertaking should take clear precedence over redressive measures if these commitments are sufficient, effectively and fully remedy the situation and also if they are not contrary to EU interest.</p> <p>PT</p> <p>(Comments):</p> <p>See comment in article 5.</p> |
|                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <p>The Commission shall adopt a no objection decision where it finds that:</p>                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <p>the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or</p>                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <p>a distortion on the internal market is outweighed by positive effects within the meaning of Article 5.</p>                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| Article 10       | <p>AT</p> <p>(Comments):</p> <p>Regarding this article, we have several questions and kindly ask for clarification:</p> <ul style="list-style-type: none"> <li>– What is the timeline for taking interim measures? Until when can they be taken?</li> <li>– Which specific interim measures does the Commission have in mind? Would the interim measures be the same as the redressive measures foreseen in Article 6 or a subset of these? A set of possible interim measures may be added in a separate para 3.</li> </ul> <p>How will Member States be involved in Article 10?</p> <p>HU</p> <p>(Comments):</p> <p><b>The Regulation should make it clear that the decision according to Article 9(2), (3) and (4) must cover the fate of any interim measure (uphold or cancel them).</b></p> |
| Interim measures | <p>FR</p> <p>(Comments):</p> <p>It could be important to give the undertaking concerned the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision (for this, the scope of the article 38 could be extend).</p> <p>Furthermore, for the sake of legal certainty and previsibility, it is</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|  | <p>necessary to specify a typology and the purpose of interim measures and at which moment of the investigation (preliminary review and/or an in-depth investigation) it can be taken by the Commission.</p> <p>CZ</p> <p>(Comments):</p> <p>Interim measures should only be taken in exceptional cases where a delay would cause significant damage, and these measures should be supported by clear evidence. Interim measures should be proportionate and last only for a limited time until distortion is confirmed by an in-depth investigation.</p> <p>LU</p> <p>(Comments):</p> <p>It is not clear at what stage the Commission could take interim measures. The article should specify that interim measures can only be imposed once a decision to launch an in-depth investigation has started, as explained by the Commission during a WP.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 4.</p> <p>In order to ensure legal certainty, ES considers it important to have a more detailed regulation of interim measures. In particular, the time limit for interim measures and the content of such measures could be further detailed. Also, an express reference to the proportionality of interim measures should be included.</p> |
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|                                                  | <p>SK</p> <p>(Drafting):</p> <p><u>The Commission may take interim measures such as:</u></p> <p><u>a) order to perform, endure or abstain from a specified action;</u></p> <p><u>b) order to secure items, which are to be disposed or destroyed, or items which are necessary for evaluation of foreign subsidy</u></p> <p>SK</p> <p>(Comments):</p> <p><u>We propose an inexhaustive list of potential measures.</u></p>                                                                                                            |
| The Commission may take interim measures, where: | <p>CZ</p> <p>(Drafting):</p> <p>The Commission may take interim measures <u>in critical circumstances</u>, where:</p> <p>PT</p> <p>(Comments):</p> <p>For legal certainty, the scope of these measures should be clarified. In the recitals, it is only mentioned that these measures are needed to “to restore competition in the internal market immediately and to prevent irreparable harm”. These measures should be clarified, maybe by examples, and also their consequences to MS (for instance on their implementation).</p> |
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| <p>there are indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and</p> | <p>CZ</p> <p>(Drafting):</p> <p><u>a provisional affirmative determination has been made there are indications</u> that a financial contribution constitutes a foreign subsidy and distorts the internal market; and</p> <p>CZ</p> <p>(Comments):</p> <p>We suggest to align the wording with anti-subsidy legislation.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <p>there is a serious risk of substantial and irreparable damage to competition on the internal market.</p>                    | <p>FI</p> <p>(Comments):</p> <p>We support the wording “serious risk of substantial and irreparable damage to competition..” as it is also in line with the competition rules.</p> <p>Taking into account that the interim measures can be a powerful tool and not complying with a decision ordering interim measures can be fined (Art 15), we suggest to consider modifications to the wording.</p> <p>We suggest to <u>add the time limit</u> for interim measures. For example in ECN+ Directive art 11 it has been regulated that “Such a decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.”</p> <p>According the proposal it would be adequate to have just <u>an indication of</u> distortive foreign subsidy. We find this wording a bit too unprecise for example compared to the antitrust rules where <i>prima facie finding</i> of an</p> |

**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)**

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|  | <p>infringement is required (ECN+ Directive, art 11 and Regulation 1/2003 Art 8).</p> <p>PL</p> <p>(Drafting):</p> <p>there is a serious risk of substantial and irreparable damage to competition on the internal market; <del>or-</del></p> <p>CZ</p> <p>(Drafting):</p> <p>there is a serious risk of substantial and irreparable damage to competition on the internal market <u>in case of delayed measures.</u></p>            |
|  | <p>DK</p> <p>(Drafting):</p> <p><u>A decision regarding the ordering of interim measures shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.</u></p> <p>DK</p> <p>(Comments):</p> <p>Addition. This is aligned with art. 8, in Reg. 1/2003, and art. 11 in the ECN+ directive regarding interim measures in relation to infringements of TEUF art. 101 and 102.</p> <p>PL</p> |



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|                      | <p>(Drafting):</p> <p><a href="#">there is considered a significantly negative impact on other undertakings in the same sector particularly on SMEs</a></p> <p>PL</p> <p>(Comments):</p> <p>We propose that one of the circumstances when the Commission may impose interim measures is that the subsidy has a clear negative impact on enterprises in the same sector, in particular on SMEs. SMEs represent 99% of the EU economic activity, employ nearly 100 million people and contribute more than half of the EU GDP. Yet SMEs have little ability to protect themselves against the effects of subsidies from foreign enterprises.</p> <p>CZ</p> <p>(Drafting):</p> <p><a href="#">Interim measures shall be proportional and imposed only temporarily during in-depth investigation, for a maximum period of [four months].</a></p> |
| Article 11           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Information requests | <p>PT</p> <p>(Comments):</p> <p>It would be important to have more detailed information from the Commission on the ways/means to collect the information required and to assess its accuracy.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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|                                                                                           | <p>LU</p> <p>(Comments):</p> <p>What is the legal status of such information requests? In comparison to the EUMR (article 11), this article only refers to “requests”, and does not distinguish between “simple requests” and “decisions”. Requesting information based on decisions would provide more legal certainty not least by providing a means of recourse for undertakings concerned.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 4.</p> <p>In order to ensure the principle of legal certainty, ES considers that it would be appropriate to refine the wording of Article 11 by including an express reference to the time limit within which undertakings have to reply to the injunction and by providing the possibility for MS to have access to such information upon request to the Commission.</p> |
| The Commission may require an undertaking concerned to provide all necessary information. | <p>AT</p> <p>(Drafting):</p> <p><u>In order to carry out the duties assigned to it by this Regulation, the</u> <del>The</del> Commission may require an undertaking concerned to provide all necessary information.</p> <p>AT</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

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|  | <p>(Comments):</p> <p>In para 1, it should be clarified that the Commission may require information only in order to carry out its duties under the respective Regulation.</p> <p>DK</p> <p>(Drafting):</p> <p>The Commission may require an undertaking <u>or association of undertakings</u> concerned to provide all necessary information. <u>The obligation to provide all necessary information covers information which is accessible to such undertakings or associations of undertakings.</u></p> <p>DK</p> <p>(Comments):</p> <p>This is aligned with art. 8 in the ECN+ directive regarding requests for information.</p> <p>FR</p> <p>(Drafting):</p> <p>The Commission may require an undertaking concerned to provide all necessary information <b>to carry out the duties assigned to it by this Regulation.</b></p> <p>PL</p> <p>(Drafting):</p> <p>The Commission may require an undertaking concerned to provide all</p> |
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|  | <p>necessary information <a href="#">concerning granted financial contribution by the third country.</a></p> <p>PL</p> <p>(Comments):</p> <p>This phrase is destined to limit administrative burden to undertakings and to assure that requested information were linked to subject matter of the Regulation.</p> <p>CZ</p> <p>(Drafting):</p> <p>The Commission <del>may</del> <u>shall</u> require an undertaking concerned to provide all necessary information.</p> <p>CZ</p> <p>(Comments):</p> <p>The assessment of single market distortions should be based on the provision of clear facts; a decision made solely on the basis of allegations, conjectures or remote possibilities creates legal uncertainty for subjects on the single market. Although we share the view, that undertakings should not be unnecessarily burdened, we believe an undertaking concerned (preliminary reviewed or investigated) shall always have the right to comment. Article 38 provides for the right of defence only at the time of disclosure (at the end of in-dept investigation). In our view an undertaking concerned shall have clearly set right to comment already in the information gathering phase. In light of that the Commission shall require the undertaking concerned to provide all the necessary information, which should be basis for evaluation of the case.</p> |
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|                                                                                                                  | <p>PT</p> <p>(Comments):</p> <p>The role played by MS concerned should be more central (as is written, there is no intervention of MS during the request for information).</p> <p>LU</p> <p>(Comments):</p> <p>For the sake of legal certainty, the notion of “undertaking concerned” should be clarified.</p>                                                                                                                                                                                                                                                                                                       |
| <p>The Commission may also request such information from other undertakings or associations of undertakings.</p> | <p>AT</p> <p>(Comments):</p> <p>Regarding para 2, may the Commission request information from any other undertaking or associations of undertakings? Paragraph 2 has no criteria according to which other undertakings from which information may be requested are identified. In the case of public procurement: can such a request be aimed at subcontractors, competitors or other third parties?</p> <p>SE</p> <p>(Drafting):</p> <p>The Commission may also request such information from other undertakings or associations of undertakings <u>taking due account of the principle of proportionality.</u></p> |

