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**COMMISSION STAFF WORKING DOCUMENT**

***Accompanying the document***

**COMMUNICATION FROM THE COMMISSION**

# Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market

{C(2026) 42 final}

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# 1. INTRODUCTION

## 1.1. The FSR: Scope

Regulation (EU) 2022/2560 of the European Parliament and of the Council[1] (the 'Foreign Subsidies Regulation', 'FSR') lays down rules and procedures for investigating foreign subsidies and for redressing distortions of the internal market caused by foreign subsidies.

The purpose of the FSR is to contribute to the proper functioning of the internal market by establishing a harmonised framework to address distortions caused, directly or indirectly, by foreign subsidies, with a view to ensuring a level playing field.

The proper application and enforcement of the FSR should contribute to the resilience of the internal market against distortions caused by foreign subsidies and thereby to the European Union ('EU')'s open strategic autonomy.

For the purposes of the FSR, a foreign subsidy is deemed to exist where a third country provides, directly or indirectly, a financial contribution that confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries. Foreign subsidies are not generally prohibited. Once the existence of a foreign subsidy is established, the Commission should assess, on a case-by-case basis, whether such a foreign subsidy distorts the internal market. The Commission may then, in deciding whether to impose redressive measures or accept commitments, balance the negative effects of a foreign subsidy in terms of distortion of the internal market against the positive effects of that foreign subsidy.

## 1.2. FSR guidelines: legal basis and objectives

### *1.2.1. Legal basis*

In accordance with Article 46(1) FSR, the Commission is required, in order to foster the predictability of that Regulation, to publish and regularly update guidelines on:

(a) the application of the criteria for determining the existence of a distortion in accordance with Article 4(1) FSR;

(b) the application of the balancing test in accordance with Article 6 FSR;

(c) the application of the Commission's power to request the prior notification of any concentration in accordance with Article 21(5) FSR or of foreign financial contributions received by an economic operator in a public procurement procedure in accordance with Article 29(8) FSR (also referred to as 'call-in'); and,

(d) the assessment of a distortion in a public procurement procedure in accordance with Article 27 FSR.

### *1.2.2. Objectives of the FSR Guidelines*

The FSR introduces novel technical concepts for assessing the impact of foreign subsidies on concentrations, participation in public procurement procedures, and any other

[1] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (OJ L 330, 23.12.2022, p. 1, ELI: http://data.europa.eu/eli/reg/2022/2560/OJ)

economic activity in the internal market, without specifying the methodology to be applied. The novel technical concepts concern in particular the assessment of distortions, the assessment of distortions in public procurement, the balancing test and call-ins. These technical concepts, in line with recital (9) of the FSR, should be applied and interpreted in light of the relevant EU legislation, including that relating to State aid, mergers and public procurement.

The implementation of these technical concepts may raise questions for companies operating in the internal market, companies considering acquisitions of other companies operating in the internal market or companies participating in public procurement procedures in the internal market. In line with recital (73) of the FSR, the Guidelines under the Foreign Subsidies Regulation[2] ('FSR Guidelines', 'Guidelines') are necessary in order to foster predictability of the FSR. More generally, the Guidelines contribute to increasing the overall transparency of the Commission's action.

In implementing these technical concepts, the FSR Guidelines should seek to achieve a balance between (i) the objectives of the FSR, namely preserving the level playing field in the internal market while taking into account the potential positive effects of subsidies, (ii) ensuring the effective enforcement of the FSR by the Commission in light of these overarching objectives, taking into account sound legal analysis, and economic and commercial reality, (iii) ensuring legal certainty and predictability for undertakings and other stakeholders, and (iv) minimising the administrative burden for undertakings and public procurement authorities.

### 1.3. Summary of the main elements in each section of the FSR guidelines

On 9 January 2026, the Commission adopted the FSR Guidelines, clarifying several aspects of the FSR:

- Assessment of distortions (Articles 4(1) and 5 FSR) – Section 2 of the FSR Guidelines.

The FSR Guidelines clarify that once the Commission has found that an undertaking pursuing an economic activity in the internal market has benefited from a foreign subsidy, it will assess whether there is a distortion in the internal market through two steps.

First, the Commission will examine if the foreign subsidy strengthens the undertaking's competitive position in the EU. The Commission conducts this assessment by distinguishing between foreign subsidies that support, directly or indirectly, the undertaking's economic activities in the internal market ("targeted foreign subsidies") and other foreign subsidies ("non-targeted foreign subsidies"). For subsidies not targeted at economic activities in the EU a more detailed analysis will be conducted to assess the risk of them being used to cross-subsidise economic activities in the EU.

Second, the Commission will consider the impact on competition by analysing whether the subsidy is liable to alter the undertaking's competitive behaviour and market dynamics to the detriment of other operators, thus negatively affecting competition in the

[2] Communication from the Commission – Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (OJ C, C/2026/224, 13.1.2026, ELI: http://data.europa.eu/eli/C/2026/224/oj)

internal market. Such analysis will not be performed in a detailed way on the basis of indicators for the foreign subsidies deemed as the most likely to distort the internal market (Article 5(1) FSR).

The FSR Guidelines provide a non-exhaustive list of scenarios in which subsidies may have a distortive effect, e.g. impact on the acquisition of other undertakings or on the operating decisions of the undertaking under investigation, the alteration of investment decisions of the undertaking under investigation, or impact on activities at other levels of the value chain.

- Assessment of distortions in public procurement procedures (Article 27 FSR) – Section 2 of the FSR Guidelines, and more concretely Section 2.5.

