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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Final consolidated table with MS comments on articles related to public procurement in Chapter IV, Articles 6, 8, 14 of document ST 5407/2/22 REV 2 - Presidency compromise for a Regulation on Foreign Subsidies distorting the Internal Market

Delegations will find attached the tables with MS comments on articles related to public procurement in Chapter IV, Articles 6, 8, 14 of document ST 5407/2/22 REV 2.

Table for MS comments on the Articles 6, 8 + 14 + CHAPTER 4 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 5407/2/22 REV 2 – 907 rows

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc; 5407/2/22 REV 2	**EE – HR – DK – CZ – IT – FI – LU - AT – HU – PL – SE – RO – NL – BE - DE – ES** **MS drafting sugesstions and comments**
CHAPTER 1: GENERAL PROVISIONS	
Article 1	
Subject matter and scope	
(1) This Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and ~~in particular~~ **notably** in concentrations and public procurement procedures.	
(2) This Regulation addresses foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. ~~An~~ **Among others, an** undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure **in the Union** is considered to be engaging in an economic activity in the internal market.	
Article 2	
Existence of a foreign subsidy	
(1) For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides **directly or indirectly** a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or	

in fact, to an individual undertaking or industry or to several undertakings or industries.	
(2) For the purpose of this Regulation,	
(a) a financial contribution shall include **inter alia**:	
(i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;	
(ii) the foregoing of revenue that is otherwise due~~; or~~ **, such as tax exemptions;**	
(iii) **granting of special or exclusive rights without adequate remuneration; or**	
(iv) the provision of goods or services or the purchase of goods ~~and~~ **or** services;	
(b) the financial contribution provided by the third country shall include the financial contribution provided by:	
(i) the central government and government authorities at all other levels;	
(ii) **any** foreign public entities, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or	

(iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances~~.~~ **including those mentioned in subparagraph (ii).**	
Article 3	
Distortions on the internal market	
(1) A distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include**, inter alia,** the following:	
(a) the amount of the subsidy;	
(b) the nature of the subsidy;	
(c) the situation of the undertaking**, including its size** and the markets **or sectors** concerned;	
(d) the level of economic activity of the undertaking concerned on the internal market;	
(e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.	
(2) A foreign subsidy **to an undertaking** is unlikely to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three ~~fiscal~~ **financial** years.	

Article 4	
Categories of foreign subsidies most likely to distort the internal market	
(1) A foreign subsidy falling in any of the following categories is most likely to distort the internal market:	
(~~1~~**a**) a foreign subsidy granted to an ailing undertaking, that is to say which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;	
(~~2~~**b**) a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, that is to say without any limitation as to the amount or the duration of such guarantee;	
(~~3~~**c**) a foreign subsidy directly facilitating a concentration;	
(~~4~~**d**) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking ~~would~~ **could** be awarded the public contract.	
(2) An undertaking shall be granted the possibility to prove that a foreign subsidy listed above does not distort the internal market in the specific circumstances of the case.	

Article 5	
Balancing	
(1) The Commission shall, where warranted, balance the negative effects of a foreign subsidy in terms of distortion on the internal market with positive effects on the development of the relevant economic activity.	
(2) The Commission shall take into account the balancing between the negative and positive effects when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments.	
(3) The Commission shall publish guidance on the application of this article in light of enforcement practice.	

Article 6	NL (Comments): **NL:** NLD believes it is important that the commitments and redressive measures take into account public procurements' specificities. Hence, NLD welcomes the new provision in paragraph 2. However, the new provision does not remedy the situation as such. Upon request, we are happy to think along with the Commission and the Presidency about possible remedies. With a scrutiny reservation, we suggest the following lines of thinking. Please note that further details, suitability, feasibility, and relation to the Union's international commitments require further investigation. We believe that measures that can be imposed on future tenders might in effect deter (i.e. prevent) unduly advantageous tenders (a concept to be further defined) for the current tender. *Score/price adjustments:* - Inspired by IPI measures, a score adjustment based on competitive prices can be imposed. This can be done for the current tender and/or future tenders (whilst permitting the current tender). - A score adjustment mitigates the unfair competitive advantage and deters unduly advantageous tenders for this and/or future tenders. *Temporarily exclusion* - Undertakings may be prohibited to participate in the current and/or future tenders for a limited period. - This might *de facto* be effectuated by a severe (increasing) score/price adjustment. *Fines*:

	- Based on the degree of an unduly advantageous tender, a fine might be imposed (whilst permitting the current tender). *Sourcing restrictions:* - Inspired by IPI measures, a sourcing restriction may be imposed. For instance: a maximum value percentage of sourcing (of goods, services and subcontractors) originating from the subsidy providing country. This may be adopted in the contractual conditions. - Further research is necessary in order to what extent sourcing restrictions are in line with the goal and scope of RFS. *Gradual measures:* *Severity of measures may increase over time. E.g. in case of recurrent behavior the score adjustment increases.*
Commitments and redressive measures	IT (Comments): For the purposes of legal certainty, it should be clarified whether it is an open or closed list. Furthermore, it should be clarified which is the criterion for choosing among the corrective measures envisaged. In addition, it should be considered whether it is appropriate to provide a preference for one type of measures over the others, as occurs in other related sectors, even with respect to less invasive measures for the company.
(1) To remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, the Commission may impose	EE

redressive measures. The undertaking concerned may also offer commitments.	(Drafting): (1) To remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, the Commission may impose redressive measures. The ~~undertaking~~ economic operator concerned may also offer commitments. EE (Comments): Wording should be as much in line with the procurement directives as possible in order to facilitate understanding for all parties involved. Since there is no definition for an undertaking given in the draft, the easiest and clearest solution is to use the same terms as in public procurement directives, where the appropriate definitions are given. Word "undertaking" should be therefore replaced with "economic operator" throughout the regulation. The same modifications should be done in the recitals. CZ (Drafting): (1) On the basis of the conclusions reached during the in-depth investigation, the Commission may impose redressive measures t~~T~~o remedy the distortion on the internal market actually or potentially caused

	by a foreign subsidy~~, the Commission may impose redressive measures~~. The undertaking concerned may also offer commitments. CZ (Comments): In our view it is appropriate and important for credibility of the EU legislation to link imposition of redressive measures to the **facts** established during the in-depth investigation.
(2) Commitments or redressive measures shall **be proportionate and** fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.	
(3) Commitments or redressive measures may consist**, inter alia,** of the following:	AT (Comments): Which commitments are addressed by Art. 30 if not "commitments" according to Art. 6? In its Power Point presentation for the CWG (no. 14) the COM referred – in the context of Art. 6 and procurement – to "commitments". What kind of commitments does the COM envisage in the context of procurement? AT points again to the difficulties and legal problems if "offered commitments" alter bids during the course of a procurement procedure. As the ECJ consistently points out, tenders may not be altered in open procedures and the possibility to alter a tender offered only to a specific tenderer may infringe the principle of equal treatment. In this context AT also points out, that from the current wording it would not be clear, how a tender from an undertaking which had received a problematic subsidy

	would be "classified" (in a procurement context): would it be an "irregular" or "unacceptable" tender (see for ex Art. 26 para 4 letter b of Directive 2014/24/EU)?
(a) offering access under fair and non-discriminatory conditions to an infrastructure~~-~~**, including research facility, production capability or any other essential facility** that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union;	CZ (Comments): Competition law defines the term "essential facility". By analogy, it should be also used here. "Research facility, production capability" would constitute an "essential facility" only under certain circumstances and not automatically. Thus, if the text of letter (a) were to be modified, the term "essential facility" should be used in accordance with the definition
(b) reducing capacity or market presence;	
(c) refraining from certain investments;	
(d) licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;	
(e) publication of results of research and development;	
(f) divestment of certain assets;	
(g) requiring the undertakings concerned to dissolve the concentration;	EE (Drafting): (g) requiring the ~~undertakings~~ economic operators concerned to dissolve the concentration;

	EE (Comments): Please see explanation in modification concerning art 6 (1).
(h) repayment of the foreign subsidy, including an appropriate interest rate~~.~~ **, calculated according to Commission Regulation (EC) No 794/2004.**	
(i) requiring the undertakings concerned to notify the Commission of participation in all EU public procurement procedures, including where the estimated value of the public contract is below the Article 27 thresholds.	EE (Drafting): **(i) requiring the ~~undertakings~~ economic operators concerned to notify the Commission of participation in all EU public procurement procedures, including where the estimated value of the public contract is below the Article 27 thresholds.** EE (Comments): Please see explanation in modification concerning art 6 (1). DK (Comments): DK would like the Commission/Presidency to explain the purpose; how it will affect the procurement procedures for the undertakings concerned;

	and in which situations the Commission will find it proportionate to use this measure IT (Comments): The amendment concerns only the commitments and not the decision prohibiting the award of the contract. In order to allow the Commission to deal jointly and only once the participation in all EU public procurement, the obligation to indicate (and update) the list of tenders in which the economic operator participates should be triggered at the time of in-depth investigation. In this way, the impact of a possible EC decision, concerning a single tender on the other not notified ongoing tenders would be reduced FI (Comments): **The reason for introducing this amendment is a bit unclear to us. The obligation to make a notification is not a measure that is considered to correct the distortions like other measures.** **In addition, we would like to ask you to specify the temporal dimension of the proposal. In particular, we would like to know whether the period of notification obligation is in the Commission's discretion without any maximum duration. In our view, the time-frame should be restricted.**

	It should also be explored whether the amendment is proportionate as it now covers all EU public procurement procedures below the threshold. AT (Drafting): **(i) requiring the undertakings concerned to notify the Commission of participation in all ~~EU~~ public procurement procedures falling within the scope of Directive 2009/81/EC, Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, including where the estimated value of the public contract is below the Article 27 thresholds.** AT (Comments): It seems disproportionate and not in line with the PP Directives, that the undertaking (no plural neeeded here!) concerned has to notify the COM of participation in all EU public procurement procedures, even if the estimated value of the public contract is below the thresholds of Art. 27. Letter (i) does not set a minimum threshold for notification and since it is not phrased in a way, that it would only apply to pp procedures "falling within the scope of the 2014 procurement directives", all pp procedures (even those well below the pp thresholds) would be covered!

	What are the consequences for the undertaking concerned if it does not notify its participation? SE (Comments): The addition is acceptable. It must be clear that it is not a notification according to chapter 4 that is requested in all cases. The reference to EU public procurement procedures should refer to procurements over the thresholds for EU public procurements as regulated by the directives. RO (Comments): RO supports the completion of the text. DE (Drafting): **(i) requiring the undertakings concerned to notify the Commission of participation in all EU public procurement procedures, including where the estimated value of the public contract is below the Article 27 thresholds. On this basis, the Commission may decide whether or**

	not to initiate a procedure according to Chapter 2 or a procedure according to Article 28(6). DE (Comments): Clarification that the notification will not automatically trigger the Chapter IV procedure.
(4) The Commission may impose reporting and transparency requirements**, including periodic reporting regarding the implementation of the commitments and redressive measures listed in paragraph 3**.	
(5) If an undertaking offers commitments which fully and effectively remedy the distortion on the internal market, the Commission may accept them and make them binding on the undertaking in a decision with commitments according to Article 9(3).	EE (Drafting): (5) If an ~~undertaking~~ economic operator offers commitments which fully and effectively remedy the distortion on the internal market, the Commission may accept them and make them binding on the ~~undertaking~~ economic operator in a decision with commitments according to Article 9(3). EE (Comments): Please see explanation in modification concerning art 6 (1).

(6) Where the undertaking concerned proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.	EE (Drafting): (6) Where the ~~undertaking~~ economic operator concerned proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention. EE (Comments): Please see explanation in modification concerning art 6 (1).
Chapter 2: Ex Officio review of foreign subsidies	DE (Comments): We still consider further clarification necessary regarding the scope of Chapter 2. In this context we refer to our comments and suggestions on recitals 21 and 23.

Article 7	
Ex officio review of foreign subsidies	BE (Comments): *The addition of a role for Member States and organisations in Article 7 and the consequent precautions in Article 8 are in line with the desire for Member States or economic operators to be able to relay a problem they have identified in practice.*
The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies. **Such source may include, among others, the Member States and their authorities and any natural or legal person or association.**	
Article 8	
Preliminary review	
~~(1) The Commission shall~~ **(1) When the Commission considers that the information referred to in Article 7 indicates that a distortive foreign subsidy may exist, it may** seek all the information it considers necessary to assess, on a preliminary basis, whether the financial contribution under examination constitutes a foreign subsidy and whether it distorts the internal market. To that end, the Commission may in particular:	ES (Comments): ES considers that, in order to ensure an appropriate coordination within the procurement procedure concerned, a reference to the need to inform the contracting authority or contracting entity concerned could be included when a preliminary review has been initiated.
(a) request information in accordance with Article 11; **and**	

(b) conduct inspections in and outside the Union in accordance with Article 12 or Article 13.	
(2) Where the Commission, based on the preliminary review, ~~considers that there are~~ **has** sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it shall	EE (Drafting): (2) Where the Commission, based on the preliminary review, ~~considers that there are~~ **has** sufficient indications that an ~~undertaking~~ economic operator has been granted a foreign subsidy that distorts the internal market, it shall EE (Comments): Please see explanation in modification concerning art 6 (1).
(a) adopt **without undue delay** a decision to initiate an in-depth investigation ('decision to initiate the in-depth investigation'), which shall summarise the relevant issues of fact and law and shall include the preliminary assessment of the existence of a foreign subsidy and of the actual or potential distortion on the internal market;	IT (Comments): Even if "*without undue delay*" goes in the right direction, it would be more precise to pinpoint a specific term, for instance 60 days.
(b) inform the undertaking concerned **and the Member States and, if the review is initiated under Chapter 4 , the contracting authority or contracting entity concerned**; and	EE (Drafting):

	(b) inform the ~~undertaking~~ economic operator concerned **and the Member States and, if the review is initiated under Chapter 4 , the contracting authority or contracting entity concerned**; and EE (Comments): Please see explanation in modification concerning art 6 (1). CZ (Drafting): (b) inform the undertaking concerned, the third country concerned, ~~**and**~~ **the Member States and, if the review is initiated under Chapter 4 , the contracting authority or contracting entity concerned**; and CZ (Comments): We believe that also the third countries should be informed, where possible. This would further enhance transparency of the procedure. FI (Comments):

	We welcome this addition concerning notifying MS and contracting authorities. Could the time-frame of Commission's reporting be clarified? We suggest informing "without undue delay" SE (Comments): SE welcomes the addition. RO (Drafting): (b) inform the undertaking concerned **and the Member States and, if the review is initiated under Chapter 4 , the contracting authority or contracting entity concerned and the Member State**; and RO (Comments): RO supports the completion of the text. It considers that the Member State (i.e. the national authority responsible for public procurement) should be informed if the review is initiated. It is not clear if the revised text covers also the reviews under Chapter 4. NL

	(Comments): **NL:** NLD welcomes the inclusion of informing member states and contracting authorities about the initiation and conclusion of the preliminary review.
(c) publish a notice in the Official Journal of the European Union, which invites interested parties, Member States and the third country concerned to express their views in writing within a prescribed period of time.	AT (Comments): The "prescribed period of time" should be specified in terms of a minimum and maximum.
(3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient ~~grounds~~ **indications** to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the undertaking concerned **and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned**.	EE (Drafting): (3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient ~~grounds~~ **indications** to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the ~~undertaking~~ economic operator concerned **and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned**. EE (Comments): Please see explanation in modification concerning art 6 (1).

	CZ (Drafting): (3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient ~~grounds~~ **indications** to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the undertaking concerned, the third country concerned, the Member State **and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned**. CZ (Comments): Again, we propose to inform the third country concerned. Furthermore, it seems to be appropriate to inform the Member State not only about the initiation of the in-depth investigation but also on the fact, that it will not be initiated AT (Drafting):

	(3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient ~~grounds~~ **indications** to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the undertaking concerned **and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned and the respective Member State**. AT (Comments): The COM must also inform MS (with regard to pp procedures; as it is also foreseen in para 2 letter b), not only the CA/CE concerned. This is a valuable information, which should be shared with the MS of the CA/CE. SE (Comments): SE welcomes the addition. RO (Drafting):

	(3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient ~~grounds~~ **indications** to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the undertaking concerned **and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned and the Member State**. RO (Comments): RO supports the completion of the text. However, RO considers that the Member State (i.e. the national authority responsible for public procurement) should be informed also on the Commission decision not to initiate in-depth investigation.
	IT (Drafting): ***(4) By*** [the date of application of this ***Regulation], the Commission will publish guidance on the criteria to open such a procedure.*** IT (Comments):

	The Regulation does not provide information on the criteria to open an "ex-officio review". This instrument should be less discretionary to avoid unjustified obstacles to foreign investment in the EU internal market.
Article 9	
In-depth investigation	
(1) During the in-depth investigation, the Commission shall further assess the foreign subsidy ~~distorting the internal market~~ that has been identified in the decision to initiate the in-depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13.	
(2) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5, it may impose redressive measures ('decision with redressive measures'). **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**	
(3) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5 and the undertaking concerned offers commitments, which the Commission deems appropriate and sufficient to fully and effectively remedy the distortion, it may by a decision make these commitments binding on the undertaking ('decision with commitments'). A decision accepting the repayment of a foreign subsidy in accordance with Article 6(6) shall be considered a decision with commitments. **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**	
(4) The Commission shall adopt **without undue delay** a no objection decision where it finds that:	

(a) the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or	
(b) a distortion on the internal market is outweighed by positive effects within the meaning of Article 5.	
Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	
(5) The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the in-depth investigation. In case of non-cooperation by the undertaking concerned or the third country pursuant to article 14, this period is suspended.	
Article 10	
Interim measures	
(1) ~~The~~ **To maintain competition in the internal market immediately and to prevent irreparable harm, the** Commission may take interim measures **during the in-depth-investigation**, where:	
~~1~~**a**) there are **sufficient** indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and	
(~~2~~**b**) there is a serious risk of substantial and irreparable damage to competition on the internal market	
(2) The interim measures may notably consist of the measures mentioned under article 6.	