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|                                                                                      | <p>SE</p> <p>(Comments):</p> <p>As the current wording in article 7.1 of Council regulation (EU) 2015/1589.</p> <p>PT</p> <p>(Comments):</p> <p>To clarify the scope to involve other undertakings or associations of undertakings.</p> <p>LU</p> <p>(Comments):</p> <p>What is meant by “association of undertakings”? Is this the equivalent of linked undertakings that form a single economic entity according to EU state aid case law?</p> |
| A request for information to an undertaking or an association of undertakings shall: | <p>AT</p> <p>(Comments):</p> <p>Regarding the sanctions in para 3, we are wondering if and how can they be applied to other undertakings which are (potentially) not involved in the assessment process (in-depth investigation)? How can the undertaking concerned be held liable if such “third” parties are not submitting the information requested (see para 3 point c)?</p>                                                                |
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| <p>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 provided;</p>                | <p>LV</p> <p>(Drafting):</p> <p>state its legal basis and its purpose, specify what information is required and set an appropriate time limit of at least 30 days within which the information is to be provided;</p> <p>LV</p> <p>(Comments):</p> <p>To be on the safe side, it is better to state a particular minimum time limit (which may be not 30 days but also some other number of days) rather than leave just the words “appropriate time limit”. Associations or undertakings may claim the time limit set in the request for information has NOT been appropriate.</p> |
| <p>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;</p> | <p>NL</p> <p>(Comments):</p> <p><u>NL fully agrees with the possibility to impose a fine when firms do not cooperate. The effectiveness of the instrument is inextricably linked to the availability of information. It is crucial that firms are incentivized to give such information.</u></p> <p>PT</p> <p>(Comments):</p> <p>It would be important to distinguish whether the information supplied is incorrect, incomplete or misleading due to the lack of information or if it</p>                                                                                           |

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|                                                                                                                                                                                               | was given deliberately.                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 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. |                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|                                                                                                                                                                                               | <p>AT</p> <p>(Drafting):</p> <p><a href="#">(3a) The Commission shall without delay forward a copy of a request for information under paragraph (1) and (2) to the Member State whose territory is affected.</a></p> <p>AT</p> <p>(Comments):</p> <p>Furthermore, Member States should be informed of such information requests (compare Article 18 para 5 of Regulation (EC) No. 1/2003). A new para 3a should therefore be added.</p> |
| 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.                                    | <p>FI</p> <p>(Drafting):</p> <p>Proposal:</p> <p>Member States shall provide it with all necessary information <u>available</u></p> <p>FI</p> <p>(Comments):</p> <p>The scope of the MS obligation to provide the Commission with “all</p>                                                                                                                                                                                              |



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|  | <p>necessary information” could be clarified for example by adding the word “available”. According the proposal (Art 11(1) – 11(3)) the Commission has a right to request information from undertakings and from associations of undertakings. We presume that information available to undertakings but not to MSs will be requested from undertakings.</p> <p>FR</p> <p>(Drafting):</p> <p>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.</p> <p><b>The disclosure of such information shall not prejudice essential security interests of Member States.</b></p> <p>FR</p> <p>(Comments):</p> <p>Member States are supporting the cooperation with the Commission within the implementation of this Regulation.</p> <p>In that extent, article 11(4), requires Member States to provide the Commission with all the information necessary for it to carry out the tasks assigned to it by this Regulation,</p> <p>However, the provision of information relating to sensitive economic transactions must not lead to the undermining of the national security and essential security interests of Member States. In order to prevent such a risk, a new provision could be introduced as a new sentence following article 11(4) of this Regulation.</p> |
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|                                                                                                        | <p>CZ</p> <p>(Drafting):</p> <p>At the request of the Commission, Member States shall <u>to the extent possible</u> provide it with all necessary information to carry out the duties assigned to it by this Regulation.</p> <p>CZ</p> <p>(Comments):</p> <p>In Article 11 as well as in Article 12, Member States are given duties they might not be able to fulfil. We believe Members States shall assist the Commission “to the extent possible”.</p> <p>LU</p> <p>(Comments):</p> <p>What specific information does the Commission intent to request from Member States?</p> <p>Information that are part of other ongoing procedures might be subject to legal constraints and cannot be shared with the Commission (e.g. information on public security; FDI screening regulation). This should be specified.</p> |
|                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p>The Commission may also request a third country concerned to provide all necessary information.</p> | <p>AT</p> <p>(Comments):</p> <p>Furthermore, we kindly ask for clarification if there is a need or requirement by WTO-law (compare e.g. Article 13 WTO Agreement on</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

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|                                                                       | Subsidies and Countervailing Measures) to enter into consultations with the allegedly subsidizing third country at some point in time, also during an investigation? If so, is the option in para 5 sufficiently adhering to this WTO requirement?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                                       | <p>CZ</p> <p>(Drafting):</p> <p><u>Parties receiving information requests shall be given at least [30] days to reply. An extension to the [30]-day period may be granted, provided that the party shows due cause for such an extension in terms of its particular circumstances.</u></p> <p>CZ</p> <p>(Comments):</p> <p>We understand that time limits need to be prescribed on case by case basis; however at least minimal time limit should be provided for in the Regulation to give undertakings certainty. Moreover, we suggest adding a possibility for an undertaking to ask for an extension of the time limit, because in some cases such requests could be justified. Suggested text is an analogy to Regulation on protection against subsidised imports (anti-subsidy regulation).</p> |
| Article 12                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| Inspections within the Union                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| The Commission may conduct the necessary inspections of undertakings. | <p>AT</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

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|  | <p><u>In order to carry out the duties assigned to it by this Regulation, the</u> <del>The</del> Commission may conduct the necessary inspections of undertakings.</p> <p>AT</p> <p>(Comments):</p> <p>Like in Article 11, it should be clarified that the Commission conducts inspections in order to carry out its duties under the respective Regulation (para 1).</p> <p>DK</p> <p>(Drafting):</p> <p>The Commission may conduct the necessary inspections of undertakings <u>and associations of undertakings</u>.</p> <p>DK</p> <p>(Comments):</p> <p>Aligned with art. 20, in Reg. 1/2003—regarding the Commission’s powers of inspection in relation to TEUF art. 101 and 102</p> <p>PL</p> <p>(Drafting):</p> <p><u>If justified by gathered information</u> <del>If</del> the Commission may conduct the necessary inspections of undertakings.</p> <p>PL</p> <p>(Comments):</p> |
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|                                                                                                                                             | <p>This phrase is destined to limit administrative burden to undertakings and to assure that the decision on initiation of inspections were justified and not arbitrary.</p> <p>PT</p> <p>(Comments):</p> <p>This power requires a more detailed information and assessment vis-à-vis internal legislation of the concerned MS.</p> <p>Additionally, it should also be clarified that national public authorities and courts should be involved in the inspections.</p> <p>LU</p> <p>(Comments):</p> <p>Are the prerogatives of the Commission limited to the undertaking concerned or do they also extend to other undertakings? If the former is the case, the terms used in article 12 should be unified in that respect.</p> |
| Where the Commission undertakes such an inspection, the officials authorised by the Commission to conduct an inspection shall be empowered: |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| to enter any premises and land of the undertaking concerned;                                                                                | <p>DK</p> <p>(Drafting):</p> <p>to enter any premises and land of the undertaking <u>and associations of undertakings</u> concerned;</p> <p>DK</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

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|                                                                          | <p>(Comments):</p> <p>See above.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| to examine books and other business records and take, or request copies; | <p>AT</p> <p>(Drafting):</p> <p>to examine books and other business records, <u>irrespective of the medium on which they are stored</u>, and take, or request copies;</p> <p>AT</p> <p>(Comments):</p> <p>In para 2 point b), it should be clarified that this power also covers electronic data. It must be pointed out that such data can be stored on servers which are not on the premises and land of the undertaking concerned but in third countries outside of the EU (“cloud-solutions”). Can Commission explain how it intends to execute its powers in such cases (for ex. “sealing of books”)? How shall the obligations according to para 3 be enacted in such cases?</p> <p>DK</p> <p>(Drafting):</p> <p>to examine books and other business records, <u>-irrespective of the medium on which they are stored and to have the right to access any information which is accessible to the entity subject to the inspection, and to</u> take, or request copies;</p> <p>DK</p> |