If an economic operator participates in a public procurement procedure in the internal market and the Commission has information that a foreign subsidy may have affected the terms of the tender in relation to the procured work, supplies or services, the Commission will assess whether there has been a distortion. The assessment is limited to the public procurement procedure in question.

First, the Commission will assess whether the economic operator may have used the foreign subsidy in designing and improving the terms of its tender. The Commission will analyse the possibility and the incentives to use the foreign subsidy to cross-subsidise the tender under investigation, even when the subsidy was not specifically granted for the purpose of participating in public procurement procedures in the EU.

If the foreign subsidy is liable to benefit the tender under investigation, the Commission will assess whether the submitted tender is advantageous in relation to the subject of the procurement by comparing its terms in particular with those of the other submitted tenders in the procedure and the contracting authority's own estimates.

Finally, if the tender is considered as advantageous, the Commission will assess whether the advantage stems to an appreciable extent from the foreign subsidy which would render it unduly advantageous, or from other factors.

- The balancing test (Article 6 FSR) - Section 3 of the FSR Guidelines.

The FSR Guidelines explain the Commission’s process of weighing the negative effects of a distortive foreign subsidy against any possible positive effects of that foreign subsidy.

Positive effects should relate to the development of the subsidised economic activity on the internal market or policy objectives which are relevant to the Union.

The Commission will only take into consideration positive effects that are specific to the foreign subsidy under assessment.

In performing the balancing test, the Commission will consider amongst others, the severity of the distortion, the nature and intensity of the positive effects, and whether the positive effects can be achieved without the distortion occurring.

If the positive effects outweigh the negative ones, the Commission will not object to the foreign subsidy. If not, the Commission may accept commitments or impose redressive measures.

The FSR Guidelines provide illustrative examples of the relevant evidence that can be submitted and how the Commission would carry out the balancing test.

- Use of call-in mechanism for concentrations and public procurement procedures (Articles 21(5) and 29(8) FSR) - Section 4 of the FSR Guidelines.

The Commission can request the prior notification of non-notifiable concentrations and non-notifiable foreign financial contributions in public procurement procedures when certain conditions are met, in particular (i) where it suspects that foreign subsidies have been granted to relevant undertakings or where these have benefited from foreign subsidies in the last three years and (ii) when concentrations have not yet been fully implemented and in the case of public procurement procedures, when the contract has not been awarded yet.

The Commission will evaluate whether an *ex-ante* review is warranted based on the impact of the concentration or the public procurement procedure in the Union, considering factors such as the competitive impact of the concentration or the public procurement procedure, whether it concerns a strategic economic activity, and the possibility of a distortion.

The FSR Guidelines include certain safe harbours for foreign subsidies below EUR 4 million or subsidies addressing certain extraordinary circumstances, and recall that low value public procurement procedures are unlikely to merit *ex ante* review.

### 1.4. The Staff Working Document accompanying the FSR Guidelines

This Staff Working Document accompanying the FSR Guidelines serves as a transparency tool, and it does not substitute for an impact assessment under the Commission Better Regulation requirements.

The FSR Guidelines did not require an impact assessment as Article 46 FSR mandated the Commission to clarify technical concepts with the adoption of the FSR Guidelines.[3] Related policy options were already considered as part of the impact assessment accompanying the FSR.[4]

## 2. SUMMARY OF MAIN CONSULTATION ACTIVITIES

### 2.1. Main reactions to the call for evidence and targeted consultations

On 5 March 2025, the Commission published a call for evidence[5] that ran from 5 March 2025 to 2 April 2025. During that period, interested stakeholders had the opportunity to provide their feedback on the scope of the FSR Guidelines. At the same time, the Commission initiated a targeted consultation and requested feedback from Member States and selected stakeholders via a dedicated questionnaire. The comments submitted by

[3] See Section 1.2 above.

[4] Commission Staff Working Document Impact Assessment Accompanying the Proposal for A Regulation of the European Parliament and d of the Council on foreign subsidies distorting the internal market: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0099

[5] The call for evidence was published on the Commission Have your say site on 5 March 2025: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines_en

Member States and interested stakeholders during the feedback period for the call for evidence and the targeted consultations are summarised below. The summary of the comments is divided in line with the four sections of the FSR Guidelines, namely: i) assessment of distortions, ii) assessment of distortions in public procurement, iii) balancing test and iv) call-ins. The synopsis report in Annex I provides further details.

*2.1.1. Assessment of distortions*

Respondents stated that:

- The FSR Guidelines should clarify key notions of the FSR and describe clearly the criteria and methodologies to be used by the Commission in assessing distortion; they should also address in more detail the treatment of tax incentives provided by third countries.
- The FSR Guidelines should clarify how the Commission will assess the possibility of cross-subsidisation, in particular when the entity receiving the foreign subsidy is not based in the EU.
- The FSR Guidelines should introduce safe harbours/exemptions for certain non-distortive subsidies and provide examples.

*2.1.2. Assessment of distortions in public procurement*

Respondents stated that:

- The FSR Guidelines should explain how a conclusive link between the foreign subsidy and the advantageous tender would be established and they should provide for the opportunity to prove that no such link exists.
- The FSR Guidelines should explain how the assessment of whether a tender is unduly advantageous differs from the assessment of whether a tender is abnormally low.
- The FSR Guidelines should clarify how the advantageous nature of a tender is assessed, in particular how the terms of a tender would be compared to those of other tenders and to the contracting authority's own estimates of the procurement value.

*2.1.3. Balancing test*

Respondents stated that:

- The FSR Guidelines should clarify the methodology to be used by the Commission in performing the balancing test and how that methodology would align with other competition instruments, notably State aid.
- According to some respondents, a one-size-fits-all approach should be avoided; instead, the methodology should be tailored to the specifics of the case.
- The FSR Guidelines should provide a non-exhaustive list of examples of relevant positive effects to consider.