(3) <u>The interim measures shall be proportionate and shall apply either for a specific time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.</u>	
<u>Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).</u>	
Article 11	
Information requests	
(1) ~~The~~ **<u>To carry out the duties assigned to it by this Regulation, the</u>** Commission may require an undertaking concerned to provide all necessary information.	
(2) The Commission may also request such information from other undertakings or associations of undertakings~~.~~ **<u>, taking due account of the principle of proportionality.</u>**	
(3) A request for information to an undertaking or an association of undertakings shall:	
(a) state its legal basis and its purpose, specify what information is required and set an appropriate time limit within which the information is to be provided;	
(b) contain a statement that if the information supplied is incorrect, incomplete or misleading fines and periodic penalty payments provided for in Article 15 could be imposed;	

(c) contain a statement that, pursuant to Article 14, a lack of cooperation from the undertaking concerned allows the Commission to take a decision on the basis of the facts that are available.	
(4) At the request of the Commission, Member States shall provide it with all necessary information to carry out the duties assigned to it by this Regulation. **Paragraph 3 point (a) applies ~~accordingly~~ mutatis mutandis.**	
(5) The Commission may also request a third country concerned to provide all necessary information. **Paragraph 3 points (a) and (c) apply ~~accordingly~~ mutatis mutandis.**	
Article 12	
Inspections within the Union	
(1) ~~The~~ **To carry out the duties assigned to it by this Regulation, the** Commission may conduct the necessary inspections of undertakings **and associations of undertakings**.	
(2) Where the Commission undertakes such an inspection, the officials authorised by the Commission to conduct an inspection shall be empowered:	
(a) to enter any premises and land of ~~the~~ **an** undertaking ~~concerned~~ **or association of undertakings**;	
(b) to examine books and other business records**, irrespective of the medium on which they are stored** and **to have the right to access any information which is accessible to the entity subject to the inspection, and to** take, or request copies;	

(c) to ask any representative or member of staff of the undertaking **or association of undertakings** for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers;	
(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection.	
(3) The undertaking ~~concerned~~ **or association of undertakings** shall submit to inspections ordered by decision of the Commission. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a Commission decision:	
(a) specifying the subject matter and purpose of the inspection;	
(b) containing a statement that, pursuant to Article 14, a lack of cooperation from the undertaking concerned allows the Commission to take a decision on the basis of the facts that are available;	
(c) referring to the possibility to impose fines and ~~penalties~~ **periodic penalty payments** provided for in Article 15~~.~~ **;**	
(d) stating the right to have the decision reviewed by the Court of Justice pursuant to Article 263 TFEU.	
(4) In good time before the inspection, the Commission shall give notice of the inspection to the Member State in whose territory it is to be conducted **and appoint the date on which it is to begin**.	

(5) Officials **and** ~~of the Commission as well as~~ ~~officials~~ **other persons** authorised or appointed by the Member State in whose territory the inspection is to be conducted shall, at the request of the Member State or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.	
(6) Where officials or other accompanying persons authorised by the Commission find that an undertaking opposes an inspection within the meaning of this Article, the Member State concerned shall provide them with the necessary assistance and shall request, where appropriate, the assistance of the police or of an equivalent enforcement authority so as to enable them to conduct their inspection. **If the assistance provided in this paragraph requires authorization from a judicial authority according to national rules, such authorization shall be applied for. Such authorization may also be applied for as a precautionary measure.**	
(7) Upon request of the Commission, a Member State shall in its own territory carry out any inspection or other fact-finding measure under its national law in order to establish whether there is a foreign subsidy distorting the internal market.	
Article 13	
Inspection outside the Union	
In order to carry out the duties assigned to it by this Regulation, the Commission may conduct inspections in the territory of a third country, provided that the undertaking concerned has given its consent and the government of ~~the~~ **that** third country has been officially notified and has	

agreed to the inspection. Article 12(1), (2), and (3) points (a) and (b) shall apply by analogy.	
Article 14	
Non-cooperation	
(1) The Commission may take a decision pursuant to Article 8 or Article 9, **including a decision under Article 30(2)**, on the basis of the facts available, if an undertaking ~~concerned~~ or a third country:	EE (Drafting): (1) The Commission may take a decision pursuant to Article 8 or Article 9, **including a decision under Article 30(2)**, on the basis of the facts available, if an ~~undertaking~~ economic operator ~~concerned~~ or a third country: EE (Comments): Please see explanation in modification concerning art 6 (1). LU (Drafting): (1) The Commission may take a decision pursuant to Article 8**,** ~~or Article 9~~, **or**~~including a decision under Article~~ 30(2), on the basis of the facts available, if an undertaking or a third country: LU

	(Comments): The suggested wording is not clear. AT (Comments): It seems to be at odds with the principle of a fair trial if undertakings will be held responsible for actions of a state (which they cannot influence) because according to para 1 the COM will take a decision on the basis of the facts available if an undertaking or a third country does not cooperate! Only in cases where the undertaking can be considered as a part of the respective state (like a SOE or a CA/CE according to the public procurement regime) such consequences would be adequate (see para 3). SE (Comments): The addition is acceptable. Why is "concerned" deleted? The resulting wording seems very wide. RO (Comments): RO supports the completion of the text. DE (Drafting):

	1) The Commission may take a decision pursuant to Article 8 or Article 9, ~~including a decision under Article 30(2),~~ on the basis of the facts available, if an undertaking ~~concerned~~ or a third country: DE (Comments): In DE's view the insertion is likely to create confusion considering the distinction between the scope of application of Chapter II and IV. We strongly suggest the deletion. ES (Comments): ES considers that this provision could be further discussed, as it is not clear how a provision for Chapter II can apply to those procedures assessed within Chapter IV.
(a) provides incomplete, incorrect or misleading information in response to an information request under Article 11;	
(b) fails to provide the information requested within the time limit prescribed by the Commission;	
(c) refuses to submit to the Commission's inspection within or outside the Union ordered under Article 12 or Article 13; or	
(d) otherwise impedes the preliminary review or the in-depth investigation.	

(2) Where an undertaking or association of undertakings, a Member State or the third country has supplied incorrect or misleading information to the Commission, that information shall be disregarded.	EE (Drafting): (2) Where an ~~undertaking~~ economic operator or ~~association of undertakings~~ a group of economic operators, a Member State or the third country has supplied incorrect or misleading information to the Commission, that information shall be disregarded. EE (Comments): Please see explanation in modification concerning art 6 (1).
(3) Where an undertaking concerned, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit.	EE (Drafting): (3) Where an ~~undertaking~~ economic operator concerned, including a ~~public undertaking~~body governed by public law which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that ~~undertaking~~ economic operator may be deemed to have received such benefit. EE (Comments):

	Please see explanation in modification concerning art 6 (1). Body governed by public law is a term used in procurement directives – see 2014/24/EU art 2 point 1 (4). CZ (Drafting): (3) Where an undertaking concerned, including a public undertaking which is directly or indirectly controlled by the State, ~~fails~~ refuses to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit. CZ (Comments): We have concerns as regards the reversed burden of proof on whether the financial contribution confers a benefit to the undertaking and in general about the ability to prove the opposite. Moreover, any financial contribution does not necessarily constitute a countervailable foreign subsidy. Also, with reference to the subject of this Article, which is "Non-cooperation", we suggest a change in wording, so it is clear, that the undertaking intentionally hampers the process.
(4) When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.	EE (Drafting):

	(4) When applying facts available, the result of the procedure may be less favourable to the ~~undertaking~~ economic operator concerned than if it had cooperated. EE (Comments): Please see explanation in modification concerning art 6 (1). CZ (Drafting): (4) When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated. Undertakings, associations of undertakings and third countries concerned shall be made aware of the consequences of non-cooperation. CZ (Comments): By analogy with anti-subsidy regulation, all parties involved need to be informed of the consequences of non-cooperation.
Article 15	
Fines and periodic penalty payments	
(1) The Commission may impose by decision fines and periodic penalty payments where an undertaking ~~concerned~~ or an association of undertakings, intentionally or negligently:	

(a) supplies incorrect, incomplete or misleading information in response to a request made pursuant to Article 11, or does not supply the information within the prescribed time limit;	
(b) produces the required books or other records related to the business in incomplete form during inspections under Article 12;	
(c) in response to a question asked in accordance with Article 12(2), point (c),	
(i) gives an incorrect or misleading answer,	
(ii) fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or	
(iii) fails or refuses to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 12(3);	
(d) refuses to submit to inspections ordered under Article 12 or has broken seals affixed in accordance with Article 12(2)(d).	
(2) Fines imposed in the cases referred to in paragraph 1 shall not exceed 1 % of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding ~~business~~ **financial** year.	
(3) Periodic penalty payments imposed in the cases referred to in paragraph 1 shall not exceed 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned in the preceding ~~business~~ **financial** year for each working day of delay, calculated from the date established in the decision, until it submits	

complete and correct information as requested by the Commission**, or until it submits to an inspection**.	
(4) Before adopting any decision in accordance with paragraph 1, **(a)** the Commission shall set a final time limit of two weeks to receive the missing information from the undertaking or from the association of undertakings concerned.	
(5) Where an undertaking concerned does not comply with a decision with commitments pursuant to Article 9(3), a decision ordering interim measures pursuant to Article 10 or a decision imposing redressive measures pursuant to Article 9(2), the Commission may impose by decision:	
(a) fines not exceeding 10 % of the aggregate turnover of the undertaking concerned in the preceding ~~business~~ **financial** year; and	
(b) periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking concerned in the preceding ~~business~~ **financial** year for each day of non-compliance, starting from the day of the Commission decision imposing such penalty payments, until the Commission finds that the undertaking concerned complies with the decision.	
(6) In fixing the amount of the fine or periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness.	
(7) Where the undertakings concerned or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce the	

definitive amount of the periodic penalty payment compared to that under the original decision imposing periodic penalty payments.	
Article 16	
Revocation	
The Commission may revoke a decision taken pursuant to Article 9(2), (3) or (4) and adopt a new decision in any of the following cases:	
(1) where the undertaking concerned acts contrary to its commitments or the redressive measures imposed;	
(2) where the decision was based on incomplete, incorrect or misleading information.	
Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	
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	
(1) 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:	
(a) the merger of two or more previously independent undertakings or parts of undertakings;	
(b) 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.	
(2) 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.	
(3) For the purposes of Article 19, a 'notifiable concentration' shall be deemed to arise where, in a concentration,	
(a) ~~the acquired undertaking or at~~ **At** least one of the merging undertakings**, the acquired undertaking or the joint venture** is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and	
(b) ~~the~~ **The** undertakings ~~concerned received~~ **involved in the concentration were granted** from third countries ~~an~~ **combined** aggregate financial ~~contribution~~ **contributions** in the three calendar years prior to notification of more than EUR 50 million.	

(4) ~~In the creation of a joint venture referred to in paragraph 2, a 'notifiable concentration' shall be deemed to arise where:~~	
~~(a) 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~~	
~~(b) 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.~~	
A concentration shall not be deemed to arise where:	
(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;	
(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;	

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.	
Article 19	
Prior notification of concentrations	
(1) 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.	
(2) 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.	
(3) 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.	
(4) 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).	
(5) 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.	
Article 20	
Definition of control	
(1) 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:	
(a) ownership or the right to use all or part of the assets of an undertaking;	

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.	
(2) Control shall be acquired by persons or undertakings which:	
(a) are holders of the rights or entitled to rights under the contracts concerned; or	
(b) 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	
(1) 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~~ **Union** shall comprise products sold and services provided to undertakings or consumers in the internal market.	
(2) 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.	
(3) Instead of turnover, the following shall be used for the following categories of undertakings:	
(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC, 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;	
(b) for insurance undertakings, the value of gross 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.	
(4) Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned shall be calculated by adding together the respective turnovers of:	
(a) the undertaking concerned;	
(b) 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,	
(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;	
(c) those undertakings which have in the undertaking concerned any of the rights or powers referred to in point (b);	

(d) those undertakings in which an undertaking as referred to in point (c) has any of the rights or powers referred to in point (b);	
(e) 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).	
(5) Where undertakings concerned jointly have the rights or powers listed in paragraph 4, point (b), in calculating the aggregate turnover of the undertakings concerned,	
(a) 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 concerned;	
(b) 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~~ **granted by** third countries ~~by~~ **to** all undertakings referred to in Article 21(4), points (a) to (e).	

Article 23	
Suspension of concentrations and time limits	
(1) A notifiable concentration shall not be implemented before its notification.	
In addition, the following time limits shall apply:	
(a) where the Commission receives the complete notification, the concentration shall not be implemented for a period of 25 working days after that receipt;	
(b) 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;	
(c) where the ~~concentration has been declared not to distort the internal market pursuant to~~ **Commission adopted** a decision under Article 24(3), point (a) or point (b), ~~it~~ **the concentration** 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.	
(2) 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:	
(a) the concentration is notified to the Commission pursuant to Article 19 without delay; and	
(b) 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.	
(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.	
(4) 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 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.	

(5) 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.	
(6) 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:	
(a) 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	
(b) a decision has been revoked pursuant to Article 24(1).	
(7) 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.	
(8) 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	
(1) Articles 8, 9(1), (3) and (4), 10, 11, 12, 13, 14 and 16 shall apply to notified concentrations.	
(2) The Commission may initiate an in-depth investigation under Article 8(2) no later than 25 working days after receipt of the complete notification.	
(3) After the in-depth investigation, the Commission shall adopt one of the following decisions:	
(a) a decision with commitments pursuant to Article 9(3);	
(b) a no objection decision pursuant to Article 9(4);	
(c) a decision prohibiting a concentration, where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5.	
Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	
(4) 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.	

(5) 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.	
(6) The Commission may, where it finds that a concentration **notifiable under Article 19(1) or which has been notified upon request of the Commission under Article 19(5)** has already been implemented and that **foreign subsidies in that** concentration ~~has been found to~~ distort the internal market pursuant to Articles 3 to 5**,** adopt one of the following measures:	
(a) require the undertakings concerned to dissolve the concentration, in particular through the 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;	
(b) 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).	
(7) The Commission may order interim measures referred to in Article 10 also where:	
(a) a concentration has been implemented in breach of Article 19;	
(b) a concentration has been implemented in breach of a decision with commitments under this Article, paragraph 3, point (a).	
Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	
Article 25	
Fines and periodic penalty payments applicable to concentrations	
(1) The Commission may impose fines and periodic penalty payments as set out in Article 15.	
(2) In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding ~~business~~ **financial** year where they, intentionally or negligently, supply incorrect or misleading information in a notification pursuant to Article 19 or supplement thereto.	
(3) ~~The~~ **In addition, the** Commission may impose by decision on undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding ~~business~~ **financial** year where they, intentionally or negligently:	

(a) 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;	
(b) implement a notified concentration in breach of Article 23;	
(c) implement a notified concentration prohibited in accordance with Article 24(3), point (c).	

CHAPTER 4: PUBLIC PROCUREMENT PROCEDURES	HR (Comments): We have a general question: how does chapter IV but also chapter II correlate with: 1. Procurement under EU threshold as set out in PP directives; 2. Design contests and procurement of social and other specific services; 3. Contracts that are excluded from the scope of public procurement directives, for example according to art 7-17 of the Directive 2014/24/EU or art 11-14 of the Directive 2009/81/EC; 4. Defence and security procurement; 5. Procurement under art 346 of the TFEU. We believe it is not clear from the text nor the recital how will FSR proposal apply to those cases and we propose to make that precise and clear in the text. This is very important to increase legal certainty and predictability. IT (Comments): As a preliminary remark, it should be noted that the Italian authorities are concerned about the impact of the provisions under Chapter 4 on the execution of procurements that are important for the economic recovery, especially those included in the NRRP. In particular, suspending the award of high-value contracts for a considerable period of time, as provided for in Article 29, could undermine the objective of speeding up procedures and complying with the NRRP milestones.

	In addition, it should be clarified in this Chapter 4 that, apart from cases of notifications and ad hoc notifications, the exercise of the ex-officio power of the EC would never affect contracts already awarded and their execution. In other words, the Italian authorities are concerned that the ex-officio exercise, in cases of redressive measures to undertakings, may also have an impact on the executions of the contracts already awarded to the company in question PL (Comments): In our opinion it is still also worth to consider other solutions to the problem of foreign subsidies in public procurement, such as: - establishment of an obligation for economic operators operating on the EU market, to inform/notify the Commission about received foreign subsidies (as is it in the case of national state aid assessed to its compliance with Article 107 TFUE); - on the basis of the result of the notifications proposed above the Commission could either: - publish "black lists" of economic operators excluded from the participation in contract award procedures in the EU because of received foreign subsidies distorting internal market, or - issue certificates to economic operators declaring that particular foreign subsidy does not distort internal market.

	Both above documents could then be used in procedure according to Article 69 of directive 2014/24/UE on "abnormally low tender". NL (Comments): **NL:**NLD welcomes the new redraft and supports the instrument. As emphasized before, some key concerns remain relating to the timelines of an investigation. It is of utmost importance that delay of procurement procedures is kept to a minimum. This should be well addressed and reflected upon in the articles and recitals. DE (Comments): As a preliminary remark to this Chapter, DE supports the Commission's approach to limit the instrument to the economically most important procurements. This will narrow down the application of the instrument to those distortions which have the most relevant impact on fair competition in the single market. **OVERALL, IT NEEDS TO BE ENSURED THAT ADMINISTRATIVE BURDEN, COSTS AND UNEXPECTED COMPLICATIONS DURING THE AWARD PROCEDURE ON CONTRACTING AUTHORITIES AND ENTITIES ON ONE SIDE AS WELL AS ON UNDERTAKINGS ON THE OTHER SIDE ARE KEPT TO A MINIMUM. EFFICIENT, TIMELY AND LEGALLY SECURE PROCUREMENT PROCEDURES ARE OF UTMOST IMPORTANCE, ESPECIALLY IN TIMES OF**

	SIGNIFICANT PUBLIC INVESTMENT PROGRAMS AIMING AT A SWIFT RECOVERY OF THE EUROPEAN ECONOMY AND PROCUREMENT PROCEDURES LINKED TO CURRENT CRISES.
Article 26	HR (Comments):
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.	EE (Drafting): Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an ~~undertaking~~ economic operator 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. EE

	(Comments): Please see explanation in modification concerning art 6 (1). DK (Comments): We would like a clarification on what "unduly advantageous" means in this relation AT (Comments): The (wide) concept of "unduly advantageous tender" must be elaborated. The concept seems to be too narrow: the assessment "shall be limited to the pp procedure at stake". The wording of Art. 26 presupposes that the undertaking concerned submits a tender itself; however, the regulation also cover cases where the undertaking concerned is "only" a subcontractor or part of a bidding consortium (see Art. 28). In the CWG on 28.6.21. regarding Chapter 4 clarifications regarding the term „undertaking", which is not common in PP, were presented as possible. Unfortunately, the text hasn't been adapted to address this issue! In addition, AT maintains the position, that the three-year limitation is questionable and also prior subsidies should be taken into account to have an effective instrument. SE

	(Comments): The concept of an unduly advantageous tender needs to be clarified within the proposed regulation, with cross references as relevant. NL (Comments): **NL:**Article 26 refers to a causal relationship between the subsidy and an "unduly advantageous bid". From the current text, it is still unclear how the causal relationship will be demonstrated. Such as indicated in the Working Party (February 21), more clarification is required either in the articles, recitals or guidelines, as we believe proving causality is a complex exercise. We think a framework would be helpful, including specific examples where distortion in a tender can be presumed. NLD believes the period for subsidies that are eligible for notification should reflect a balance between the effectiveness of the instrument and the administrative burden for both undertakings and the Commission. NLD is interested why a period of three years is maintained. In this regard, we want to emphasize that an export credit facility (where distortion might be presumed) may be open for multiple years. As mentioned in our written comments for chapter 5, the relation with IPI requires clarification. Application of the instruments may coincide. It should be clear how the instruments interact. An example is a tender for a contract above the threshold of the RFS (250 million) whereby a tender is submitted by an undertaking from a third country, against which an IPI measure is already in force. It should be clear what is expected of the contracting authority in this case. With RFS, the trigger is the submission of the tender. The EC is notified and might investigate. With IPI, the trigger is the evaluation of the submitted tender

	to which an IPI measure should be applied, which is later in the procurement procedure. (Although in case of IPI, the contracting authority can see in the tender submitted by the undertaking whether it falls within the scope of an IPI measure). The question then is: what should the contracting authority do? Apply IPI when evaluating the submitted tenders and then wait for EC research results? Because depending on the percentage of the score adjustment under IPI (or exclusion), the relevant tender can still come out as the winner. A similar concern regards the interaction with abnormally low tenders (according to Article 69 of Directive 2014/24/EU). DE (Comments): DE understands that Article 26 requires a link between the existence of a foreign subsidy and an unduly advantageous tender in a specific procurement procedure for the instrument to apply. However, it remains uncertain how the Commission will assess this link and how an undertaking will be able to rebut the presumption that a foreign subsidy is causal for an unduly advantageous tender. DE suggests that a definition of the notion "unduly advantageous tender" should be added and more substantial explanations should be included in the recitals and/or in specifying guidelines. ES (Comments):

	ES considers that the term "unduly advantageous tender" should be defined in an article dedicated to definitions, as it is different from the term "abnormally low tender" used in the Public Procurement Directives.This definition should be set out in a quantitative or objective manner in order to allow an unbiased assessment by the contracting authority.