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|                                                                                                                                                                                                | <p>(Comments):</p> <p>Se above. See also article 6 in the ECN+ directive.</p> <p>LV</p> <p>(Drafting):</p> <p>to examine books and other business records and take, or request copies or extracts, irrespective of the medium on which they are stored;</p> <p>LV</p> <p>(Comments):</p> <p>Would it not be appropriate, despite the way in which the powers of the European Commission are described in Regulation 2015/1589, to insert in this provision the words "<i>irrespective of the medium on which they are stored</i>" as in Article 20(2)(b) of Regulation 1/2003? In the opinion of the Republic of Latvia, it is unlikely that, for example, in cases where inspections may be carried out in third countries, the latter would be familiar with the case law of the Court of Justice of the European Union or the European Commission and would be willing to interpret any provision extensively as far as inspections are concerned.</p> <p>In addition, for the same reasons as stated above, in the opinion of the Republic of Latvia, a reference to “extracts” should also be made in the provision, taking into account Article 20(2)(c) of Regulation 1/2003.</p> |
| 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; | <p>DK</p> <p>(Drafting):</p> <p>to ask any representative or member of staff of the undertaking <u>or association of undertakings</u> for explanations on facts or documents</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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|                                                                                                                                                                                                                                                                       | <p>relating to the subject-matter and purpose of the inspection and to record the answers;</p> <p>DK</p> <p>(Comments):</p> <p>See above.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 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: | <p>AT</p> <p>(Comments):</p> <p>Article 12 seems to be based on Article 20 of Regulation (EC) No. 1/2003, however not all relevant provision have been incorporated in the current proposal – this raises various questions.</p> <p>The rights according to Article 12 fall within the scope of various provisions of the ECHR (Article 8, 10 etc.). Inspections and obligations linked to such obligations are only admissible after a judge has dealt with the facts of the case. Article 12 does not provide for the involvement of a court if the national system so requires (see in this regard however Article 20 (7) and (8) of Regulation (EC) No. 1/2003). How shall the system of Article 12 function, if – according to the legal system of a Member State – entry into premises, sealing of records a.s.o. have to be ordered by a judge? What happens if the judge – contrary to the Commission’s position – sees no need for the inspections required by the Commission? How to resolve a conflict in such cases in the light of the obligations of para 6? Regulation (EC) No. 1/2003 provides that the decision ordering an inspection shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties and the</p> |



**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)**

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|                                                                                                                                                                                                  | <p>right to have the decision reviewed by the Court of Justice – why is this provision missing in the current context?</p> <p>We think that the wording of Article 12 must be closely aligned to Regulation (EC) No. 1/2003.</p> <p>DK</p> <p>(Drafting):</p> <p>The undertaking <u>or association of undertakings</u> 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:</p> <p>DK</p> <p>(Comments):</p> <p>See above.</p> |
|                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 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 decision on the basis of the facts that are available; | <p>PT</p> <p>(Comments):</p> <p>We need more clarification from the Commission on the extent and the implementation of this provision</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| referring to the possibility to impose fines and penalties provided for in Article 15.                                                                                                           | DK                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

**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)**

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|                                                                                                                                                      | <p>(Drafting):</p> <p>referring to the possibility to impose fines and <u>periodic penalty payments</u> <del>penalties</del> provided for in Article 15.</p> <p>DK</p> <p>(Comments):</p> <p>A clarification.</p>                                                                                               |
|                                                                                                                                                      | <p>LU</p> <p>(Drafting):</p> <p><b><u>(d) stating the right to have the decision reviewed by the Court of Justice.</u></b></p> <p>LU</p> <p>(Comments):</p> <p>Undertakings should be made aware of their right of appeal as is currently also the case for inspections under the EUMR (see article 20(4)).</p> |
| 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. | <p>FI</p> <p>(Drafting):</p> <p>LV</p> <p>(Comments):</p>                                                                                                                                                                                                                                                       |

**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)**

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|                                                                                                                                                                                                                                                                                                                                                                                        | <p>Is it expected that the national competition authorities will be directly involved in the implementation of this provision, or are they going to be authorities dealing with the State (commercial) aid control?</p>                                                                                                                                                                                                                                      |
|                                                                                                                                                                                                                                                                                                                                                                                        | <p>AT</p> <p>(Drafting):</p> <p><a href="#">(d) appoint the date on which it is to begin;</a></p> <p><a href="#">(e) indicate the right to have the decision reviewed by the Court of Justice.</a></p> <p>AT</p> <p>(Comments):</p> <p>See comment above.</p>                                                                                                                                                                                                |
| <p>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.</p> | <p>HU</p> <p>(Comments):</p> <p><b>The exact expectations from the Member States should be specified either here or in an implementing act adopted by the Commission on the basis of an Article 42 authorisation because “actively assist” is very vague.</b></p> <p>LV</p> <p>(Comments):</p> <p>Is it expected that the national competition authorities will be directly involved in the implementation of this provision or will they be authorities</p> |

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|                                                                                                                                                                                                                                                                                                                                                                                                          | <p>dealing with the State (commercial) aid control?</p> <p>CZ</p> <p>(Drafting):</p> <p>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 <u>to the extent possible</u> the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.</p> <p>CZ</p> <p>(Comments):</p> <p>As regards inspections of companies within the Union, the requirement for the involvement of Member States' authorities in the inspection process is not entirely clear. Also, in line with Article 11, Member States are given duties they might not be able to fulfil.</p> |
| 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. | <p>LV</p> <p>(Comments):</p> <p>Is it expected that the national competition authorities will be directly involved in the implementation of this provision or will they be authorities dealing with the State (commercial) aid control?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|                                                                                                                                                                                                                                                                                                                                                                                                          | AT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|  | <p>(Drafting):</p> <p><u>(6a) If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure. [Where authorisation is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are proportionate to the subject matter of the inspection. The national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.]</u></p> <p>AT</p> <p>(Comments):</p> <p>See comment above regarding para 3.</p> <p>LU</p> <p>(Drafting):</p> <p><b><u>(7) If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.</u></b></p> <p><b><u>(8) Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of</u></b></p> |
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|                                                                                                                                                                                                                                                         | <p><b><u>the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.</u></b></p> <p>LU</p> <p>(Comments):</p> <p>For the sake of legal certainty, for the Commission, Member States and undertakings, the role of national judicial authorities cannot be ignored. The suggested approach is identical to the procedures foreseen under the EUMR (see article 13(7) and (8)).</p> |
| <p>Upon request of the Commission, a Member State shall in its own territory carry out any inspection or other fact-finding measure under its national law in order to establish whether there is a foreign subsidy distorting the internal market.</p> | <p>LV</p> <p>(Comments):</p> <p>Is it expected that the national competition authorities will be directly involved in the implementation of this provision or will they be authorities dealing with the State (commercial) aid control?</p> <p>LU</p> <p>(Comments):</p> <p>Does this imply that all Member States need to put in place a national law that specifically allows for DFS inspections or fact-finding missions?</p>                                                                                                                                                                                                                                                                                                                                                                                               |
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| Article 13 | <p>AT</p> <p>(Comments):</p> <p>Regarding this article, we have several questions and kindly ask for clarification:</p> <ul style="list-style-type: none"> <li>– How does Article 13 DFS-Proposal compare to Article 16 Regulation (EU) 2016/1036 (Basic Antidumping Regulation) or Article 26 Regulation (EU) 2016/1037 (Basic Antisubsidy Regulation) on verification visits?</li> <li>– How are such verification visits conducted in practice?</li> <li>– What if a third country denies the consent whereas the undertaking concerned gives it consent?</li> <li>– It seems highly unrealistic, that foreign countries and the undertaking concerned will give a consent or give a consent in due time.</li> </ul> <p>According to Article 29 the Commission shall carry out in the field of public procurement a preliminary review within 60 days and has to adopt a decision within 200 days. If critical information is only available outside the Union (on servers of an undertaking) it is unrealistic that the Commission can meet the above mentioned deadlines. What about countries, which systematically deny such a consent? How to proceed in such situations (whereas the undertaking would give it)? It seems to be at odds with the principle of a fair trial if undertakings would be held responsible for actions of a state (which they cannot influence) or if undertakings are submitted to conflicting (legal) obligations (current regulation versus legal framework of their “home country”).</p> <p>It should be examined whether, in the case of EC inspections outside the Union, staff of the MS that have requested such inspections can also participate. Such a possibility is foreseen for inspections in the course of verification visits pursuant to Article 26 para of Regulation (EU) 2016/1037 and could also be useful for inspections under the DFS.</p> |
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| <p>Inspection outside the Union</p>                                                                                                                                                                                                                                                                                                                                                                | <p>CZ</p> <p>(Comments):</p> <p>An inspection outside the Union can be potentially carried out only if the responsible authorities have sufficient tools at their disposal. It is not entirely clear from the proposal which tools or institutes will be used. In order to set up these tools effectively, it will also be necessary to evaluate in more detail the real possibilities of obtaining information about subsidies from third countries.</p> <p>LU</p> <p>(Comments):</p> <p>We recognise the need for the Commission to proceed with inspections outside the EU, but wonder as to the extent such inspections could be carried out in practice. At the same time, we remain cautious about possible retaliations by third countries.</p> |
| <p>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.</p> | <p>CZ</p> <p>(Comments):</p> <p>We would also like to ask the Commission about expected course of action in case undertaking concerned would have given its consent but the government of the third country would have not agreed to the inspection.</p> <p>PT</p> <p>(Comments):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |



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|                                                                                                                                                            | Could the Commission further elaborate on how to conduct these inspections.                                                                                                                                                                                                                                                                                                         |
| Article 14                                                                                                                                                 | <p>PL</p> <p>(Comments):</p> <p>What scenario of action is foreseen by the Commission in the case of not receiving any information from the undertaking and/or third country and the impossibility of determining the amount of the suspected benefit received by the undertaking?</p>                                                                                              |
| Non-cooperation                                                                                                                                            | <p>CZ</p> <p>(Comments):</p> <p>The procedure in case of non-cooperation should be based on the precedent set by EU regulation in the area of anti-trust and mergers, and where appropriate, in line with anti-subsidy regulation.</p> <p>PT</p> <p>(Comments):</p> <p>We need more clarification from the Commission on the extent and the implementation of these provisions.</p> |
| 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: | <p>AT</p> <p>(Comments):</p> <p>Regarding para 1, we are slightly concerned regarding the fact that an</p>                                                                                                                                                                                                                                                                          |

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|  | <p>undertaking can be held responsible for actions of a third country. Only in cases where the undertaking can be considered as a part of the respective state (e.g. a SOE) such consequences would be adequate.</p> <p>LU</p> <p>(Comments):</p> <p>This article should provide for a safeguard to the extent that an undertaking cannot be blamed and sanctioned for the non-cooperation of a third country with the Commission.</p> <p>ES</p> <p>(Drafting):</p> <p>The Commission may take a decision pursuant to Article 8 or Article 9 on the basis of the facts available, if an undertaking concerned <del>or a third country</del>.</p> <p>ES</p> <p>(Comments):</p> <p>ES has some doubts as to whether inaction or non-compliance by a third country should have consequences for the undertaking concerned. Especially in cases where the link between the third country and the company is limited, for example, to the granting of selective aid. Aside from the cases in which the undertaking is state owned, the third country and the undertaking concerned will be different and separate entities.</p> <p>In this sense, the undertaking concerned will normally have no way of forcing the third country to cooperate with the Commission. In the same manner, the possible negative repercussions of non-cooperation that the undertaking will suffer may have little impact on the third country's will</p> |
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|                                                                                                                         | to cooperate.<br>As such, ES considers that making the undertaking liable for a behaviour (non-cooperation) of which it is not responsible and has no control or power of influence may not be proportionate.                                                                                                       |
| provides incomplete, incorrect or misleading information in response to an information request under Article 11;        |                                                                                                                                                                                                                                                                                                                     |
| fails to provide the information requested within 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 | CZ<br><br>(Comments):<br><br>We would like to ask about consequences of a situation when an undertaking is ready to cooperate and allow inspection, but the government of the third country has not agreed to the inspection, as according to Art. 13, the inspection is allowed only with third country agreement. |
| otherwise impedes the preliminary review or the in-depth investigation.                                                 | CZ<br><br>(Drafting):<br><br>otherwise <u>significantly</u> impedes the preliminary review or the in-depth investigation.<br><br>CZ                                                                                                                                                                                 |

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|                                                                                                                                                                                                                                                                                                         | <p>(Comments):</p> <p>We would suggest adding word “significantly”, so it applies strictly on cases, where the given undertaking clearly and intentionally impedes the investigation.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 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. | <p>HU</p> <p>(Comments):</p> <p><b>At the 10 September 2021 Working Party for Competition meeting, it was stated that this presumption (“that undertaking may be deemed to have received such benefit”) only applies to the <i>amount/extent</i> of the benefit. If this is the case, this should be clarified in the text.</b></p> <p><b>In this form, the text reverses the burden of proof regarding the existence of the financial contribution. The Hungarian authorities believe this is an excessive measure, as failure to provide information can be sanctioned by other, more proportionate means, such as penalties.</b></p> <p>FI</p> <p>(Comments):</p> <p>We suggest to make it clearer <u>whether</u> this formulation <u>lowers Commission’s burden of proof</u> also in the EU courts in situations where the Commission has not received all the relevant, correct and timely information it has asked for.</p> |

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|  | <p>It should be made clearer for example in the recital 22 that the <u>presumption concerns only the benefit conferred</u> and not the existence of the financial contribution.</p> <p>CZ</p> <p>(Drafting):</p> <p>Where an undertaking concerned, including a public undertaking which is directly or indirectly controlled by the State, <del>fails-refuses</del> 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.</p> <p>CZ</p> <p>(Comments):</p> <p>We have concerns as regards the reversed burden of proof on whether the financial contribution confers a benefit to the undertaking and in general about the ability to prove the opposite. Moreover, any financial contribution does not necessarily constitute a countervailable foreign subsidy. Also, with reference to the subject of this Article, which is “Non-cooperation”, we suggest a change in wording, so it is clear, that the undertaking intentionally hampers the process.</p> <p>ES</p> <p>(Drafting):</p> <p>Where an undertaking concerned, <del>including a public undertaking which is directly or indirectly controlled by the State,</del> fails to provide the <del>necessary</del> <b>required</b> information to determine whether a financial contribution</p> |
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|  | <p>confers a benefit to it, that undertaking may be deemed to have received such benefit.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 3.</p> <p>The CJEU, in the context of state aid, includes the category of “public undertaking” in the concept of undertaking. It would therefore be appropriate to remove reference to the concept of “public undertaking” and refer only to the all-encompassing concept of “undertaking”. In addition, it would be more appropriate to replace the concept of "necessary information" with that of "required information" (as in Art. 11) for the sake of consistency of the Regulation.</p> |
|  | <p>CZ</p> <p>(Drafting):</p> <p><u>If decisions are based on the provisions of paragraph 1 or 3, it shall, where practicable, be checked by reference to information from other independent sources which may be available, or information obtained within information requests under Article 11.</u></p> <p>CZ</p> <p>(Comments):</p> <p>By analogy with anti-subsidy regulation, we suggest adding a new paragraph to ensure all available sources are used in the decision-making process as much as possible.</p>                                                                                                                                   |

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| <p>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.</p> | <p>AT</p> <p>(Drafting):</p> <p><del>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.</del></p> <p>AT</p> <p>(Comments):</p> <p>Regarding para 4, we cannot see the added value of this provision as this should be the legal standard. Therefore, we suggest to move para 4 to Recital 22 as a new last sentence.</p> <p>FI</p> <p>(Drafting):</p> <p>When applying <u>only</u> facts <u>which have been</u> available, the <u>decision</u> may be less favourable to the undertaking concerned than if it had <u>cooperated</u>.</p> <p>FI</p> <p>(Comments):</p> <p>It is not entirely clear what is meant by “the result of the procedure”. In the recital 22 it has been stated more clearly that: “The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate.</p> <p>CZ</p> <p>(Drafting):</p> |
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|  | <p>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.<br/> <u>Undertakings, associations of undertakings and third countries concerned shall be made aware of the consequences of non-cooperation.</u></p> <p>CZ</p> <p>(Comments):</p> <p>By analogy with anti-subsidy regulation, all parties involved need to be informed of the consequences of non-cooperation.</p> <p>SE</p> <p>(Drafting):</p> <p><del>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.</del></p> <p>SE</p> <p>(Comments):</p> <p>Move to recitals.</p> <p>LU</p> <p>(Drafting):</p> <p><del>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.</del></p> <p>LU</p> <p>(Comments):</p> |
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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)**

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|  | <p>We are wondering about the usefulness of this paragraph. The outcome should be based on the available information only. This goes without saying that an undertaking can obviously be fined or be subject to penalties for non-cooperation (see notably article 15(1)(a)).</p> <p>ES</p> <p>(Comments):</p> <p>ES understands that this provision might be interpreted as having a punitive component, in the sense that it might be understood as , in cases of non-cooperation by the undertaking, enabling the Commission to “punish” this lack of cooperation by adopting a harsher decision (meaning harsher redressive measures) for the undertaking than it would have otherwise adopted. It cloud create a contradiction with the redressive nature of measures in article 6, which objective is to remedy the distortion caused in the internal market, not to “punish” the undertaking that has not cooperate.</p> <p>Since, after the Commission’s clarifications, ES understands that this provision is intended to act as a mere warning, ES considers that either it should be moved to a recital, or else further clarification should be included in the wording of this provision, in order to avoid any possible misinterpretation.</p> |
|  | <p>ES</p> <p>(Drafting):</p> <p><b><u>Article 14 (5) NEW</u></b></p> <p><b><u>If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time limit</u></b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