- The FSR Guidelines should clarify whether and how positive effects regarding third country policy objectives would be considered and how consumer welfare would be taken into account.
- The FSR Guidelines should clarify how positive effects would be assessed and quantified.

*2.1.4. Call-ins*

Respondents stated that:

- The FSR Guidelines should set out clear rules on and specify the circumstances under which the Commission may use its power to call-in concentrations below thresholds. Without such rules and specifications, Article 21(5) FSR would lack legal certainty and predictability. Clear rules are also considered necessary on the use of the power to call-in foreign financial contributions which are not notifiable under Article 28(1) FSR. This is needed because Article 29(8) FSR grants the Commission broad discretion, in that the only condition for taking action is the suspicion of the existence of a foreign subsidy.
- Call-ins may be more appropriate for certain sectors which warrant closer scrutiny because they are vital for future competitiveness, e.g. steel, energy, battery technology and critical infrastructure; as well as where intellectual property rights are concerned, such as in relation to unique technologies, patents, know-how and access to resources.
- According to certain respondents, call-ins should be restricted (if necessary by setting de minimis thresholds) to exceptional cases, where there is a strong basis for suspicion and a highly predictable distorting effect on competition. Other respondents encourage the Commission to make wider use of the call-in powers.
- The FSR Guidelines should address concerns over legal uncertainty as to whether an economic operator may become subject to a call-in and excessive burden on participants in public procurement, with emphasis on the timing of notification requests.

## 2.2. Main reactions to the public consultation on the draft FSR guidelines

On 18 July 2025, the Commission launched a public consultation on a draft of the FSR Guidelines.[6] Respondents reiterated many of the points already raised when the initiative was launched in March 2025, in the context of the call for evidence and the targeted consultations with Member States and relevant stakeholders. During the public consultation on the draft FSR guidelines, any interested stakeholder had the opportunity to read the draft Commission proposal in detail and provide more targeted comments. The comments submitted by interested stakeholders during the public consultation held from 18 July 2025 to 12 September 2025 are summarised below. The summary of the comments is divided in line with the four sections of the FSR Guidelines, namely: i)

[6] The draft FSR Guidelines were published for public consultation on the Commission's site: https://competition-policy.ec.europa.eu/public-consultations/guidelines-foreign-subsidies_en

assessment of distortions, ii) assessment of distortions in public procurement, iii) balancing test and iv) call-ins. The synopsis report in Annex I provides further details.

*2.2.1. Assessment of distortions*

- Respondents generally argued that the Commission would keep too much discretion when carrying out the assessment: the substantive tests for both parts of the distortion assessment (improvement of the competitive position and negative impact in the internal market) would be too general, without any constraints set on the Commission's discretion.
- Respondents also considered that some explanations are not sufficiently clear and examples would be necessary to provide clarity on the type of assessment that the Commission would carry out.
- According to some respondents, in the cross-subsidisation test – which is part of the assessment of the improvement of competitive position – the draft FSR guidelines would seem to have shifted the burden of proof to the undertaking under investigation, favouring the Commission. Some respondents considered that the assessment should focus on the likelihood of cross-subsidisation, in particular on the incentives for cross-subsidisation. Some respondents indicated that internal group policies, by-laws, and other intragroup arrangements should be considered as possible barriers to cross-subsidisation, especially for listed companies.
- The appreciability tests introduced in both parts of the distortion assessment should, according to several respondents, be based on more concrete criteria and quantitative thresholds should be set out to facilitate predictability. In addition, numerous respondents stated that some examples should be introduced regarding categories of subsidies which would be considered by the Commission unlikely to be distortive.
- According to some respondents, the Commission should be required to show a substantive causal link between the foreign subsidy and the distortion. Allowing the Commission to merely show that there is a reasonable link between the foreign subsidy and the distortion, especially where the foreign subsidy is but one among many contributing factors, would mean ending up with a confusing, unreasonable and unpredictable test where the Commission enjoys too much discretion.
- According to some respondents, the Commission would enjoy too much discretion in establishing distortion in an acquisition. For example, one respondent expressed concerns that a distortion in the acquisition process could be found for the sole reason that potential acquirers have been possibly crowded out as this might lead to overenforcement and be seen as too speculative. In this respect, another respondent argued that the Commission should only consider these cases where a competing offer was actually made. At the same time, another respondent suggested that the Commission should indicate which tools it plans to use to carry out the relevant counterfactual analysis.

*2.2.2. Assessment of distortions in public procurement*

- Many respondents pointed out that the scope of foreign subsidies that the Commission considers examining in order to assess whether a tender is unduly advantageous appears to be broader than the scope of the notification requirement under Article 28(1)(b) FSR. Respondents suggested that the Commission should explain the reasons for this interpretation and possibly provide examples.
- Several respondents pointed out that the Commission should investigate all indicators to establish the actual impact of the foreign subsidies on the tender, e.g. by proving direct or indirect cost advantages. Other respondents suggested that the foreign subsidy should exceed a certain size in relation to the price offered in the tender or should be otherwise substantial to be considered to have a distortive effect. Some respondents pointed out that the draft FSR guidelines seem to reverse the burden of proof, as they appear to establish a negative presumption that the foreign subsidy has an impact on the tender in the absence of evidence to the contrary, especially as the foreign subsidy may not to be the main factor for the advantageous nature of the tender.
- Several respondents argued that the Commission should explain the respective roles and responsibilities of the contracting authority and the Commission with regard to the assessment of an abnormally low tender, particularly where there are indications of subsidies from third countries.
- Some respondents requested more examples to improve the clarity of the text, e.g. for subsidies which are unlikely to have a distortive effect and for a better risk assessment when participating in a tender.

