



Council of the European Union
General Secretariat

**Interinstitutional files:
2021/0114(COD)**

Brussels, 29 October 2021

WK 12746/2021 INIT

LIMITE

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

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

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

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21	AT - PL - CZ - NL - SE - PT - MS Drafting suggestions and comments
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,	
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 207 thereof,	
Having regard to the proposal from the European Commission,	
After transmission of the draft legislative act to the national parliaments,	
Having regard to the opinion of the European Economic and Social Committee ¹ ,	
Acting in accordance with the ordinary legislative procedure,	
Whereas:	
	CZ (Drafting): <u>The Union is committed to openness and multilateral trade rules. Trade and foreign direct investment contribute to the Union's growth by enhancing its competitiveness, creating jobs and economies of scale, bringing in capital, technologies, innovation, expertise, and by opening new markets for the Union's exports.</u>

¹ OJ C [...], [...], p. [...].

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	CZ (Comments): In line with „open strategic autonomy” we suggest adding a recital recalling EU’s commitment to open and rule-based trade and acknowledging the importance of openness for the EU’s economy.
A strong, open and competitive internal market enables both European and foreign undertakings to compete on merits. The Union benefits from a sophisticated and effective system of State aid control, aiming at ensuring fair conditions for all undertakings engaging in an economic activity in the internal market. This State aid control system prevents Member States from granting State aid that unduly distorts competition in the internal market.	
At the same time, undertakings might receive subsidies from third countries, that provide public funds which are then used, for instance, to finance economic activities in the internal market in any sector of the economy, such as participation in public procurement tenders, or acquisitions of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies. Such subsidies are currently not subject to Union State aid rules.	
Foreign subsidies can distort the internal market and undermine the level playing field for various economic activities in the Union. This could in particular occur in the context of concentrations entailing a change of control over Union undertakings, where such concentrations are fully or partially financed through foreign subsidies, or if undertakings benefiting from foreign subsidies are awarded public contracts in the Union.	
No existing Union instruments address distortions caused by foreign subsidies. Trade defence instruments enable the Commission to act when	PT

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subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned. Under the WTO Agreement on Subsidies and Countervailing Measures, the Union has the possibility to initiate State-to-State dispute settlement against certain foreign subsidies granted by WTO members and limited to goods.	(Comments): There are some concerns about the implications for the Union's foreign reputation, namely the perception of the EU as being protectionist, regardless of the safeguard provided in Article 40(7). We consider that an Opinion from the Legal Service of the EU Council should be requested inter alia on the following questions: • Compatibility of this proposed Regulation with the EU's international commitments, in particular WTO rules; Compatibility of this regime with investment protection provisions contained in international agreements foreseeing investment provisions concluded by the EU.
It is therefore necessary to complement existing Union instruments with a new tool to effectively deal with distortions in the internal market caused by foreign subsidies and ensure a level playing field. In particular, the new tool complements Union State aid rules which deal with distortions in the internal market caused by Member State subsidies.	
Rules and procedures to investigate foreign subsidies that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies could distort the internal market if the undertaking benefitting from the foreign subsidy engages in an economic activity in the Union. This Regulation should therefore establish rules for all undertakings engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them.	CZ (Drafting): <u>To provide legal certainty and consistency in the application of this Regulation, the Regulation defines the term foreign subsidy and lays down rules and procedures for investigating foreign subsidies that distort the internal market.</u>Rules and procedures to investigate foreign subsidies that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies could distort the internal market if the undertaking benefitting

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	from the foreign subsidy engages in an economic activity in the Union. This Regulation should therefore establish rules for all undertakings engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them. NL (Drafting): Rules and procedures to investigate foreign subsidies, <u>financial relations with public undertakings and exclusive or special rights granted to one or more undertakings</u> that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies <u>and certain other financial and competitive advantages</u> could distort the internal market if the undertaking benefitting from the foreign subsidy engages in an economic activity in the Union. This Regulation should therefore establish rules for all undertakings engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them. NL (Comments): <u>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</u>
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	the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.
	SE (Drafting): When efficient multilateral rules have been established a review of this regulation shall be undertaken. SE (Comments): This should be tied both to the purpose of this regulation and the review article present in the proposal (article 46).
To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission should be the sole authority competent to apply this Regulation. The Commission should have the power to examine any foreign subsidy to the extent it is in the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.	CZ (Drafting): To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission should be the sole authority competent to apply this Regulation. The Commission should have the power to examine any foreign subsidy to the extent it is in the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available and reliable sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.