*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)*

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|                                     | <p><b><u>specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.</u></b></p> <p>ES</p> <p>(Comments):</p> <p>ES considers that a new paragraph should be included with a reference to notifying the company why the information provided is not accepted, as set out in Art 28.4 of Regulation 1037/2016, on protection against subsidised imports from non-EU countries.</p> |
| Article 15                          | <p>NL</p> <p>(Comments):</p> <p><u>NL: Guidelines on the way in which fines are determined would be welcomed (comparable to the Guidelines on the method of setting fines in relation to Regulation 1/2003). In such guidelines different factors could be taken into account, such as the duration of a violation and whether there is a repeated offence.</u></p>                                                                                                                               |
| Fines and periodic penalty payments | <p>PL</p> <p>(Comments):</p> <p>The possibility of imposing fines and periodic penalty payments by the Commission for incorrect, incomplete or misleading information should not discourage potential investors in the EU. Therefore, the provisions of the regulation and the Commission's requests for information should be formulated as precisely as possible so that the undertakings have certainty</p>                                                                                    |

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|                                                                                                                                                                                  | <p>and clarity as to the information required from them.</p> <p>Will undertakings have the possibility to appeal against Commission's decisions imposing fines or periodic penalty payments?</p> <p>PT</p> <p>(Comments):</p> <p>We need more clarification from the Commission on the extent and the implementation of these provisions.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 5.</p> <p>It would be appropriate to assess the compatibility of measures under this Article with the WTO Agreement on Subsidies and Countervailing Measures.</p> |
| <p>The Commission may impose by decision fines and periodic penalty payments where an undertaking concerned or an association of undertakings, intentionally or negligently:</p> | <p>AT</p> <p>(Comments):</p> <p>Regarding para 15, we have the following suggestions:</p> <ul style="list-style-type: none"> <li>– Fines and periodic penalty payments should not be mixed in one paragraph. It would be better to have two separate paragraphs, e.g. para 1 for fines and para 2 for periodic penalty payments.</li> <li>– The concept of “undertaking concerned” should be clarified as it seems to have different meanings under the different chapters.</li> </ul>                                                                                     |

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|  | <p>Furthermore, we have two questions and kindly ask for clarification:</p> <ul style="list-style-type: none"> <li>– How should the imposition of fines and payments work in third country situations (which may happen in the case of Art. 11)?</li> </ul> <p>What happens when the aggregative turnover is not available (i.e. Chinese SOE)? [see para 2, 3 and 5 a) and b)]</p> <p>PL</p> <p>(Comments):</p> <p>In what situations, as specified in paragraph 1, the Commission will impose fines, and in what situations, periodic penalty payments? In our opinion, this distinction should be included in the provisions of the article, in order to provide legal certainty to entrepreneurs as to when they will be fined with 1% of the aggregate turnover, and when they will receive a periodic penalty payment of 5% of the average daily aggregate turnover.</p> <p>PT</p> <p>(Comments):</p> <p>See comment in article 11, number 2 (b).</p> <p>LU</p> <p>(Comments):</p> <p>It is unclear to which undertakings this paragraph refers to. For instance, undertakings (other than the undertaking concerned) can be required by the Commission to provide information. However, they do not seem to fall into the scope of this article. The use of the notions of “undertaking concerned” and “undertaking” is not the same throughout the text.</p> <p>ES</p> |
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|                                                                                                                                                                                     | <p>(Comments):</p> <p>See general comment number 3.</p> <p>ES considers that the meaning of “aggregate turnover” should be clarified as it is different that the concept used in other regulations (“total turnover” in R.1/2003 and in the DMA).</p> <p>Besides, the term “preceding business year” should also be clarified and revised in order to achieve consistency in the Regulation, as art. 21 set out the term “preceding financial year”.</p> |
| 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                                        | <p>HU</p> <p>(Comments):</p> <p><b>We propose that Article 42 of the Regulation should empower the Commission to adopt implementing acts in order to regulate such time limits (their general framework, minimum and maximum deadlines, how they can be extended, what factors are to be taken into account when they are set).</b></p>                                                                                                                  |

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|                                                                                                                                                                                                  | <p>LV</p> <p>(Drafting):</p> <p>(ii) fails to rectify within a time-limit of at least 30 days as set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or</p> <p>LV</p> <p>(Comments):</p> <p>Alternatively, also Article 11 might be supplemented with a provision stating that the <u>minimum</u> time limit shall be stated in both, the initial information request and in the request to rectify the answer given to the initial information request. (see comments under Article 11)</p> |
| (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).                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 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. | <p>FI</p> <p>(Comments):</p> <p>We consider the 1 % maximum appropriate and equivalent to the sanctions in competition rules.</p> <p>NL</p>                                                                                                                                                                                                                                                                                                                                                                                              |

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|                                                                                                                                                                                                                                                                                                 | <p>(Drafting):</p> <p><u>NL: Fines imposed in the cases referred to in paragraph 1 shall not exceed <del>51</del>% of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding <b>fiscal</b> <del>business</del> year.</u></p> <p>NL</p> <p>(Comments):</p> <p><u>NL: The percentage of fines imposed should be increased to increase deterrent effect and also allow the Commission to take into account repeated breaches of the obligations listed in paragraph 1. Furthermore it should be clarified (if necessary) if the aggregate turnover is calculated on a worldwide basis. NL assumes that this is the case.</u></p> <p><u>NL: there is a lack of consistency between article 3 and this paragraph of article 15. They should be brought in alignment. Article 3 refers to ‘fiscal years’, in this paragraph ‘business year’ is used. Both options are acceptable to the Netherlands.</u></p> <p>LU</p> <p>(Comments):</p> <p>Please see comment above.</p> <p>Does the notion of “aggregate turnover” refer to the turnover achieved in the internal market or worldwide?</p> |
| <p>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</p> | <p>NL</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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| <p>established in the decision, until it submits complete and correct information as requested by the Commission.</p> | <p><u>NL</u>: Periodic penalty payments imposed in the cases referred to in paragraph 1 shall not exceed <del>10</del><b>5</b>% of the average daily aggregate turnover of the undertaking or association of undertakings concerned in the preceding <del>fiscal business</del> 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.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: See comment above with regard to the need for an effective deterrent.</u></p> <p><u>NL: See comment above with regard to business year.</u></p> <p>LU</p> <p>(Comments):</p> <p>Please see comment above.</p> |
|                                                                                                                       | <p>PL</p> <p>(Drafting):</p> <p><u>The decisions on periodic penalty payments imposed in the cases referred to in paragraph 1 does not cover period following the decision taken pursuant to Article 8 or Article 9.</u></p> <p>PL</p> <p>(Comments):</p> <p>We deem such a provision necessary to eliminate penalty obligations in</p>                                                                                                                                                                                                                                                                                                                                                                              |



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|                                                                                                                                                                                                                                                                                                                                             | case such obligations have lost its purpose.                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 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:                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <p>finances not exceeding 10 % of the aggregate turnover of the undertaking concerned in the preceding business year; and</p>                                                                                                                                                                                                               | <p>NL</p> <p>(Drafting):</p> <p><u>NL</u>: fines not exceeding 10 % of the aggregate turnover of the undertaking concerned in the preceding <u>fiscal business</u>-year; and</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: there is a lack of consistency between article 3 and this paragraph of article 15. They should be brought in alignment. Article 3 refers to ‘fiscal years’, in this paragraph ‘business year’ is used. Both options are acceptable to the Netherlands.</u></p> |
|                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 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 | <p>NL</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

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| <p>decision.</p>                                                                                                                                                                                                               | <p>NL: periodic penalty payments not exceeding <del>10</del><b>5</b>% of the average daily aggregate turnover of the undertaking concerned in the preceding <b>fiscal business</b>-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.</p> <p>NL</p> <p>(Comments):</p> <p><u>NL: See comments above.</u></p> <p><u>NL: It seems important to align the maximum periodic penalty payment with the maximum fine based on total yearly turnover, in order to avoid a situation where the maximum possible fine that can be set per day is too low. In addition the maximum periodic penalty should be higher than under article 15(3) in order to reflect the gravity of the behaviour.</u></p> |
|                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <p>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.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|                                                                                                                                                                                                                                | <p>AT</p> <p>(Drafting):</p> <p><u>(7) Where the undertakings concerned or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce the definitive amount of the periodic penalty payment compared to that under the original decision imposing periodic penalty payments.</u></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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|            | <p>AT</p> <p>(Comments):</p> <p>Similar to Article 24 para 2 of Regulation (EC) No 1/2003, Article 15 para 2 of Regulation (EC) No 139/2004 or Article 8 para 4 of Regulation (EU) No 2015/1589 a new para 7 should be added to Article 15 that determines that the definitive amount of the periodic penalty payment compared to that under the original decision may be reduced where the under-takings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce.</p> |
| Article 16 | <p>AT</p> <p>(Comments):</p> <p>No comments so far.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Revocation | <p>HU</p> <p>(Comments):</p> <p><b>Please note that the Commission's right to revoke the decision has no time limit. The Hungarian authorities suggest that the revocation decision should not be made beyond the limitation periods in Article 35. A shorter deadline for revocation is also acceptable.</b></p> <p>FR</p> <p>(Comments):</p> <p>It could be important to give the undertaking concerned the opportunity to submit observations on the grounds on which the Commission intends to</p>                                  |