*2.2.3. Balancing test*

- Certain respondents stated that, when assessing the positive effects, account should be taken of the policy objectives of third countries, while other respondents opposed this.
- Certain respondents stated that the Commission's methodology under the balancing test should align with assessment principles for State aid compatibility, while other respondents called for a different approach in view of the differences between State aid and the FSR.
- Requests were made to align the legal standard for the admission of positive effects with the legal standard for establishing a distortion.
- Many respondents requested clarity on the types of admissible evidence.
- Many respondents also requested that the FSR Guidelines provide examples of a balancing test.

*2.2.4. Call-ins*

- Respondents generally argued that the FSR Guidelines granted too much discretion to the Commission when exercising its call-in powers. To ensure legal certainty of the call-in instrument, they favoured a requirement of a substantiated suspicion or positive evidence to prove the suspicion for a call-in.

- Most respondents considered that limits should be placed on the Commission call-in powers. They argued that call-ins should be applied only in exceptional circumstances and that thresholds should be established for carrying out call-ins. Some were opposed to granting these powers to the Commission altogether.
- Most respondents agreed that in its assessment on whether to initiate a call-in, the Commission should consider whether the suspected foreign subsidies may have a distortive effect.
- According to some respondents there should be a minimum procurement value to justify that a tender may have an impact in the Union.
- A few respondents suggested that more information should be provided regarding the call-in mechanism and the procedural consequences regarding the call-in of the tender of one economic operator for (i) the other participants in the public procurement procedure and (ii) for the contracting entity.

### 2.3. Other engagement with stakeholders

In addition to the above consultation activities, Commission's representatives participated in conferences and ad-hoc meetings organised by stakeholders, attended discussions on the draft FSR Guidelines at the Council working party on competition on 16 June 2025 and on 28 November 2025, held a meeting with the national contact points for the FSR concentration module on 29 September 2025 and organised a discussion on the draft Guidelines with the Foreign Subsidies Advisory Committee (FSAC) on 4 December 2025. These different consultations contributed to the collection of feedback and comments that were considered in the drafting of the FSR Guidelines.

## 3. THE FSR GUIDELINES CLARIFY KEY CONCEPTS, FOSTERING PREDICTABILITY AND ENSURING TRANSPARENCY

### 3.1. Assessment of distortions

The assessment of the concept of distortion is composed of two legs. First, the foreign subsidies must be liable to improve the competitive position in the internal market of the beneficiary of the subsidy. Second, the foreign subsidy must actually or potentially negatively affect competition in the internal market. These two conditions must be met cumulatively and, consequently, only foreign subsidies which meet both of them will be considered distortive.

The FSR Guidelines enhance transparency and predictability by setting out a detailed analytical framework for the assessment of these two conditions, and by explaining the evidentiary and the legal standards applicable in each of them. The FSR Guidelines include examples of foreign subsidies and explain how the analysis would take place under both conditions. Importantly, the FSR Guidelines introduce a threshold of "significance" of the subsidy or "appreciability" of the distortion. The FSR Guidelines also present different examples of theories of distortion and illustrate in a detailed way how the Commission would carry out a distortion assessment for each of them.

More specifically, the FSR Guidelines introduce a clear-cut conceptual distinction between the first condition (improvement of the competitive position) and the second one

(the subsidy actually or potentially negatively affecting competition in the internal market). While the second condition concerns the impact of the foreign subsidy on competition in the internal market, the first condition focuses on determining the existence of a link (actual or potential) between the foreign subsidy and the economic activities of the undertaking in the internal market. In the case of subsidies which have no connection with the internal market, the Commission may find no impact on the internal market, without having to conduct the assessment under the second leg. On the contrary, if such a link exists, the Commission will analyse the concrete impact of that foreign subsidy on the internal market. The FSR Guidelines thus strengthen predictability in the enforcement of the FSR: undertakings are able to determine beforehand which foreign subsidies are unlikely to be considered problematic and subject to an analysis on their impact on competition in the internal market.

In assessing that link with the internal market, i.e. whether a foreign subsidy improves the competitive position of an undertaking in the internal market, the FSR Guidelines distinguish between so-called "targeted" and "non-targeted" subsidies and explain when a subsidy would fall under one of the two categories, giving concrete guidance and providing examples. The analytical framework differs for each category, while making it clear, to respond to some of the concerns expressed by respondents to the public consultation, that it is for the Commission to substantiate its findings with evidence, with the degree of evidentiary support varying according to the category of subsidy. As demonstrated by *inter alia* their purpose, nature, and scope, targeted subsidies have a link with the internal market since they support the undertaking's economic activities in it, rendering any further analysis superfluous. By contrast, non-targeted subsidies require a more detailed analysis by the Commission so it can establish whether the subsidy improves the competitive position of the undertaking in the internal market. That analysis concerns essentially whether the undertaking is liable to use those subsidies (or resources freed up by them) to support its economic activities in the internal market ("cross-subsidisation").

The FSR Guidelines stipulate a transparent and foreseeable analytical lens by providing specific factors to determine the potential for cross-subsidisation, such as the shareholding structure of the beneficiary group, the existence of functional, economic and organic links between the beneficiary entities and their EU subsidiaries, applicable laws, the economic situation of the undertaking, design and conditions of the foreign subsidy or binding agreements with third parties. For each of these factors, the FSR Guidelines explain their specific impact on the risk of cross-subsidisation. Moreover, the FSR Guidelines foster transparency by providing specific examples of situations where each of these factors could play a determining role on the assessment of cross-subsidisation.

