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WORKING PAPER

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From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Proposal for a Regulation on Foreign Subsidies distorting the Internal Market - Table for MS comments on document ST 8576/21 - Articles 17 to 32, 33, 35, 40 and 47

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

You are invited to send your comments on Articles 17 to 32, 33, 35, 40 and 47 and only on recitals that corresponds to those articles.

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

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

Please send your comments to: Jan.Sitar@gov.si and Competition@consilium.europa.eu by Tuesday, **30 November, 14h00 at the latest**.

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Kind regards,

Secretariat Competition



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. 33; 35; 40 and 47) – 372 rows

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21	MS Drafting suggestions	MS comments
HAVE ADOPTED THIS REGULATION:		
Chapter 3: Concentrations		
Article 17		
Distortions on the internal market by foreign subsidies in concentrations		
In a concentration, the assessment whether there is a distortion on the internal market within the meaning of Articles 3 or 4 shall be limited to the concentration at stake. Only foreign subsidies granted in the three calendar years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest shall be considered in the assessment.		
Article 18		
Definition of and notification thresholds for concentrations		
For the purposes of this Regulation, a concentration shall be deemed to arise where a change of control on a lasting basis results from any of the following:		

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the merger of two or more previously independent undertakings or parts of undertakings;		
the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.		
The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1.		
For the purposes of Article 19, a ‘notifiable concentration’ shall be deemed to arise where, in a concentration,		
the acquired undertaking or at least one of the merging undertakings is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and		
the undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR 50 million.		
In the creation of a joint venture referred to in		

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paragraph 2, a ‘notifiable concentration’ shall be deemed to arise where:		
the joint venture itself or one of its parent undertakings is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and		
the joint venture itself and its parent undertakings received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR 50 million.		
Article 19		
Prior notification of concentrations		
Notifiable concentrations shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.		
The undertakings concerned may also notify the proposed concentration when they demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced their intention to make such a bid, provided that the intended agreement or bid would result in a notifiable concentration under paragraph 1.		

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A concentration which consists in a merger within the meaning of Article 18(1), point (a) or in the acquisition of joint control within the meaning of Article 18(1), point (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be done by the person or undertaking acquiring control of the whole or parts of one or more undertakings.		
If the undertakings concerned fail to meet their obligation to notify, the Commission may review a notifiable concentration in accordance with this Regulation by requesting the notification of that concentration. In that case the Commission shall not be bound by the time limits referred to in Article 23(1) and (4).		
The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 18 at any time prior to its implementation where the Commission suspects that the undertakings concerned may have benefitted from foreign subsidies in the three years prior to the concentration. That concentration shall be deemed to be a notifiable concentration for the purposes of this Regulation.		

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Article 20		
Definition of control		
For the purposes of Article 18, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:		
ownership or the right to use all or part of the assets of an undertaking;		
rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.		
Control shall be acquired by persons or undertakings which:		
are holders of the rights or entitled to rights under the contracts concerned; or		
while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.		
Article 21		
Calculation of turnover		

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Aggregate turnover shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.		
Turnover in the internal market shall comprise products sold and services provided to undertakings or consumers in the internal market.		
By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the object of the concentration shall be taken into account with regard to the seller or sellers.		
However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the latest transaction.		

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Instead of turnover, the following shall be used for the following categories of undertakings:		
for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC ¹ , after deduction of value added tax and other taxes directly related to those items, where appropriate:		
(i) interest income and similar income;		
(ii) income from securities:		
income from shares and other variable yield securities,		
income from participating interests,		
income from shares in affiliated undertakings;		
(iii) commissions receivable;		
(iv) net profit on financial operations;		
(v) other operating income;		
for insurance undertakings, the value of gross		

¹ Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

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premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums;		
For the purposes of point (a), for a credit or financial institution in the internal market the turnover shall comprise the income items, as defined in that point, which are received by the branch or division of that institution established in the internal market.		
Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned shall be calculated by adding together the respective turnovers of:		
the undertaking concerned;		
those undertakings in which the undertaking concerned, directly or indirectly:		
(i) owns more than half the capital or business assets,		
(ii) has the power to exercise more than half the voting rights,		