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|                                                                                                                                         | <p>adopt its decision (for this, the scope of the article 38 could be extended).</p> <p>LU</p> <p>(Comments):</p> <p>It remains unclear whether the revocation and the adoption of a new decision would always occur at the same point in time or whether the revocation would reboot the process (same procedure and timeframe than for the previous decision).</p>                                                                                                                                                                                                 |
| 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: | <p>HU</p> <p>(Drafting):</p> <p><b><u>Within the applicable limitation period defined in Article 35(1), The 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:</u></b></p>                                                                                                                                                                                                                                                                                                      |
| where the undertaking concerned acts contrary to its commitments or the redressive measures imposed;                                    | <p>ES</p> <p>(Comments):</p> <p>Further clarification on the relation between Art. 15(5) and Art. 16(1) would be welcomed.</p> <p>In the event of a company failing to comply with the commitments or corrective measures, the fines in Art. 15.5 would be applicable. There would be no reason for adopting a new decision in such a case, since the elements that motivated the decision remain unchanged.</p> <p>If, as commented by the Commission, the reason for adopting a new decision is to adapt it to possible changes in the elements that motivated</p> |

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | the first decision and to new market situations, this should be clarified within the text.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| where the decision was based on incomplete, incorrect or misleading information.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | PL<br><br>(Comments):<br><br>The revocation of a decision adopted on the basis of incomplete, incorrect or misleading information should concern the information received in the course of procedures and not any information obtained by the Commission, therefore it is worth clarifying the provisions in this article.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 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. | AT<br><br>(Drafting):<br><br>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 <a href="#">for the application of this Regulation</a> and may carry out the necessary inspections, <a href="#">taking due account of the principle of proportionality</a> . <del>The Commission may also request the Member State or third country concerned to supply information.</del> |

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|  | <p>AT</p> <p>(Comments):</p> <p>Regarding para 1, the last sentence does not seem necessary as para 4 already refers to Article 11 and according to Article 11 para 4 and 5, information requests can be addressed to Member States and third countries. The last sentence of para 1 can therefore be deleted. For the sake of clarity, it should be added that necessary information should be supplied for the application of the present Regulation and reference to the principle of proportionality should be made (compare also Article 17 of Regulation (EC) No. 1/2003 and Article 25 of Regulation (EU) 2015/1589).</p> <p>Furthermore, Member States should have the right to request the Commission to conduct such a market investigation if there is reasonable suspicion according to the first sentence of para 1. Moreover, we kindly ask for clarification, how the provision of para 1 should be applied in the context of Chapter 4? Chapter 4 applies to specific PP procedures whereas Art. 34 para 1 refers to “economic activities”.</p> <p>PL</p> <p>(Drafting):</p> <p>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</p> |
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|  | <p>information and may carry out the necessary <del>inspections</del>inquiries. The Commission may also request the Member State or third country concerned to supply information.</p> <p>PL</p> <p>(Comments):</p> <ul style="list-style-type: none"> <li>• In which specific situations does the Commission intend to conduct a market investigation?</li> <li>• How will these situations differ from those in which ex officio reviews will be initiated?</li> <li>• Will the Commission request information once again from the undertakings under the procedures from chapters 2-4 if it has done so in the market investigation?</li> <li>• Will undertakings be able to appeal against Commission's decisions on fines and periodic penalty payments under Article 15 as part of the market investigation?</li> <li>• Why are the provisions of article 14 not applicable in a market investigation?</li> </ul> <p>We propose to use a word “inquiries” instead of the word “inspections” because the latter is defined in Article 12 and is appropriate to individual “ex officio review of foreign subsidies” (Chapter 2). We are not convinced that individual burdensome “inspections” under Article 12 should be applied during “market investigations” under Article 34. We propose to delete reference to Article 12 in the last paragraph of Article 34.</p> <p>SE</p> <p>(Comments):</p> <p>Definition of “reasonable suspicion” is suggested to be inserted in a</p> |
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|                                                                                                                                                                                                                                     | <p>definition section, see proposal above related to article 2.</p> <p>LU</p> <p>(Comments):</p> <p>We are wondering as to the extent the Commission will be able to request information from Member States that is deemed confidential, not least with regard to the FDI screening Regulation (article 10).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <p>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.</p> | <p>PL</p> <p>(Comments):</p> <p>Due to the reasons for launching the market investigation (suspicion of the existence of subsidies distorting the internal market), in case of requesting information from the undertakings concerned, the Commission should provide the results of the investigation to the undertakings concerned and the Member States where these companies operate with the possibility to submit observations.</p> <p>The report on the results of the market investigation could be periodically evaluated, e.g. every 3 years, and also include an assessment of which areas/sectors, including public procurement, are most likely to be affected by foreign subsidies, including data on which areas/sectors, including public procurement, in such a reporting period were found to be affected by foreign subsidies. The review of the report could be part of the review of the application of the regulation referred to in Article 46.</p> <p>CZ</p> <p>(Drafting):</p> <p>The Commission <del>may</del><u>shall</u> publish a report on the results of its market</p> |



**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)**

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|                                                                                                                                       | <p>investigation into particular sectors, particular types of economic activity or particular subsidy instruments and invite comments from interested parties.</p> <p>CZ</p> <p>(Comments):</p> <p>We believe, that reporting and giving possibility to comment should be mandatory.</p> <p>ES</p> <p>(Drafting):</p> <p>The Commission <u>shall</u><del>may</del> 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.</p> <p>ES</p> <p>(Comments):</p> <p>For reasons of legal certainty, ES considers more appropriate to replace the verb "may" by "shall".</p> |
| 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 shall apply.                                                                            | <p>PL</p> <p>(Drafting):</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

**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)**

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|  | <p>Articles 11, <del>12</del> 13 and 15 of this Regulation shall apply.</p> <p>PL</p> <p>(Comments):</p> <p>We are not convinced that individual “inspections” under Article 12, potentially very burdensome to undertakings should be applied during “market investigations” under Article 34. We propose to delete reference to Article 12 in this paragraph.</p> <p>CZ</p> <p>(Drafting):</p> <p>Articles 11, 12, <del>13</del> and <del>15</del> 13 of this Regulation shall apply.</p> <p>CZ</p> <p>(Comments):</p> <p>In our view, fines and penalty payments would constitute excessive burden for companies in case of general market investigations.</p> <p>ES</p> <p>(Drafting):</p> <p>Articles 11, 12, <u>and</u> 13 <del>and</del> 15 of this Regulation shall apply.</p> <p>ES</p> <p>(Comments):</p> <p>ES has some doubts regarding the possibility of applying fines and periodic penalty payments (of Art. 15) in the framework of a market</p> |
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|                                                                                                  | investigation. Under the current wording, it seems that it would be possible to <i>create bis in idem</i> situations to an undertaking, i.e. to impose fines on the same company in the framework of a market investigation and subsequently in the framework of an in-depth investigation. Further clarification on this point would be welcomed.                                                                                                                                                                                     |
| Article 36                                                                                       | AT<br><br>(Comments):<br><br>No comments so far.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Publication of decisions                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| The Commission shall publish a summary notice of the decisions adopted pursuant to Article 8(2). | CZ<br><br>(Comments):<br><br>Art. 8 (2c) already obliges the Commission to publish a notice about the decision to initiate an in-depth investigation in OJ. Thus, we are wondering, what is the reason behind publishing a summary notice of these decision as stated in Art. 36 (1)? Also, where should such a notice be published and if periodically, then how often?<br><br>NL<br><br>(Drafting):<br><br><u>NL</u> : The Commission shall publish a summary notice of the decisions adopted pursuant to Article 8(2), <b>(3)</b> . |

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|                                                                                                                                                                                        | <p>NL</p> <p>(Comments):</p> <p><u>NL: As stated above, the Netherlands is of the opinion that when the Commission decides, based on Article 8 par. 3, to close a preliminary review because there are insufficient grounds for an in-depth investigation, this should result in a decision. By extension, we are of the opinion that Article 8 sub 3 should be included in Article 36 as a decision that warrants publication.</u></p>                                                                                                                                                                           |
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| 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. | <p>ES</p> <p>(Drafting):</p> <p>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 <b><u>Union in languages other than the authentic language version. The authentic language version shall be accompanied by a meaningful summary in the language of that Official Journal.</u></b></p> <p>ES</p> <p>(Comments):</p> <p>ES would appreciate the inclusion of the wording of Art.32 of Regulation 1589/2015, which also refers to the language versions of the official journal.</p> |
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| When publishing summary notices and decisions, the Commission shall                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