The introduction of quantitative thresholds, which was requested by some market respondents to the public consultation, was not considered appropriate. Setting out thresholds exceeding those in Articles 4(2) and 4(3) FSR would not be prudent in view of the nature of the distortion assessment, which is strictly linked to the economic and legal elements of each case, in particular the nature of the subsidy and the characteristics of the beneficiary and of the industry This being said, the introduction of a specific section on foreign subsidies which are not liable to improve the competitive position of the undertaking in the internal market addresses some of the concerns expressed by market

respondents, and increases predictability. These categories include, among others, subsidies materially complying with the Union State aid compatibility rules, had they been granted by a Member State, subsidies designed to crowd-in private investment or subsidies pursuing non-economic or social objectives. The FSR Guidelines include in this section those subsidies which exceed the thresholds set out in Article 4(2) and (3) FSR, but with an amount that is still insignificant in relation to the extent of the actual or potential economic activities of that undertaking in the internal market. Despite some comments received in the public consultation, that assessment cannot be set out in absolute terms but is left to a case-by-case analysis.

As regards the second condition, the FSR Guidelines foster predictability and ensure transparency by (i) addressing the general principles that the Commission will apply when assessing whether a foreign subsidy actually or potentially negatively affects competition in the internal market; (ii) addressing the substantive standard to establish that a foreign subsidy actually or potentially negatively affects competition in the EU internal market; (iii) outlining the steps that the Commission will follow in such assessment by examining first the impact of the foreign subsidy on the behaviour of the subsidised undertaking and, second, how that behaviour can alter or interfere with the competitive dynamics to the detriment of other economic actors; (iv) providing non-exhaustive examples of theories of distortion with meaningful descriptions of what type of assessment the Commission may carry out under each scenario.

As regards the general principles the Commission will apply in assessing the second condition, the Guidelines explain how the Commission will assess whether the foreign subsidies under review are (i) liable to and (ii) have a negative impact on the level playing field in the internal market (para. 36 ff.). The first element consists in the liability for the foreign subsidies at issue (in isolation or combined) to have a negative impact. The second element consists in an actual or potential alteration of or interference with the level playing field, to the detriment of economic actors such as competitors, other players active in the value chain or in sectors directly or indirectly related to the undertaking under investigation's economic activities, consumers or workers. Moreover, the FSR Guidelines clarify that such alteration of or interference with the level playing field can occur in relation to any of the EU activities of the subsidised undertaking and that, for this purpose, the Commission may carry out a dynamic and prospective assessment, hence taking into account how these activities and the sector in which they operate are likely to evolve in the near future.

As regards the substantive standard, the Commission took into account the concerns raised by some respondents to the public consultation. According to those respondents, there would be no need for the Commission to show a causal link between the alleged foreign subsidy and the alleged negative impact. The wording *causal link* would be confusing as to the evidence required to show the factual and legal causation. To address these concerns, the final text of the FSR Guidelines has been improved in terms of clarity, without, however, changing the substance of the test and of the underlying counterfactual analysis. For example, the Commission has harmonised the wording throughout the distortion section referring always (and exclusively) to the capacity of the foreign subsidy to negatively affect competition in the EU internal market. The standard is one of capacity, not of actual occurrence. Moreover, the final text of the FSR Guidelines now

clarifies that "*it is not necessary for the foreign subsidy to be the sole reason for the negative impact on competition in the internal market. It is sufficient that the foreign subsidy contributes to the negative impact on competition in the internal market*". At the same time, the FSR Guidelines make clear that, while the Commission does not need to prove an actual impact, the impact needs to be appreciable.

As regards the steps that the Commission will take when assessing whether a foreign subsidy actually or potentially negatively affects competition, the FSR Guidelines outline a two-steps assessment, consisting in examining: (i) the impact of the foreign subsidy on the behaviour of the subsidised undertaking; and (ii) how that behaviour actually or potentially alters, or interferes with the competitive dynamics to the detriment of other economic actors, including undertakings active across the same value chain or in other affected sectors. The Commission will base its assessment on several possible indicators such as the nature, the amount, the frequency, the conditions and scope of the foreign subsidy as well as the size of the subsidised undertaking and dynamic characteristics of the sector(s) affected.

As regards the non-exhaustive examples of theories of distortion, the FSR Guidelines foster predictability and ensure transparency by providing meaningful descriptions of the type of assessment the Commission may carry out under each scenario.

First, the FSR Guidelines explain that the Commission may look into possible distortions in the acquisition of other undertakings. More specifically, the Commission explains that it will first consider whether there is any foreign subsidy that may have facilitated an acquisition that, absent the foreign subsidy, it would have happened in a different way or it would have not happened at all. The FSR Guidelines clarify that this is the case where, for example, the foreign subsidy may facilitate the offering of more attractive terms than what would prevail in a normal market context. In this context, the FSR Guidelines clarify that the negative impact raises from the crowding out of actual or potential alternative acquirers. In this respect, some respondents to the public consultation raised concerns that the approach taken by the Commission in the FSR Guidelines would be too broad. To address such concerns and hence foster predictability and ensure transparency, the final text of the FSR Guidelines has been further refined with clearer examples, taken from the Commission's most recent decisional and preliminary review practice in notified concentrations, which is another reason why the Commission considered that no change of substance was required.

Second, the FSR Guidelines explain that the Commission may look into distortions in the operating decisions of the subsidised undertaking and outlines a set of relevant indicators. Such distortion may occur where, for instance, the foreign subsidy would facilitate the offer of lower prices or improved sales terms or market expansion beyond the likely levels absent the foreign subsidy causing rivals to reduce sales and profits, hence downsize or exit the market.