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	CZ (Comments): In our view, defining Commission as the sole authority competent to apply this Regulation does not ensure certainty and predictability of the legislation for business operators. Consistency in the application of the Regulation and legal certainty need to be ensured by clarity of the proposal. Therefore, we suggest amendments to recital 6 and 7. In order not to cause delays in public procurement proceedings ex ante notification of foreign subsidise relating to public procurements should not be allowed.
	CZ (Drafting): <u>Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them. Foreign subsidies to small and medium-sized undertakings are unlikely to cause distortion.</u> CZ (Comments): We suggest including separate recital on SMEs, using part of the wording from current recital 6 and amended wording from recital 14.
Foreign subsidy in the context of this Regulation should be understood as an intervention that meets three cumulative conditions.	CZ

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	(Drafting): Foreign subsidy in the context of this Regulation should be understood as an intervention that meets three cumulative conditions <u>based on international rules given by the WTO Agreement on Subsidies and Countervailing Measures and EU rules on state aid.</u> CZ (Comments): Reference to ASCM and EU State Aid rules could be included in recitals (e.g. recital 8).
There should be a financial contribution provided, directly or indirectly, by the public authorities of a third country. The financial contribution may be granted through public or private entities. Whether a public entity provides a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment prevailing in the country in which the entity operates including the government's role in the economy. Financial contributions may also be granted through a private entity if its actions can be attributed to the third country.	NL (Drafting): There should be a financial contribution <u>advantage</u> provided, directly or indirectly, by the public authorities of a third country <u>or through state resources of a third country</u>. The financial contribution may be granted through public or private entities. Whether a public entity provides a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment prevailing in the country in which the entity operates including the government's role in the economy. Financial contributions may also be granted through a private entity if its actions can be attributed to the third country. NL (Comments): <u>NL: the scope of “financial contribution” as defined in article 2 points (i)</u>

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	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.
Such a financial contribution should confer a benefit to an undertaking engaging in an economic activity in the internal market. A financial contribution that benefits an entity engaging in non-economic activities does not constitute a foreign subsidy. The existence of a benefit should be determined on the basis of comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service.. If no directly comparable benchmarks are available, existing benchmarks could be adjusted or alternative benchmarks could be established based on generally accepted assessment methods.	NL (Drafting): Such a financial contribution advantage should confer a benefit to an undertaking engaging in an economic activity in the internal market. A financial contribution that benefits an entity engaging in non-economic activities does not constitute a foreign subsidy. The existence of a benefit should be determined on the basis of comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service-. If no directly comparable benchmarks are available, existing benchmarks could be adjusted or alternative benchmarks could be established based on generally accepted assessment methods NL (Comments): Alteration to reflect the proposed amendment above.

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	Double punctuation mark.
The benefit should be conferred to an individual undertaking or industry or several undertakings or industries. The benefit could be established by law or in fact.	
	NL (Drafting): A benefit shall be deemed to exist in situations where exclusive or special rights have been granted by law or in fact to an undertaking, whereby the undertaking subsequently leverages its exclusive or special rights by off-setting costs or losses incurred on the internal market through increased turnover or profits on the captive markets where these exclusive or special rights apply. NL (Comments): NL: in line proposed amendments regarding the scope of this regulation further clarification is needed when other financial and competitive 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.
Once the existence of a foreign subsidy is established, the Commission should assess whether the foreign subsidy distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited. Subsidies in the form of export financing may be a cause of particular concern because of their distortive effects. This is not the case if such financing is provided in line with the OECD Arrangement	CZ (Drafting): Once the existence of a foreign subsidy is established, the Commission

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on officially supported export credits. The Commission should assess on a case-by-case basis whether a foreign subsidy distorts the internal market.	shouldit needs to be assessed on a case-by-case basis whether the foreign subsidy distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited. <u>To determine distortion, it should be considered whether a foreign subsidy improves, not negligibly, the competitive position of its recipient in the internal market.</u> Subsidies in the form of export financing may be a cause of particular concern because of their distortive effects. This is not the case if such financing is provided in line with the OECD Arrangement on officially supported export credits. The Commission should assess on a case-by-case basis whether a foreign subsidy distorts the internal market. CZ (Comments): It is necessary to provide predictability for all undertakings engaging in an economic activity on the internal market whether a foreign subsidy is deemed to cause distortion. Therefore, at least indicative criteria for assessment whether the foreign subsidy distorts the internal market should be laid down.
The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of the undertaking concerned and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market.	CZ (Drafting): The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of the undertaking concerned and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission

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	could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market, <u>size of undertakings and level of their economic activity on the internal market</u>. NL (Drafting): The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of the undertaking concerned and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market. <u>In the case of a subsidiary, another relevant indicator can be the transmission of a financial benefit to a subsidiary of the beneficiary established in a Member State.</u> NL (Comments): <u>NL: happy to see that this recital reflects the NL addition in Article 3 that indicators ‘may include, but are not limited to...’.</u> <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</u>
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	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.
When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 5 million should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this	CZ (Drafting): When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less

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Regulation.	likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 5 million should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this Regulation. NL (Drafting): When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 5 million to a single undertaking established in a third country should be deemed, as a general rule, unlikely
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to distort the internal market within the meaning of this Regulation. In addition, a foreign subsidy to an undertaking established in the internal market is unlikely to distort the internal market within the meaning of this Regulation if its total amount is below EUR 200.000 to a single undertaking 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

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	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 .
Like certain types of State aid, also certain categories of foreign subsidies, such as unlimited guarantees, are likely to create distortions in the internal market because of their nature. Those categories should not require a detailed assessment based on indicators. An undertaking could in any event show that the foreign subsidy in question would not distort the internal market in the specific circumstances of the case.	NL (Drafting): Like certain types of State aid, also certain categories of foreign subsidies, such as unlimited guarantees – that is to say without any limitation as to the amount or the duration of such guarantee –; are likely to create distortions in the internal market because of their nature. Those categories should not require a detailed assessment based on indicators. An undertaking could in any event show that the foreign subsidy in question would not distort the internal market in the specific circumstances of the case.
The Commission should take into account the positive effects of the foreign subsidy on the development of the relevant subsidised economic activity. The Commission should weigh these positive effects against the negative effects of a foreign subsidy in terms of distortion on the internal market in order to determine, if applicable, the appropriate redressive measure or accept commitments. The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects.	AT (Drafting): The Commission should take into account the positive and negative effects of the foreign subsidy on the development of the relevant subsidised economic activity. 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, important national interests. The Commission should weigh these positive effects

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	against the negative effects of a foreign subsidy in terms of distortion on the internal market in order to determine, if applicable, the appropriate redressive measure or accept commitments. The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects. AT (Comments): In our opinion, 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). CZ (Drafting): The Commission should take into account the positive effects of the foreign subsidy on the development of the relevant subsidised economic activity <u>and to other EU policy objectives should be taken into account.</u> The Commission should weigh these positive effects against the negative effects of a foreign subsidy in terms of distortion on the internal market in order to determine, if applicable, the appropriate redressive measure or accept commitments. The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects. CZ
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	(Comments): Result of balancing should not be anticipated in recital 16 and should be done in cooperation with relevant stakeholders. NL (Comments): <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>
Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake. They should include behavioural or structural remedies or the repayment of the foreign subsidy.	CZ (Drafting): Where <u>the facts established during in-depth investigation show a distortion on the internal market,</u>the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures <u>could be imposed</u> on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake, <u>and should remain in force only as long as they are necessary.</u> They should include behavioural or structural remedies or the repayment of the foreign subsidy. CZ (Comments): In order to avoid any protectionist impression and to ensure, that

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	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. Temporality of the measures is an important element of proportionality. NL (Drafting): Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake. They should include behavioural or structural remedies, remedies regarding the governance of the beneficiary, or the repayment of the foreign subsidy. NL (Comments): NL: by introducing the possibility of allowing commitments or 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.
	NL (Drafting): In case of repeated distortions of the internal market within the meaning

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	of this Regulation, the Commission should be able to remove market access to the internal market with regard to that specific undertaking. NL (Comments): NL: 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.
The undertaking concerned should have the possibility to offer commitments in order to remedy the distortion caused by the foreign subsidy. If the Commission considers that the commitments offered fully and effectively remedy the distortion, it could accept them and make them binding by decision.	
The undertaking concerned could offer to repay the subsidy, together with appropriate interest. The Commission should accept a repayment offered as a commitment if it can ascertain that the repayment fully remedies the distortion, is executed in a transparent manner and is effective in practice, while taking into account the risk of circumvention of the objectives of this Regulation.	
Unless the undertakings concerned offer commitments that would fully and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a public contract before it takes place. Where the concentration has already been implemented, notably in cases where no prior notification was required	CZ (Drafting): Unless the undertakings concerned offer commitments that would fully