Article 27	DK (Comments): *DK finds it necessary to address the situation, when only one or two economic actors submit a tender. We suggest exempting these situations from chapter 4. It could be addressed in this article or in art. 5 on the balancing test or in a recital to either of these two articles.*
Definition of and notification threshold in public procurement procedures	PL (Comments): ES (Comments): ES welcomes the reference to framework agreements in this article. However, in order to ensure legal certainty, a reference to negotiated procedures, centralised purchasing activities or dynamic purchasing systems could also be made. In this sense, the text could include, when appropriate, references to these types of procedures and specify their special requirements or specific considerations within the scope of this Regulation.
(1) For the purposes of Article 28, a public procurement procedure means:	SE (Comments):

	The scope of public procurements covered by this chapter should be described in recitals as guidance to concerned parties. DE (Drafting): (1) For the purposes of **this chapter** ~~Article 28,~~ a public procurement procedure means: DE (Comments): Clarification
(a) 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;	AT (Drafting): (a) any type of award procedure ~~laid down in~~ covered by 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; AT (Comments):

	The definition refers on the one hand to "any type of award procedure laid down in Directive … for the conclusion of a public contract" (see letter a; this would imply that all pp procedures, regardless if they are excluded from the scope of the PP Directives, are covered) but refers at the same time to specific procedures excluded by the PP Directives (see letter c; this would imply that only PP procedures covered by the scope of the PP Directives are addressed in letter a). The addition is necessary to make ensure that the award of public contracts that are excluded from the PP Directives are not within the scope of chapter 4 (see for example Art. 10 Dir 2014/24/EU).
(b) 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;	AT (Drafting): (b) a procedure for the award of a works or a service concession ~~as defined in Article 5, point (1) of~~covered by Directive 2014/23/EU of the European Parliament and of the Council; AT (Comments): See above. In a Recital it must be clarified, how DFS should apply to concessions procedures (which do not have fixed procedures; see Art. 30 para 1 Dir 2014/23/EU). [Alternative suggestion: (b) a procedure for the award of a works or a service concession as defined in Article 5, point (1) of and within the scope of Directive 2014/23/EU of the European Parliament and of the Council;]

(c) 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.	HR (Drafting): ~~(c) 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.~~ HR (Comments): We have a question on the reasoning behind the inclusion of this point c) in the scope? It is not clear to us why contracts that are excluded from the scope of public procurement directives are included in the scope of FSR. What is the added value here? And why include only this type of excluded contracts and not others? Also, it is not clear how CION got the data on these contracts since there is no obligation to publish contract award notices for such contracts in TED?! We see no added value and propose to delete this point. CZ (Drafting):

	~~(c) 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.~~ CZ (Comments): In the extent of the proposed provision of Art 27/1/c, majority of the further procedural provisions is inapplicable (as the tender in the meaning of PP directives is not submitted). AT (Comments): See above. In a Recital it must be clarified, how DFS should apply to such procedures (which do not have to follow the regular PP rules). HU (Drafting): ~~(c) 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.~~

	HU (Comments): We maintain our disagreement with the extension of the scope of the Regulation to public procurement exempted from the Public Procurement Directives by international agreement. In our view, this provision would unreasonably extend the scope of the Regulation and such procurements will not be covered by the International Procurement Instrument (IPI), which also serves similar purposes.
	HR (Drafting): **(ca) any type of award procedure laid down in Regulation 2018/1046/EU** HR (Comments): We propose to include award procedures laid down in Financial Regulation since EU institutions are big public buyers. CION should provide information on the number of procurement contracts concluded by EU institutions that are there above the 250 million euro threshold.
(2) 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.~~ **:**	HR (Comments): We support the clarification in this paragraph. However, we believe that dynamic purchasing systems should be also addressed in the text.

(a) the estimated value of that public contract or framework agreement is equal or greater than EUR 250 million; and	EE (Comments): Please note that dynamic purchasing systems are still not addressed in the draft. LU (Drafting): (a) the estimated value of that public contract or framework agreement is equal or greater than EUR 250 million **net of VAT**; and LU (Comments): Luxembourg fully supports the threshold foreseen in the Commission's proposal as it provides for the right balance between covering those cases possibly subject to financial contributions distortive to the single market and not introducing unnecessary administrative burden. AT (Drafting):

	a) the estimated value of that public contract, the ~~or~~ framework agreement or the dynamic purchasing system is equal or greater than EUR 250 million; and AT (Comments): AT thanks the COM for adding the wording "the estimated value of that public contract or framework agreement", because it clarifies, that only FAs with at least that estimated value are covered (we suggest to add for reasons of clarification the DPS). RO (Drafting): **(a) the estimated value of that public contract or framework agreement is equal or greater than EUR 250 million net of VAT; and** RO (Comments): RO considers that it is necessary to fix the threshold without VAT. Motivation: According to the Public procurement Directives contracting authorities/entities should estimate the value of the contract without VAT.

	Taking in consideration that VAT is different in each EU Member State, it is necessary to estimate and compare the contracts in same conditions NL (Comments): **NL:** NLD conducted a more detailed analysis to the proposed thresholds. We believe that the current threshold of 250 million should in any case not be higher in order to secure effectivity of the instrument. This is especially relevant in the light of the proposed threshold of 50 million for individual lots. In addition, we propose to differentiate the threshold for goods and services on the one hand and works on the other, parallel to Directive 2014/24. Hence, there will be more balance in the targeted tenders (in various sectors). Also from a perspective of targeting those tenders where the damage can be the highest in terms added value, it makes sense to differentiate between goods and services and works. Furthermore, NLD welcomes clarification on the notification of dynamic purchasing systems. At what moment in the procedure are they prone to notification? DE (Comments): DE welcomes the clarification with regard to lots and framework agreements. Additionally, it should be pointed out in the recitals that the notification only applies to the conclusion of a framework agreement and does not extend to individual call-offs. However, we would also like to

	indicate that suppliers and subcontracts, in many cases, will not be known until the call-off stage depending on the individual circumstances of the procurement. ES (Comments): ES considers that the thresholds are a key element of the proposal and should therefore be re-evaluated in order to ensure predictability and legal certainty and to minimise administrative burdens to undertakings and public authorities, especially in the context of the implementation of the NGUE Funds. One of the reasons why the thresholds should be carefully established would be to avoid that the request by the COM regarding cases falling outside Chapter 2 of the Regulation (established in article 28(6) becomes the standard procedure. In particular, this request under article 28(6) should not be as broad as it is under the current wording, and be limited by certain time limits and requisites.
	NL (Drafting): **NL: (b) Procedures for the award of contracts based on a framework agreement are excluded from notification.** NL (Comments):

	NL: NLD welcomes the clarity with respect to the notification of framework agreements. However, from a perspective of administrative burden, we underline, and agree, that double assessment of call-offs under framework agreements should be prevented. This should be well adopted in the Regulation.
(b) the undertakings involved in the tender were granted from third countries combined aggregate financial contributions in the three calendar years prior to notification equal to or greater than EUR 5 million.	EE (Drafting): **(b) the ~~undertakings~~ economic operators involved in the tender were granted from third countries combined aggregate financial contributions in the three calendar years prior to notification equal to or greater than EUR 5 million.** EE (Comments): Please see explanation in modification concerning art 6 (1). CZ (Comments): The suggested 5 million EUR limit for a financial contribution is too low. We believe the financial limit for public procurement should be increased. In comparison the suggested limit for concentrations in article 18(3) is 50 million EUR. The possible effects of the proposed limit on public procurement need to be considered so that the limit does not make it more difficult to award a larger number of public contracts. FI

	(Comments): **We support the new wording. However, we would like to ask if you could specify what is meant by the "combined aggregate financial contributions": is the idea to cover financial contributions that the company has received from several/more than one third countries?** LU (Comments): We welcome this additional criteria. AT (Comments): Do we understand correctly that for the € 5 million threshold all financial contributions from all third countries to undertakings should be included when determining a "notifiable foreign financial contribution in an EU public procurement procedure"? The term "third country" should be clarified: are third countries all other countries outside the EU or are certain countries with which the EU has concluded bilateral or multilateral agreements covering the issue of "subsidies" not to be considered "third countries"? More specifically: Would the EEA countries be considered such third countries, what about the WTO members party to the WTO

	Agreement on Subsidies and Countervailing Measures? And EU candidate countries? HU (Drafting): b) the undertakings involved in the tender were granted from third countries combined aggregate financial contributions **in the last three years** prior to notification equal to or greater than EUR 5 million. HU (Comments): We agree with the revised drafting proposal namely, that the obligation to notify under Article 28 should not be constituted merely by reaching or exceeding a certain threshold, but also by the cumulative criterion of financial contributions from a third country participating in a public procurement procedure and amounting to at least EUR 5 million in the three years preceding the procedure. However, there is the question that how the "calendar year" is to be interpreted: should the current calendar year and the two preceding calendar years be taken into account, as in the state aid de minimis rule, or should 3 years be counted backwards from the current date? Furthermore, the text needs to be brought into line with the term 'last three years' used in Article 28(1). SE

	(Comments): SE welcomes the amendment. RO (Comments): RO supports the completion of the text. NL (Comments): BE (Comments): The addition of the 5 million threshold to Article 27 is a good thing. It will avoid starting procedures, which slow down public procurement procedures, in cases where the procedure is unlikely to result in a decision finding a distortion of the internal market because of the limited amount of the grant. DE (Drafting):

	(b) the respective undertakings involved in the tender was ~~were~~ granted ~~from third countries combined aggregate financial contributions~~ a foreign subsidy of a total amount equal to or greater than EUR 5 million over a period of ~~in~~ the three calendar years prior to notification DE (Comments): DE, in general, welcomes, amendment and suggests an alignment with Article 3(2). It should be clarified with regard to both articles whether the de minimis threshold covers financial contributions / subsidies from one or multiple sources. ES (Comments): ES would welcome more clarification about the interplay between this provision and the provision in article 28 (*undertakings shall either notify to the contracting authority or the contracting entity all foreign financial contributions received in the three years preceding that notification)* as it is not clear if the undertaking concerned should notify all financial contributions or only those equal or greater than EUR 5 million.
	NL

	(Drafting): **NL: (c) Where the aggregate financial contribution in the three calendar years prior to notification does not exceed EUR 200 000 per country, these subsidies should not be taken into account when calculating the aggregate financial contributions as referred to in Article 27(2)(b).** NL (Comments): **NL:** By calculating the aggregate financial contributions (Article 27(2)(b)), it is determined whether aggregate financial contributions are notifiable. The financial contributions that add up to >5 million, should be notified with the Commission. However, an undertaking might have received minor financial contributions (extreme example: a €100 voucher) for which we believe the administrative burden of registering the contribution are not proportionate to the likelihood of such a minor subsidy being distortive. We therefore propose a minimum threshold of EUR 200.000 per 3 calendar years. We want to stress that this threshold is EUR 200.000 ***per country***. This way, circumvention of the RFS through this de minimis threshold remains unlikely. The threshold of EUR 200.000 per three years per country is similar to the threshold in Regulation (EU) 1407/2013 on de minimis aid for state aid.
(2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the value net of VAT of the tender for each lot concerned is less than EUR 50	EE (Drafting): **(2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign**

million. However, where the aggregate value of all the lots the tenderer applies for is 50% or more of the estimated value of the procurement, foreign financial contributions must be notified for all such lots the estimated value of which surpasses EUR 5 million.	**financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the value net of VAT of the tender for each lot concerned is less than EUR 50 million. However, where the aggregate value of all the lots the ~~tenderer~~ economic operator applies for is 50% or more of the estimated value of the procurement, foreign financial contributions must be notified for all such lots the estimated value of which surpasses EUR 5 million.** EE (Comments): Please see explanation in modification concerning art 6 (1). Also, tenderer is an economic operator that has submitted a tender but not only tenderers but also economic operators who have submitted a request to participate, are concerned. HR (Comments): We propose to split this paragraph in two or more subparagraphs, so the text becomes more readable. Additionally, we propose to move phrase "net of VAT" after the phrase "tender", or at the end of the sentence. IT (Drafting):

	(2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the value net of VAT of ~~the tender for~~ each lot concerned is less than EUR 50 million. However, where the aggregate value of all the lots the tenderer applies for is 50% or more of the estimated value of the procurement, foreign financial contributions must be notified for all such lots the estimated value of which surpasses EUR 5 million. IT (Comments): It is requested to eliminate the reference to the value of the offer and to consider only the value of the lot. In the event of the value of the offer is considered, the contracting authority would become aware of the notification obligation only at the time of the opening of the economic offer, or at a very advanced stage of the award procedure. FI (Comments):

	We would like to propose that this wording is clarified. **Please confirm that the first requirement is that at least the EUR 250 million threshold is met and only after that the other requirements are been assessed.** **Does dividing a procurement into lots mean a framework agreement or could it be a question of several invitations to tender by the same contracting entity?** LU (Drafting): (2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the value net of VAT of the tender for each lot **the tenderer applies for** ~~concerned~~ is less than EUR 50 million. However, where the aggregate value of all the lots the tenderer applies for is 50% or more of the estimated value of the procurement, foreign financial contributions must be notified for all such lots the estimated value of which surpasses EUR 5 million. LU

	(Comments): We believe that the current wording can be subject to some confusion. It should be clarified that the words "each lot concerned" only refer to the lots a specific tenderer applies for and not every single lot the procurement is divided into. The current proposal could be understood as to require every single tender to be valued at less than EUR 50 million for article 27 (2a) to apply. This would in turn mean that all tenderers are subject to notification if at least one tender surpasses the 50 million threshold even if they apply for a different lot where their own tender stays below said threshold. AT (Drafting): **(2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the estimated value ~~net of VAT of the tender~~ for each lot concerned is less than EUR 50 million. However, where the aggregate estimated value of all the lots the tenderer applies for is 50% or more of the estimated value of the procurement, foreign financial contributions must be notified for all such lots the estimated value of which ~~surpasses~~ is equal or greater than EUR 5 million.**

	AT (Comments): AT supports the concept of para 2a; however it is not understandable, that the basic concept of Art. 27 (see para 2 letter a) is based on the estimated value of a contract, in the case of lots however on "the value net of VAT of the tender for each lot". Since the value of the "tenders" might significantly vary and given the basic concept of Art. 27, para 2a should be based on the estimated value of the lot as well! We suggest to use the wording "equal or greater to" to be in line with wording in para 2b. HU (Drafting): (2a), Where the contracting authority or contracting entity decides to divide the procurement into lots, for the purpose of Article 28, **the foreign financial contribution is subject to the notification requirement if the aggregate estimated value of the tender for all the lots combined for which the tenderer applies for is equal or greater than [EUR 100 million].** HU (Comments):

	In our view, the proposed paragraph - especially the second sentence - is too complex and needs to be simplified to avoid legal uncertainty. For the sake of this, it would be useful, for example, to define only a specific value or percentage from which notification is mandatory in case of tendering (e.g. tenders for lots with an aggregate estimated value reaching EUR 100 million) . The phrase "must be notified for all such lots" can be misleading, because it sounds as if a notification should be submitted for each lot separately. According to our interpretation, the obligated undertaking submits one notification in a procurement procedure (it would be redundant to submit the same information more than once). PL (Drafting): **(2a) Where the contracting authority or entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in line with the threshold set out in paragraph 2(a), shall not be deemed to arise where the value net of VAT of the tender for each lot concerned is less than EUR 50 million. However, where the aggregate value of all the lots the tenderer applies for is 50% or more of the estimated value of the procurement, or exceeds value indicated in paragraph 2 (a), foreign financial**

	contributions must be notified for all such lots the estimated value of which surpasses EUR 5 million. PL (Comments): We propose to add in this new provision an obligation for the tenderer to notify foreign subsidies where he/she submits bids for parts of the contract, regardless of the value of the individual parts, the total value of which exceeds the amount indicated in Article 27 para. 2 (a) (EUR 250 million). SE (Comments): The wording needs to be clarified in the second part concerning 50 per cent. RO (Comments): RO considers that this new provision will increase the administrative burden for the contracting authorities and entities. DE (Comments):

	DE welcomes an explicit provision on thresholds for lots. As regards the second sentence, however, the 50% threshold might be difficult to apply where it is not clear from the start on how many lots a given undertaking is submitting a bid. It should be further explored, whether a uniform threshold according to sentence 1 (possibly lower) regarding lots would be preferable with a view to procurement practice. ES (Comments): This specific provision refers to procurement procedures divided into lots is welcomed. However, ES considers that, since the general rule in the field of EU public procurement is the division of the contract into lots, a clearer wording is essential to enable contracting authorities to apply the Regulation with maximum legal certainty. In particular, a provision about the awarding of those lots where there is no tender from an undertaking that has been granted a foreign subsidy, as well as a provision about the interplay between the notification obligation set out in this provision and the notification obligation set out in paragraph 2, would be welcomed.
	AT (Drafting): (2b) Procedures for the award of contracts based on a framework agreement are excluded from the application of this chapter. In the case of a dynamic purchasing system of an estimated value equal or greater than EUR 250 million, Chapter 4 shall only apply to the award of specific contracts with an estimated value equal or greater than EUR 50 million.

	AT (Comments): AT supports the view the COM has shared in the CWG that only the procedure that leads to the conclusion of the FA is subject to Chapter 4, but not the respective call-offs from such FAs. Call-offs do not represent any type of award procedure. Yet, it shall be clarified in the legal text, how this regulations deals with a FA as such for reasons of legal certainty. Especially, in the light of Art 33 para 4 Dir 2014/24/EU, that allows for multiple partners in a FA and a later "mini-competition". As already submitted in writing, those questions are of utmost importance for AT (see for example the following recent procedure: TED Nr. 2021/S 151-401747, open procedure to conclude a framework agreement; COVID-Tests; above € 400 Mio.). For a DPS a rule is suggested along the line of para 2a.
(3) Procedures for the award of contracts falling within the scope of Directive 2009/81/EC of the European Parliament and of the Council do not fall under this Chapter.	HR (Comments): From the explanations provided by CION, we understand that defence and security procurement falls under Chapter II. To increase legal certainty, we propose to clarify this in the recitals. DE (Comments):

	It should also be clarified that procurements falling within the scope of the exclusions set out in Directive 2009/81/EC are not covered by Chapter IV. DE would like to point out that also the award of contracts under Directive 2014/24/EU can be highly relevant for military missions respectively military readiness (*Einsatzfähigkeit*). This is especially but not exclusively relevant in cases of urgency DE therefore considers it necessary to implement a mechanism that ensures that the application of this Regulation does not delay or prevent such awarding procedures that are required for military missions or military readiness. Such a mechanism is especially relevant since Art 28 para 6 is not limited to any threshold and has become even more relevant and important considering the crisis in Ukraine. It does not matter whether goods or services fall under Directive 2009/81/EC or under Directive 2014/24/EU. If the goods or services are needed for military missions it is necessary to ensure, that the application of this Regulation does not delay or prevent (see also our comments on Article 30 (2)) awarding procedures. ES (Comments): As procedures for the award of contracts falling within the scope of Directive 2009/81/EC, do not fall under Chapter IV, it should be clarified, conversely, that defence and security contracts which, according to Articles 15 to 17 of Directive 2014/24/EU are covered by its provisions, do fall within the scope of the Regulation. This is particularly relevant in relation to mixed contracts, as indicated in Directive 2014/24/EU, in the sense that the contracting authority should not be prevented from choosing to apply Directive 2014/24 to certain mixed contracts instead of applying Directive 2009/81/EC.

(3a) Procedures for the award of contracts falling under Article 32(2)(c) of Directive 2014/24/UE and Article 50(1)(d) of Directive 2014/25/EU shall fall under Chapter 2 and are excluded from the application of this Chapter .	HR (Comments): We welcome this clarification. However, it is not clear what is going to happen with concession contracts. Indeed, Directive 2014/23/EU doesn't have a specific provision on negotiated procedure without prior publication, and leaves it to the national law. We propose to clarify this corelation. We propose to take into account also urgent open procedures (see for example art 27(3) of the Directive 2014/24/EU) CZ (Drafting): **(3a) Procedures for the award of contracts falling under Article 32(2)(b, c) of Directive 2014/24/UE and Article 50 ~~(1)~~(c, d) of Directive 2014/25/EU shall fall under Chapter 2 and are excluded from the application of this Chapter .** CZ (Comments): There is no paragraph 1 in the Article 50 of Directive 2014/25/EU. We suggest that negotiated procedure without prior publication based on the lack of competition, Art 32(2)(b) Directive 2014/24/EU and Art 50(c)

	Directive 2014/25/EU is also excluded from the application of this Chapter. FI (Comments): **We support the clarification according to which the provisions will not apply if the contract is done without publishing the contract notice.** AT (Comments): AT welcomes this provision. It is important to ensure the safety of supply in cases of extreme urgency. However a solution – not necessarily an exclusion – must be implemented for "urgent procurements" (see for example Art. 27 para 3 and Art. 28 para 6 of Directive 2014/24/EU); see AT suggestions below. HU (Drafting): (3a) **This Chapter shall not apply to procedures** for the award of contracts **covered by** Article 32(2)(c) of Directive 2014/24/EU and Article 50(1)(d) of Directive 2014/25/EU. HU

	(Comments): We support the abolition of the notification obligation for tenderers in cases of extreme urgency in the application of the negotiated procedure without prior publication of a contract notice under Article 32(2)(c) of Directive 2014/24/EU and Article 50(1)(d) of Directive 2014/25/EU. However, we do not consider it is necessary to emphasise that the ex officio procedure under Chapter 2 of the Regulation would apply in this case, since it could apply regardless of any reference to it in this paragraph. We also suggest deleting the phrase "shall fall under Chapter 2 and", as this gives the impression that the ex officio procedure is mandatory in such cases. SE (Drafting): **(3a) Procedures for the award of contracts falling under Article 32~~(2)(c)~~ of Directive 2014/24/UE and Article 50~~(1)(d)~~ of Directive 2014/25/EU shall fall under Chapter 2 and are excluded from the application of this Chapter .** SE (Comments):

	The scope of the regulation covers all foreign subsidies. The need to notify cases under chapter 4 in cases when MS are free to use the negotiated procedure without prior publication does not seem proportional from an administrative costs point of view. The amendment is welcomed by SE but the whole of article 32 also covers inter alia situations with no tenders or no suitable tender and when only a particular economic operator can provide the supplies or services. This ground has its roots in the principle of proportionality. Exempting these procedures is relevant and they are strictly regulated by the directives, related national legislation and constitute decisions which can be followed up through the remedies directive, which secures that circumvention of the proposed regulation is avoided. RO (Comments): RO considers that in practice more cases which need to be exempted may arise. Example: the cases provided by Art.32 (3) (b) - for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics.

	NL (Comments): **NL:**NLD believes it is important to secure the continuity of procurement procedures in cases where the public interest is at stake, such as health emergencies. It is convenient to include provisions in this chapter to guarantee the continuity in such exceptional cases. NLD therefore welcomes the proposed exclusion for the negotiated procedure without prior publication, which can be used for reasons of extreme urgency. However, the proposed exclusion remains too narrow. NLD believes that there should be a fast track procedure (upon request) for procurement procedures with shorter timelines, which can be used in case of a state of urgency such as mentioned in Article 27(3) and 28(6) of Directive 2014/24/EU. DE (Comments): DE welcomes the amendment ES (Comments): ES welcomes this exemption. Nevertheless, given that there are some differences in national rules regarding emergency or urgency procedures, the possibility to include a general clause referred to these categories of contracts should be included.

(4) 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.	HR (Comments): It is not clear what is the added value of this provision. *A contrario*, these definitions do not apply in relation to chapter II? Or? It doesn't make any sense. We propose to move this paragraph in a new separate article with definitions. ES (Comments): ES considers that, in order to reinforce legal certainty and predictability, key elements for the application of the Regulation should be defined in a dedicated article. In particular, the definition of "economic operator", "estimated value", "central purchasing body" or "tenderer", among others, should be included in this paragraph.
	AT (Drafting): (5) The contracting authority or contracting entity must state in the contract notice or, in case a procedure without a prior publication is conducted, in the procurement documents, that chapter 4 of this regulation is applicable. AT

	(Comments): According to this article, chapter 4 is applicable if certain thresholds, that are based on the estimated value, are met. The estimated values do not have to be published by CA/CE in the contract notices (Annex V, Part C, Nr. 8 only mentions the "Estimated total order of magnitude of contract(s);"). Therefore economic operators might be unsure, whether they have to submit a declaration or notification according to Art 28 of this regulation. Therefore, AT suggests this paragraph.

Article 28	NL (Comments): **NL:** Please note that the amendments for this Article in the redraft Rev. 1 are not adopted in Rev. 2. This concerns paragraphs (1), (1a), (2b) are not updated. ES (Comments): ES points out that the modifications introduced by the Presidency in the first compromise text are not included in this table. Comments are made in reference to the first compromise text proposal.
Prior notification of foreign financial contributions in the context of public procurement procedures	PL (Comments): *PL proposes to establish an **ex-ante approval procedure** of foreign subsidies for economic operators intending to apply for a public contract in the EU above threshold of Article 27(2)(a). The approval would be granted by the Commission upon request of an economic operator and could be used for a specific category of procurement (e.g. specific construction works, specific design or IT services) during specific period, e.g. 3 years. This could allow to shorten the time of the examination of foreign subsidies under the notification procedure. However such approval would only be valid until any new foreign subsidy is granted to this economic operator. Then the economic operator would need to apply for a new approval of the Commission.*

(1) 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 such information or declaration shall not be awarded the contract.	EE (Drafting): (1) When submitting a tender or a request to participate in a public procurement procedure, ~~undertakings~~ economic operators 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~~ Economic operators which do not submit such information or declaration shall not be awarded the contract. EE (Comments): Please see explanation in modification concerning art 6 (1). HR (Comments): How will this provision be applicable in multiphase procedures like competitive dialogue or innovation partnership? Should the economic operator provide notification in request to participate and then again in every tender including final tender it submits? Regarding last sentence it is still not clear to us how will contracting authority assess this in PP procedure? Is this a new exclusion ground? We note that this possibility

	isn't mentioned in Recital 36. Why? Additionally, does this mean that contracting authority cannot clarify such tender according to Art 56(3) of the Directive 2014/24/EU? We propose to clarify this in the recitals. We believe that there is no need to exclude a tenderer for purely formalistic grounds if declaration that there is no financial contribution is not submitted the tender. There should be a possibility to clarify it according to Art 56(3). Finally, we believe that according to only once principle and the need of end-to-end electronic public procurement this notification should be made through European Single Procurement Document and Commission should amend Regulation 2016/7 in that regard. CZ (Drafting): (1) By the time limit for submission of tenders ~~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 using a standard form 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. If such a notification or declaration has not been submitted to the contracting authority or the contracting entity within the above time limit, the contracting authority or the contracting entity invites the undertaking concerned to submit the notification or declaration in an additional five-day limit from the date on which it receives the invitation.

	If the notification or declaration is incomplete, incorrect or contains misleading information, the Commission may invite the undertaking concerned to complement, correct or clarify the notification or declaration. Undertakings which do not submit such information or declaration within the additional five-day time limit set by the contracting authority or the contracting entity or undertakings which do not submit complement, correction or clarification of the notification or declaration by the additional time limit set by the Commission or undertakings whose notification or declaration remains incomplete, incorrect or misleading despite complement, correction or clarification submitted at the invitation of the Commission shall not be awarded the contract. In that case, the Commission shall adopt a decision prohibiting the award of the contract to the undertaking concerned pursuant to Article 30 (2) with the consequences set out in Article 30 (2). CZ (Comments): We suggest setting a clear deadline until which the undertaking concerned has to submit a notification or declaration. This should be done within the deadline for submission of tenders or requests to participate in a public procurement procedure. The „notification or declaration“ needs to be submitted using a standard form. The contracting authority or the contracting entity should not be involved in inviting and receiving complement, correction or clarification of notifications and declarations. If undertakings submit complement, correction or clarification of the notification or declaration directly towards the Commission, it will speed up and simplify the public procurement process and the process pursuant to this Regulation.

	The undertakings which have not submitted such information or declaration within the prescribed time limit shall send it additionally at an invitation of the contracting authority. We suggest that the Commission is entitled to invite the undertaking concerned to complement, correct or clarify the notification or declaration in the case when it is incomplete, incorrect or contains misleading information. In the situations described in Article 28 (1) in which the contract shall not be awarded the Commission shall adopt a decision prohibiting the award of the contract to the undertaking concerned in accordance with Article 30 (2) with the consequences set out in Article 30 (2). IT (Comments): It is necessary to specify a period beyond which undertakings which do not submit the information or declarations requested by the contracting authority are excluded and the ranking is scrolled without changing it. FI (Comments): **Please clarify the threshold in view of the amendments to article 27(2) and threshold of 5 MEUR. Is the idea that the notification should be done only when there is no subsidy that exceeds the threshold of 5 MEUR (see Art 27(2)).**

	AT (Drafting): (1) ~~When submitting a~~A tender or a request to participate in a public procurement procedure~~, undertakings~~ shall ~~either notify to the contracting authority or the contracting entity~~include a notification of all foreign financial contributions received in the three years preceding that notification or confirm in a declaration that ~~they did not receive any~~no foreign financial contributions in the last three years were received. ~~Undertakings~~ If ~~which do not submit~~ such ~~information~~ a notification or declaration is missing, a candidate shall not be invited to submit a tender or the tender shall be rejected ~~awarded the contract~~ in case the contracting authority or contracting entity has unsuccessfully asked the undertaking to supplement the request to participate or the tender. AT (Comments): Regarding the first sentence: Some MS, including AT, commented on the fact, that the term "undertaking" is not common in pp procedures. As the undertaking seems to include e.g. subcontractors and so forth, who has to notify/declare the contributions to the CA/CE? Para 3 includes the term "lead" economic operator, that is also unknown in the PP context. Who shall ensure notification? To solve those points, AT suggests changes to the first sentence with the following intentions:

	• No change to the purpose/result of Chapter 4 is intended; just putting para 1 in line with concepts known from the pp procedures. • As any tender or request to participate in a pp procedure necessarily contains various documents and/or information, any declaration or notification in this chapter shall be a mandatory part of it according to para 1. • This ensures, that the candidates or tenderers submitting the request to participate or the tender have to ensure that all (!) the information is included – independent of the fact, if a (sole) economic operator submits it or a group of economic operators; or, eg, a main subcontractor is part of the bid. • For multi-stage procedures, please see the suggestion for a new paragraph 4a <u>Regarding the second sentence:</u> If information is missing in a request to participate or in a tender, the consequence shall be the same as in the pp Directives. In Art. 28 this is a consequence directed at the CA/CE and is not based in a COM decision like in Art. 30 para 2. To ensure, that a notification or declaration can be supplemented and does not result in the modification of the request to participate or the tender, that is against European law, the sentence is suggested. <u>General comment to Para 1:</u> In light of the changes to Art. 27 para 2 letter b: Is it still appropriate to require a notification of "any" financial contribution? Wouldn't it be enough to notify only those, that are at least theoretically significant? HU

	(Drafting): (1) 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, **with an aggregate value referred to in Article 27(2)(b).** Undertakings which do not submit such information or declaration shall not be awarded the contract. HU (Comments): In the text, the phrase "did not receive any foreign financial contributions" should be brought in line with Article 27(2)(b), as the aids with a value of less than EUR 5 million do not need to be notified. PL (Drafting): (1) ~~When~~ Before submitting a tender or a request to participate in a public procurement procedure, ~~undertakings~~ economic operator or in case of consortium a lead economic operator shall ~~either~~ notify to the ~~contracting authority or the contracting entity~~Commission 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~~. A proof of sending such a notification or a declaration that they did not receive any foreign financial contributions in the last three years economic operator or in case of consortium a lead economic operator shall send to the contracting authority or contracting entity with a tender or a request to participate in a public procurement procedure. ~~Undertakings~~ Economic operator or a consortium which do not submit such ~~information~~ proof or declaration to contracting authority or contracting entity or declaration shall not be awarded the contract. PL (Comments): PL is of the opinion that a notification of foreign subsidy under this Article should be sent directly to the Commission by economic operators without the intermediary of contracting authorities. The solution currently proposed in this chapter (imposing on the EU contracting authorities the function of an intermediary in submitting notifications of foreign subsidies from contractors applying for the contract) is not optimal, as it involves unnecessary red tape. Economic operator should notify foreign subsidy directly to the Commission using appropriate on-line tools, and only inform contracting authority about the notification in the offer or in the application for participation if it is the case. We see the following benefits of such a solution:

	• Due to such shortening of the information flow the Commission would receive the notification earlier, practically at the same time as the deadline for submitting an application for participation in a tender or a bid (when an appropriate on-line form is to be used), so it will be able to proceed the notification sooner. The on-line form provided by the Commission should have the function of issuing a certified confirmation of receipt, which contractors would be able to attach to the application/offer, or indicate an appropriate link in the ESPD (Single European Procurement Document). • Disruptions in communication related to the participation of unnecessary intermediary in the notification procedure would be eliminated, and as a result, it would be possible to complete the investigation sooner, which then will allow for a timely award of the contract. • Contracting entities would not be subject to an unnecessary administrative burden related to the processing of notifications on foreign subsidies, completing it from applications or tenders of the contractor, providing this information in a complete form to the Commission, collecting and storing such information for a period of 10 years for the event of possible inspections. In this context, we propose a new wording of Article 28 para. (1). Following this proposal, Article 28(4) and 28(5) would also need to be amended, as they also relate to the obligations of contracting

	authorities/entities to transmit notifications from economic operators to the Commission. SE (Comments): Guidance for concerned parties must be given in recitals, on envisaged procedural steps and definitions. NL (Comments): **NL:** More clarification is needed on the specific moment of notification in various procurement procedures (such as innovation partnership or competitive dialogue). From the current redraft it seems that entrepreneurs have to notify twice: when submitting the tender and request to participate. This moment is particularly important for legal certainty and a swift and efficient investigation, preventing delay in the procurement procedure. It should be clear when and how the information is transferred from the undertaking to the Commission. NLD welcomes the oral explanation of the Commission in the Working Party (February 21), emphasizing that the purpose is to assess the notification as early as possible. But this should be well reflected in the articles and/or recitals. DE (Drafting):

	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 **equal or above the threshold set out in Article 27 para. 2(b) they have** received in the three years preceding that **initial** notification or confirm in a declaration that they **and, if applicable, their main subcontractors and suppliers** did not receive any foreign financial contributions **equal or above the threshold** in the last three years. Undertakings which do not submit such information or declaration shall not be awarded the contract. **The threshold referred to in sentence 1 shall not apply to procedures initiated under paragraph 6 of this article.** DE (Comments): Considering the drastic consequences of non-compliance with the obligation of notification [see Article 32], it is important to detail its scope as precisely as possible. It needs to be clarified which pieces of information need to be provided at what exact time of the procurement procedure. The current wording suggests that all pieces of information referred to in Article 28 need to be provided upon submission of the tender or the request to participate in a public procurement procedure. However, a number of elements will not be available at such an early stage of the procurement procedure. Taking note of the explanations given by the Commission that the Regulation is not intended to create additional obligations as compared to

	the Procurement Directives, we consider it essential to provide more details on the notification obligation, especially with a view to its sequencing throughout the procurement procedure, and thereby clarifying its relation to the Directives and ensuring legal certainty. We therefore support the Commission's proposal for an implementing act concerning the form, content and procedural details of notifications pursuant to Article 28 provided for in Article 42 para. 1 lit. b, possibly complemented by explanative guidelines, to be drafted in close cooperation with the Member States. DE suggest that a distinction could be introduced between an initial notification containing information on the economic operator(s) acting as bidder(s) and a subsequent notification including information on subcontractors and suppliers. ES (Comments): ES would welcome more clarity in the wording of this article. In particular, it should be clarified: - whether the request by the COM, when a notification or declaration is incomplete, incorrect or contains misleading information, has a suspensive effect. - The definition of the concept "irregular tender", that should include a warning that it is not the same as the definition given in Article 26(4)(b)(2) of the 2014/24 Directive.
(2) 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	EE (Drafting):

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~~**20**% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.**	(2) 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~~**2025**% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.** EE (Comments): Since many MS-s were in the opinion that the decrease from 30 to 20% is problematic, appropriate compromise could be 25%. HR (Comments): What is the the correlation between the term "undertaking" and "economic operator". Namely, in para 1 the obligation to notify is on the undertaking, and here, para 2 mentions economic operators. The term economic operator is precisely defined in public procurement directives. For example, Art 2(1)(10) of the Directive 2014/24/EU defines economic operator as any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market. So what is the difference between undertaking and economic operator? If there is no

	difference in substance, we propose to change the term undertaking with economic operator thorough out the text of Chapter IV. Finally, we prefer 30% instead of 20%. CZ (Drafting): (2) The obligation to notify foreign financial contributions pursuant to para 1 ~~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~~**20**% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.** In the procurement documents, the contracting authority or the contracting entity shall require the indication of scope and value of the contract intended to be subcontracted to third parties and any proposed subcontractors. CZ (Comments): The term "*key elements*" is rather vague, these "key elements" should be defined in the regulation. In case the Art 71(2) of Directive 2014/24/EU is applicable adequately, it´s wording shall be used.

	IT (Drafting): (2) 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. **An undertaking participating in a group of economic operators must notify if its share exceed than 10%.** 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~~**20**% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.** IT (Comments): The proposed amendment is necessary to avoid that companies with minority stakes in a temporary grouping of companies have to notify foreign aid unlikely to have a significant impact on the tender. We welcome the proposal to reduce the subcontracting rate to 20%. It should be considered that subcontracting applies at the stage of execution of the contract. Therefore, the consequences of the notification obligation for these entities on the management of the contract are unclear. In particular, it should be clarified whether the time required for the

	assessment of the subcontractor interrupts the execution of the contract or whether it can continue. In the first case, there will be problems with compliance with the timing of execution (the contracts of the NRRP, for example, must be concluded by 2026), in the second case the work could be carried out with the help of a subcontractor considered unsuitable following the screening (in Italy the name of the subcontractor is known 20 days before). Furthermore, it should be clarified whether, following a negative judgment, the contract is terminated or whether a new subcontractor should be sought. In addition, on the criteria to identify the main subcontractor or supplier, the reference to "key element" should be removed because undermines the legal certainty. Finally, it should be clarified which cases are covered by the definition of Groups of economic operators. FI (Comments): **The proportion of subcontractors has been reduced from 30% to 20%. How do you justify this change? Does the Commission know what kind of impacts the amendment will have and how it will increase the number of suppliers to be examined?** AT (Drafting): (2) 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, as well as main subcontractors and main suppliers, that are already known in the procurement procedure. 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~~**2030**% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.** AT (Comments): The concept of Para 2 is not strictly aligned with the practice and concept of PP procedures according to the PP Directives: At the stage of a request to participate or of the submission of a tender the whole supply chain is not yet fixed. This can be done during the procedure and even after the conclusion of a contract; in the latter case an exchange within the supply chain can be possible as well. Since not all economic operators in the supply chain are already well established at this point in time, only those who are already known shall be part of the notification in Art 28. What are "key elements of the contract performance"? A clarification should be made in a Recital.

	AT wants to keep – at least at this stage – the 30%! Keep a leeway for the negotiations with the EP! HU (Drafting): The obligation to notify foreign financial contributions under this paragraph shall extend to economic operators **and** 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. **This obligation shall also extend to those main subcontractors and main suppliers who are known at the time of the tendering**. 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 value of the submitted tender, net of VAT. HU (Comments): We maintain our previous observation that the extension of the notification obligation to subcontractors and in particular suppliers is problematic and raises a number of practical issues that need to be addressed. In particular, it may be problematic to apply the obligation to the parties concerned in the case of framework agreements where the total value of the

	procurement is high but may cover a wide range of products and it is not yet possible to name all the suppliers of the goods to be procured in the future. There is also the question of whether all members of the supply chain should be covered by this obligation. The reduction of the percentage from 30% to 20% will amplify this problem. We note that our previous written proposal to limit the notification obligation to subcontractors and suppliers which are known at the time of the tender, has not been taken on board. PL (Comments): Is it correct to interpret this provision in this sense that the obligation to notify foreign subsidies, including to major subcontractors/subsuppliers, does not apply at the stage of contract execution when major subcontractors/subsuppliers are changed or only presented to the contracting authority at that stage? EU public procurement rules allow subcontractors to be disclosed to the contracting authority only at the stage of contract execution (not at the stage of tender or request for participation), if they are not known at the stage of proposal or tender; furthermore, the contracting authority may not require information on subcontractors/subsuppliers to be provided to it. Do the terms “main subcontractors” and “main suppliers” cover all entities on whose resources the economic operators may rely on the contract (entities on whose capacities relay economic operators - Article 63 of Directive 2014/24/ EU), or only a subcategory of such entities, which

	qualify as "main subcontractors" or "main suppliers"? If the notification obligation were to apply to all "entities on whose capacities relay economic operator", an appropriate provision would be needed in this regard. SE (Drafting): (2) 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~~**23**~~**30**~~% of ~~the estimated value of the contract~~ **the value of the submitted tender, net of VAT.** SE (Comments): SE does not agree with the reduced threshold. The article is also problematic in other aspects. This chapter will not cover all involved parties since they do not all need to be known to submit a

	tender. The public procurement directives do not require subcontractors to be specified at the time of the tendering. What is the relation to article 71 Directive 2014/24/EU? This must be clarified. RO (Comments): RO supports the modification. NL (Comments): **NL:** In the International Procurement Instrument this threshold is currently set at 15%. It seems convenient to align this percentage in the present Regulation. We notice that the first round of written comment gave rise to multiple questions on the level of the proposed threshold. Can the presidency clarify why the threshold for subcontractors is lowered and why 20% is proposed instead of alignment with IPI? Parallel to the comments of other member states in Working Party (February 21), NL wants to emphasize that subcontractors might also be contracted in a later stage: after the award of the contract. This is a serious risk for circumvention. To prevent opportunism, the Commission may require ex-post reporting (i.e. simple notification) of subcontractors in case they appear (after the award) responsible for more than [the subcontractor threshold]% of the contract value. In these situations the provisions from chapter 2 may be applied. The meaning of 'key elements' requires more clarification. In comparison in the Council's position on the IPI the following phrase was added: unless that person or entity is necessary for fulfilling the majority of at least one of the selection criteria in a procurement procedure.

	DE (Drafting): 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**20**% of the estimated value of the contract **the value of the submitted tender, net of VAT. The initial notification according to paragraph 1 of this article does not need to contain any information on main subcontractors and main suppliers.** DE (Comments): DE understands that for reasons of avoiding circumvention, the notification shall include financial contributions to important subcontractors. However, since the terms *"main subcontractor"* and *"main supplier*" do not appear in the Procurement Directives, DE considers that they should be further refined by more detailed definitions.

	DE has a scrutiny reservation regarding the reduction of the threshold for being considered *"main"* subcontractor or supplier. The assessment largely depends on the details of the how such notification obligation will be designed. ES (Comments): In order to ensure predictability and legal certainty, a clarification should be included in the wording, explaining whether the text refers only to first-tier subcontractors or whether it extends to the whole chain of subcontractors. In this sense, ES considers that controlling the whole chain of subcontractors may give rise to some practical problems of applicability. ES would welcome an objective definition of "main subcontractors" or "main suppliers", in quantitative terms, as a more ambiguous definition such as the current one (they shall be deemed to be main where their participation ensures key element of the contracts) could bring some difficulties to the assessment. Besides, the extension of the scope resulting from the reducing from 30% to 20% to the value of the submitted tender could be further discussed in order to ensure a right balance between the assessment of most distorting foreign subsidies and the right level of administrative burdens. ES considers that a specific provision regarding procedures where the main subcontractors or main suppliers are unknown at the time of the notification or change during the procedure could be included.

	ES would welcome clarification regarding the extent of the concerned economic operator's responsibility in procedures where incorrect, incomplete or misleading information is provided by main subcontractors and/or suppliers.
(3) For groups of economic operators, main subcontractors and main suppliers, the lead economic operator shall ensure notification.	HR (Comments): Difference between undertaking and economic operator?! LU (Drafting): (3) For groups of economic operators, main subcontractors and main suppliers, the lead economic operator shall ensure notification **or declaration**. LU (Comments): For the sake of coherence paragraphs 3, 4 and 5 should not be limited to notifications and also take into consideration declarations. AT (Drafting):

	~~(3) For groups of economic operators, main subcontractors and main suppliers, the lead economic operator shall ensure notification.~~ AT (Comments): If the notification needs to be included in the request to participate or in the tender as suggested in para 1, it is clear, that the (group of) economic operator(s) submitting the request to participate or the tender has to ensure the validity of the information. Para 3 is therefore no longer needed. This would also solve the question, who the lead economic operator is as its definition is simply not necessary anymore. The obligation to include information about main subcontractors and main suppliers follows from para 2. Otherwise (if the change is not accepted): What is the definition of the "lead economic operator"? There is no "lead economic operator" in regard of "main subcontractors" or "main suppliers", because there is no contractual relationship between subcontractors/suppliers. Why should one of them be responsible for the notification and on which legal basis? During the PP procedure this is even more problematic because the names of subcontractors/suppliers (if they are even known at this stage) constitute a protected ("secret") information of the respective tenderer. To have a

	new obligation for a "lead" economic operator would just bring legal insecurity. NL (Comments): **NL:** The meaning of 'lead operator' requires more clarification in this article. NL would like to see similar terminology as in the EU public procurement directives DE (Drafting): For groups of economic operators, main subcontractors and main suppliers, the lead economic operator shall ensure notification. **Financial contributions received by main subcontractors and main suppliers shall be notified in due time after they have been designated in accordance with the obligations set out in Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU.** DE (Comments): Clarification that the Regulation does not stipulate any additional obligations for contracting authorities / entities to require bidders to name their subcontractors as compared to the Procurement Directives.

(4) The contracting authority or the contracting entity shall transfer the notification to the Commission without delay.	HR (Comments): How will this provision work in practice? Will CION have a dedicated email address or will there be a possibility for a API through TED? Since this is a Regulation, does this provision (if it stays as is) allow MS to oblige contracting authorities/entities law to notify also national body responsible for public procurement policy? CZ (Drafting): The contracting authority or the contracting entity shall transfer the notification or declaration or information that the undertaking concerned has not submitted the notification or declaration even within the additional five-day time limit, including documents proving this fact (by means of a prescribed electronic tool, if created) to the Commission without delay. CZ (Comments): We suggest that the contracting authority or the contracting entity shall transfer not only the notification of possible foreign subsidy to the Commission but also the declaration or the information that the

	undertaking did not provide the required information so that the EC can take steps pursuant to this regulation. In order to make the whole process as efficient as possible, we suggest an electronic tool is created through which the necessary information for a specific public contract could be exchanged between the Commission, undertakings concerned and the contracting authority. LU (Drafting): (4) The contracting authority or the contracting entity shall transfer the notification **or declaration** to the Commission without delay. PL (Drafting): ~~(4) The contracting authority or the contracting entity shall transfer the notification to the Commission without delay.~~ PL (Comments): See our comment to Article 28 (1). SE (Comments):

	It must be clear that the point in time is in line with public procurement directives so that notifications are to be transferred after the tender process closes. NL (Comments): **NL:** As mentioned in Working Party (February 21), direct contact between the Commission and the contracting authorities is uncommon. NLD believes it is important that member states maintain an overview of the communication with the Commission. This aspect is also taken into account in the Council's position on the IPI. NLD suggests to organize a procedure where member states serve as an intermediary and suggests to make use of existing possibilities like Tender Electronic Daily (TED). We therefore suggest to examine to what extent the eForms is able to offer a convenient solution. ES (Comments): ES considers that the contracting authority or the contracting entity could also transfer to the COM all those declarations received in order to ensure the applicability of article 28(1a). ES would welcome a specific provision for a dedicated channel for notifications in order to minimise administrative burdens to contracting authorities.
	AT

	(Drafting): (4a) In a competitive procedure with negotiation, an innovation partnership or a competitive dialogue the contracting authority or the contracting entity shall transfer a notification that is part of the request to participate or the initial tender to the Commission without delay. A notification that is part of a tender submitted at a later stage of the procurement procedure is not to be transferred to the Commission unless the notification has been changed or a tender has been substantively modified. (4b) In any procurement procedure, once the Commission decided not to initiate an in-depth investigation according to Article 29 (3) or issues a decision according to Article 30 (3) regarding a specific undertaking, no further notifications from this undertaking need to be transferred to the Commission unless the notification has been changed. AT (Comments): Art 28 does not clearly distinguish between the submission of a tender and the request to participate; in para 1 it just mentions both next to each other. This raises several questions: Is it up to the economic operator to decide when to submit the required information (for example: can the tenderer in a restricted procedure decide to submit the information only together with the tender; can the tenderer decide to submit the information only at the last stage of a negotiated procedure together with the last and final offer; or does it repeatedly have to submit the information)? To address those questions, AT would like to propose two new paragraphs, that are based on the following ideas:

	• A candidate/bidder has to submit a notification or a declaration with a request to participate and with – every – offer (para 1). • As a general rule a CA/CE has to transfer a notification to the COM every time (para 4). • New: In a multi-stage procedure (restricted proc., negotiated proc., innovation partnership, competitive dialogue) a notification has to be – typically – submitted to the COM at the submission of the request to participate and with the initial tender, but not with every subsequent tender. • New: If the COM reaches a result regarding a specific undertaking, that no further action is needed, no further notifications regarding this undertaking are necessary. (As the COM laid out in the CWG on 21.2.22 it might be the case, that an assessment is already possible with a request to participate because it could be no relevant subsidy at all; no further notification shall be necessary here). • In any case, if the notification was changed subsequently, it shall be forwarded to the COM (this would cover a situation for example, where a new subcontractor, who received financial contributions, is affected). • On the other hand, a change in a tender shall only result in a new notification to the COM if the change was substantial; typical changes of offers in a negotiated procedure shall not trigger a new investigation by the COM. Obviously, a "substantial" change is a vague term at first, so it needs to be clearly explained in a recital or even the text needs to be supplemented with examples.
(5) 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.	EE (Drafting): (5) 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. EE (Comments): Please see explanation in modification concerning art 6 (1). HR (Comments): Difference between undertaking and economic operator?! IT (Comments): It is necessary to specify a period beyond which undertakings which do not submit the information or declarations requested by the contracting authority are excluded and the ranking is scrolled without changing it. LU (Drafting): (5) Where the undertaking, economic operators or groups of economic operators referred to in paragraph**s** 1 **and 2** fail to notify a foreign financial contribution, or where such a notification **or declaration** is not transferred to the Commission, the Commission may initiate a review.

	PL (Drafting): (5) 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. PL (Comments): See our comment to Article 28 (1). ES (Comments): In order to ensure consistency within this chapter, a clarification about the differences between the concept of "economic operator" and "undertaking" would be welcomed. ES would welcome a reference about whether this review is the preliminary review of Article 8, or if it refers to different procedure.
(6) 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	EE (Drafting):

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 **and is subject to the provisions set out in Chapter 4 of this Regulation**.	(6) Where the Commission suspects that an ~~undertaking~~ economic operator 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~~ economic operator 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 **and is subject to the provisions set out in Chapter 4 of this Regulation**. EE (Comments): Please see explanation in modification concerning art 6 (1). HR (Comments): How will the time limits (30/150 days) be calculated in this case? When will the time limit start? CZ (Drafting): (6) 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 where the estimated value of reviewed public contract or framework agreement is lower than EUR 250 million, but at the same time the value of the combined aggregate financial contributions granted from third countries in this period is equal to or greater than EUR 5 million ~~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 **and is subject to the provisions set out in Chapter 4 of this Regulation.** CZ (Comments): We suggest adjusting the possibility for the Commission to request notification of foreign financial contributions received by the undertaking concerned, in line with Article 3 (2) of this Regulation. IT (Drafting):

	(6) 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 **and is subject to the provisions set out in Chapter 4 of this Regulation**. IT (Comments): As for Art.19.5, it is necessary to clarify the criteria on which the "suspect" of the EC can be based in order to ensure legal certainty LU (Drafting): (6) Where the Commission **has reasonable grounds to** suspect~~s~~ **a distortion on the internal market as a result of** ~~that~~ an undertaking ~~may have~~**having** 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 **and is subject to the provisions set out in Chapter 4 of this Regulation**. LU (Comments): The possibility for the Commission to request a prior notification in a public procurement procedure falling below the notification threshold raises legal uncertainty for undertakings, at least until the public procurement has been attributed. The suggested proposal aims to better frame the Commission's room for manoeuvre while increasing predictability for undertakings. In our view the Commission should focus on possible distortions on the internal market which is the ultimate objective of this regulation and not on foreign subsidies that are legal and legitimate.

	AT (Comments): This provision does not contain any threshold. A potential ex ante blockage of the conclusion of any pp procedure regardless of its value is entirely unacceptable, because it makes the management of pp procedures impossible for CA/CE. Either there should be an ex post review and process, or there needs to be a de minimis threshold in this provision as well. The consequences of the ex officio investigation are unclear. If the COM asks for a notification shortly before the award of the contract, can the CA/CE nevertheless award the contract if the COM has – beside the request for notification – not taken any other action? What is the (legal) relationship (consequence) of para 1 last sentence in the context of para 6? What is the intention of the wording "or fall within the scope of para 5 of this Article" in the context of para 6? Is the intention, that the COM may initiate an ex officio procedure if financial contributions to subcontractors a.s.o. are not notified (in cases below the threshold of Art. 27 para 2? If yes, the wording must be improved. SE (Comments): The requests for notification can only be made in cases where the estimated value of that public contract or framework agreement is above EU public procurement thresholds, as clarified by the Commission at the

	working group 21 February 2022. This must be clarified within the proposal. These cases could fit better under an ex-officio procedure, taking into account the unclarities concerning timing and time limits for investigations in relation to these proposed cases. The time limits in article 29 apply from the time of a notification, not from the start of an evaluation process related to a public procurement procedure. The articles may need to be reviewed to make sure KOM review and MS evaluation can be conducted in parallel. RO (Comments): RO supports the completion of the text. NL (Comments): **NL:** It remains unclear how timelines from articles 29 (2) and 29 (4) apply in a procedure under paragraph 6. It is undesirable if they start right before the contract is to be awarded. We suggest that the timelines start at the moment hypothetical notification should have taken place and/or that the Commission has one week after the receipt of the tenders to intervene (according to the submitted written comments DE). Supplementary thresholds based on the value of the procurement should be introduced for the examination of ongoing procurements in accordance

	with Article 28 (6). At least the thresholds from the Public Procurement Directives should apply. In addition we want to emphasize that the timelines for smaller tenders may be even shorter. Hence, the risk and impact of delay due to a Commission's investigation increases for interventions under 28(6). We follow the reasoning of the Commission that formal subjective criteria for intervention might increase the burden of proof and introduce more complexity. However, more clarification on the parameters that determine whether the Commission intends to intervene in tenders below EUR 250 million in the recitals is helpful, also for contracting authorities. DE (Drafting): 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 **covered by Directive 2014/23/EU, Directive 2014/24/EU or Directive 2014/25/EU** 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~~ **If** the Commission has requested the notification of such a financial contribution **as early as one week after the time limit for the receipt of tenders provided for in the specific public procurement procedure**, it

	is deemed to be a notifiable foreign financial contribution in a public procurement procedure. **In any other cases, the provisions of chapter 2 shall apply accordingly without affecting the public procurement procedure in question.** DE (Comments): The first insertion aims at clarifying that only procurements above the EU thresholds are eligible for ad-hoc procedures. Furthermore, it should be considered to limit review proceedings under Chapter IV based on ad-hoc notification to a certain time period within the procurement procedure (e.g. time limit for the receipt of tenders) to avoid excessive delays. If the Commission asks for an ad-hoc notification after this time limit, the possible market distortion could still be assessed under the ex-officio instrument without any consequences on the individual procurement procedure. Given the intricate details we think that in terms of legal certainty it could be helpful to provide for the publication of further guidelines of the application by the Commission. ES (Comments): ES has some concerns regarding the proportionality and predictability of this provision. In this sense, the time limit in which the COM can request

	the notification should be limited, in order to avoid an excessive delay in procedures that fall out of the thresholds.
	IT (Drafting): **By [the date of application of this Regulation], the Commission shall publish guidance on the criteria to require such a notification.** IT (Comments): Additional guidance on the criteria to request an "ad hoc" notification should be provided as to ensure legal certainty and prevent the increase of litigation.