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(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings,		
(iv) has the right to manage the undertakings' affairs;		
those undertakings which have in the undertaking concerned any of the rights or powers referred to in point (b);		
those undertakings in which an undertaking as referred to in point (c) has any of the rights or powers referred to in point (b);		
those undertakings in which two or more undertakings as referred to in points (a) to (d) jointly have any of the rights or powers referred to in point (b).		
Where undertakings concerned jointly have the rights or powers listed in paragraph 4, point (b), in calculating the aggregate turnover of the undertakings concerned,		
account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, and this turnover shall be apportioned equally amongst the undertakings		

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concerned;		
no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4, points (b) to (e).		
Article 22		
Aggregation of financial contributions		
The aggregate financial contribution to an undertaking concerned shall be calculated by adding together the respective financial contributions received from third countries by all undertakings referred to in Article 21(4), points (a) to (e).		
Article 23		
Suspension of concentrations and time limits		
A notifiable concentration shall not be implemented before its notification.		
In addition, the following time limits shall apply:		
where the Commission receives the complete		

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notification, the concentration shall not be implemented for a period of 25 working days after that receipt;		
where the Commission initiates an in-depth investigation no later than 25 working days after receipt of the complete notification, the concentration shall not be implemented for a period of 90 working days after the opening of the in-depth investigation; that period shall be extended by 15 working days where the undertakings concerned offer commitments pursuant to Article 6 with a view to remedy the distortion on the internal market;		
where the concentration has been declared not to distort the internal market pursuant to a decision under Article 24(3), point (a) or point (b), it may be implemented thereafter.		
Each period shall begin on the working day following that of the receipt of the complete notification or of the adoption of the relevant Commission decision, respectively.		
Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that:		

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the concentration is notified to the Commission pursuant to Article 19 without delay; and		
the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.		
The Commission may, upon request, grant a derogation from the obligations laid down in paragraphs 1 or 2. The request to grant a derogation shall state the grounds for the derogation. In deciding on the request, the Commission shall take into account in particular the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the risk of a distortion on the internal market posed by the concentration. Such a derogation may be granted subject to certain conditions and obligations in order to ensure that there is no distortion on the internal market. A derogation may be applied for and granted at any time, either before notification or after the transaction.		
The time limits provided for in paragraph 1, point (b) shall be extended if the undertakings concerned make a request to that effect not later than 15 working days after the opening of the in-depth investigation pursuant to Article 8. The		

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undertakings concerned may make only one such request. Likewise, at any time following the opening of the in-depth investigation, the time limits provided for in paragraph 1, point (b) may be extended by the Commission with the agreement of the undertakings concerned. The total duration of any extension or extensions pursuant to this paragraph shall not exceed 20 working days.		
The time limits provided for in paragraph 1 may exceptionally be suspended where the undertakings have not supplied the complete information which the Commission has requested pursuant to Article 11 or have refused to submit to an inspection ordered by decision pursuant to Article 12.		
The Commission may adopt a decision pursuant to Article 24(3) without being bound by the time limits referred to in paragraphs 1 and 4, in cases where:		
it finds that a concentration has been implemented in breach of the commitments attached to a decision taken under Article 24(3), point (a), which has found that, in the absence of the commitments, the concentration would distort the internal market; or		
a decision has been revoked pursuant to Article 24(1).		

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Any transaction carried out in breach of paragraph 1 shall be considered valid only after a decision pursuant to Article 24(3) has been adopted.		
This Article shall have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller were aware or ought to have been aware that the transaction was carried out in breach of paragraph 1.		
Article 24		
Procedural rules applicable to the preliminary review and the in-depth investigation of notified concentrations		
Articles 8, 9(1), (3) and (4), 10, 11, 12, 13, 14 and 16 shall apply to notified concentrations.		
The Commission may initiate an in-depth investigation under Article 8(2) no later than 25 working days after receipt of the complete notification.		
After the in-depth investigation, the Commission shall adopt one of the following decisions:		
a decision with commitments pursuant to Article		

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9(3);		
a no objection decision pursuant to Article 9(4);		
a decision prohibiting a concentration, where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5.		
Decisions pursuant to paragraph 3 shall be adopted within 90 working days after the opening of the in-depth investigation at the latest, extended as the case may be pursuant to Article 23(1), point (b), (4) and (5). If the Commission does not adopt a decision within that time limit, the undertakings concerned shall be allowed to implement the concentration.		
In any request for information to an undertaking, the Commission shall specify whether time limits will be suspended pursuant to Article 23(5), in the event the undertaking fails to provide complete information in the prescribed time limit.		
The Commission may, where it finds that a concentration has already been implemented and that concentration has been found to distort the internal market pursuant to Articles 3 to 5 adopt one of the following measures:		
require the undertakings concerned to dissolve the concentration, in particular through the		