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because the notification thresholds were not reached, the distortion may nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission could decide to remedy the distortion by ordering the undertakings concerned to dissolve the concentration.	and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a public contract before it takes place. Where the concentration has already been implemented, notably in cases where no prior notification was required because the notification thresholds were not reached, the distortion may nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission could decide <u>exceptionally as a last-resort option</u>, to remedy the distortion by ordering the undertakings concerned to dissolve the concentration. CZ (Comments): In our view dissolving concentration could be legally complicated and therefore used only if there is no other option.
The Commission should have the power, on its own initiative, to examine any information on foreign subsidies. To this end, it is necessary to establish a procedure consisting of two steps, namely a preliminary review and an in-depth investigation.	CZ (Drafting): The Commission should have the power, on its own initiative, to examine any <u>relevant and reliable</u> information on foreign subsidies. To this end, it is necessary to establish a procedure consisting of two steps, namely a preliminary review and an in-depth investigation. CZ (Comments): 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. Ex officio review

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	should be reserved only for exceptional cases (similarly to anti-subsidy investigations). See changes to article 7.
The Commission should be given adequate investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of the undertaking, or, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate.	AT (Drafting): The Commission should be given adequate investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of the undertaking, or, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate. <u>When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.</u> AT (Comments): Regarding Article 14 para 4, we cannot see the added value of this provision as this should be the legal standard. Therefore, we suggest to move this para to Recital 22 as a new last sentence (see also our comment in the Articles document).

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Furthermore, where necessary to restore competition in the internal market immediately and to prevent irreparable harm, the Commission should have the power to adopt interim measures.	PL (Drafting): Furthermore, where necessary to restore competition in the internal market immediately and to prevent irreparable harm, the Commission should have the power to adopt interim measures. <u>Interim measures shall be proportionate and not exceed what is necessary to achieve their goals.</u> PT (Comments): For legal certainty, the role and the procedure for adopting these interim measures should be clarified by examples and their consequences to MS should be specified (for instance on their implementation). Guidelines should also be considered on this issue.
In all cases where, as a result of the preliminary review, the Commission has sufficient indications of the existence of a foreign subsidy distorting the internal market, the Commission should have the power to launch an in-depth investigation to gather additional relevant information to assess the foreign subsidy, and to allow the interested parties to exercise their rights of defence.	
The Commission should close the in-depth investigation by adopting a decision.	CZ (Drafting): The Commission should close the in-depth investigation <u>after proper consultation with all interested parties</u> by adopting a decision.

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	CZ (Comments): We believe the in-depth investigation should inevitably include information from all relevant stakeholders.
The Commission should have appropriate instruments to ensure the effectiveness of commitments and redressive measures. If the undertaking concerned does not comply with a decision with commitments, a decision imposing redressive measures, or a decision ordering interim measures, the Commission should have the power to impose fines and periodic penalty payments.	
In order to ensure the correct and effective application of this Regulation, the Commission should have the power to revoke a decision and adopt a new one, where the decision was based on incomplete, incorrect or misleading information, or where an undertaking acts contrary to its commitments or the redressive measures imposed.	
Given the potentially significant impact of concentrations on the internal market, the Commission should have the power, upon notification, to examine information on foreign financial contributions in the context of a proposed concentration. Undertakings should not be allowed to implement the concentration prior to the conclusion of the Commission's review.	
This examination by the Commission should follow the same procedure as the one where a foreign subsidy is reviewed on the Commission's initiative, subject to adjustments to reflect the specificities of concentrations.	
It is necessary to strike a balance between effective protection of the	

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internal market and the need to limit the administrative burden on undertakings subject to this Regulation. Therefore, only concentrations meeting combined thresholds as defined in this Regulation based on the size of the turnover in the Union and the size of the subsidy should be subject to mandatory prior notification.	
Below the notification thresholds, the Commission could require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a public contract, if it considers that the concentration or the bid would merit ex-ante review given their impact in the Union. The Commission should also have the possibility to carry out a review on its own initiative of already implemented concentrations or awarded public contracts.	CZ (Drafting): Below the notification thresholds, the Commission could require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a public contract, if it considers that the concentration or the bid would merit ex-ante review given their impact in the Union. <u>In critical circumstances where there is clear evidence that foreign subsidies have caused or are threatening to cause severe distortion on the internal market,</u> Tthe Commission should also have the possibility to carry out a review on its own initiative of already implemented concentrations or awarded public contracts. CZ (Comments): Intervention in already implemented concentrations or awarded public contracts would cause serious breach of legal certainty. Therefore, it should be based on facts and not mere allegations, and reserved only for exceptional cases.
When reviewing a concentration, the assessment of whether there is a distortion in the internal market should be limited to the concentration at stake, and only foreign subsidies granted in the three years prior to the	