**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)**

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| 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                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <p>CZ</p> <p>(Comments):</p> <p>We are of the opinion, that Article 37 should also include obligation to inform the contracting authority about Commission’s decision to initiate a review of entities that fail to notify a foreign financial contribution in the context of public procurement procedures (Art. 28(5)), or it should be clearly explained how the contracting authorities will be informed about such decision.</p>                                                                                                                                                                                                                                                                     |
| 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 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. | <p>AT</p> <p>(Comments):</p> <p>As already suggested under Article 15, the concept of “undertaking concerned” should be clarified. For example, the term “undertaking concerned” is used in the context of Chapter 4 as addressing the tenderer or candidate receiving foreign financial subsidies. However, decisions pursuant to Art. 15 may be addressed to other undertakings as well (see Art. 15 para a) in connection with Art. 11). Why should – in such situations the decision be addressed to the tenderer or candidate receiving foreign financial subsidies; the latter will also not be in a position to indicate which information (of a third party) it considers to be confidential.</p> |

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|  | <p>PL</p> <p>(Comments):</p> <p>Decisions taken pursuant to Articles 9, 24, 30 should also be communicated to the Member States concerned.</p> <p>SE</p> <p>(Comments):</p> <p>It would be beneficial with time limits, for the concerned units to know when they at the latest will receive information.</p> <p>ES</p> <p>(Drafting):</p> <p>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 Commission shall provide the contracting authority or the contracting entity <b>and the Member State</b> concerned with a copy of any Commission decision addressed to an undertaking participating in a public procurement procedure.</p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 1.</p> |
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| <p>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.</p> | <p>CZ</p> <p>(Comments):</p> <p>We would like to ask the Commission for clarification whether, similarly to Art. 37 (1), there is an option for undertakings to indicate confidential information before the decision is passed towards the contracting authority/entity.</p> <p>ES</p> <p>(Drafting):</p> <p>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.</p> <p><b><u>The Commission shall provide the coordinating authority of the Member State with a copy of any decision adopted pursuant to Article 30(2) and (3)</u></b></p> <p>ES</p> <p>(Comments):</p> <p>See general comment number 1.</p> <p>ES considers it adequate that the recipient of the information should be the contracting authority, but suggest that a copy should also be sent also to the coordinating authority of the Member State.</p> |
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|                                  | <p>MT</p> <p>(Drafting):</p> <p><b><u>Where any decision of the Commission has not been received by the contracting authority or the contracting entity concerned within the time limits established under Article 29, that decision shall not affect any contract that has been awarded before the said receipt of any such decision.</u></b></p> <p>MT</p> <p>(Comments):</p> <p>Malta would draw attention to the scenario where a contracting authority/entity has not been notified of a Commission decision within the time limits imposed, and is thus putting forward this new paragraph.</p> |
| Article 38                       | <p>CZ</p> <p>(Comments):</p> <p>In general, we are of the opinion that the undertaking concerned should have their right of defence. Nevertheless, we are not sure whether the current provisions in the draft regulation give them this right. There are no set time limits in which the observations should be submitted and also there's no obligation for the Commission to consider or review these facts before actually issuing the decision.</p>                                                                                                                                              |
| Disclosure and rights of defence | <p>PL</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |



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|                                                                                                                                                                                                                                                                  | <p>(Comments):</p> <p>Will an undertaking be able to appeal against Commission's decision under the right of defence?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <p>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.</p> | <p>AT</p> <p>(Comments):</p> <p>As para 1 only mentions the right of an undertaking to submit observations as right of defence, we were wondering, what about other rights of defence, such as the right of access to the Commission's files?</p> <p>FR</p> <p>(Drafting):</p> <p>The Commission shall, before adopting a decision pursuant to Articles 9, 10, 15, 16, 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.</p> <p>FR</p> <p>(Comments):</p> <p>It could be important to give the undertaking concerned the opportunity to submit observations on the grounds on which the Commission intends to adopt <u>interim measures</u> (article 10) and <u>revocation</u> (article 16).</p> <p>PL</p> <p>(Comments):</p> |

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|                                                                                                                                                                 | <p>It would be appropriate to indicate the time when the undertakings will be able to submit observations to the decision.</p> <p>CZ</p> <p>(Drafting):</p> <p>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, <u>within a period to be set by the Commission in each case, which shall be at least [10] days</u>, observations on the grounds on which the Commission intends to adopt its decision.</p> <p>CZ</p> <p>(Comments):</p> <p>Time limit should be set for the right to comment and at least a few days should be provided for by the regulation. The wording suggested is an analogy to anti-subsidy regulation.</p> <p>LU</p> <p>(Comments):</p> <p>What is foreseen if the addressee is an association of undertakings pursuant to article 15? Will the rights of defense be exercised by each undertaking that is part of the association?</p> <p>The concepts of “undertaking” and “association of undertakings” need to be clarified.</p> |
| <p>The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations.</p> | <p>PL</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

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|  | <p>(Drafting):</p> <p>The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations. <a href="#">Negligence or refusal to submit such observations release the Commission from this obligation.</a></p> <p>PL</p> <p>(Comments):</p> <p>There may be situations in which undertakings will not cooperate with the Commission to the extent indicated in paragraph 2 (refusal to provide observations), so an appropriate wording should be included in this paragraph to indicate that the Commission may take a decision despite such a situation.</p> |
|  | <p>CZ</p> <p>(Drafting):</p> <p><a href="#">Disclosure shall not prejudice any subsequent decision which may be taken by the Commission, but where such a decision is based on any different facts and considerations they shall be disclosed as soon as possible.</a></p> <p>CZ</p> <p>(Comments):</p> <p>By analogy with anti-subsidy regulation, we suggest adding a paragraph on disclosure. We believe that the Commission should have the right to change decision after disclosure and receiving observations of undertakings. At the same time all interested parties need to be informed about any changes ASAP.</p>                     |

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| Article 39                                                                                                                                                                                                    | <p>AT</p> <p>(Comments):</p> <p>No comments so far.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Professional secrecy                                                                                                                                                                                          | <p>HU</p> <p>(Comments):</p> <p><b>The Hungarian authorities recommend that the rules on professional secrecy should be more detailed, similarly to State aid cases, where they are regulated by a separate Communication (C(2003) 4582 of 1 December 2003). This would prevent legal debates about the issue of confidentiality, which is in everybody's interest. Article 42 should empower the Commission to regulate the rules of professional secrecy in detail in an implementing act.</b></p> |
| Information acquired under this Regulation shall be used only for the purposes for which it was acquired.                                                                                                     | <p>FI</p> <p>(Comments):</p> <p>We support the wording. We agree that information acquired under this Regulation can be used only for the purposes of applying this regulation.</p>                                                                                                                                                                                                                                                                                                                  |
| 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. | <p>LU</p> <p>(Drafting):</p> <p>The Commission, its officials and other persons working under its</p>                                                                                                                                                                                                                                                                                                                                                                                                |

*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)*

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|                                                                                                                                                                                         | supervision shall not disclose information covered by the obligation of professional secrecy that they have acquired under this Regulation. <b><u>This obligation also applies to all representatives and experts of Member States attending meetings of the Committee pursuant to Article 43.</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 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. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
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|                                                                                                                                                                                         | <b><u>General comments</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                                                                                                                                                                         | <p>AT</p> <p>(Comments):</p> <p>Austria is committed to creating a comprehensive legal framework that better reflects the changing global competitive environment. Therefore, Austria welcomes this new proposal on distortive foreign subsidies. In our view, the proposal has to be examined and amended carefully in order to have an effective legal instrument while maintaining the openness of the EU to FDI.</p> <p>For Austria, it is important that procedures, especially public procurement procedures, can be carried out quickly and efficiently. Furthermore, we see the need for further discussions regarding the involvement of Member States in the enforcement of this Regulation.</p> <p>In our comments, we have listed several questions and we kindly ask for clarifications.</p> <p>Besides, it would be useful to have a flowchart of all the stages of an ex officio review of foreign subsidies (compare “Flowchart of a typical anti-dumping investigation”) including the timelines (and limitation period) as</p> |