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dissolution of the merger or the disposal of all the shares or assets acquired, to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible;		
order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.		
The measures referred to in points (a) and (b) may be imposed either in a decision pursuant to paragraph 3, point (c), or by separate decision		
The Commission may adopt any of the measures referred to in points (a) or (b) where it finds that a concentration has been implemented in breach of a decision taken pursuant to paragraph (3), point (a), which has found that, in the absence of the commitments, the concentration would fulfil the criterion laid down in paragraph 3, point (c).		
The Commission may order interim measures referred to in Article 10 also where:		
a concentration has been implemented in breach		

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of Article 19;		
a concentration has been implemented in breach of a decision with commitments under this Article, paragraph 3, point (a).		
Article 25		
Fines and periodic penalty payments applicable to concentrations		
The Commission may impose fines and periodic penalty payments as set out in Article 15.		
In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding business year where they, intentionally or negligently, supply incorrect or misleading information in a notification pursuant to Article 19 or supplement thereto.		
The Commission may impose by decision on undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding business year where they, intentionally or negligently:		
fail to notify a notifiable concentration in accordance with Article 19 prior to its implementation, unless they are expressly authorised to do so by Article 23;		

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implement a notified concentration in breach of Article 23;		
implement a notified concentration prohibited in accordance with Article 24(3), point (c).		
Chapter 4: Public procurement procedures		
Article 26		
Distortions on the internal market by foreign subsidies in public procurement procedures		
Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an undertaking to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment of whether there is a distortion on the internal market pursuant to Article 3 and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure at stake. Only foreign subsidies granted during the three years prior to the notification shall be taken into account in the assessment.		
Article 27		
Definition of and notification threshold in public		

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procurement procedures		
For the purposes of Article 28, a public procurement procedure means:		
any type of award procedure laid down in Directive 2014/24/EU and Directive 2014/25/EU of the European Parliament and of the Council for the conclusion of a public contract as defined in Article 2(1), point (5) of Directive 2014/24/EU or of a supply, works and service contract as defined in Article 2, point (1) of Directive 2014/25/EU;		
a procedure for the award of a works or a service concession as defined in Article 5, point (1) of Directive 2014/23/EU of the European Parliament and of the Council;		
procedures for the award of contracts referred to in Article 10(4), point (a) of Directive 2014/23/EU, Article 9(1), point (a) of Directive 2014/24/EU and Article 20(1) point (a) of Directive 2014/25/EU.		
For the purpose of Article 28, a notifiable foreign financial contribution in an EU public procurement procedure shall be deemed to arise where the estimated value of that public procurement is equal or greater than EUR 250 million.		

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Procedures for the award of contracts falling within the scope of Directive 2009/81/EC of the European Parliament and of the Council ² do not fall under this Chapter.		
For the purposes of this Chapter, the definitions of the terms “contracting authority” in Article 6 of Directive 2014/23/EU Article 2(1) of Directive 2014/24/EU, Article 3 of Directive 2014/25/EU, , and “contracting entity” in Article 7 of Directive 2014/23/EU and Article 4 of Directive 2014/25/EU shall apply.		
Article 28		
Prior notification of foreign financial contributions in the context of public procurement procedures		
When submitting a tender or a request to participate in a public procurement procedure, undertakings shall either notify to the contracting authority or the contracting entity all foreign financial contributions received in the three years preceding that notification or confirm in a declaration that they did not receive any foreign financial contributions in the last three years. Undertakings which do not submit		

² Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

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such information or declaration shall not be awarded the contract.		
The obligation to notify foreign financial contributions under this paragraph shall extend to economic operators, groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU, main subcontractors and main suppliers. A subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds 30% of the estimated value of the contract.		
For groups of economic operators, main subcontractors and main suppliers, the lead economic operator shall ensure notification.		
The contracting authority or the contracting entity shall transfer the notification to the Commission without delay.		
Where the undertaking, economic operators or groups of economic operators referred to in paragraph 1 fail to notify a foreign financial contribution, or where such a notification is not transferred to the Commission, the Commission may initiate a review.		

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Where the Commission suspects that an undertaking may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may request the notification of the foreign financial contributions received by that undertaking in any public procurement procedure which are not notifiable under Article 27(2) or fall within the scope of paragraph 5 of this Article, at any time before the award of the contract. Once the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure.		
Article 29		
Procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures		
Articles 8, 9 (1), (3) and (4), 11, 12, 13, 14, 16 and 22 shall apply to notified financial contributions in public procurement procedures.		
The Commission shall carry out a preliminary review no later than 60 days after it received the notification.		
The Commission shall decide whether to initiate		

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an in-depth investigation within the time limit for completing the preliminary review and inform the undertaking concerned and the contracting authority or the contracting entity without delay.		
The Commission may adopt a decision closing the in-depth investigation no later than 200 days after it received the notification. In exceptional circumstances, this time limit may be extended after consultation with the concerned contracting authority or contracting entity.		
Article 30		
Commission decisions		
Where, after an in-depth investigation, the Commission finds that an undertaking benefits from a foreign subsidy which distorts the internal market pursuant to Articles 3 to 5, and where the undertaking concerned offers commitments that fully and effectively remove the distortion on the internal market, it shall adopt a decision with commitments pursuant to Article 9(3). The assessment under Article 5 shall not result in a modification of the initial tender submitted by the undertaking that is incompatible with Union law.		
Where the undertaking concerned does not offer commitments or where the Commission		

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considers that the commitments referred to in paragraph 1 are neither appropriate nor sufficient to fully and effectively remove the distortion it shall adopt a decision prohibiting the award of the contract to the undertaking concerned (“decision prohibiting the award of the contract”).		
Where, after an in-depth investigation, the Commission does not find that an undertaking benefits from a foreign subsidy which distorts the internal market, it shall adopt a decision pursuant to Article 9(4).		
Article 31		
Evaluations in public procurement procedures involving a notification and suspension of award		
During the preliminary review and the in-depth investigation, the evaluation of tenders in a public procurement procedure may continue. The contract shall not be awarded before the expiry of the time limit set in Article 29(2).		
If a decision to open an in-depth investigation is taken pursuant to Article 29(3), the contract shall not be awarded to an undertaking submitting a notification under Article 28 until the Commission reaches a decision under Article 30(3) or the time limit set in Article 29(4) elapses. If the Commission has not adopted a		

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decision within this time limit, the contract may be awarded to any undertaking, including the one submitting the notification.		
The contract may be awarded to an undertaking submitting a declaration under Article 28 before the Commission takes any of the decisions referred to in Article 30 or before the time limit laid down in Article 29(4) elapses only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender.		
Where the Commission issues a decision under Article 30(2) regarding the most economically advantageous tender, the contract may be awarded to the undertaking having submitted the next best tender not subject to a decision under Article 30(2).		
Where the Commission adopts a decision in accordance with Article 30(1) or (3), the contract may be awarded to any undertaking having submitted the most economically advantageous tender, including, as the case may be, the undertaking(s) having submitted the notification under Article 28.		
In all cases, the contracting authority or the contracting entity shall inform the Commission of any decision relating to the outcome of the		

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public procurement procedure.		
The principles governing public procurement, including proportionality, non-discrimination, equal treatment, and transparency, shall be observed as regards all undertakings involved in the public procurement procedure. The investigation of foreign subsidies pursuant to this Regulation shall not result in the contracting authority or the contracting entity treating the undertaking concerned in a way that is contrary to those principles.		
Each time limit shall begin on the working day following that of the receipt of the notification or of the adoption of the relevant Commission decision.		
Article 32		
Fines and periodic penalty payments applicable to financial contributions in the context of public procurement procedures		
The Commission may impose fines and periodic penalty payments as set out in Article 15.		
In addition, the Commission may impose by decision on the undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding business year, where they intentionally or negligently supply incorrect or		

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misleading information in a notification pursuant to Article 28 or supplement thereto;		
The Commission may impose by decision on the undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding business year where they, intentionally or negligently, fail to notify a subsidy in accordance with Article 28 during the public procurement procedure.		
Chapter 5: Common procedural provisions		
Article 33		
Relation between procedures		
A financial contribution notified in the context of a concentration under Article 19 may be relevant and assessed again in relation to another economic activity.		
A financial contribution notified in the context of a public procurement procedure under Article 28 may be relevant and assessed again in relation to another economic activity.		
Article 35		
Limitation periods		
The powers of the Commission under Article 9		

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shall be subject to a limitation period of ten years, starting on the day on which a foreign subsidy is granted to the undertaking concerned. Any action taken by the Commission under Articles 8, 11, 12 or 13 with respect to a foreign subsidy shall interrupt the limitation period. After each interruption, the limitation period shall start to run afresh.		
The powers of the Commission to impose fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of three years, starting on the day on which the infringement referred to in Articles 15, 25 or 32 took place. In the case of continuing or repeated infringements, the limitation period shall start on the day on which the infringement ceases. Any action taken by the Commission with respect to an infringement referred to in Articles 15, 25 or 32 shall interrupt the limitation period for the imposition of fines or periodic penalty payments. After each interruption, the limitation period shall start to run afresh.		
The powers of the Commission to enforce decisions imposing fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of five years, starting on the day on which the Commission decision imposing fines or periodic penalty payments was taken. Any action taken by the		

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Commission, or by a Member State acting upon request of the Commission, intended to enforce payment of the fine or periodic penalty payment shall interrupt that limitation period. After each interruption, the limitation period shall start to run afresh.		
Chapter 6: Relationship to other instruments		
Article 40		
Relationship to other instruments		
This Regulation is without prejudice to the application of Articles 101, 102, 106, 107 and 108 of the Treaty, Council Regulation (EC) No 1/2003 ³ and Council Regulation (EC) No 139/2004 ⁴ .		
This Regulation is without prejudice to the application of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 ⁵ .		

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

⁵ Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

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This Regulation is without prejudice to the application of Regulation (EU) 2019/452 of the European Parliament and of the Council ⁶ .		
This Regulation takes precedence over Regulation (EU) 2016/1035 of the European Parliament and of the Council until that Regulation becomes applicable pursuant to its Article 18. Where, after that date, a foreign subsidy falls within the scope of application of both Regulation (EU) 2016/1035 and this Regulation, Regulation (EU) 2016/1035 takes precedence. However, the provisions applicable to public procurement and concentrations of this Regulation take precedence over Regulation (EU) 2016/1035.		
This Regulation takes precedence over Council Regulation (EEC) No 4057/86.		
This Regulation is without prejudice to the application of Regulation (EU) 2019/712 of the European Parliament and of the Council. Notifiable concentrations, as defined in Article 18 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 3. Public procurement procedures, as defined in Article 27		

⁶ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I , 21.3.2019, p. 1).

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of this Regulation, involving air carriers shall be subject to the provisions of Chapter 4.		
An investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into. In particular, no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures. This Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements.		
Article 47		
Transitional provisions		
This Regulation shall apply to foreign subsidies granted in the ten years prior to the date of application of this Regulation where such foreign subsidies distort the internal market after the start of application of this Regulation.		
This Regulation shall apply to foreign financial contributions granted in the three years prior to the date of application of this Regulation where such foreign financial contributions were		

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granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.		
This Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before the date of application of the Regulation.		
This Regulation shall not apply to public procurement procedures initiated before the date of application of the Regulation.		
		General comments
END	END	END

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

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

¹ OJ C [...], [...], p. [...].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Explanations for submitting drafting suggestions and comments using the table

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

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

- **Column 1** is for information and **should not be modified at all**.
- Add your **drafting suggestions in column 2** in track changes
- For adding your suggestions DO NOT modify the text in column 1 - copy and paste the text from column 1 to column 2 and make your changes on the text in column 2
- Add your **comments related to the specific part of the text and your suggested changes in column 3**
- Please add any **general comments** at the **bottom of the table in column 3**.
- Please, do not delete any lines or squares from the table!
- Please, do not insert any new lines or columns!
- Use the existing empty lines to add new text (e.g. to add two new articles after existing Article 1, please add them both in the same empty row after Article 1). It is really important that the table you will send us back with your comments contains the same number of rows and columns as the original table.
- You are free to change header/footer of the attached files as you wish - but please keep the table intact.
- In case you send additional comments regarding the same package at a later point, please do it on an empty table. Please do not add your comments to the table you previously sent us.

Thanks a lot for your collaboration !