Third, the FSR Guidelines explain that the Commission may look into distortions in the investment decisions of the subsidised undertaking and highlight some relevant indicators for its assessment. This assessment looks at where, for example, the foreign subsidy may affect the undertaking's investment decisions and hence either allow the subsidised

undertaking to carry out investments that it would otherwise not have undertaken or discourage investments by other competitors.

Fourth, the FSR Guidelines explain that the Commission may look into distortions across the value chain or related sectors. This is the case, for example, when the foreign subsidy may lead to an increase in the demand for a certain input whose access is more costly or difficult for rivals of the subsidised undertaking, hence leading to their market downsizing or exit. The FSR Guidelines also clarify that the Commission can look in possible business relocations to outside the EU internal market and all the related alterations of the competitive dynamics that may result in a distortion. To foster predictability and ensure transparency, the FSR Guidelines outline a set of indicators that could be used in this assessment (such as the level of vertical integration across the value chain and the characteristics of the sector at issue).

### 3.2. Assessment of distortions in public procurement

In the context of public procurement procedures, the FSR Guidelines enhance transparency and predictability, in particular, by explaining the degree of evidentiary support required for the Commission to substantiate its findings with evidence varying according to the category of subsidy and by setting out a structured analytical framework for assessing whether a foreign subsidy causes or risks causing a distortion in the internal market by enabling, actually or potentially, an economic operator to submit an unduly advantageous tender.

The FSR Guidelines provide clarity on which foreign subsidies within a corporate group may be relevant for establishing a distortion in a public procurement procedure. While the notification obligation under Article 28(1), point (b) of FSR merely mentions entities forming part of a linear controlling shareholding structure, the FSR Guidelines clarify that the substantive scope of the Commission's assessment go beyond those entities. Namely, Section 2.5.1. of the FSR Guidelines elucidates the aspects the Commission will look at to assess whether subsidies granted to entities outside the strict notification scope can benefit the economic operator, a main subcontractor, or a main supplier and thus improve the economic operator's competitive position. This distinction between notification obligations and substantive assessment criteria is crucial for legal certainty: Notifying parties are made aware of the fact that the absence of a notification obligation for a given corporate group entity does not automatically exclude the relevance of foreign subsidies granted to it.

In this context, the FSR Guidelines reinforce legal certainty by providing clear conditions under which the Commission may consider a foreign subsidy granted to an entity within the corporate group of either the economic operator, a main subcontractor or a main supplier, but outside the scope of Article 28(1), point (b) of FSR. They explain that mere membership in the same corporate group is not sufficient to imply that subsidies will be made available to the economic operator or the main subcontractor or main supplier. Instead, the Commission's assessment centers on whether the subsidy is limited in law or in fact to the entity it was granted to, or whether it may have otherwise been made available, directly or indirectly, to the economic operator or the main subcontractor of supplier involved in the same tender. By referring to concrete factors such as economic and financial interconnections, coordinated strategies, mutual dependencies, and intra-

group transactions, the FSR Guidelines provide a transparent and foreseeable analytical lens. Economic operators can thus anticipate the types of internal arrangements that may lead the Commission to conclude that a subsidy granted elsewhere in the group has improved the tenderer's competitive position. The clarifications were introduced as a direct response to the public consultation where business representatives in particular stressed the need for further clarification of the scope of the Commission's assessment.

Furthermore, predictability is increased through the introduction and explanation of a step-by-step analytical framework to be used by the Commission for the substantive assessment of whether a tender is unduly advantageous. The FSR Guidelines spell out three analytical stages during which it is determined: (i) whether the tender is advantageous, (ii) whether that advantage is undue, and (iii) whether there is an actual or potential negative effect on the procurement procedure. This sequencing makes explicit that the Commission will not automatically infer the existence of a distortion merely by the existence of a foreign subsidy.

In the first step, the FSR Guidelines further enhance transparency by describing in detail how the Commission will assess if a tender is advantageous. The Commission will assess whether the tender submitted by the economic operator is advantageous in relation to the works, supplies, or services concerned. That advantage may consist in, for example, reducing the price, increasing the quality, or offering better terms related to delivery and lead times. It sets out concrete comparative methodologies, including comparison with (i) other tenders in the same procedure, (ii) the contracting authority's estimates and preparatory documents, or (iii) a counterfactual tender that would likely have been submitted absent the subsidy. By explaining the purpose and limits of each method—such as under what circumstances an offer is not suitable as a benchmark—the Commission makes its reasoning understandable and clear for economic operators and contracting authorities alike.

The second step concerns the "undue" nature of the advantage, where the Commission directly addresses concerns expressed in the public consultation about how the link between a subsidy and the tender will be established. The FSR Guidelines clarify that an advantage is undue only if it stems to an appreciable extent from a foreign subsidy. The Commission will not establish the existence of an undue advantage without first considering any evidence submitted by the economic operator in question who will be explicitly invited to justify the advantage by reference to alternative, legitimate factors, such as cost-efficiency, innovation, or exceptionally favourable market conditions, drawing on the established framework for assessing abnormally low tenders under Union procurement law. This alignment with familiar legal concepts and case-law significantly enhances predictability, as undertakings can rely on well-known justificatory arguments and evidentiary standards.

Importantly, the FSR Guidelines also explain the standard applied by the Commission to establish the link. They clarify that the foreign subsidy need not be the sole cause of the advantageous tender; it suffices that it could have impacted the tender to an appreciable extent. By articulating this threshold openly, the Commission allows undertakings to assess *ex ante* whether the scale and nature of a subsidy are likely to be considered relevant, particularly where a subsidy covers a substantial portion of the contract value.

Finally, transparency is increased by clarifying the procedures and explaining how the Commission will coordinate with contracting authorities in the assessment of tenders. By delineating the respective roles of the Commission and the contracting authority in Section 2.5.2 of the FSR Guidelines - in cases involving abnormally low tenders - the FSR Guidelines reduce uncertainty about parallel assessments and procedural overlap. Economic operators are thus able to better understand how and when foreign subsidy concerns will be examined, and by whom, and contracting authorities and entities are informed about how to cooperate with the Commission when reviewing abnormally low tenders.

In sum, the FSR Guidelines respond to the consultation's feedback by making explicit both the substantive and procedural framework governing the assessment of foreign subsidies in public procurement procedures. They clarify that group-level subsidies may be relevant even when falling outside the notification scope but only under certain conditions, and they set out a structured, evidence-based methodology for establishing the link between a subsidy and an advantageous tender, with the aim of significantly improving predictability and transparency for all stakeholders involved.

### 3.3. Balancing test

In the context of the balancing test, the FSR Guidelines enhance transparency and predictability, in particular by detailing which positive effects are considered relevant to the assessment, setting out a structured analytical framework for determining whether positive effects can be taken into account, the methodology pursued by the Commission in performing the balancing test, and explaining evidentiary standards.

The FSR Guidelines explain that, in order to preserve the effective enforcement of the FSR, the assessment of the balancing test is to be performed on a case-by-case basis, taking into account in particular the specific distortion resulting from the foreign subsidy identified in that concrete case and in the context of the relevant economic activity, as well as the specific positive effects of the foreign subsidy under review. Consequently, it is not possible to determine, in advance, that a foreign subsidy of a certain type and meeting certain conditions would necessarily have positive effects that outweigh the distortion of the internal market resulting from that foreign subsidy.

The FSR Guidelines then clarify which positive effects can be taken into account.

With respect to positive effects on the development of the relevant subsidised economic activity on the internal market, the FSR Guidelines explain how foreign subsidies should be considered to enable the development of that activity, i.e., where they make it possible for the subsidized economic activity to exist at all or trigger a change in the development of that subsidized economic activity. That may be the case where the subsidy remedies a market failure. The FSR Guidelines clarify that the simple fact that a particular project or activity may not be profitable does not necessarily imply a market failure, since that lack of profitability may be the result of a well functioning market. In doing so, the FSR Guidelines underline that to preserve the level-playing field in the internal market, the assessment of whether or not foreign subsidies do have positive effects on the development of the economic activity should be based on economic reality, duly demonstrated by the party invoking the positive effects, and that not all foreign subsidies can be considered to have such positive effects.

The FSR Guidelines also clarify that the scope of the relevant subsidised economic activity should be understood as that carried out by the undertaking and in respect of which a distortion is established; as such, positive effects on other undertakings or other economic activities are to be assessed in the context of broader positive effects. This approach confirms that not all positive effects of foreign subsidies (under a global welfare standard) need to be taken into account, as such an approach would run contrary to the fundamental objective of the FSR, which is to ensure the level-playing field in the internal market.

In respect of other policy objectives, the FSR Guidelines provide additional transparency on the types of policy objectives that may be considered, and provide examples of such policy objectives such as those recognised in Union law or in non-binding acts of the Union, such as under State aid rules.

The FSR Guidelines also clarify that policy objectives other than those of the Union can be taken into account, to the extent that they are nevertheless relevant to the Union, such as when those foreign subsidies create positive effects for the Union and/or contribute to a global welfare improvement or the preservation of global public goods. The approach taken in the FSR Guidelines thus preserves the underlying objective of the FSR, which is to ensure a level-playing field on the internal market, whilst recognizing the potential positive effects of foreign subsidies to the Union.

The FSR Guidelines state that the availability of alternative sources of supply for the contracting authority may be taken into account in the context of public procurement. They clarify that availability cannot be regarded as a positive effect of foreign subsidies in the strict sense, as this availability depends rather on the interest of other economic operators in a tender and on their submission of eligible tenders. Nevertheless, the ability of the contracting authority to perform its tasks effectively can be considered a positive effect in a broader sense, particularly when deciding on commitments and their possible nature and scope due to the potential impact on public services.

The FSR Guidelines then provide a structured analytical framework for the performance of the balancing test.

That analytical framework does not fully replicate State aid methodological principles, nor existing State aid compatibility and exemption rules. Indeed, in view of (i) the structural and procedural differences between the FSR and State aid, notably the fact that under the FSR, one should precisely identify how the foreign subsidies distort the internal market and (ii) the fact that foreign subsidies may lead to positive and negative effects which are not evenly geographically allocated, it is more appropriate, in order to ensure the effectiveness of the enforcement of the FSR and avoid discrimination against companies receiving foreign subsidies, to apply more flexible principles under the balancing test than under State aid rules.

Accordingly, the FSR Guidelines state that the positive effects must be “specific” to the foreign subsidy, i.e. the Commission will consider whether, absent the foreign subsidies, such positive effects would not occur, or otherwise not to the same degree. For that purpose, the Commission will take into account whether the foreign subsidies have led, lead, or are likely to lead to a change in behaviour of the undertaking benefitting from the foreign subsidy. That assessment is to be evaluated in an objective manner, grounded in

economic reality, that ensures that the foreign subsidy does indeed contribute to the positive contributions to the Union that the FSR recognises. Correspondingly, that evaluation does not depend on the intention of the third country granting the foreign subsidies; rather, it is the objective effect of the foreign subsidy that is relevant.