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|  | <p>well as for the other Chapters.</p> <p>DK</p> <p>(Comments):</p> <p>To ensure an effective and consistent application and enforcement of this Regulation, the Danish Government supports that the Commission should be the sole authority competent to apply and enforce this Regulation.</p> <p>FI</p> <p>(Comments):</p> <p>It would be informative to have a specific rule stating the right of appeal of companies.</p> <p>PL</p> <p>(Comments):</p> <ul style="list-style-type: none"> <li>• It should be borne in mind that the products or services of subsidized third-country companies may appear on the internal market in a direct form, i.e. in the form of products or services of these companies, but they may also appear in an indirect form, i.e. in the value chains of EU companies contracting products and services from third-country companies that do not comply with the principle of equal competition or grant unauthorized state aid.</li> <li>• In our opinion, the greatest risk related to the subsidy assessment process is access to information, which will allow for a reliable assessment, first of all the existence of distortions of competition in the internal market and then its scale.</li> </ul> |
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|  | <p>Moreover, the effectiveness of the instrument will, to a large extent, depend on the level of available of Commission's resources, which will translate into the pace and quality of proceedings. Additional investigative effort will increase the time pressure and may translate into a limited ability to gather information and identify subsidies - the ability to put companies that are more cooperative at a disadvantage compared to those that are less cooperative.</p> <p>CZ</p> <p>(Comments):</p> <p>The Czech Republic fully agrees with the importance of clear rules for competition in the internal market, including foreign subsidies. At the same time, we are committed to open trade and wish to preserve economic environment favourable for international cooperation of companies and smooth flow of goods, services and capital into and out of the EU. In this respect we would like to share a few comments on the proposal for a regulation on foreign subsidies distorting the internal market.</p> <p>In order to ensure a proper and transparent application of rules to address the distortive effects that foreign subsidies may have on the internal market, language of existing EU State aid, merger, antitrust and public procurement and anti-subsidies rules, as well as language of existing international rules on foreign subsidies should be reflected throughout the proposal to the best extent possible.</p> <p>Furthermore, to ensure legal certainty of the proposal for all parties involve, it is necessary to explain, in adequate detail, when a foreign subsidy is to be considered distorting the internal market. At the</p> |
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|  | <p>same time, it is desirable to set out clear and detailed guidance as to the factors which may be relevant for the EU's ability to intervene ex officio in all market situations, including ex post interventions in concentrations and public procurement procedures below thresholds. Unlimited possibility to intervene below thresholds damages predictability of rules on the internal market and thus harms all undertakings engaging in an economic activity on the internal market. It might be useful to add in the proposal a possibility for self-imposed consultations for undertakings that prepare concentration or participation in a public tender, in order to avoid Commissions intervention in already implemented concentrations or awarded public contracts.</p> <p>Redressive measures in the proposal need to be proportionate and thus should remain in force solely to the extent that they are necessary to remedy the distortion, including for the limited time only.</p> <p>Special attention in the proposal should be given to SMEs. SMEs are more vulnerable to administrative burden and at the same time rarely have the power to significantly distort the EU internal market.</p> <p>In general, we believe that the inspection process can be very demanding, especially for SMEs, we would consider it appropriate if their position was taken into account.</p> <p>Although we understand the need for consistency, we believe it should be achieved by clear set of principles and criteria and not by exclusive competence of the Commission. Even if the Commission was solely responsible for enforcing the regulation it would not ensure stakeholders sufficient predictability.</p> |
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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)**

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|  | <p>The Czech Republic does not agree with the delegation of new powers to the Commission. <i>Especially in the case of public procurement procedures the competence should remain with the Member States to avoid delays and legal uncertainty.</i> At the same time, we believe that the advisory procedure is not adequate involvement of Member States in the decision-making process.</p> <p>SE</p> <p>(Comments):</p> <ul style="list-style-type: none"> <li>- SE welcomes the proposal and the changes from the white paper, especially that the Commission is the sole authority competent to apply this Regulation.</li> <li>- WTO-compatibility and adherence to our FTA-commitments must be ensured. SE calls for an assessment of this by the Council Legal Service. This assessment should include where the limits can be set for specifying the balancing test which is to be conducted under article 5.</li> <li>- Concerning financing, staff resources need to be optimized at the 2020 level in line with the European Council conclusions of July 2020.</li> <li>- The target group of third country and EU undertakings subject to prior notification needs to be limited to catch the potentially most distortive foreign subsidies on the internal market.</li> <li>- Unnecessary administrative burden for public authorities, undertakings and other concerned parties must be avoided.</li> </ul> <p>LU</p> <p>(Comments):</p> <p>Luxembourg welcomes the Proposal for a regulation on foreign subsidies distorting the internal market as it <u>aims to ensure fair competition in the Single Market</u>. Existing rules, especially in the field of trade defence, state aid and merger control might prove to be insufficient to assess the impact</p> |
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|  | <p>and control public funding from third countries. As a result, the well-functioning of the Single-Market can possibly be undermined, leaving European companies to compete on unequal terms with their foreign competitors.</p> <p>As the European Union's growth, employment and economic development in the past decades has also been the result of foreign investment, it is crucial that <u>Europe continues to be attractive for foreign companies willing to invest in the EU</u>. The objective of the proposal should thus be the strengthening of the Single Market. Luxembourg thereby stresses the <u>importance of maintaining an open and fair European economy, not least to avoid possible retaliation measures by third countries</u>.</p> <p><u>Luxembourg agrees with the principle of the Commission's envisaged central role in the implementation and enforcement of the new rules</u>. The new instrument at the Commission's disposal should always remain effective, proportionate and fit-for-purpose while striving to achieve legal certainty and predictability for undertakings concerned. At the same time, we believe that there might be <u>merits in introducing a role for Member States in supporting the Commission</u> when gathering and/or assessing information. Such a support to the Commission <u>should not lead to the creation of additional administrative burden</u>.</p> <p>More specifically, the DFS proposal should be <u>coherent with existing rules and avoid overlaps</u>, in particular with the FDI screening regulation and the EU merger control regulation.</p> <p>From a more technical point of view, we would like to mention that the use of the notion of "undertaking (concerned)" and "association of undertakings (concerned)" is not the same throughout the text and would need to be revised accordingly.</p> |
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|  | <p>Above comments are only preliminary views that are subject to evolve during the ongoing negotiations.</p> <p>ES</p> <p>(Comments):</p> <p><b>1. Member states involvement:</b></p> <p>Spain fully supports the centralized enforcement of the regulation by the Commission. Nevertheless, in order to ensure institutional balance, the regulation should provide an efficient participation, coordination and communication system with MS during the decision making process.</p> <p>For example, in the balancing test framework set out in article 5 some sensitiveness for the strategic interests of the different MS that might be affected should be granted. Therefore, MS should have the opportunity to be informed and provide comments in the process of assessment carried out by the Commission.</p> <p><b>2. Thresholds.</b></p> <p>ES considers that the thresholds should be set high enough to avoid an excessive administrative burden on companies. However, it is important that the procedures set out in Chapters 3 (mergers) and 4 (public procurement procedures) are reasonable and manage to capture all those situations that distort the internal market. Therefore, Spain considers that, in the interest of legal certainty, the extraordinary ex officio procedure should truly be extraordinary for those concentrations or public tenders that fall outside the thresholds and not become the standard procedure.</p> |
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|  | <p>It should be considered to lower the thresholds.</p> <p><b>3. Formal consistency.</b></p> <p>The aim of formal consistency principle is to leave no ambiguities, contradictions or doubts as to the meaning of a term. Any given term in a regulation is therefore to be used in a uniform manner to refer to the same thing.</p> <p>As is set out in the Joint Practical Guide for persons involved in the drafting of European Union Legislation (guidelines 6.2 and 14), this principle applies not only to the provisions of a single act, including the annexes, but also to the provisions of related acts and to all other acts in the same field. In general, terminology must be consistent with the legislation in force.</p> <p>In the interest of precision and to avoid problems of interpretation it may be necessary to define a given term.</p> <p>Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act. That is, <i>inter alia</i>, true where a term has several meanings in different pieces of legislations but must be understood in only one of them or if, for the purposes of the act, the meaning is to be limited or extended with respect to the normal meaning given to that term.</p> <p>This Regulation includes some concepts which are common in European competition legal framework. For example, some concepts (undertaking, turnover, financial contribution, control...) come from different regulations such as merger control, FDI screening, public procurement directives or state aid control where there can be some nuances or differences in the meaning.</p> <p>In order to ensure legal certainty and formal consistency, ES considers that an article with all the relevant or controversial definitions of concepts</p> |
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|            | <p>used in this regulation should be added.</p> <p><b>4. Procedures</b></p> <p>In order to ensure legal certainty and predictability, the procedures of this Regulation should include and clarify certain formal elements relating to time references, deadlines, procedural safeguards or the participation of Member States or interested third parties.</p> <p><b>5. Interplay with other regulations.</b></p> <p>Spain considers that, in order to avoid future problems in the implementation of this regulation, it might be necessary to ensure consistency with existing procedures (merger control, FDI screening or state aid control).</p> <p>When two procedures involving, respectively, the Commission and a national competition authority coexist for the same undertaking, it is necessary to articulate the necessary information and cooperation mechanisms to minimise administrative burdens and to ensure the efficiency of both rules.</p> <p>It is also necessary to take into account the principle of proportionality when establishing corrective measures on the same undertaking on the basis of separate procedures, since, when analysed together, the measures adopted separately could have negative and disproportionate consequences for the undertaking concerned.</p> |
| <b>END</b> | <b>END</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |