

CONTRIBUTION OF THE APDC IN THE CONTEXT OF THE TARGETED CONSULTATION ON THE FSR GUIDELINES LAUNCHED BY THE EUROPEAN COMMISSION

2 APRIL 2025

1. INTRODUCTION

1. The Association des Avocats Pratiquant le Droit de la Concurrence (“**APDC**”) is a French non-profit association of lawyers (*avocats à la Cour*) specialising in competition law. Members must be registered to and in good standing with a French bar association and demonstrate at least three years of past experience in the field. With more than 250 active members to date, the APDC is representative of the French competition law bar.
2. The APDC welcomes the European Commission’s (the “**Commission**”) consultation on the Foreign Subsidies Regulation (“**FSR**”) published by the Commission on 5 March 2025 (the “**Consultation**”) and the opportunity to comment.
3. While the Consultation primarily aims to comment on the upcoming guidelines that the Commission will publish to clarify notably the concept of “distortion” as foreseen under Article 46 of the FSR, the APDC seizes this opportunity to also present comments going beyond that concept of distortion, including responses to certain questions raised under section 5 of the Consultation.

4. As a preliminary comment, the APDC would like to point out that, based on the experience in advising companies so far, the FSR has introduced significant additional compliance requirements for businesses, resulting in substantial administrative work, financial costs, and legal uncertainty. Based on this observation, in line with the Draghi Report and the ongoing focus on simplification within the European Union (“EU”), the APDC is of the view that the FSR should be simplified to focus on the most critical Foreign Financial Contributions (“FFCs”) and reduce unnecessary burdens. This is particularly true in the context of *ex ante* notifications both under the Mergers & Acquisitions (“M&A”) and Public Procurement Procedures (“PPP”) tools. Reducing the number of *ex ante* notifications would allow the Commission to spend more time and resources on *ex officio* investigations and/or the most problematic foreign subsidies.

5. Indeed, the volume of FSR filings, particularly in relation to M&A, is far higher than what the Commission had predicted in its 2021 Impact Assessment¹, which anticipated only 33 M&A notifications per year, whereas after more than a year and a half after the entry into force of notification obligations in October 2023, 195 M&A notifications have been filed². This significant difference between the forecast and the actual number of notifications underscores the need for a simplification of the FSR, ensuring it addresses only the most distortive foreign subsidies without imposing excessive burdens on businesses. The Commission has previously streamlined merger control processes: drawing on the expertise gained from these efforts, the Commission should apply similar principles to simplify the FSR regime.

¹ Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021 (see [here](#)).

² At the date of the reply to the Consultation, the Commission indicates this figure on its website, available [here](#).

6. As a second general comment, the APDC is also of the view that the existing rules and guidelines on State aid control should be the relevant benchmark for the Commission in its implementation of the balancing test. This is consistent with the objective of the FSR, which is to level the playing field within the single market between undertakings subject to State aid control and undertakings receiving foreign subsidies from non-EU countries. The Commission, in its implementation of the balancing test should strive to ensure that no foreign subsidy that would have been allowed under State aid rule can be prohibited (i.e., fail the balancing test) under the FSR. This will allow all parties involved to rely on well-known principles of State aid rules and of the benefit of the Commission's long-standing practice in this area and will ensure that the implementation of the FSR remains consistent with the principle of non-discrimination.
7. In this respect, the Commission's FSR guidelines should refer to the State aid rules' exemptions (under the general block exemption regulation), which should provide parties with "safe harbors" ensuring that the balancing test is met, and the Commission's State aid guidelines setting out the key parameters to be applied by the Commission when the exemptions are not met. The Commission should apply the same rules and principles, all things equal, under the FSR. This would maximize legal certainty for the parties and would allow the Commission to prioritize truly problematic foreign subsidies in its enforcement practice.
8. The APDC outlines below a series of suggestions to simplify the FSR framework and address certain issues currently faced by businesses.

A. Elevating the Monetary Thresholds for PPP and M&A

9. The current **PPP thresholds** of €300 000 (reporting threshold for declarations), €1 million (reporting threshold for individual FCC for notifications), and €4 million (notification threshold and reporting threshold by non-EU country for notifications) are too low and should be significantly increased to reflect current market realities. The same is true for **M&A** where the €50 million notification threshold of combined FCCs should be elevated.
10. In addition, the APDC is also of the view that FCCs taken into account for the purposes of the notification threshold should exclude any purchases of goods and services at market terms, at least for M&A deals (in particular in a context where, since they are at market terms, these FCCs by nature are unlikely to raise any issues). Cumulated with increased thresholds, this would have the benefit of reducing the number of the notifications of transactions or public procurement bids unlikely to raise issues.
11. Similarly, the *de minimis* reporting threshold of €1 million should also be significantly increased in a context where the burden imposed on businesses to collect and report these FCCs is overly burdensome.
12. Finally, the Commission could envisage to create a safe harbor for FCCs with limited impact and an exemption mechanism for private equity funds that should only be required to provide a reasonable and limited amount of information, given that they enter regularly into M&A transactions and since the FCCs they receive should in principle not vary significantly between each transaction.

B. Increasing Transparency

13. The APDC supports the publication of FSR-related information on the Commission's website (since October 2024) but would welcome some improvement in particular in the context of PPP.

14. Indeed, the current system for submitting notifications and information to adjudicatory authorities (in PPP FSR filings) is not as efficient as it could be. Companies are often unaware of the status of their filings and often receive limited (or no) feedback from the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (“**DG GROW**”). Moreover, the handling of confidential information can create complications, particularly as far as information about FFCs granted to main subcontractors and suppliers are concerned in consolidated notifications.
15. The APDC would welcome more communication and knowledge sharing in the context of the PPP tool.

C. Increasing Responsiveness

16. The APDC further notes that the FSR’s pre-notification process, as it currently operates, causes delays and uncertainty for companies. Indeed, although recent improvements in processing times have been noted, further enhancements would be welcomed, such as: (i) accelerating the pre-notification period in particular for companies that have recently notified and in which notifications did not raise particular concerns (ii) streamlining / limiting requests for information to what is strictly necessary in line with the letter of the FSR and doing so consistently across case teams, (iii) accepting waiver requests more frequently.
17. The APDC also submits that case teams should be able to refer to / access information submitted in previous FSR notifications by the same notifying party(ies) and that the Commission should be able to take this information into account during their assessment, if relevant to the case under review. This practice would have the long-term benefit of allowing the Commission to focus only on new questions potentially raised by a new notification, thereby increasing efficiency of its review process, especially in terms of timing. The APDC would also welcome more consistency regarding the type and level of information requested by the cases teams in charge of review, in particular in the framework of M&A notifications.

D. Increasing Clarity on Remedies

18. To date, only the press release of one phase II decision with remedies has been published³ (the decision itself has still not been published after 6 months). The APDC would welcome guidance on the types of remedies which could address the Commission's concerns, as it would reduce legal uncertainty and improve predictability.
19. On a more specific point, based on the press release referred to above, the APDC is particularly concerned with the Commission pushing parties to accept "*commitments to inform the Commission of future acquisitions that are not notifiable concentrations under the FSR*"⁴ (see further comment below).

E. Clarifying certain Key Concepts

20. The APDC is of the view that several concepts under the FSR would also benefit from further clarification.
21. In particular,
- **Foreign subsidy:** focusing on the main subsidies would increase legal certainty and guide businesses more effectively.
 - **Financial contribution:** clear and predefined criteria are required to reduce the scope of what is currently requested from businesses (e.g. it is unclear whether all financial flows with foreign public banks should be considered as a financial contribution).

³ See Commission's press release published on 24 September 2024, whereby the Commission announced that it conditionally approved the acquisition of parts of PPF Telecom by e& under the FSR (Case FS. 100011, EMIRATES TELECOMMUNICATIONS GROUP / PPF TELECOM GROUP), available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3166.

⁴ See below paras. 71 *et seq.*

- **Market terms exemption:** the APDC does not understand why financial services are excluded from this exemption. This creates an unnecessary burden, particularly when it is clear that financial services are not problematic.
- **Tax exemptions:** Similarly, the “general” criterion for tax exemptions is too narrow. For example, the Commission seems to apply it to temporary taxes only (“*tax holidays*”). In this respect, the APDC also notes discrepancies between the French and English versions of the Implementing Regulation⁵.

More generally, the APDC notes that the exemption for tax and fiscal incentives, currently drafted and applied too narrowly, ends up capturing situations where such taxes, despite not being problematic, need to be collected and declared, and this strongly reinforces the administrative burden of data collection for companies.

22. Finally, clarifications about how FFCs should be taken into account when a company’s structure (parent companies) has changed between the day the FFC is granted and the day of the FSR notification (e.g., in the event of a divestment) would be helpful.

F. Clarifying Third Parties’ Rights

23. To date, contrary to State aid cases where procedural rules exist for complainants, the FSR does not provide for these, and it should.
24. The APDC is of the view that a mechanism for formal complaints should be introduced.

⁵ The French version of the Commission Implementing Regulation 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to the FSR mentions, in Annexes 1 and 2, Table 1, “*les exonérations fiscales [...] d’application générale*” whereas the English version mentions “*tax holidays [...] that are of general application*”.

G. Improving Coordination between DG COMP - DG GROW - Adjudicatory authorities

25. As a final general comment, if not already in place, the APDC believes that the establishment of a joint task force between the Directorate-General for Competition (“**DG COMP**”) and DG GROW would ensure greater consistency in decision-making and improve transparency.
26. The APDC is also of the view that there would be significant benefit in enhanced communication between the Commission and adjudicatory authorities about the FSR PPP requirements. For example, it is particularly important that the Commission explains how to handle confidential information and remind adjudicatory authorities that they cannot impose additional information requirements on foreign subsidies / FFCs outside of those provided for in the Form FS-PP.

2. SECTION 1: THE APPLICATION OF THE CRITERIA FOR DETERMINING THE EXISTENCE OF A DISTORTION ACCORDING TO ARTICLE 4(1) OF THE FSR

Article 4(1) of the FSR defines the notion of distortion as follows: “A distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market”.

- A. Question 1.1. Are there any criteria and indicators that you see as decisive for determining whether “a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market” and whether “that foreign subsidy actually or potentially negatively affects competition in the internal market” in addition to the indicators already listed in Article 4(1) of the FSR? If yes, please explain what those indicators are and why you deem them to be important. Should each of the indicators, listed in Article 4(1) of the FSR or additional ones, for assessing a distortion be assessed separately, without accounting for other relevant indicators, or collectively? Under which circumstances?**
27. As a preliminary remark and as mentioned in paras. 19 *et seq.*, before considering the notion of foreign subsidy, the APDC would welcome clarifications about the application of the notion of FFCs. In this regard, a clear definition of the categories referred to in Article 3.1 of Regulation 2022/2560 is crucial to determining its scope of application and ensure legal certainty.
28. Indeed, according to point 6(c) of the Instructions to Table 1 in the Form FS-CO of Implementing Regulation (EU) 2023/1441, the FFC consisting of the provision/purchase of goods/services at market terms in the ordinary course of business do not need to be included in Table 1. However, without any objective justification, “financial services at market terms in the ordinary course of business” are included, even though they have no direct or indirect link with a proposed merger. The explanations given by the Commission in the Q&A published for concentrations (question 27) do not clarify the basis for this distinction and do not provide a sufficient level of legal certainty.

- **Need for clarity and predictability in the assessment of the criteria listed in Article 4(1)**

29. The APDC notes that:

- The Commission Staff Working Document provides that *“the indicators listed in Article 4(1) of Regulation (EU) 2022/2560 are neither exhaustive nor mandatory for every case. The Commission will assess each case on its merits and will use the relevant indicators as appropriate to assess the distortive effect of the subsidy”*.⁶
- Similarly, point 19 of the preamble of the FSR states that *“when using the indicators to determine the existence of a distortion in the internal market, the Commission could take into account various elements such as the size of the foreign subsidy in absolute terms or in relation to the size of the market or to the value of the investment”*.

30. In the APDC’s view, this approach causes legal uncertainty. As it stands, companies find themselves exposed to unpredictability given the variety of foreign subsidies and the absence of case law.

31. Companies would greatly benefit from clearer guidance on how to determine whether there is a distortion or not. The Commission would also benefit from it as it would obtain more relevant information.

⁶ Commission, Staff Working Document, 26 July 2024, Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (“**Staff Working Document**”).

a) Factors explicitly listed in Article 4(1)

32. Regarding the indicators listed in Article 4(1) of the FSR, in particular:

- **The amount of the foreign subsidy** (4.1.a) is not a meaningful indicator as such, as it needs to be related to the undertaking's turnover in the market concerned and/or the size of the market concerned to become a relevant metric;
- **The situation of the undertaking** – e.g., internal organisation (4.1.c) and **the level and evolution of economic activity of the undertaking on the internal market** (4.1.d) are broad concepts which provide the Commission with an overly wide margin of discretion.

33. In the interest of legal certainty and efficiency both for the Commission and businesses, the Commission should prioritize increasing clarity and predictability as to the scope of the application of the distortion test.

34. The guidelines should detail each factor by:

- For **the amount of the foreign subsidy** (4.1.a):
 - o reiterating that the amount of the subsidy shall be assessed in relation to the size of the market, or by reference to the value of the investment (e.g., acquisition price). If the Commission considers the amount of the subsidy as a criterion in itself, the guidelines should provide more clarifications on the criteria,
 - o giving examples of the relative or absolute amounts which would, in principle, not be problematic under the FSR,
 - o indicating that it is relevant to analyse the proportionality of the amount of the foreign subsidy to the objective it pursues.
- Regarding **the nature of the foreign subsidy** (4.1.b):
 - o clarifying if the notion of “nature” covers the type of subsidy (loan, etc.), or other characteristics of the subsidy such as frequency, conditions attached, etc;

- Regarding **the situation of the undertaking, including its size and the markets or sectors concerned** (4.1.c):
 - providing guidance on the extent to which effects on markets that lead to vertical or conglomerate links are relevant for the assessment of a distortion of the internal market,
 - clarifying that both the situation of the undertaking in the internal market and the situation of the undertaking in the bidding process in case of a merger is relevant. Indeed, the Commission has made it clear that in the context of mergers it is interested both in distortion in the internal market (i.e., distortions caused on the goods and services markets concerned by the transaction) and distortions in the bidding process (i.e., outbidding other participants);
 - explaining how the Commission intends to strike the balance in situations where a foreign subsidy leads to a distortion in the bidding process and at the same time to efficiency gains in the internal market (e.g., the subsidy granted to the beneficiary may have discouraged other bidders in the bidding process but is likely to allow the consolidated entity to offer better products at a lower price, enhancing consumer welfare);
- Regarding **the level and evolution of economic activity of the undertaking on the internal market** (4.1.d):
 - giving an indication about the turnover level below which an undertaking is considered to have a low degree of activity in the EU and providing examples of other factors relevant for this assessment. Indeed, the Commission considers that a foreign subsidy to a beneficiary that shows a low degree of activity in the internal market measured for instance in terms of turnover achieved in the EU, is less likely to cause distortions.⁷

⁷

Ibid.

- Regarding **the purpose and conditions attached to the foreign subsidy as well as its use on the internal market** (4.1.e):

- o providing examples of non-problematic scenarios.

- b) Acknowledgment of the distinction between distortions impacting the transaction and distortions impacting competition on the relevant market post-transaction

35. From the APDC's perspective, beyond the question of interpretation of the factors included in Article 4(1), the guidelines should also address the fundamental distinction between:

- subsidies that may impact competition with regards to the transaction/tender itself (e.g. by allowing the acquirer to offer a higher price or better conditions); and
- subsidies that may impact competition on the relevant market(s) post-implementation of the transaction.

36. Indicators could include:

- To assess the impact of a subsidy on the transaction itself, the analysis may start with the amount and nature of the subsidy (4.1.a & 4.1.b), as some forms of foreign subsidies are less likely to be used to distort the acquisition process than others (a foreign subsidy provided to the acquirer in instalments, for instance, is likely to have an impact on the transaction).

- To assess the impact of a foreign subsidy on the market post-transaction, on the other hand, the analysis could start with the purpose and conditions attached to the foreign subsidy as well as its use on the internal market (4.1.e), a foreign subsidy that is unrelated to the market(s) relevant for the transaction (e.g., a R&D subsidy related to a different market) is unlikely to affect competition on those markets, irrespective of its amount and nature (unless the amount is so important that it has a general impact on the operations of the company). Foreign subsidies that can be used by the undertaking as it sees fit are also more likely to impact competition than foreign subsidies with a special purpose and/or conditions attached, unless the purpose/conditions are specifically related to the market(s) at stake.
37. The situation of the undertaking, including its size and the markets or sectors concerned (4.1.c) and the level and evolution of economic activity of the undertaking on the internal market (4.1.d) could provide interesting context but should generally not be considered as determining factors to assess the impact of a foreign subsidy on competition, unless they are direct consequences of the foreign subsidy itself.
- c) Holistic approach to the assessment of the existence of a distortion
38. From the APDC's standpoint, the indicators should be assessed **collectively** (for example, the amount of the foreign subsidy and the situation of the undertaking, including its size and the markets or sectors concerned), as opposed to individual assessments in silos. A holistic approach makes it easier to consider the specificities of each case. Also, when considered together, the indicators can reveal a clear pattern of distortion – or lack thereof.

39. Indeed, it would not be appropriate for the Commission to base a conclusion of actual or potential distortion on a single criterion alone (e.g., a large subsidy may not necessarily lead to a distortion in a particular sector). As mentioned above, it is essential that the Commission provides concrete examples of how these criteria would be assessed and weighed (e.g., in the case of a large subsidy that enables a non-EU company to enter the internal market, thereby increasing competition, or in the case of a modest subsidy that has, however, resulted in excluding other potential new entrants on the internal market from the bidding process, etc.).
40. In any case, it is of the upmost importance that the Commission's application of the distortion test does not lead to a situation where foreign subsidies received from non-EU countries are treated differently from those received from EU countries in the context of a State aid decision. Indeed, **the FSR should act as a “mirror” of State aid rules** to ensure a level playing field between companies active in the internal market. In this context, the guidelines should, to the extent possible, refer to the rules enclosed in State aid instruments, and in particular the General Block Exemption Regulation (Regulation n°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market).
41. The Commission's State aid decisional practice should also act as a compass when applying the distortion test. Only in very specific circumstances should the State aid rules not apply to a FSR analysis (for example, the exemption concerning regional aids is not relevant when the regions being subsidized are outside of the EU).

42. Additionally, in its Staff Working Document, the Commission stated that “*a detailed assessment based on indicators is not required in the case of subsidies falling under Article 5*”. This implies that, conversely, when a subsidy does not fall within one of the categories listed in Article 5 of the FSR, a detailed analysis is required. This need for a comprehensive assessment is reinforced by the Commission’s position that “*these indicators appear necessary since the lack of transparency of many subsidies and the complexity of commercial reality make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy*”.
 43. The only scenario where the Commission would consider relying on a single criterion to presume a distortive effect could be in cases of “naked distortions”. This refers to conduct that serves no economic purpose for an undertaking other than restricting competition – and even in such case, it would remain relevant to consider the circumstances of the fact that enable to establish the restrictive objective.
 44. Finally, the guidelines should also clarify the articulation between the distortion test and the list of subsidies that are most likely to distort the internal market provided in Article 5(1) of the FSR which creates a presumption of distortion in certain circumstances. Article 5 covers very different categories of subsidies (aid to ailing undertakings, unlimited guarantees, export financing measures, subsidies directly facilitating a concentration/the submission of an unduly advantageous tender). In its Staff Working Document, the Commission provided additional guidance on how it assesses distortions caused by unlimited guarantees. A similar explanation for Articles 5(1)(a) and (c) would be beneficial to clarify the types of foreign subsidies that may be caught under the regulation. The guidelines should clarify the standard of proof that needs to be met by undertakings to rebut the *de facto* presumption created by Article 5(1).
- **Safe harbours**
45. To ensure greater predictability and legal certainty, the guidelines should provide concrete examples of non-problematic situations, i.e., safe harbours under which subsidies that meet specific criteria would be exempt from the distortion test.

46. Furthermore, the guidelines should:

- Regarding **the amount of the foreign subsidy** (4.1.a),
 - o confirm that it intends to apply Article 4(4) (i.e. subsidies aimed at making good the damage caused by natural disasters or exceptional occurrences) consistently with established State aid rules related to Article 107(2)(b),
 - o propose additional safe harbours. In particular, while the FSR states that, in the context of a concentration, a foreign subsidy covering a substantial part of the purchase price is likely to be distortive,⁸ it would be useful if the guidelines could provide a percentage below which the amount of the subsidy is considered not to cover a substantial part of the acquisition price.
- Regarding **the situation of the undertaking, including its size and the markets or sectors concerned** (4.1.c),
 - o provide examples of situations unlikely to raise issues, e.g.,
 - foreign subsidies to SMEs could be considered less likely to cause distortions than foreign subsidies to large undertakings;⁹
 - foreign subsidies in markets characterised by overcapacity could be considered, under certain conditions, as more likely to cause distortions;¹⁰
 - foreign subsidies to beneficiaries active in markets with a high degree of concentration, the presence of a dominant undertaking or with high barriers to entry could be considered under certain conditions, as more likely to be distortive.

⁸ FSR, Recital 19.

⁹ Ibid.

¹⁰ Ibid.

- **Additional indicators**

47. The value of the transaction could be taken into account as an additional indicator on a case by case basis and combined with other relevant factors.

B. Question 1.2. In the assessment of whether “a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market”, what is your view on how to assess the possibility that the foreign subsidy could potentially be used in the internal market or could potentially improve the undertaking’s activity in the internal market? In your opinion, which elements are relevant for this assessment?

48. Assessing whether a **foreign subsidy could potentially be used in the internal market** requires the Commission to identify a link between the foreign subsidy at stake and the relevant market in the EU. The APDC considers that such link should neither be indirect, nor hypothetical, and should be assessed differently depending on whether the beneficiary is established in the EU or outside of the EU.
49. The APDC submits that the Commission should carry out its assessment taking into consideration at least two possible scenarios:

- Where the **beneficiary entity is established in the EU**, the APDC understands that the Commission takes a wide-encompassing view of the existence of such a relationship, indicating in its Staff Working Document that “*in the case of an interest-free loan provided by a third country directly to an EU entity active in the internal market, there is, prima facie, an apparent connection between the alleged subsidy and the activity in the internal market*”. This position is consistent with existing State aid law, which presumes the existence of such an advantage.¹¹ However, it is important to reiterate that, in accordance with State aid law, said relationship between the subsidy and the beneficiary’s competitive position cannot be hypothetical.¹²
- Where the **beneficiary entity (e.g. a subsidiary of the notifying party that benefited from the foreign subsidy) is not established in the EU**, the above-mentioned approach cannot be applied. In that case, in the APDC’s view, the Commission should demonstrate that the foreign subsidy is liable to improve the competitive position of the beneficiary in the internal market. For example, in circumstances where the foreign subsidy is received by a non-EU subsidiary that has no activities in the EU and no capital/economic link with an EU subsidiary of the same group, then it should be concluded (or at the very least presumed) that the subsidy does not have a distortive effect. Indeed, the FSR should not capture foreign subsidies completely unrelated to activities in the internal market.

¹¹ Commission’s Notice on the notion of State aid, para. 187: “A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition”.

¹² CJEU, 24 juillet 2003, Altmark Trans, aff. C-280/00, paras. 78-79: “Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State. In the present case, that finding is not merely hypothetical”.

The APDC notes in this regard that, in previous FSR filings, the Commission has asked notifying parties more detailed information concerning FFCs granted to non-EU beneficiary entities active in non-EU markets, including for activities unrelated with the transaction and for FFCs granted at market terms. This is typically the case for financial services (since the exemption not to report services purchased or supplied at market terms does not apply to financial services).¹³ In such cases, the APDC considers that where the FFC was granted to an entity established outside the EU, and even more where it was granted on market terms, there should be a presumption that the foreign subsidy is not to be used in the internal market and therefore cannot have an impact on the undertaking's competitive position in the internal market.

If the beneficiary entity operates only locally (i.e., within a third country's jurisdiction) and has no connection with the notifying party's activities in the EU, it should be concluded that the foreign subsidy cannot be used in the internal market and that the subsidy has no distortion effect.

The APDC therefore expects the guidelines to clarify, relying where relevant on existing State aid rules / case-law, how the Commission intends to assess situations where the beneficiary entity is not present in the EU, but nonetheless considers that the foreign subsidy does improve the competitive position of the beneficiary entity or the group it belongs to in the internal market. As per the Commission's notice on the notion of State aid, such assessment should rely on capital, functional, economic and organic links between the relevant group entities¹⁴.

¹³ Implementing Regulation (EU) 2023/1441 of July 2023, Annex I, Instructions to provide information concerning FFCs that do not fall into any of the categories of Article 5(1), points (a) to (e)

¹⁴ Commission's notice on the notion of state aid, para. 11: "*Several separate legal entities may be considered to form one economic unit for the purposes of the application of state aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant*". See also the recent General Court, decision T-146/22, Ryanair ([here](#)) for a summary of the case-law on this matter.

50. Regarding the question related to **how the foreign subsidy could potentially improve the beneficiary's activities** in the internal market **and its competitive position**, the APDC considers that several criteria should be considered collectively to assess the potential improvement of such competitive position. The following criteria could notably be taken into account:

- the market share(s) of the beneficiary entity in the relevant internal market(s);
- its competitors' position on such market(s);
- whether or not the relevant market is concentrated;
- whether competitive pressure is impacted due to the foreign subsidy;
- whether the foreign subsidy creates a barrier to entry and its impact on potential new entrants in the relevant internal market(s);
- whether the subsidy leads to an increase in profitability for the beneficiary entity;
- whether the subsidy results in overcapacity in the internal market.

51. The APDC also deems the counterfactual analysis to be important where the Commission must assess whether the foreign subsidy improved the competitive position of the beneficiary entity and distorted competition in the internal market, by comparing the case at stake to a case where no subsidy would have been granted, in accordance with the State aid approach¹⁵.

¹⁵ Commission's notice on the notion of state aid, para. 189: "A public aid can distort competition even if it does not help a beneficiary company develop its activities and gain market share. It is sufficient that aid allows it to maintain a stronger competitive position than it would have had without aid".

C. **Question 1.3.** In the assessment of whether “*the foreign subsidy actually or potentially negatively affects competition in the internal market*”, what is your view on whether and how to consider the following elements: level playing field, consumer welfare, the competitive position of competitors, the competitive process and what level of importance to attribute to each of them? Should other elements be considered?

52. The elements mentioned by the Commission, while potentially relevant, are so far formulated in vague and general terms. The APDC would welcome an explanation and clarification of the terms used in the guidelines, with concrete examples of how the Commission intends to assess each element. We provide below some considerations that should, in the APDC’s view, be taken into account for such assessment.

- **Level Playing Field.** As evidenced by the text of the FSR itself¹⁶, the concept of level playing field is key to the existence and application of the FSR. The crux of the FSR is to ensure a level-playing field between competing undertakings in the internal market. For the sake of legal certainty and consistency of the legal framework applicable to contributions granted by EU Member States and non-EU States, it is therefore essential that the concept of level playing field should be assessed consistently with regard to the concepts relevant under State aid rules, and in particular the notion of “selective advantage”. Whether or not a subsidy has a negative effect on the level playing field should be analysed through a comparison between the subsidized firm’s financial position, pricing strategy, and investment capacity and a counterfactual scenario where it would not have received the subsidy in question. In its assessment, the Commission should also consider whether the level playing field could be different from one Member State or region to another within the EU. The effect of the foreign subsidy on the competitive position of competitors is generally relevant for the assessment, particularly in a concentrated market. If the recipient is in a less favourable position compared to powerful competitors, the subsidy could actually play in favour of a level playing field and support competition on the market. Some categories of subsidies, such as subsidies

¹⁶ See, in particular, recitals 1, 4 and 6 of the FSR.

covered by Article 5(1)(a) of the FSR (referring to subsidies granted to an ailing undertaking which would otherwise go out of business in the short or medium term) are however unlikely to benefit competition in the longer term, unless they have some clear benefit to innovation (e.g. in the case of a new entrant that needs additional funding to continue its development). A foreign subsidy could also enable an undertaking to scale up much more rapidly than its competitors, leading to excessive market dominance and reduced diversity in market participants. In its assessment of whether the grant of foreign subsidies will affect the level-playing field in the internal market, the Commission can also consider the fact that other players have received States aids from EU Member States in the relevant market. However, if the aid has been notified and found compatible with the internal market, it should be presumed not to impact competition and may therefore be disregarded, except in specific circumstances.

- **Consumer Welfare.** Consumer welfare is another critical criterion and should be taken into account to determine whether a subsidy negatively affects competition. A subsidy may actually be deemed to contribute to consumer welfare when it facilitates the development of a new technology or product to the benefit of consumers. However, the situation becomes more complex in a situation where a subsidy negatively affects the level-playing field between (EU and non-EU) competitors but has a positive impact on consumer welfare. Possible situations include cases where the subsidy granted to the beneficiary has the effect of discouraging other bidders at the bidding stage but is likely to allow the consolidated entity to offer better products at a lower price, thereby enhancing consumer welfare; or situations where the beneficiary is less risk-averse due to enhanced liquidity, allowing it to invest in innovative and disruptive projects beyond what an equivalent economic operator could have done absent the subsidy. The Commission therefore needs to detail how it intends to strike the balance. To that end, the Commission should consider the potential pro-competitive effects of a foreign subsidy when assessing whether it can “actually or potentially negatively affect competition in the internal market”. That being said, if the foreign subsidy

leads to a significant part of competition being eliminated from the market, consumer welfare may in most cases be deemed negatively impacted.

- **Competitive Process.** The competitive process is relevant in assessing the subsidy's impact on the transaction itself, including the number of potential buyers, their identity, and the seller's selection process. It may however be difficult for the buyer to know exactly the process that was set up by the seller, and the seller may be unwilling to disclose to the buyer the number of bidders or participants in a competitive process (especially when there were a lower number of interested parties than the seller may have hinted at/than the buyer may have originally thought). Providing guidelines as to exactly what information should be provided to the Commission and the process to do so while maintaining confidentiality would therefore be quite helpful. As the Commission does in certain cases, the Commission could also reach out to sellers early in the process to avoid unnecessary delays by directly sending sellers requests for information. The seller shall be obliged to provide accurate information in a timely manner. On the other hand, information related to the competitive process is a priori less relevant to assess the post-transaction impact of the subsidies on the market. Elements that could be taken into account include the price-elasticity of the demand (to assess the actual impact of the subsidy in cases where it allows the beneficiary to offer lower prices) and the periodicity of tenders, in markets that are characterized by large but infrequent purchases from customers (in that case, the risk that the subsidy may affect one specific tender/RFP may have an overall disproportionate impact on the market).
- **Additional Considerations.** The APDC strongly encourages the Commission to take other factors into account, including environmental and social standards. Subsidies that benefit the development of "greener" products or that allow undertakings to maintain higher social standards should in general be viewed more favourably. The impact of the subsidies on innovation should also be part of the analysis. While some issues related to innovation can be captured under the concept of consumer welfare, the impact of the subsidy on the innovation process in itself should be given consideration as well.

53. More generally, the APDC encourages the Commission to provide a comprehensive list of the factors that may be taken into consideration in its analyses. While the APDC acknowledges that such a list may not be exhaustive, giving undertakings as much visibility as possible will ensure a smoother implementation of the FSR.

D. Question 1.4. Based on your own experience, please provide examples of distortions that may occur in the internal market because of foreign subsidies.

54. n/a.

3. SECTION 2: THE APPLICATION OF THE BALANCING TEST IN ACCORDING WITH ARTICLE 6 OF THE FSR

Article 6(1) of the FSR describes the application of the balancing test as follows:
“The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union”.

A. Question 2.1. What positive effects do you deem to be relevant for the assessment and how such effects should be measured? What other effects beyond “the broader positive effects in relation to the relevant policy objectives, in particular those of the Union” should be considered in this balancing exercise? Please explain why for each effect identified.

55. The APDC is of the view that the guidelines should prioritize enhancing clarity and predictability regarding the scope of the balancing test. The assessment of positive effects should be grounded in well-established benchmarks and existing regulatory frameworks to ensure consistency and legal certainty.

56. In particular, as explained above, the APDC believes that there would be benefits in closely aligning the implementation of the FSR with existing State aid rules. This is particularly true for the application of the balancing test which was introduced “*in order to assure coherence with EU State aid rules*”¹⁷. The Commission’s initial clarifications on the application of the FSR in its Staff Working Document remain insufficient, as they merely state that “*where certain positive effects on the internal market have been acknowledged under the EU State aid rules, such positive effects would likely be taken into account in the assessment*” under the FSR¹⁸.
57. When applicable, the balancing test should consider whether a subsidy would be permissible under the General Block Exemption Regulation (“**GBER**”)¹⁹ or specific Commission state aid guidelines if granted by an EU Member State. The guidelines could indicate that foreign subsidies fulfilling GBER conditions or other state aid guidelines should be presumed to pass the balancing test (*i.e.*, their positive effects outweigh their negative effects) without further assessment.
58. This approach would enhance efficiency by allowing the Commission to focus on foreign subsidies with a genuine potential to distort competition in the internal market. Undertakings would also benefit from the decreased administrative burden, particularly in merger cases where businesses already face significant and increasing scrutiny. The balancing test should not impose excessive additional hurdles.

¹⁷ Impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, SWD(2021) 99 final, May 5, 2021, page 58, available at the following link: https://competition-policy.ec.europa.eu/document/download/feaa6917-8fad-4fc4-bd3c-3baac1dc5297_en?filename=foreign_subsidies_impact_assessment_report.pdf.

¹⁸ Staff Working Document (emphasis added).

¹⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, available at the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R0651-20230701>.

59. There may be circumstances in which the proposed approach would not be appropriate, but those should be exceptional. For instance, the Commission could take the view that subsidies aimed at assisting regions located outside of the EU should not be assessed under the FSR even if in theory they fulfil all the conditions set out in the GBER or guidelines regarding regional aids.
60. For cases that do not fall within the GBER or State aid guidelines framework, the Commission should rely on existing State aid decisional practice and case law. In the unlikely scenario that the Commission cannot rely on State aid rules in its assessment, it should prioritize relying on other existing EU legislation, for example the assessment of sustainability agreements under Article 101(3) of the TFEU in the updated version of the guidelines on horizontal co-operation agreements.²⁰
61. There may be a limited set of criteria that are absent in State aid legislation but relevant to the FSR. The existence of a trade agreement between the EU (or an EU Member State) and the subsidizing country is one of them. If a foreign subsidy aligns with commitments made under a trade agreement, it may warrant a more favourable assessment. This criterion would allow the Commission to take into account positive effects that do not materialize within the single market but do materialize in that third country. Such criterion is objective enough not to hinder legal certainty and predictability.

²⁰

Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements (2023/C 259/01), paras. 556 *et seq.*, available at the following link: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)).

- B. Question 2.2. The assessment of whether foreign subsidies enable an economic operator to submit an unduly advantageous tender shall be limited to the public procurement in question (Article 27 FSR). According to the FSR, the Commission should take into account the availability of alternative sources of supply. Based on your experience, how should the availability of alternative sources of supply be assessed in public procurement procedures? In particular, what is the link between the positive effects of a subsidy and the availability of alternative sources of supply?**
62. At this early stage of implementation, companies and practitioners have limited experience in applying and interpreting the balancing test within PPP.
63. Article 27 of the FSR asserts that the assessment of whether a tender is unduly advantageous should be confined to the specific PPP in question. Accordingly, the evaluation of alternative sources of supply should consider only the other bidders and cannot include the hypothetical participation of other market players.
- C. Question 2.3. How should the positive effects of foreign subsidies be assessed in comparison to their negative effects? Could you give examples of positive effects that can, in your view, outweigh the negative effect of foreign subsidies? In its assessment of the balancing test, how should the Commission prioritise the information and characteristics of the undertaking(s) (e.g. financial structure, business plan, sector, etc.) and of the market where the undertaking operates?**
64. As stated in the response to question 2.1. above, the Commission should assess the positive effects of foreign subsidies in comparison to their negative effects with reference to existing State aid practice.

65. The guidelines should include a dedicated section detailing the circumstances in which a foreign subsidy falling within one of the categories of Article 5 of the FSR can pass the balancing test. This section should draw on insights from past State aid decisions to ensure consistency and predictability in the assessment process. Furthermore, the guidelines should clarify whether, in a merger context, the positive effects of a foreign subsidy on the internal market can outweigh any distortions caused during the bidding process. For example, while a foreign subsidy may have discouraged other bidders, it could ultimately allow the consolidated entity to offer better products at lower prices, thereby enhancing consumer welfare.
66. Regarding examples of positive effects that may outweigh the negative effects of foreign subsidies, companies and practitioners have limited experience at this early stage of implementation.
67. The APDC further submits that the assessment should remain as straightforward as possible and rely on information and characteristics already deemed relevant in the context of State aid. In particular, market characteristics such as concentration levels and barriers to entry should be key factors in the Commission's analysis.
68. Additionally, the Commission should consider the broader role of subsidies in the relevant market. For example, a foreign subsidy is less likely to be distortive if the beneficiary operates in a market where many firms also receive subsidies from both EU and non-EU public sources.

69. Finally, it is essential to ensure that document requests are limited to what is strictly necessary to avoid undue administrative burdens. Given the time-sensitive nature of mergers and PPP, the Commission should encourage notifying parties to engage as early as possible in a discussion on potential positive effects of their subsidies when it considers that a specific case might require an in-depth investigation (phase 2). These discussions should occur as soon as possible during pre-notification and phase 1 discussions, allowing the Commission to assess whether redressive measures are required, and if so precisely identify them, or, conversely, whether no such measures are necessary.

D. Question 2.4. Any interested party, including other parties beyond the undertaking(s) under investigation can provide evidence of the existence of positive and negative effects of a foreign subsidy. In your experience, what type of evidence and analysis could best serve this purpose?

70. As stated in the response to question 2.3 above, the Commission's assessment should remain as straightforward as possible and only rely on documents which are strictly necessary. Economic analysis may be useful, but only to the extent that it would also be required in a State aid context.

4. SECTION 3: THE APPLICATION OF THE COMMISSION’S POWER TO REQUEST THE PRIOR NOTIFICATION OF ANY CONCENTRATION ACCORDING TO ARTICLE 21(5) OF THE FSR OR FOREIGN FINANCIAL CONTRIBUTIONS RECEIVED BY AN ECONOMIC OPERATOR IN A PUBLIC PROCUREMENT PROCEDURE ACCORDING TO ARTICLE 29(8) OF THE FSR

Article 21(5) of the FSR describes how the Commission can apply its power regarding concentrations as follows: *“The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 20 at any time prior to its implementation where the Commission suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration”*.

Similarly, Article 29(8) of the FSR describes how the Commission can apply its power in a public procurement procedure as follows: *“Without prejudice of the possibility for the Commission to start an ex officio procedure, where the Commission suspects that an 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 before the award of the contract request the notification of the foreign financial contributions provided by third countries to that economic operator in any public procurement procedure which are not notifiable under Article 28(1) or fall within the scope of Article 30(4)”*.

71. As a preliminary note, the APDC emphasizes that the Commission’s power to request prior notification of a concentration or tender in a PPP that does not meet the notification thresholds (the “*Call-in*”) should be exercised only in exceptional cases.

- **Notification thresholds are defined to identify concentrations and PPP tenders which are most likely to involve foreign subsidies that could distort the internal market.**

72. As mentioned above, the APDC notes that most concentrations or tenders notified to the Commission are unproblematic, and that the current notification thresholds are already too low (see above, paras. 8 *et seq.*). Therefore, the APDC believes that the vast majority of FFCs received and reported in the context of FSR notification obligations are highly unlikely to distort competition in the internal market.
73. In that context, with a view to ensure legal certainty and reduce the current burden associated with FSR implementation for companies, it is important that the Commission clarify that its Call-in power will be exercised only in exceptional circumstances.
74. In any case, given the significantly higher number of notifications received compared to initial expectations (see above para. 4), the APDC believes that the focus of the Commission should shift away from targeting concentrations or tenders below the thresholds. Instead, it should recalibrate the notification thresholds themselves to ensure that they only catch concentrations or tenders that are potentially sensitive from a FSR point of view in order to reduce constraints imposed on undertakings wishing to invest in the EU.

- **It is important that the Commission defines clear guidelines to allow undertakings to identify cases in which the Commission may use its Call-in power.**

75. There is currently no clear guidance on the conditions for a Call-in. The text of the FSR only mentions that (i) the Commission can intervene where it suspects the existence of foreign subsidies in the past three years (see response to question 3.3 below) and (ii) the Commission can consider whether a concentration or tender, below the notification thresholds, would merit an *ex ante* review given its impact in the EU (see response to question 3.4 below). Furthermore, there is, to date, no public information on cases where the Commission has used or considered using these powers since the FSR's entry into force.

76. In this context, the APDC suggests that the Commission establishes clear guidelines allowing undertakings to identify potential Call-in risks. In particular, the concepts of "suspicion" and "impact in the Union" should be clarified. The APDC is particularly concerned that the term "suspicion" can easily give rise to arbitrary decisions, with conclusions made based on unfounded assumptions (see response to question 3.3). The Commission should give strong guarantees.

- **There should be clear procedural rules to define how the Commission implements its Call-in power.**

77. Currently the FSR and its Implementing Regulation do not define procedural rules regarding the implementation by the Commission of its Call-in power. This creates legal uncertainty for undertakings that cannot factor in a potential FSR review process in their M&A / public procurement timelines.

78. Indeed, although the Commission cannot exercise its Call-in power after a transaction closes or, in the context of a PPP, after a contract is awarded, a late use of Call-in power (i.e. a few days before closing/award decision) could significantly delay these processes and be detrimental for undertakings.

79. On that basis, the APDC is of the view that the Commission should establish clear procedural rules, such as (i) a clear time limit for intervention and (ii) a maximum deadline from the initial inquiry date by the Commission to decide whether it will use its Call-in power or not. Both deadlines need to be short to take into account the business constraints of the parties. In any case, the APDC recommends that the Commission engage with the parties early in the process and be open to discussing timing issues to ensure greater transparency.
80. In addition, the APDC also notes that calling a transaction or a tender in does not mean that, *per se*, they are problematic from an FSR point of view. Therefore, even if the Commission choose to use its Call-in power, this does not mean that the transaction or tender at stake automatically leads to a substantive concern from a FSR point of view. The Commission should use the steps of reasoning defined by the FSR in the context of the review of a transaction or a tender before deciding whether a FSR notification leads to substantive concerns, i.e., (i) identify any foreign subsidies, (ii) assess whether the foreign subsidies distort competition in the internal market and (iii) determine whether any positive effects outweigh the negative effects of the distortions of competition that have been identified under (ii).
- A. **Question 3.1. Which factors do you consider relevant for the application of the power to request the prior notification of concentrations below the notification thresholds under the FSR? Can you give any examples of concentrations where it would be or would have been appropriate – in your view – to assess the potential distortive effect in the internal market of foreign subsidies in the concentration? If yes, please explain in more detail.**
81. The APDC wishes to remind of the need to limit the implementation of the Commission's Call-in power to exceptional cases where the Commission can put forward sufficiently robust evidence to justify intervening outside the applicable thresholds.

82. In that context, the APDC submits that the following factors are **not** relevant when assessing whether the Commission should use its Call-in power:

- **The amount of FFCs received.** Article 21(5) of the FSR expressly refers to the narrow concept of “foreign subsidies” – and not to the broader concept of “financial contributions”. On that basis, the APDC considers that the Commission cannot base its Call-in power on the fact that an undertaking would have received FFCs (below the notification threshold) that do not amount to foreign subsidies.
- **The fact that the parties to a transaction are close to meeting the notification thresholds.** The APDC also notes that the Commission has consistently maintained a clear policy in merger control cases of not investigating transactions where a company's turnover is “close to” but still below the EUMR thresholds. The APDC sees no justification for applying a different policy in FSR cases. Quite the contrary, if the Commission were to catch transactions or tenders “close to” the notification thresholds, this would be very detrimental to legal certainty. This lack of legal certainty is furthered by the fact that the term “close to” poses the risk of being interpreted very differently by participating undertakings who will not be able to draw the line between when a FSR notification is triggered or not. The APDC strongly rejects this possibility.
- **Countries of origin of the notifying party.** This would amount to a discrimination which would be in breach of the Treaties and contrary to the spirit of enforcement under the FSR. As Executive Vice-President Ribera herself stated in the press release accompanying the launch of this Consultation, “*We've introduced the Foreign Subsidies Regulation so that every company, European or foreign, would play by the same rules in the Single Market*”²¹.

²¹ See https://ec.europa.eu/commission/presscorner/detail/en/ip_25_685

- **Business sectors of the target.** The APDC submits that a sectoral approach would not be relevant either. In particular, as countries can have different policies regarding the use of public procurement rules in similar sectors (e.g., energy), a sectoral approach would (i) fail to take into account these specificities, (ii) risk putting the focus on a limited number of sectors without proper justification and (iii) be overly rigid at times when both the economy and political landscapes are moving very quickly. The APDC understands that this is one of the reasons why the FSR has opted not to adopt a sectoral approach.
- **Former concentrations which triggered FSR filings including those which were cleared subject to commitments.** The APDC is particularly concerned by the commitment imposed on Emirates Telecommunications Group Company PJSC (e&) to inform the Commission of future acquisitions that do not meet the FSR thresholds²². This creates legal uncertainty (as noted above in our comments regarding the suggestion to catch “close to the thresholds” transactions), arbitrariness (as previously mentioned) and the risk of disadvantaging certain companies in bidding processes. The APDC considers that that such a remedy should remain exceptional.

83. The APDC believes that the following factors could be considered, on a case-by-case basis, when assessing whether the Commission should use its Call-in power:

- **Complaints by competitors.** complaints should rely on a sufficient body of evidence demonstrating, on a case-by-case basis, the potential existence of foreign subsidies that are likely to distort competition in the EU (see response to question 3.3).
- **Information gathered by the Commission in the context of *ex officio* investigations** when this information points out to the existence of significant foreign subsidies likely to distort competition in the EU.

²²

See Commission, Case FS. 100011, EMIRATES TELECOMMUNICATIONS GROUP / PPF TELECOM GROUP, decision dated 24 September 2024.

84. The APDC has not identified examples of concentrations where it would be or would have been appropriate, in its view, to assess the potential distortive effect in the internal market of foreign subsidies received by the parties to the concentration.
- B. Question 3.2. Which factors do you consider relevant for the application of the power to request the notification of foreign financial contributions in a public procurement procedure below the notification thresholds under the FSR? Can you give any example of public procurement procedures where it would be or would have been appropriate – in your view – to assess the potential distortive effect of foreign subsidies distorting the internal market in the context of public procurement procedures? If yes, please explain in more detail.**
85. As indicated above, the APDC urges the Commission to limit the implementation of such Call-in power to exceptional cases with respect to PPP as well.
86. First and as mentioned above, as per the FSR applicable notification thresholds for FFCs are very low, one may question the need for the use of Call-in power.
87. Second, pursuant to Article 29 of the FSR, the mandatory notification requirement applies to PPP as defined by the relevant EU directives on public procurement. Conversely, the notification obligation does not extend to procedures that fall outside the scope of these directives, such as those exempted on the grounds of essential security interests. For completeness, this does not lead to an enforcement gap, since the security exemptions can only be invoked if the protection of essential security interests cannot be achieved through less intrusive measures.²³ As for any exception mechanism, it remains important to ensure that there is no excessive reliance on this derogation with a view to ensure a coherent application of the FSR.

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Recital 41 highlights that public procurement for the award of contracts for European defence and security equipment market should not be subject to notification requirements under the FSR and that it is only possible, by exception, to examine the foreign subsidies in the context of such contracts in an *ex officio* review, it being specified that the possibility to benefit from this defence and security exemption should not go beyond what is strictly necessary for the protection of the legitimate interests that this exemption help to safeguard.

88. Third, there are outstanding questions regarding the application of the normal review procedure. For instance, the Commission has not yet made clear in an official statement or in an updated version of its Q&A (which has not been updated since its first publication) whether for the notification thresholds, parties should consider both direct and indirect subsidiaries of the tenderer or only direct subsidiaries. As recalled by the FSR, the need to address foreign subsidies distorting the internal market is especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayers.
89. Priority should therefore be given to investigating PPP which do exceed the applicable thresholds.
90. In addition to the above, the APDC believes that the same following factors could be considered, on a case-by-case basis, when assessing whether the Commission should use its Call-in power:
- **Complaints by competitors:** complaints should rely on a solid body of evidence demonstrating that the foreign subsidies are likely to distort competition in the EU;
 - **Information gathered by the Commission in the context of *ex officio* investigations** when this information points to the existence of foreign subsidies likely to distort competition in the EU.
- C. **Question 3.3. How would you assess whether a ‘suspicion’ of foreign subsidies exists? In your experience, what type of evidence should be found in order to meet this legal condition?**
91. It is of the utmost importance for legal certainty that the Commission takes a very cautious approach when assessing whether a ‘suspicion’ of foreign subsidies exists. The concept of suspicion is not explicitly defined in the FSR, which refers merely to the fact that “*an 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*” (our emphasis).

92. The APDC acknowledges the tension between not discouraging prospective complainants under the FSR but also ensuring a predictable legal standard is applied.
93. The APDC is of the view that “suspicion” should be based on a sufficiently strong body of evidence / indicia.
94. The APDC is of the view that relevant factors to take into account should not be listed in a limitative manner by the guidelines. Such factors could include, *inter alia*:
 - **Complaints by competitors or third parties:** complaints should rely on a sufficiently solid body of evidence / indicia pointing to the presence of foreign subsidies likely to distort competition in the EU. The number of complaints submitted could be an indication taken into account by the Commission to decide whether or not to intervene;
 - **Amount of the foreign subsidies** at stake (e.g., very high amount) with a demonstrable nexus to the transaction or the PPP at stake;
 - **The amount / consideration** for the transaction or the financial offer under the tender. For instance, in the context of a PPP, a bid that is significantly lower than the offers submitted by other participants could trigger more interest if this can potentially be linked to the foreign subsidies received by the tenderer;
 - The presence of **foreign subsidies most likely to distort the internal market** (as defined under Article 5 of the FSR);
 - **The concomitance** of the granting of the FFC with the transaction or the PPP.
95. The Commission should consider each situation on a case-by-case basis, in light of all relevant factors.

D. Question 3.4. How would you assess whether a concentration or a tender in a public procurement procedure has an ‘impact in the Union’ which merits an ex-ante review (recital 36 of the FSR)? What factors would you take into account?

96. “Impact in the Union” is a concept that is not defined to date in the FSR. In particular, it is unclear whether proving an “impact in the Union” requires demonstrating only a nexus with the EU or also a potential distortion of competition arising from foreign subsidies granted to undertakings or just that the concentration or the tender has a nexus with the EU.
97. Regardless of whether the notion of “impact in the Union” implies a potential distortion of competition arising from foreign subsidies granted to undertakings, the APDC believes that the Commission should use its Call-in power **only in cases where the concentration or the tender involves foreign subsidies that could lead to a potential distortion of competition within the EU.**
98. In any case and as noted above, the APDC believes that if notification thresholds are not met, a concentration or a tender is unlikely to have any impact in the EU and the Commission should thus assume the concentration or tender does not have any impact in the EU, unless strong evidence suggests the opposite.