Article 29	HR (Comments): We welcome that the time limits have been reduced. DK (Comments): *In general we support the reduction of the timeframe for the investigations*
	BE (Comments): *The reduction in the time taken by the European Commission to process files, in Article 29, is a real step forward. The purpose of public procurement is to meet a need of the contracting authority. In some cases, the suspension of the public procurement procedure for a certain period of time can lead to major problems, in particular for the continuity of the public service.*
Procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures	IT (Comments): In order to avoid multiple notifications for the same company, an adequate control mechanism should be provided for. In the event of multiple reports, it is not clear what can happen to the verification activities and if the terms referred to in art. 29 stop or keep running. *The terms provided for by art. 29 affect the purposes of the PNRR.*

(1) Articles 8, 9 (1), (3) and (4), 11, 12, 13, 14, 16 and 22 shall apply to notified financial contributions in public procurement procedures.	AT (Comments): Why does Art. 7 (ex officio review) and 10 (interim measures) do not apply in the context of Chapter 4? Art. 7 and 28 para 6 do not exactly replicate each other. Why does Art. 15 not apply (plus additional provisions) – see Art. 32?
(2) The Commission shall carry out a preliminary review no later than ~~60~~ **30** days after it received the notification. **In duly justified cases, the Commission may once extend this time limit by 15 days**	FI (Comments): **We support shortening the deadlines. However, as regards art 44(3), we are rather hesitant concerning the possibility to extend the Commission's investigation timeline for public procurement cases.** LU (Comments): We support the lowering of the preliminary review period. AT (Comments): AT welcomes the shortening of the threshold of 60 days to 30 days.

	The current regulation only allows to extend the time limits in duly justified cases. How will these look like in practice? Will COM needs to notify this extension to the CA/CE? SE (Comments): Time limits should be close to the ones in chapter 3. It is positive that the possible extension period is defined. RO (Comments): RO supports the proposed modifications. NL (Drafting): (2) The Commission shall carry out a preliminary review no later than ~~60~~ **~~30~~ 20** days after it received the notification. **In duly justified cases, the Commission may once extend this time limit by 15 days** NL (Comments):

	NL: NLD emphasizes the importance of a highly qualitative investigation such as also discussed in Working Party (February 21). However, the cost and impact of delay of procurement procedures can be significant. Therefore, it is positive that the timelines were shortened in the first redraft. Still, we would suggest to further shorten the timelines to 20 and 65 days respectively. In addition, specific shorter and appropriate timelines should apply for the suggested 'fast track' procedure for procurement procedures with shorter timelines, which can be used in case of a state of urgency such as mentioned in Article 27(3) and 28(6) of Directive 2014/24/EU. (cross referencing to NLD comment on Article 27(3a)). More clarification is needed on how the standstill period interferes and intervenes with multistage procedures. Depending on further clarification on the moment of notification (i.e. the start of the investigation) according to Article 28(1), NLD could come to an amended position on the timelines. DE (Drafting): The Commission shall carry out a preliminary review no later than 30 days after it received the **initial** notification. In duly justified cases, the Commission may once extend this time limit by 15 days DE

	(Comments): See above Subsequent notifications (in particular as regards subcontractors or suppliers) are without relevance to time limits. ES (Comments): ES welcomes this new wording. Nevertheless, a closed list of reasons that would allow the COM to extend the time limit should be specified in this article. ES would appreciate a specification about when does this time limit starts to run, since Article 28(1a) and Article 28(4) stablish the reception of the notification in two different moments.
(3) The Commission shall decide whether to initiate 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.	EE (Drafting): (3) The Commission shall decide whether to initiate an in-depth investigation within the time limit for completing the preliminary review and inform the ~~undertaking~~ economic operator concerned and the contracting authority or the contracting entity without delay. EE (Comments):

	Please see explanation in modification concerning art 6 (1). CZ (Drafting): (3) The Commission shall decide whether to initiate or not an in-depth investigation within the time limit for completing the preliminary review and in any case inform the undertaking concerned, the third country concerned and the contracting authority or the contracting entity without delay. CZ (Comments): Regarding the proposed effect of the Commission decision, any such decision should be subject of announcement. The third country should be informed where possible.
(4) The Commission may adopt a decision closing the in-depth investigation no later than ~~200~~ **150** days after it received the notification. In ~~exceptional circumstances~~ **duly justified cases**, this time limit may be extended **for 30 days** after consultation with the concerned contracting authority or contracting entity.	HR (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than ~~200~~ **150** days after it received the notification. In ~~exceptional circumstances~~ **duly justified cases**, **the Commission may once extend this time limit by** ~~this time limit may be extended~~ **~~for~~ 30 days** after consultation with the concerned contracting authority or contracting entity.

	HR (Comments): We propose to align the text with para 2. CZ (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than ~~200~~ **150** days after it received the notification. In ~~exceptional circumstances~~ **duly justified cases**, this time limit may be extended **for 30 days** after consultation with the concerned contracting authority or contracting entity. Decision closing the in-depth investigation shall be announced to the undertaking concerned, the third country concerned and the contracting authority or the contracting entity without delay. CZ (Comments): As the review proceedings prevent the contracting authority or the contracting entity from awarding a contract, we suggest that the completion of the review is announced to them without delay. The proposed or similar wording also covers situations where the investigation is closed sooner than in 150 days. IT (Drafting):

	The Commission may adopt a decision closing the in-depth investigation no later than ~~200 150~~ **90** days after it received the notification. In ~~exceptional circumstances~~ **duly justified cases**, this time limit may be extended **for 30 days** after consultation with the concerned contracting authority or contracting entity IT (Comments): In order to make the term uniform with that provided for mergers, we ask for the reduction to 90 days for the adoption of the decision closing the in-depth investigation LU (Comments): We support the lowering of the in-depth investigation period. AT (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than ~~200~~ **~~150~~ 100** days after it received the notification. In ~~exceptional circumstances~~ **duly justified cases**, this time

	limit may be once extended **for 30 days** after consultation with the concerned contracting authority or contracting entity. AT (Comments): The threshold of 150 days is still too long and must be shortened. The extension should be possible only once (like para 2). The time limit in Para 4 still reflects the general problem of the concept of Chapter 4: CA/CE struggle already now to have real competition in big projects (there can only be "one winner", the non-successful competitors will have to bear their own – significant – expenses for the participation). Therefore, it is of utmost importance for CA/CE that their candidates and tenderers stay in the competition but also that only suitable candidates are selected for the bidding process. If it is unsure if economic operators can stay in the process (for ex.: the COM opens a preliminary review after the notification of a request to participate or the COM follows up with an in-depth investigation in parallel to a negotiation process) the CA/CE is in a very difficult situation because it needs legal security. It is most likely that CA/CE in such situations 1) put the procedure on hold (see in this regard Art. 31, which provides, that after the elapse of the delays of Art. 29 the contract may be awarded to the undertaking concerned) or 2) try to

	eliminate the respective undertaking. Doing the latter reduces the competition (maybe resulting in a single sourcing situation/ negotiation) or may have the effect (if the investigation is closed) that not the best value for money offer is selected (which in cases above 250 Mio € results in wasting a lot of public money). Furthermore, the exclusion of the tenderer will most likely be challenged; therefore, additional delays and costs will be caused. HU (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than **90 days** after it received the notification. In duly justified cases, this time limit may be extended for 30 days after consultation with the concerned contracting authority or contracting entity. HU (Comments): We agree with the direction of reducing the deadline, but in our view 150 days is still too long and therefore the Commission's procedure may have a negative impact on the retention of bidders and the willingness to bid. We suggest that instead of 150 days, 90 days (or perhaps 120 days may

	still be acceptable to us) should be considered, with the possibility of an extension. PL (Comments): PL still considers the deadline for in-depth investigation as too long. In our opinion the time limit for the in-depth investigation should be further reduced to 90 days. SE (Comments): Time limits should be close to the ones in chapter 3. It is positive that the possible extension period is defined. RO (Comments): RO supports the proposed change, but considers that the deadline is still too long and can lead to delays in awarding the contracts. NL (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than ~~200~~ ~~150~~ 65 days after it received the

	notification. In ~~exceptional circumstances~~ **duly justified cases**, this time limit may be extended **for 30 days** after consultation with the concerned contracting authority or contracting entity. DE (Drafting): (4) The Commission may adopt a decision closing the in-depth investigation no later than 150 days after it received the **initial** notification. In exceptional circumstances ~~**duly justified cases**~~**,** this time limit may be extended for 30 days after consultation with the concerned contracting authority or contracting entity, **especially in cases where there are reasonable indications that an economic operator uses suppliers or subcontractors to dissimulate the existence of foreign subsidies**. DE (Comments): DE welcomes the shortening of the deadlines as per the PCY compromise. It should be explored whether and to what extent deadlines can be further shortened, including the possibility of differentiating between the applicable procurement procedures in the individual case and other relevant factors. Examples should be provided in which cases an extension of time limits could apply.

	ES (Comments): ES welcomes this new wording. Nevertheless, a closed list of reasons that would allow the COM to extend the time limit should be specified in this article. ES would appreciate a specification about when does this time limit starts to run, since Article 28(1a) and Article 28(4) stablish the reception of the notification in two different moments.
	AT (Drafting): (5) In case a procurement procedure is conducted according to Article 27(3) or 28(6) of Directive 2014/24/EU or Article 45(3) of Directive 2014/25/EU the Commission shall carry out a preliminary review no later than 15 days after it received the notification and may adopt a decision closing the in-depth investigation no later than 60 days after it received the notification. AT (Comments): The time limits do not yet take into account, that Art. 27 para 3 or Art. 28 para 6 Dir 2014/24/EU provide for very short time limits in case of urgent procurements. Time limits laid down in this Article would make it impossible for CA/CEs to conduct procedures in case of urgency that do not yet allow for a negotiated procedure without prior publication ("extreme urgency").

	The shortened time limits for the COM take the urgency into account while the applicability of chapter 4 is maintained. Therefore, AT considers that the suggested paragraph is well-balanced. Once again see TED Nr. 2021/S 151-401747, open procedure to conclude a framework agreement; COVID-Tests; above € 400 Mio. DE (Drafting): **(NEW): In cases of Article ~~29~~ 28 (6), the time limits referred to in paragraphs 2 and 5 start to run from the date the Commission should have received the initial notification according to Article 28 (1). The Commission shall inform the undertaking of this date.**

Article 30	HR (Comments): *It is not clear how will legal remedies in public procurement procedures and Remedies directives correlate to these provisions? What will happen if ECJ annuls CION decision not to award contract to certain economic operator that was then excluded from the procedure? Who will be liable for damages? Additionally, what will happen to CION investigation procedure if, after submitting the notification to CION, contracting authority/entity decide to cancel the public procurement procedure? Will it be also cancelled? Will the decision still be adopted? We believe it should be clarified in the text.*
Commission decisions	
(1) 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).- **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**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.	EE (Drafting): (1) Where, after an in-depth investigation, the Commission finds that an ~~undertaking~~ economic operator benefits from a foreign subsidy which distorts the internal market pursuant to Articles 3 to 5, and where the ~~undertaking~~ economic operator 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).- **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**The assessment under Article 5 shall not result in a modification of the initial tender submitted by the ~~undertaking~~ economic operator that is incompatible with Union law.

	EE (Comments): Please see explanation in modification concerning art 6 (1). HR (Drafting): (1) 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). **~~Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).~~**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. HR (Comments): We propose to delete the newly added sentence on advisory procedure since it is duplication. The same sentence is already added to Art 9(3).

	AT (Drafting): (1) 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).– **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).** 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. AT (Comments): It should be clarified when the investigation happens; para 1 suggests that there is an assumption of an already existing initial tender. However, no tender may have been submitted yet (in case of two-stage procedures; see Art. 28 para 1: notify when requesting to participate). The term "initial" only refers to the first offer in procurement procedures with multiple stages and multiple offers; in the light of the above made suggestions, the term "initial" must be deleted.

	Can the COM explain what kind of "commitments" it thinks of (which do not alter the tender contrary to the PP Directives and basic principles of Union Law)? It has been settled that Chapter 1, including Art. 6, is applicable: can the COM elaborate which commitments or redressive measures can – theoretically – be applied in the context of PP procedures bearing in mind the jurisprudence of the ECJ about equal treatment, prohibition to modify tenders in open and negotiated procedures a.s.o.? HU (Drafting): (1) 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. HU (Comments): We request to clarify why the advisory committee's procedure referred to in Article 43(2) of Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, as referred

	to in Article 4 of that Regulation, is necessary such a committee should be involved in the decisions to be taken by the Commission. The impact assessment study accompanying the draft regulation foresees a significant human resource requirement for the operation of the mechanisms under the regulation, so we do not see the point of the proposal. Furthermore, by analogy with the draft IPI Regulation, we think that it would be worthwhile to install such a task in an already existing expert committee, if it is necessary at all. RO (Comments): RO supports the completion of the text. NL (Comments): **NL:** For the advisory procedure, we refer to the written comments that will be made on art. 43(2) on the importance of objective and politically independent decision-making for individual cases. DE (Drafting): (1) Where, after an in-depth investigation, the Commission finds that an undertaking benefits from a foreign subsidy which distorts the ~~internal market pursuant~~ **public procurement procedure in question taking into account the aspects referred to in** 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). Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2). 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. DE (Comments): DE understands that, for the purpose of chapter 4, the distortion of the internal market is assessed with regard to the specific procurement procedure and is closely linked to the notion of an unduly advantageous tender. According to DE's understanding the assessment is solely based on possible distortions in the specific procurement procedure while the wording of Article 30 implies an assessment in relation to the overall internal market. For the sake of clarity, DE would suggest aligning the wording with Article 26. In this context, it is not clear for DE, how the Commission will make use of the possibility for commitments and carry out the balancing test, given that its assessment is limited to distortions in the individual procurement procedure. It is difficult to think of a commitment that fully and effectively removes the distortion of the internal market, but does not alter the tender (e.g. do not affect the price offered or change any explicit conditions of the tender). While, in general, we welcome that – in line with the procurement directives – the tender of the undertaking concerned may not be altered by the commitments in the decision. We

	imagine however that this may severely limit the potential commitments in the decision. We would also like to point out that the procurement directives do not exclude modifications of an "initial offer", especially in procedures with negotiation. Overall, there is a general need to better target Article 30 at the specific characteristics of the Commission's assessment in procurement procedures. ES (Comments): ES welcomes this new wording and the involvement of MS within the decision-making procedures in this chapter.
(2) Where the undertaking concerned does not offer commitments or where the Commission 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"). **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**	EE (Drafting): (2) Where the ~~undertaking~~ economic operator concerned does not offer commitments or where the Commission 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~~ economic operator concerned ("decision prohibiting the award of the contract"). **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).** EE (Comments): Please see explanation in modification concerning art 6 (1).

	CZ (Drafting): (2) Where the undertaking concerned does not offer commitments or where the Commission considers that the commitments referred to in paragraph 1 are neither appropriate nor sufficient to fully and effectively remove the distortion, or the case referred to in Article 28 (1) occurs, it shall adopt a decision prohibiting the award of the contract to the undertaking concerned ("decision prohibiting the award of the contract"). Once the Commission has adopted a decision prohibiting the award of the contract, the undertaking concerned shall no longer be a participant in the public procurement procedure. It does not require the contracting authority or the contracting entity to take any action to achieve such a termination of participation of the undertaking concerned. Such a decision is not an act of the contracting authority or the contracting entity but of the Commission and it is not allowed to use any means of defence under Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU against it; in relation to such an undertaking, the contracting authority or contracting entity is not obliged to fulfil its obligations stipulated in above-mentioned Directives. **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**

	CZ (Comments): The Commission decision under Article 30 (2) must be final in the sense mentioned bellow. It is necessary to exclude the possibility that the contracting authority's action or practice consisting in not treating the undertaking concerned as a participant in the public procurement procedure, respecting the Commission decision under Article 30 (2), is subject to national review. The undertaking concerned could defend itself against the Commission decision by bringing an action before the General Court. If the Commission decision is final, there will be no reason to review the actions of the contracting authority or the contracting entity in this regard, as the national authority would only refer to the Commission decision in its decision. Such a national review would be inefficient and would only prolong the tender process, usually for months. If the decision is not final, it could be challenged by arguments of the undertaking concerned. This would lead to a further significant prolongation of the public procurement procedure. It needs to be clarified / adjusted whether an action against the Commission decision under Article 30 (2) brought before the General Court would have automatic suspensive effect, whether suspensive effect may be granted to such an action by the General Court and whether suspension as an interim measure may be ordered by the General Court.

	We believe that the action has suspensive effect with regard to the possibility of further progress in the public procurement procedure IT (Comments): It is necessary to clarify which consequences could there be for the undertaking and the contracting authorities in case of participation in another call for tenders by an undertaking already subject to a decision pursuant to pr.2. In order to avoid litigation, it should be made clear whether, in the case of a group of economic operators, the "decision prohibiting the award of the contract" involves only the undertaking participating in the grouping or the group as a whole. It should be provided for the extension of the decision prohibiting the award of the contract to other contracts in which the undertaking concerned participates. This is in order to avoid the risk of disputes arising from the participation of the undertaking concerned in other tenders. A white or a black list of economic operators receiving foreign subsidies could be provided for AT (Comments): After the last CWG on 21.2.22 AT understands this provision in the following way: the decision of the COM is directed at the CA/CE and has to be “transposed” by it – for example with the rejection of the tender or the exclusion of the tender; the “technicality” doesn’t matter to the

	Regulation, as long as the contract is not awarded to the undertaking concerned. Since the COM does not want to "formally" interfere in the pp procedure by rejecting the tender in the decision itself (although this is the practical effect), the relationship to the Remedies Directives needs to be clarified, as well as the consequence within the system of the PP Directives. AT suggests to add a new paragraph for this (see para 4 below). HU (Drafting): Where the undertaking concerned does not offer commitments or where the Commission 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"). HU (Comments): Same as above. SE

	(Comments): It is of outmost importance that the procurement of certain services or supplies is still possible in case of a decision prohibiting the award of a contract. Important to solve the risk of a prohibition of award in case of just one possible tender. Where only one tender is submitted, there is a risk that another competitive procedure may end with the same outcome. Therefore a decision prohibiting the award of contract is disproportionate and inappropriate. Exemptions under article 27 is SEs proposed solution at this moment. RO (Comments): RO supports the completion of the text. NL (Comments): **NL:** In the case of only one bidder, the continuity of the procurement procedure might be threatened. For two bidders there is a risk of a disproportional price increase. We suggest to explicitly pay attention to this situation. Illustratively: such a situation can be taken into account in the balancing test. For the advisory procedure, we refer to the written comments that will be made on art. 43(2) on the importance of objective and politically independent decision-making for individual cases.

	DE (Comments): We still consider it necessary to find a solution in the regulation that precludes the risk of the failure of the award procedure in cases where only one offer that fulfils the requirements is available (e.g. in cases falling under Article 32 (2) b) of Directive 2014/24/EU). ES (Comments): ES welcomes this new wording and the involvement of MS within the decision-making procedures in this chapter. ES considers that possibility for the contracting authority or contracting entity to award the contract when there is only one tenderer or when, despite competition, only one tenderer meets the contract technical requirements could be further discussed.
	CZ (Drafting): (2a)When the Commission decides pursuant to Article 30(2) to prohibit the award of the contract to the undertaking concerned due to foreign financial contributions received by the undertaking's subcontractor, the contracting authority or contracting entity may invite the undertaking concerned to replace this subcontractor. When a tender or a request to participate in a public procurement procedure is submitted by a group of economic operators, including temporary associations, and the

	Commission decides in accordance with Article 30(2) to prohibit the award of the contract to the group of economic operators due to foreign financial contributions received by a participant in that group, it is not allowed to replace that participant. CZ (Comments): In order to allow the widest possible competition, we propose, in a situation where the Commission has decided to prohibit the award of the contract to the undertaking concerned due to foreign financial contributions received by the undertaking's subcontractor, that such an undertaking should be allowed to replace that subcontractor. This possibility of replacing the subcontractor should be left to the discretion of the contracting authority. However, the new subcontractor should also be subject to the obligation to either notify financial contributions or confirm in a declaration that it did not receive any foreign financial pursuant to Article 28. As a result, there may be further delays in the public procurement procedure in the light of further review by the Commission. Therefore, we believe that the appropriate option is leaving the possibility of replacing the original subcontractor with a new subcontractor at the discretion of the contracting authority. We also suggest that if the Commission decision prohibits the award of the contract to a group of economic operators due to foreign financial contributions received by a participant in that group, the group of economic operators is not allowed to replace that participant.
(3) 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). **Those**	EE

implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	(Drafting): (3) Where, after an in-depth investigation, the Commission does not find that an ~~undertaking~~ economic operator benefits from a foreign subsidy which distorts the internal market, it shall adopt a decision pursuant to Article 9(4). **Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).** EE (Comments): Please see explanation in modification concerning art 6 (1). HR (Drafting): 3) 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). ~~**Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**~~ HR (Comments): We propose to delete the newly added sentence on advisory procedure since it is duplication. The same sentence is already added to Art 9(4).

	HU (Drafting): 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). HU (Comments): Same as above. RO (Comments): RO supports the completion of the text. NL (Comments): **NL:** For the advisory procedure, we refer to the written comments that will be made on art. 43(2) on the importance of objective and politically independent decision-making for individual cases. ES (Comments):

	ES welcomes this new wording and the involvement of MS within the decision-making procedures in this chapter.
	AT (Drafting): (4) In a review procedure according to Article 2 (1) b of Directive 89/665/EEC or Directive 92/13/EEC regarding a decision taken by a contracting authority or contracting entity taking into account any decision by the Commission adopted under this Article, Article 2 (1) a and c of Directive 89/665/EEC and Article 2 (1) a, c and d of Directive 92/13/EEC shall not be applicable as far as the decision by the Commission adopted under this Article is relevant for the review of the decision taken by a contracting authority or contracting entity. AT (Comments): AT understands the current proposal insofar, as undertakings affected by a decision of the COM according to this article would have in principal two paths to "challenge" the decision by the COM. The second path (see below) would cause significant problems for MS and its CA/CE. **First path**: An undertaking affected by a decision of the COM under this article can challenge this decision in court according to Art 263 TFEU as the legal service correctly pointed out in the CWG on 21.2.22. The undertaking shall clearly have legal standing. In that proceeding interim measures are obviously possible. This enables the undertaking to challenge the decision directly and protect its rights under Art 47 of the Charta of Fundamental Rights.

	Second path: Since the decision by the COM has to be "transposed" by the CA/CE (see above to para 2), the subsequent decision taken by the CA/CE would obviously be subject to a review procedure according to the Directive 89/665/EC or Directive 92/13/EC. For example: the undertaking affected by the COM decision could challenge the contract award decision to the next best tender (in line with Art 31 para 4; also see Art 2a of Directive 89/665/EEC) and argue that the decision by the COM is in violation of this regulation or the treaties. If a review body in a procedure according to Art 2 para 1 letter b of those directives has doubts about the validity of the COM decision, it has to (!) refer this question to the ECJ according to Art 267 TFEU. Since Member States have some (although limited) leeway on transposing Art 2 para 1 of Directive 89/665/EEC or Directive 92/13/EC, in principal two consequences are possible: First: If the review system of a MS provides, that a review procedures is typically connected with an interim measure according to Art. 2 para 1 letter a Directive 89/665/EEC, the pp procedure could be effectively stopped for years. The ECJ typically takes more than a year to decide in a preliminary ruling. Keep in mind that this would especially effect major infrastructure/energy projects! Second: On the contrary, if interim measure are not necessarily link to review procedures according to Art 2 para 1 letter b of Directive 89/665/EEC, the CA/CE might award the contract to the next best tender (in line with Art 31 para 4). A consequent ruling by the ECJ, that the COM decision was indeed invalid, would also lead to the invalidity of the decision by the CA/CE and/or the contract. Either way, this could result in (major) damages the CA/CE would have to pay to the undertaking as foreseen in the remedies directives (see Art 2 para 1 letter c of Directive 89/665/EEC). The fact alone, that the decision by the

	COM was invalid and led to the invalid decision by the CA/CE, would not stop damages under the remedies directives. For this reasons AT suggests to block the second path. The following additional reasons and the following intentions guided our proposal for paragraph 4: • It is new, that the COM directly "interferes" in a pp procedures with a decision of its own. • There shall be no negative effects for a CA/CE if the COM decision is in violation of this regulation or the treaties (e.g. a yearlong standstill of the pp procedure and/or damages paid by the CA/CE to the undertaking). • Para 4 would – only – block interim measures and damages according to the remedies directives. And – solely – as far, as the (validity of the) decision by the COM is subject in the proceedings. Other grounds to challenge the (same) CA/CE decision can lead to interim measures and/or damages as foreseen in the remedies directives. Obviously, the "first path" shown above would not be affected by para 4.

Article 31	
Evaluations in public procurement procedures involving a notification and suspension of award	CZ (Drafting): **Processes**~~Evaluations~~ in public procurement procedures involving a notification and suspension of award CZ (Comments): *This article lays down the conditions not only for evaluation. We suggest the wording to be generalised.*
(1) 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).	CZ (Drafting): (1) During the preliminary review and the in-depth investigation, the contracting authority or the contracting entity may continue in the procurement procedure.~~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). CZ (Comments):

	The text "*may continue to evaluate tenders*" has been replaced with a more general wording to make it clear that the contracting authority may take any action (e.g. exclusion of other suppliers, handling objections, etc.). AT (Drafting): (1) During the preliminary review and the in-depth investigation, the evaluation of the requests to participate or the 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).~~ AT (Comments): In a multistage procedure also the evaluation of the requests to participate shall continue. The second sentence has to be deleted, because if there has been a declaration by the "best" bidder, the award may happen anyway (see additional reasoning at para 3). HU (Comments):

	Our comment on the possibility of concluding the contract with a tenderer which is not under evaluation has not been taken on board, however the shortening of the evaluation deadline in itself extenuates the problem raised. DE (Drafting): (1) 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).~~ DE (Comments): DE welcomes the principle that the review carried out by the Commission and the procurement procedure run in parallel. In this context, DE would welcome an adjustment of the text providing for the possibility to award contracts even before the expiry of the 60 days time limit to an undertaking having submitted a declaration under Article 28 where the latter has in any case presented the economically most advantageous tender. This issue becomes particularly important in cases of ad hoc notifications requested by the Commission in the course of a procurement procedure. The same is true for cases in which the Commission takes the decision not to initiate an in-depth review before the 30 days time limit has elapsed.

(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 decision within this time limit, the contract may be awarded to any undertaking, including the one submitting the notification.	EE (Drafting): (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~~ economic operator 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 decision within this time limit, the contract may be awarded to any ~~undertaking~~economic operator, including the one submitting the notification. EE (Comments): Please see explanation in modification concerning art 6 (1). CZ (Drafting): (2) If a decision to open an in-depth investigation is taken pursuant to Article 29(3), the contracting authority or the contracting entity shall not award 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 decision within this time limit, the contract

	may be awarded to any undertaking, including the one submitting the notification. CZ (Comments): Regarding the direct effect of the regulation, a direct ban addressed to the contracting authority should be put in place. IT (Comments): HU (Drafting): (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 decision within this time limit, the contract may be awarded to any undertaking, including the one submitting the notification. **In exceptional circumstances the contracting authority may award the contract to an undertaking submitting a notification under Article**

	28 before the time limit set in Article 29(4) elapses if it is justified for overriding reasons relating to the public interest. HU (Comments): We remark that our proposal to include a public interest exception has not been carried over. We suggest that there should be exceptions to the prohibition to award and conclude the contract for overriding reasons related to the public interest (e.g. in case it is necessary in the public interest, public order, public security or public health). We note that such an exception is also provided in the IPI regulation.
(3) 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.	EE (Drafting): (3) The contract may be awarded to an ~~undertaking~~ economic operator 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~~ economic operator in question has in any case submitted the most economically advantageous tender. EE (Comments): Please see explanation in modification concerning art 6 (1).

	HR (Comments): It is not clear what does "in any case" mean? What happens if there is only one tender submitted in public procurement procedure? Can contracting authority award a contract in such case despite CION decision? We propose a clarification in recitals with practical examples. IT (Comments): Paragraph 3 of Article 31 requires substantial clarifications. While par.1 and 2 lay down a suspensive effect on the award, par.3 provides for the possibility of awarding a contract before the expiry of the time limits or before the adoption of an EC decision if: 1. The undertaking has submitted a declaration pursuant to Article 28; 2. The undertaking has submitted the most economically advantageous tender. In this respect, it is necessary to clarify: • Does par.3 apply only in case of a declaration that you have not received foreign financial contributions in the previous three years or does it apply also in case of notified foreign subsidies received? • Could the Commission adopt a decision under Articles 30.1 and 30.2? if so, which are the consequences on the contract awarded under Article 31.3? • Which relation exists between Article 31.3 and Article 31.4 and what are the consequences for the award of a contract? Should an award under Article 31.3 be subsequently revoked if a negative decision is taken by the Commission? With which consequences on the

	responsibility of the contracting authorities and on the execution of the contracts? In conclusion: the provisions under Article 31 are unclear and give rise to serious concerns regarding legal certainty in the award of a tendering procedure, the responsibility of the authorities, disputes between contracting authorities and undertakings, and the timing of the execution of contracts. AT (Drafting): (3) 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(2) or (4) elapses only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender. AT (Comments): If a declaration has been submitted by an undertaking that has in any case submitted the most economically advantageous tender, also the preliminary review (Art. 29 para 2) must not be finished by the time the contract may be awarded.

	This would also benefit urgent procedures as laid down, for example, in Art. 27 para 3 Dir 2014/24/EU enormously. PL (Comments): With regard to paragraphs 3 and 4 it cannot be ruled out that, as a result of the application of these provisions, the Commission will issue a decision pursuant to Article 30 para. 2 (on the prohibition of awarding the contract), against an economic operator who made a false declaration in regard of foreign subsidies. From the perspective of the contracting authority such a situation should mean an obligation to withdraw from the contract and reopen the procedure. Meanwhile, the EU procurement directives do not provide for a basis for terminating the contract (or withdrawing from the contract) in such circumstances, and such an effect does not result from the provisions of the Regulation. Therefore should it be understood that the provision of para. 3 does not refer to the award of the contract (conclusion of the contract), but only to the selection of the offer of the contractor covered by the notification as the most advantageous, and the conclusion of a contract with such a contractor is still subject to the prohibition of awarding the contract under Article 31 para. 2? And if so, then how should it be understood in connection with the provision of Article 31 para. 3, the provision of Article 31 para. 5? SE (Drafting):

	(3) The contract may be awarded to an undertaking submitting a declaration that they did not receive any foreign financial contributions 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(24) elapses only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender. SE (Comments): It is important that it is clear that the wording aims at declarations opposite to notifications under article 28. Important that tenders not involving financial contributions can be the basis of awards without a time limit. NL (Drafting): (3) 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(2) or** 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. NL (Comments): **NL:** In this article or the corresponding recitals more clarity is needed about the investigation procedure in case the contract will be awarded according to this provision. Will the Commission cease the investigation? We encourage the provision that contracting authorities can award the contract in case the winner is not subject to the Commission's investigation. However, this provision should apply for both, the preliminary and in-depth investigation. This would prevent unnecessary delay of the procurement procedure. More clarification is needed on the notion of "in any case". DE (Drafting): (3) 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 limits laid down in Article 29(2) and (4) elapses only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender.

	DE (Comments): See above
(4) 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).	EE (Drafting): (4) Where the Commission issues a decision under Article 30(2) regarding the most economically advantageous tender, the contract may be awarded to the ~~undertaking~~ economic operator having submitted the next best tender not subject to a decision under Article 30(2). EE (Comments): Please see explanation in modification concerning art 6 (1). IT (Drafting): (4) 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). IT

	(Comments): The deletion is necessary to clarify that the provision shall apply to any award system and not only to the most economically advantageous offer. AT (Drafting): ~~(4) 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).~~ AT (Comments): AT maintains its position that para 4 is superfluous and should be deleted. Those are general principles, that already result from the PP Directives. The current wording would lead to legal insecurity. However a Recital could clarify this factual "consequence". SE (Comments): In line with the questions raised during the working group 21 February 2022, it must be clear how decisions can be appealed and what time frames

	that are envisaged before a contract to the next best tender can be awarded in case of a decision under article 30(2).
(5) 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.	EE (Drafting): (5) Where the Commission adopts a decision in accordance with Article 30(1) or (3), the contract may be awarded to any ~~undertaking~~ economic operator having submitted the most economically advantageous tender, including, as the case may be, the ~~undertaking~~economic operator(s) having submitted the notification under Article 28. EE (Comments): Please see explanation in modification concerning art 6 (1). AT (Drafting): ~~(5) 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.~~ AT

	(Comments): AT maintains its position that para 5 is superfluous and should be deleted. Those are general principles, that already result from the PP Directives. Could also be explained in a Recital.
(6) In all cases, the contracting authority or the contracting entity shall inform the Commission of any decision relating to the outcome of the public procurement procedure.	HR (Drafting): (6) In all cases, the contracting authority or the contracting entity shall inform the Commission of any decision relating to the outcome of the public procurement procedure **by sending a contract award notice**. HR (Comments): To increase efficiency, we propose that this notification is made via Contract award notice/ Result form as proscribed in COMMISSION IMPLEMENTING REGULATION (EU) 2019/1780 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 ('eForms'). CZ (Drafting):

	(6) In all cases, the contracting authority or the contracting entity shall inform the Commission of any decision relating to the outcome of the public procurement procedure. In case the contracting authority or the contracting entity cancels the procurement procedure or excludes the undertaking concerned from the procurement procedure, the Commission shall decide on closure of preliminary review or an in-depth review. CZ (Comments): We suggest that if the outcome of the public procurement procedure is its cancelation or the supplier concerned is excluded (based on exclusion grounds stipulated within the PP directives), the Commission investigation may be closed. AT (Drafting): (6) In all cases, the contracting authority or the contracting entity shall publish information about a notification in the contract award notice.~~inform the Commission of any decision relating to the outcome of the public procurement procedure.~~ AT (Comments): CA/CE are in any case required to publish the results of a PP procedure (see for ex. Art. 50 of Dir. 2014/24). The eForms should be used and if additional information is needed (not yet contained in Regulation

	2019/1780) the eForms Regulation should be amended accordingly (this should be stated in the recitals). What information does the COM want to know? For now, only the fact, that the pp procedure was in the scope of chapter 4 and that a notification has been submitted, comes to mind. Otherwise this is phrased too vaguely and broadly – what exactly is "any decision" relating to the outcome? What does the COM exactly want to know? Why not just ask the CA/CE to submit the results of the procedure (see Art. 84 of Dir. 2014/24/EU)? Also, any contact btw COM and CA/CE (and vice versa)must pass via the MS, so the MS has an idea of what is going on. Also there is no time frame. ES (Comments): ES would welcome further clarification as to whether the contracting authority or the contracting entity shall inform the Commission in all procedures (including those where the undertakings have only submitted a declaration that they did not receive any foreign subsidy), or only in those procedures where there has been a notification.
(7) 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.	EE (Drafting): (7) The principles governing public procurement, including proportionality, non-discrimination, equal treatment, and transparency, shall be observed as regards all ~~undertakings~~ economic operators

	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~~ economic operator concerned in a way that is contrary to those principles. EE (Comments): Please see explanation in modification concerning art 6 (1). Also, in the name of consistency, there is no need to use plural in this case. HR (Drafting): (7) 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 **Commission or the** contracting authority or the contracting entity treating the undertaking concerned in a way that is contrary to those principles. HR (Comments):

	It is not clear why only contracting authorities/entities must apply the principles mentioned. We propose to include CION also. AT (Drafting): (7) ~~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. AT (Comments): The first sentence is superfluous because already required by the PP Directives – it should therefore be deleted. The second sentence needs to be clarified: The CA/CE is required to adhere to Union basic principles – therefore any action required from CA/CE under this regulation (beside the obligation to notify) originates from the COM (request for commitments, request to submit information a.s.o.). What kind of situations are envisaged by the COM which are addressed by para 7 2nd sentence?

(8) 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.	HR (Drafting): ~~(8) 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.~~ HR (Comments): We propose to delete this paragraph since we do not see added value. Namely calculation of time limits is regulated by Council Regulation 1182/71. AT (Drafting): ~~(8) 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.~~ AT (Comments): This is just taking account of one particular case in terms of time limits; what about applying Regulation 1182/71? Why is the provision even needed?

Article 32	
Fines and periodic penalty payments applicable to financial contributions in the context of public procurement procedures	IT (Comments): *Consideration should be given to the application of a proportional principle and differentiation for SMEs.* DE (Comments): We understand that, pursuant to Article 28 para. 3, the "lead economic operator" shall ensure notification of financial contributions also with a view to its subcontractors and suppliers. In practice, the fulfilment of the obligation to provide accurate information will be contingent on the submission of relevant data by third parties. From DE's point of view, it should be clarified if and to what extent, as the case may be, the lead economic operator is to be held accountable for failures of its subcontractors and suppliers.
(1) The Commission may impose fines and periodic penalty payments as set out in Article 15.	
(2) In addition, the Commission may impose by decision on the undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding ~~business~~ **financial** year, where they	EE

intentionally or negligently supply incorrect or misleading information in a notification pursuant to Article 28 or supplement thereto;	(Drafting): (2) In addition, the Commission may impose by decision on the ~~undertakings~~ economic operator concerned fines not exceeding 1 % of their aggregate turnover in the preceding ~~business~~ **financial** year, where they intentionally or negligently supply incorrect or misleading information in a notification pursuant to Article 28 or supplement thereto; EE (Comments): Please see explanation in modification concerning art 6 (1). No need to use plural. AT (Comments): If an undertaking does not submit information or submits incomplete information it shall not be awarded the contract (obligatory exclusion from the PP procedure)! Why is it necessary to additionally impose a fine? Is this even allowed? It seems disproportionate to impose fines a.s.o. in situations where it is clear that the undertaking concerned fails to (fully) notify a subsidy but has no chance to be awarded the contract. In practice, it will be difficult in most cases to have figures on the "aggregate turnover" of undertakings from third countries. How will the Commission proceed if it cannot establish these figures? SE

	(Comments): SE welcomes a clarification that the turnover concerns worldwide, for clarity. RO (Comments): RO supports the proposed modification. NL (Drafting): (2) In addition, the Commission may impose by decision on the undertakings concerned fines not exceeding ~~1~~5 % of their aggregate worldwide turnover in the preceding ~~business~~ **financial** year, where they intentionally or negligently supply incorrect or misleading information in a notification pursuant to Article 28 or supplement thereto; NL (Comments): **NL:** With regard to the fines imposed: - NL believes the maximum percentage of the aggregate turnover should be increased, so as to increase the deterrent effect. The proposed 5% is in line with our suggested amendments for Article 15 in the previous round of comments.

	- Furthermore it should be clarified if the aggregate turnover is calculated on a worldwide basis. NL assumes that this is the case.
(3) The Commission may impose by decision on the undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding ~~business~~ **financial** year where they, intentionally or negligently, fail to notify a subsidy in accordance with Article 28 during the public procurement procedure.	EE (Drafting): (3) The Commission may impose by decision on the ~~undertakings~~ economic operator concerned fines not exceeding 10 % of their aggregate turnover in the preceding ~~business~~ **financial** year where they, intentionally or negligently, fail to notify a subsidy in accordance with Article 28 during the public procurement procedure. EE (Comments): Please see explanation in modification concerning art 6 (1). No need to use plural. AT (Comments): Same as para 2. RO (Comments): RO supports the proposed modification.

	NL (Drafting): (3) The Commission may impose by decision on the undertakings concerned fines not exceeding 10 % of their aggregate worldwide turnover in the preceding ~~business~~ **financial** year where they, intentionally or negligently, fail to notify a subsidy in accordance with Article 28 during the public procurement procedure. NL (Comments): **NL:** It should be clarified if the aggregate turnover is calculated on a worldwide basis. NL assumes that this is the case
CHAPTER 5: COMMON PROCEDURAL PROVISIONS	
Article 33	
Relation between procedures	
(1) A financial contribution notified in the context of a concentration under Article 19 **or in the context of a public procurement under Article 28** may be relevant and assessed again **under this Regulation** in relation to another economic activity.	
(2) A financial contribution ~~notified~~**assessed** in the context of ~~a public procurement~~**an ex officio** procedure **in relation to a specific economic**	

activity under ~~Article 28~~**Article 8 or Article 9** may- be relevant and assessed again **under this Regulation** in relation to another economic activity.	
Article 33a	
Communication by Member States and interested parties	
(1) Where a Member State is in possession of indications that a financial contribution may constitute a foreign subsidy distorting the internal market, it should communicate such evidence to the Commission. The Commission should not be bound by any obligation to initiate an investigation.	
(2) Where a natural or legal person, or any association, is in possession of indications that a financial contribution may constitute a foreign subsidy distorting the internal market, it should communicate, such evidence to the Commission. The Commission should not be bound by any obligation to initiate an investigation.	
Article 34	
Market investigation	
(1) Where the information available substantiates a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market, the Commission may conduct a market investigation into the particular sector, the particular type of economic activity or into the use of the subsidy instrument concerned. In the course of that market investigation, the Commission may request the undertakings or associations of undertakings concerned to supply the necessary	

information and may carry out the necessary inspections. The Commission may also request the Member State or third country concerned to supply information.	
(2) The Commission may publish a report on the results of its market investigation into particular sectors, particular types of economic activity or particular subsidy instruments and invite comments from interested parties.	
(3) The Commission may use the information obtained from such market investigations in the framework of procedures under this Regulation.	
(4) Articles 11, 12, 13 and 15 of this Regulation shall apply.	
Article 35	
Limitation periods	
(1) The powers of the Commission under ~~Article~~ **Articles 8 and** 9 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.	
(2) 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.	
(3) 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 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.	
(4) Each interruption shall start limitation period to run afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission	
(a) having having taken a decision pursuant to Article 8 or 9 in the instances set out in paragraph 1; or	
(b) having imposed a fine or a periodic penalty payment in the situation set out in paragraph 2.	
The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.	
Article 35a	
Anti-circumvention	

(1) An undertaking shall not in any way segment, divide, subdivide, fragment or split or any other way arrange financial operations or contracts through contractual, commercial, or any other means to circumvent the notification requirements laid down in Article 19(1) and (5), or Article 28(1) and (6).	
(2) The Commission may, when suspecting that an undertaking engaged in a practice laid down in paragraph 1, require such undertaking for any information that it deems necessary to determine whether the undertaking concerned engaged in the practices referred to in paragraph 1.	
(3) Where an undertaking circumvents or attempts to circumvent the notification requirements in Article 19(1) and (5) or Article 28(1) and (6) in a manner described in paragraph 1, the Commission shall initiate a review pursuant to Article 19(4) and Article 28(5) and may adopt measures pursuant to Article 25(3.a) and Article 32(3). Where a concentration has been implemented in breach of Article 19, it may adopt measures pursuant to Article 24(6) and (7), and fines pursuant to Article 25(3).	
Article 36	
Publication of decisions	
(1) The Commission shall publish a summary notice of the decisions adopted pursuant to Article 8(2).	
(2) The Commission shall publish the decisions adopted pursuant to Article 9(2), (3) and (4), Article 24(3), and Article 30(1), (2) and (3) in the Official Journal of the European Union.	

(3) When publishing summary notices and decisions, the Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information.	
Article 37	
Addressees of decisions	
(1) Decisions adopted pursuant to Articles 8, 9**, 10**, 15, 24(3), 25, 30(1) and 32 shall be addressed to the undertakings or to the association of undertakings concerned. The Commission shall notify the decision to the addressee without delay and shall give the addressee the opportunity to indicate to the Commission which information it considers to be confidential. The Commission shall provide the contracting authority or the contracting entity concerned with a copy of any Commission decision addressed to an undertaking participating in a public procurement procedure.	
(2) Decisions adopted pursuant to Article 30(2) and (3) shall be addressed to the contracting authority or the contracting entity concerned. The Commission shall provide the undertaking to which the award of the public contract is prohibited with a copy of that decision.	
Article 38	
Disclosure and rights of defence	
(1) The Commission shall, before adopting a decision pursuant to Articles 9, **10,** 15, **16,** 24(3~~) point (c~~), 25, 30(2) or 32 give the undertaking**,** concerned the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision.	

(2) The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations.	
Article 39	
Professional secrecy	
(1) Information acquired under this Regulation shall be used only for the purposes for which it was acquired**, unless the provider of the information agrees otherwise**.	
(2) The Commission, its officials and other persons working under its supervision shall not disclose information covered by the obligation of professional secrecy that they have acquired under this Regulation.	
(3) Paragraphs 1 and 2 shall not prevent publication of statistics and reports which do not contain information allowing to identify specific undertakings or associations of undertakings.	
Article 39a	
Confidentiality	
(1) Member States and the Commission shall ensure the protection of confidential information acquired in application of this Regulation in accordance with Union and the respective national law.	
(2) Member States and the Commission shall ensure that classified information provided or exchanged under this Regulation is not	

downgraded or declassified without the prior written consent of the originator.	
CHAPTER 6: RELATIONSHIP TO OTHER INSTRUMENTS	
Article 40	AT (Comments): *As regards Dir 2009/81 Art. 27 para 3 explicitly clarifies, that DFS is not applicable. However, the relationship to the International Procurement Instrument (IPI – Regulation) and to the PP Directives (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU) should also be addressed.*
Relationship to other instruments	
(1) 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 and Council Regulation (EC) No 139/2004.	
(2) 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.	
(3) This Regulation is without prejudice to the application of Regulation (EU) 2019/452 of the European Parliament and of the Council.	
(4) 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.	
(5) This Regulation takes precedence over Council Regulation (EEC) No 4057/86.	
(6) 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 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 4.	
(7) 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.	
CHAPTER 7: TRANSITIONAL AND FINAL PROVISIONS	
Article **40a**	
In accordance with Article 261 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has	

unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.	
Article 41	
~~Committee procedure for decisions~~	
~~Decisions pursuant to Articles 9~~**, 10, 16**~~, 24(3) and 30 shall be adopted in accordance with the advisory procedure referred to in Article 43(2).~~	
Article 42	
~~Committee procedure for implementing~~ **Implementing** acts	
(1) The Commission is empowered to adopt implementing acts concerning:	
(a) the form, content and procedural details of notifications of concentrations pursuant to Article 19**, taking utmost account of the goal of limiting administrative burden for notifying parties pursuant to Article 19 and Art 4 of Regulation (EC) No 139/2004**;	
(b) the form, content and procedural details of notifications of foreign financial contributions in public procurement procedures pursuant to Article 28;	
(c) details of the disclosure pursuant to Article 38;	
(d) the form**,** content and procedural details of transparency requirements;	

(e) detailed rules on the calculation of time limits;	
(f) the conditions and time limits for proposing commitments under Article 30;	
(g) detailed rules on the procedural steps referred to in Article 28, 29, 30 and 31 concerning investigations regarding public procurement procedures.	
(2) Implementing acts referred to in paragraph 1 shall be adopted in accordance with the advisory procedure referred to in Article 43(2).	
(3) Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than four weeks.	
Article 43	
Committee **procedure**	
(1) The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.	
(2) Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.	

Article 44	
Delegated acts	
~~(1)~~ The Commission is empowered to adopt delegated acts **in accordance with Article 45** for the purposes of:	
~~(a)~~**1)** amending**, if necessary,** the thresholds for notifications as set out in Articles 18**(3)** and **18(4) for concentrations and Article** 27**, (2) for public procurement procedures, after the Commission has assessed those thresholds** in the light of **its practice in preceding years of application of this Regulation, taking into account the administrative burden for the Commission and the undertakings concerned, as well as the effectiveness of the application of the Regulation, and has concluded on the necessity of revising them in order to:**	
(i) capture more accurately distortive foreign subsidies subject to the notification procedures set out in Chapter 3 and Chapter 4 ; and	
(ii**) ensure a reasonable administrative burden on the Commission and the undertakings concerned.**	
In particular, if the practice of the Commission during the preceding years of application of this Regulation shows that a large part of notifications made pursuant to Chapters 3 and 4 resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting, following the in-depth investigation, a non-objection decision pursuant to Article 9(4), and provides indications that the thresholds for notifications as set out in Articles 18(3), 18(4) and Article 27(2) are set too low in terms of administrative burden for the Commission and the undertakings concerned, as well as any other additional indications provided by	AT (Comments): What is meant by “any other additional indications” in the first sub-paragraph after letter ii and in the first sub-paragraph after the second letter ii?

the application of this Regulation supporting such conclusion, the thresholds for notifications in Articles 18(3), 18(4) and Article 27(2) shall be increased.	
Conversely, if the practice of the Commission during the first five years of application of this Regulation~~, and taking into account the effectiveness of application;~~ **shows that,**	
(i) ~~(b)~~ a large part of notifications made pursuant to Chapters 3 and 4 resulted in the Commission adopting, following the in-depth investigation, either a decision with redressive measures pursuant to Article 9(2) or a decision with commitments pursuant to Article 9(3), or	
(ii**) the number of decisions with redressive measures pursuant to Article 9(2) or with commitments pursuant to Article 9(3) adopted regarding concentrations and public procurement procedures following an ex officio review of foreign subsidies pursuant to Article 7 is equivalent to or even higher than the number of decisions with redressive measures pursuant to Article 9(2) or with commitments pursuant to Article 9(3) adopted regarding concentrations and public procurement procedures following Chapters 3 and 4 of this Regulation, or**	
(iii) both	
and provides indication that the thresholds for notifications as set out in Articles 18(3), 18(4) and Article 27(2) are set too high to ensure the effective application of the Regulation, as well as any other additional indications provided by the application of this Regulation supporting such conclusion, the thresholds for notifications in Articles (3), 18(4) and Article 27(2) shall be lowered.	

(2) supplementing this Regulation by exempting, if necessary, certain categories of undertakings concerned, such as undertakings active in a particular sector or performing a particular type of economic activity from the obligation to notify pursuant to Articles 19 and 28, after the Commission has considered, in light of the practice of the Commission ~~in~~ during the first five years of application of this Regulation, ~~in case this practice allows~~that it was possible to:	AT (Comments): According to this para the COM might exempt "certain categories of undertakings … from the obligation to notify according to Article … 28": it has to be pointed out, that in the context of Chapter 4 such an exemption seems very unlikely, because a distortive subsidy is evaluated against the background of a specific pp procedure. It seems unlikely that subsidies in a particular sector "per se" would not be problematic. Can COM elaborate its view, how para 2 might be applicable in the context of Chapter 4?
(i) identify economic activities **in the internal market** where foreign subsidies are unlikely to distort the internal market~~;~~ **pursuant to Article 3 and which would thus not necessarily justify a notification from the undertaking concerned pursuant to in Chapter 3 and Chapter 4,**	
~~(c) amending the timelines for review and in-depth investigations as set out in Articles 24 and 29.~~	
~~(2) Delegated acts referred to in paragraph 1 shall be adopted in accordance with Article 45.~~	
(ii) define one or several categories of undertakings when considering those economic activities in the internal market; and	
(iii) conclude that this or those categories of undertakings face an unreasonable administrative burden when complying with the notification requirements pursuant to in Chapter 3 and Chapter 4;	

(3) amending the timelines for preliminary review and in-depth investigations as set out in Article 24(2) and Article 24(4) for notified concentrations and in Article 29(2) and in Article 29(4) for notified financial contributions in public procurement procedures. The Commission may adopt such delegated acts where the practice of the Commission in the application of this Regulation shows that the average duration of the Commission's assessment can either be performed more quickly than the timelines foreseen in this Regulation and hence can justify to shorten the timelines in Articles 24(2), 24(4), 29(2) and 29(4) or that more time is necessary to gather and assess the information on financial contributions notified pursuant to Chapters 3 and 4 and hence justify to increase the timelines in Articles 24(2), 24(4), 29(2) and 29(4).	AT (Comments): The criteria for the amendment of the time limits are still not sufficiently precise in the Regulation. It has to be pointed out, that the proposed timelines already pose significant problems; if these timelines would be extended, the problems would be enlarged. AT therefore rejects the possibility to extend the timelines for Chapter 4!
Article 45	
Exercise of the delegation	
(1) The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.	
(2) The power to adopt delegated acts referred to in Article 44**(1), Article 44(2) and Article 44(3)** shall be conferred on the Commission for ~~an indeterminate period of time~~**five years,** starting two years after the date of entry into force of this Regulation. **The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.**	

(3) The delegation of power referred to in Article 44**(1), Article 44(2) and Article 44(3)** may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.	
(4) Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.	
(5) As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.	
(6) A delegated act adopted pursuant to Article 44 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.	
Article **45a**	
Separate delegated acts for different delegated powers	
The Commission shall adopt a separate delegated act in respect of each power delegated to it pursuant to this Regulation	

Article 46	
Review	
Within five years after the entry into force of this Regulation at the latest, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation, accompanied, where the Commission considers it appropriate, by relevant legislative proposals.	
Article 47	
Transitional provisions	
(1) This Regulation shall apply to foreign subsidies granted in the ~~ten~~ **seven** 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.	
(2) 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 granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.	
(3) 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.	
(4) This Regulation shall not apply to public procurement **contracts that have been awarded, or** procedures initiated before the date of application of the Regulation.	

Article 48	
Entry into force and date of application	
This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.	
It shall apply from [date: six months after entry into force].	
By way of derogation from the second paragraph of this Article, Article 12(7) shall apply from [date: twelve months after entry into force]	
This Regulation shall be binding in its entirety and directly applicable in all Member States.	
Done at Brussels,	
For the European Parliament For the Council	
The President The President	
	General comments:
	FI (Comments):

	Overall, we consider it importan that the relationship between FSR's Chapters 2 and 4 and the public procurement directive should be further clarified. AT (Comments): Can COM please clarify the competences of MS below the threshold of € 250 million (but still above the PP threshold)? Could MS introduce for example a similar regime like the proposed regulation on a national basis? AT maintains it positions, that Chapter 4 is not yet aligned to two stage procedures (that are foreseen in the PP Directives) in such a way that legal certainty is guaranteed (this is the reason for multiple suggestions). The most important points in this regard are the following: Firstly, Art. 28 para 1 does not clearly state at which point of a PP procedure a notification or a declaration shall be submitted. The "request to participate" (exists only in two stage procedures) and the "submission of a tender" (exists in one as well as two stage procedures) are both named. While it is easy to determine when to submit a notification or declaration in a one stage procedure (an open procedure or negotiated procedure without prior call for competition), because in these procedures only a tender is submitted, it is unclear when such a notification or a declaration shall be submitted in a two stage procedure (restricted and negotiated procedure with prior call for competition) where first a request to participate is submitted and after the selection process an offer is submitted. It is also unclear when such a notification or a declaration shall be submitted in the case of submission of multiple offers (negotiated procedure).

	Secondly, this problem is closely linked to Art. 29 para 2. The COM shall carry out a preliminary review no later than 30 days after it "received the notification". Thirdly, Art. 31 para 1 clearly states, that during "the preliminary review and the in-depth investigation, the evaluation of tenders" in a PP procedure may continue. This leads to the first block of open questions: • Is in a two-stage procedure a notification mandatory at the stage of the "request to participate" or can it be submitted together with (the initial/the final?) offer? • If it its mandatory already at the "request to participate", will another notification be mandatory when submitting an offer (with every offer in a negotiated procedure?)? • If a notification was submitted with the "request to participate", will the COM have all the necessary information to conduct its preliminary investigation? • Will there be another/multiple "preliminary investigations" for the initial tender or other tenders (see Art. 30 para. 1)? • If a tender has to be submitted before the investigation may start, what is the point in having a notification at the "request to participation" - stage? • If this is not the case, can the evaluation of the requests to participate continue? If so, Art. 31 para 1 needs to be adapted (because it only refers to "tenders"). Furthermore, can negotiations continue and new tenders be submitted in a negotiated procedure? Fourth, does that fact, that Art. 30 para 1 regarding an in-depth investigation is somehow connected to an "initial tender" imply that 1) a preliminary investigation can be based only on a request to participate? or

	2) that for any kind of investigation – even for a preliminary investigation – a tender has to be submitted? Fifth: It has been proposed to shorten the time limits (see Art. 29) but even these reduced time limits are problematic for urgent procedures (see for ex. Art. 27 (3) and Art. 28 (6) of Directive 2014/24/EU). SE (Comments): Important that this chapter is thoroughly worked through. DE (Comments): As the new German government still is forming its position we may have substantial amendments which we introduce at a later point in time. We therefore reserve our right to make further comments.
END	**END**