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concentration should be considered in the assessment.	
The need to address distortive foreign subsidies is especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayer funds. The Commission should have the power, upon notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating undertakings in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council ² , Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council ³ and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council ⁴ . It should also apply to the main subcontractors and the main suppliers of undertaking.	
When a foreign financial contribution is notified in the context of a public procurement procedure, the assessment should be limited to that procedure.	CZ

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

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

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

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	(Comments): We support inclusion of recital 34 as drafted by the Commission. However, we would like to ask the Commission about a link between recital 34 on one hand and recital 37 and article 33 on the other hand. Article 33 allows for repeated assessment.
It should be ensured that the principles governing public procurement, notably proportionality, non-discrimination, equal treatment, and transparency, are respected as regards all undertakings involved in the public procurement procedure, regardless of investigations initiated and pending pursuant to this Regulation.	
Foreign subsidies that enable an undertaking to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of the non-exhaustive set of indicators described in recitals 13 and 14 as well as the notion of unduly advantageous tender. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. The opportunity should be given to undertakings to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU. The prohibition of the award should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove the distortion.	

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Taking into account the nature of the ex ante review mechanism for concentrations and public procurement awards, and the need for legal certainty regarding these specific transactions, a concentration or public procurement tender notified and assessed under the respective procedures cannot be reviewed again by the Commission on its own initiative. Financial contributions of which the Commission was informed through the notification procedure may however also be relevant outside the concentration or procurement procedure. In order to gather information on foreign subsidies, the Commission should have the possibility to launch investigations regarding specific sectors of the economy, particular types of economic activity or the use of particular foreign subsidy instruments.	PL (Comments): Can the Commission explain what investigations regarding specific sector, particular types of economic activities, particular foreign subsidy activity are concerned? Is this an ex officio review?
For the same reasons, it is appropriate to provide for limitation periods for the imposition and enforcement of fines and periodic penalty payments.	
In the interest of transparency and legal certainty, it is appropriate to publish either in full or in a summary form all decisions adopted by the Commission.	
The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information, business secrets and personal data, in accordance with Article 339 of the Treaty.	
In cases where information marked by the undertaking as confidential or business secret does not seem to be covered by obligations of professional secrecy, it is appropriate to have a mechanism in place according to which the Commission can decide the extent to which such information can be disclosed. Any such decision to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.	

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

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

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

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Where the Commission adopts a decision at the end of an in-depth investigation, Member States should be adequately involved prior to the decision making in an advisory procedure pursuant to Article 4 of Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁸ . The choice of this procedure is justified taking into account the role of Member States in competition and State aid instruments, which also aim at levelling the playing field in the internal market.	CZ (Comments): We reserve the right the comment on following recitals at a later stage when the corresponding Articles will be discussed.
In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission in accordance with Article 291 of the Treaty. Those powers should be exercised to set out the form and content of notifications of concentrations as well as of financial contributions in the context of public procurement procedures, details of disclosure, form and content of transparency requirements, calculation of time-limits, conditions and time-limits for commitments and detailed rules on the procedural steps concerning investigations regarding public procurement procedures. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.	
In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of amending the notification	

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

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

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thresholds for concentrations and for public procurement procedures, exempting certain categories of undertakings from the notification obligations under this Regulation, as well as amending the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making ⁹ . In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.	
Where a concentration is notifiable pursuant to this Regulation, financial contributions to any of the parties to the concentration granted in the three years prior to the date of application of this Regulation should fall within the scope of this Regulation. In the context of a public procurement procedure, this Regulation should also apply to a financial contribution granted to an undertaking in the three years prior to the date of application of this Regulation,	
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	AT

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

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	(Comments): See AT's general comments in the Articles document. CZ (Comments): 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. 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. 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 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
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	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. 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. 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. 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. 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. 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.
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	SE (Comments): - Presumptions should be described further in recitals. - Which measures under article 6 are most appropriate depending on the length of time passed could be clarified in recitals. - Article 14.4 should be moved to recitals.
END	END