E. Question 3.5. In your view, are there specific sectors (both for concentrations and public procurement procedures) or specific types of public procurement procedures, which are more prone to distortive foreign subsidies and for which the power to request prior notifications below thresholds deserves to be applied more than in other sectors or types of public procurement procedures? If yes, please provide examples.

99. The APDC believes that there is to date no available evidence indicating that specific sectors or types of public procurement are more prone to distortive foreign subsidies and would, as such, deserve to be called-in. Instead, each concentration and tender should be analysed on a case-by-case basis to determine if the Commission’s Call-in powers should be used (see the above response to question 3.1).

5. **SECTION 4: THE ASSESSMENT OF A DISTORTION IN A PUBLIC PROCUREMENT PROCEDURE ACCORDING TO ARTICLE 27 OF THE FSR**

Article 27 of the FSR defines the notion of distortion of foreign subsidies in the context of public procurement procedures as follows: *“Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment pursuant to Article 4 of whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure in question”*.

Question 4.1. How would you establish the link between the foreign subsidy and the capability of that foreign subsidy to allow an economic operator to submit an unduly advantageous tender? Please explain in more detail how this link can be established in your view and illustrate this with specific examples if possible.

100. The APDC would like to emphasise that it is of utmost importance to ensure a **coherent application** of the key concepts of the FSR, whether it is with respect to M&A transactions or to PPP.
101. The APDC would therefore welcome ever-closer cooperation among the relevant services of the Commission.
102. As a second preliminary remark, as expressed in relation to the implementation of Article 4(1), the APDC believes the Commission’s application of the distortion should not lead to a **difference of treatment** between subsidies received from non-EU countries and those received from EU countries in the context of a State aid decision.
103. As a third preliminary remark, and as mentioned above, **clear and predictable rules** are needed. The Commission should be careful not to develop new tests, in particular where existing notions and relevant legal frameworks such as State aid, can be relied on (see above para. 6).

104. In this respect, the APDC notes that Recital 53 of the FSR refers to the provisions of the public procurement directives which regulate abnormally low tenders²⁴. Although the APDC acknowledges that the undertakings may rely on justifications drawing from provisions in the relevant public procurement directives, the Article 27 concept of foreign subsidies “*that cause or risk causing a distortion in a public procurement procedure*” should be primarily competition-law based.
105. The guidelines should avoid incorporating cross-references to the procurement directives, which would create undue complexity in the interpretation of the FSR: (i) public procurement directives are transposed in national law, and discrepancies or variations in the transpositions increase the risk of an inconsistent application of the distortion test, (ii) the Political Guidelines 2024-2029 announced a revision of the public procurement directives (and a consultation process has already been initiated).
106. Moreover, a concept of distortion in relation to Article 27 of the FSR that is well-defined and primarily competition-law based is a requirement in view of the application of the foreign subsidies review in the context of EU procurement rules.
107. Indeed, pursuant to the recast Financial Regulation²⁵, in order to ensure consistency between the rules applicable to Member States and the procurement procedures, EU institutions, EU bodies and executive agencies should apply *mutatis mutandis* the same rules and procedures on foreign subsidies laid down in the FSR.²⁶

²⁴ Recital 53 of the FSR, “*The opportunity should be given to economic operators to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, regulating abnormally low tenders.*”

²⁵ Cf. Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union.

²⁶ Cf. Recital 168 of Regulation (EU, Euratom) 2024/2509.

108. Chapter 4 of the FSR (including Article 27) is applicable *mutatis mutandis* to the procurement procedures under the recast Financial Regulation, which in our view reinforces the importance of the relevant distortion test being entirely defined in the guidelines.
109. In terms of substance, the assessment should be done by assessing the indicators of distortion (Article 4) and whether the tender is unduly advantageous in relation to the works, supplies or services concerned (Article 27).
110. The Commission's assessment of the existence of a distortion in the public procurement market involves a two-step test - two conditions which must be met cumulatively: (1) the tender submitted by the subsidized economic operator must be unduly advantageous in relation to the works/supplies/services concerned and (2) there must be a link between the granting of the subsidy and the tender, demonstrating that the subsidy caused or risked causing a distortion in a PPP by enabling the undertaking, directly or indirectly, to submit an unduly advantageous tender.
111. The APDC agrees that in order to ascertain that the tender in question is “advantageous” in relation to the works, supplies or services concerned, the Commission will need to compare all the bids submitted in the tender procedure.
112. In a second step, the link between the subsidy and the tender must be established, i.e. it must be shown that the foreign subsidy enabled the economic operator to submit the unduly advantageous bid.

113. It has been envisaged that this link may be presumed where it is demonstrable that the foreign subsidies were “*granted expressly with the aim of favouring the production of the goods in the European Union to be supplied under the public contract or the provision of the relevant services*”.²⁷
114. The APDC agrees that where foreign subsidies have been granted expressly with the aim of favouring the production of the goods in the EU to be supplied under the public contract or the provision of the relevant services, this should only be a *prima facie* indication of the intention of enabling an economic operator to submit a tender that is unduly advantageous.
115. However, such a subjective approach is not sufficient to demonstrate in itself that the foreign subsidy actually enabled the submission of an unduly advantageous bid. Indeed, under State aid law, only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention²⁸.
116. Similarly, since only the effect of the subsidy on the undertaking matters, it is arguably irrelevant whether the subsidy is compulsory for the undertaking in that it could not avoid or refuse it.
117. Thus, it should be demonstrated that the financial bid of an undertaking is improved as a result of the foreign subsidy, through:
- direct cost advantage; i.e. the foreign subsidy affecting the cost structure of the tender (e.g. proposed price, but also payment terms, profit margin assumptions, the exclusion of price-adjustments for long-term contracts...), particularly for tenders following a ‘lowest price’ approach;

²⁷ Commission Staff Working Document, *Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of regulation (EU) 2022/2560 on foreign subsidies distorting the internal market*, 27 July 2024, page 4.

²⁸ Paragraph 67 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the EU.

- direct non-cost advantage; i.e. the foreign subsidy affecting other (non-costs) aspects of the tender, particularly for tenders following a ‘price-quality ratio’ approach, and taking into account the relevant criteria retained by the contracting authority;
- indirect advantage; i.e. the foreign subsidy affecting the financial status of the tenderer and enabling it to present a (cross-subsidized) offer which would not have been possible absent the foreign subsidy, it being noted that this indirect advantage must be sufficiently evidenced by the Commission to avoid that every single foreign subsidy that confers an advantage to the tenderer be automatically considered, as such, as having a link with the tender.

118. Conversely, if there is no such (direct or indirect) demonstrable link between the subsidy and the tender, and thus no enabling of the undertaking to submit a tender that is unduly advantageous, the test of Article 27 should be considered not met.

6. SECTION 5: GENERAL REMARKS ON THE FSR GUIDELINES AND THE OVERALL FSR IMPLEMENTATION

Question 5.1. Within the scope of Article 46 of the FSR, which elements, regarding the guiding principles, procedures and structure, should the FSR guidelines include in order to contribute to predictability of the FSR and to transparency as well as good administrative practice?

Question 5.2. When implementing these concepts, how can the Commission minimise administrative burden for companies?

Question 5.3. Please provide any other remarks on the FSR guidelines and the Commission’s implementation of the FSR, that you may have.

119. The APDC refers to remarks made in the introduction (see paras. 1 to 25), that would increase efficiency of the overall FSR process and alleviate the burden for all stakeholders.

7. CONCLUSION

120. The APDC remains committed to supporting the Commission in its goal of effectively addressing distortions caused by foreign subsidies while ensuring that the regulatory framework remains efficient, transparent, and predictable for businesses.