The FSR Guidelines then explain how the balancing test will be performed, taking into account the underlying objective of the FSR, to ensure a level-playing field in the internal market, whilst recognizing the possible positive contributions of foreign subsidies to the Union. That assessment thus depends on the characteristics of the distortion identified by the Commission, as well as the nature, intensity and timing of the positive effects. The FSR Guidelines also ensure that the need to recognize the positive contributions of foreign subsidies to the Union takes into account the principle of proportionality: as such, the balancing test will consider the extent to which the distortion identified *exceeds that which is necessary* to achieve the positive effects (a so-called unavoidable distortion). That principle is based on the sound legal analytical framework devised under State aid, transposed and adapted to the specificities of the FSR.

The FSR Guidelines then recall the possible outcomes of the balancing test under Article 6 FSR, depending on the objective assessment of the respective needs to ensure a level playing field in the internal market and preserve the positive contributions of foreign subsidies to the Union. The guidelines foster clarity as to how the balancing test may influence the decision of the Commission to adopt redressive measures or accept commitments, and the design of such redressive measures or commitments, in particular to remedy avoidable distortions and preserve, where possible, the occurrence of positive effects.

The FSR Guidelines recall that, in view of the economic reality of subsidization, it may be necessary in certain circumstances to assess both the negative and positive effects of foreign subsidies on a cumulative basis.

The FSR Guidelines then enhance transparency and predictability of the procedure under which the balancing test is to be conducted. In particular, they clarify the burden and standard of proof of the existence of relevant positive effects, and the type of admissible evidence. Admissible evidence should be verifiable and not be theoretical, for example, on quantitative or qualitative analyses based on case specific, solid, empirical data, such as financial data. Those parameters ensure that the Commission's assessment is based on solid evidence.

The FSR Guidelines recall the timing under which information regarding positive effects may be submitted to the Commission according to the FSR Implementing Regulation[7], and state that while the Commission should make every reasonable effort to consider and incorporate all evidence submitted, the Commission is not obliged to take into account evidence submitted at a late stage of the procedure, so as to preserve the effective enforcement of the FSR.

[7] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (C/2023/4622, OJ L 177, 12.7.2023, pp. 1–44, ELI: http://data.europa.eu/eli/reg_impl/2023/1441/OJ).

Finally, the FSR Guidelines foster transparency by including a detailed illustration of how the balancing test may be conducted in a hypothetical case.

### 3.4. Call-ins

The FSR Guidelines clarify the conditions under which the Commission can call-in non-notifiable concentrations and non-notifiable foreign financial contributions in public procurement procedures. The FSR Guidelines also specify the factors that the Commission will take into account when exercising its discretion.

For the Commission to call-in non-notifiable concentrations in accordance with Article 21(5) FSR, cumulative conditions must be met, namely:

– there is a concentration, as defined under the FSR;

– the concentration does not meet at least one of the notification thresholds laid down in Article 20 FSR;

– the call-in must occur before the full implementation of the concentration;

– there is suspicion that foreign subsidies have been granted to the undertakings concerned in the three years prior to the concentration.

To foster transparency, the FSR Guidelines provide additional details on how to interpret these conditions for triggering a call-in of non-notifiable concentrations. In particular, the timing for exercising the call-in of non-notifiable concentrations relates to 'implementation' and should be understood as the full (and not merely partial) implementation of the concentration.

For the Commission to call-in the notification of non-notifiable foreign financial contributions according to Article 29(8) FSR, cumulative conditions are to be met, namely:

– there is a public procurement procedure as defined under the FSR;

– the foreign financial contributions are not notifiable as at least one of the notification thresholds under Article 28(1) FSR is not met;

– the call-in must occur before the award of the contract;

– there is suspicion that an economic operator may have benefited from foreign subsidies in the three years prior to submitting the tender or requesting to participate in the public procurement procedure.

The FSR Guidelines provide additional predictability of the Commission's action by clarifying that the Commission will only exercise its discretionary call-in power when it considers that the concentration or foreign financial contributions in a public procurement procedure merit *ex ante* review, given its 'impact in the Union'. The assessment of whether a concentration or foreign financial contributions in a public procurement procedure merit *ex ante* review, given their impact in the Union, aims to strike a balance between; (i) ensuring effective enforcement of the underlying objective of the FSR to ensure a level-playing field in the internal market, which may require that certain operations are reviewed *before* the distortion occurs, and (ii) preserving legal certainty

for undertakings and minimising their administrative burden, in particular when the FSR already sets defined thresholds above which *ex ante* notification is required.

The FSR Guidelines clarify that concentrations and public procurement procedures have a sufficient impact in the Union, even if they fall below the established thresholds. It is therefore justified to impose an additional administrative burden on undertakings in order to ensure effective enforcement of the FSR.

In that context, the FSR Guidelines set out a non-exhaustive list of factors that the Commission may consider, amongst others, when examining the impact in the Union of the concentration or public procurement procedure concerned: (i) indications about the target's actual or future economic significance; (ii) the strategic or important character of the economic activity, the sector, the supply or value chain, or the undertakings concerned; (iii) patterns in investments and acquisitions; (iv) previous Commission decisions pursuant to the FSR; and (v) contextual information indicating the possibility of a distortion.

To improve predictability for undertakings, the FSR Guidelines confirm that the Commission will not request a call-in when the suspected foreign subsidies fall below EUR 4 million over a period of three years, or when they address the damage caused by natural disasters or exceptional circumstances, reflecting the fact that such foreign subsidies are considered unlikely to distort the internal market under Articles 4(2) and 4(4) of the FSR, respectively. With regard to public procurement procedures, the FSR Guidelines confirm that tenders in public procurement procedures with an estimated value below the applicable thresholds set out in Article 4, points (a), (b) and (c) of Directive 2014/24/EU are likewise unlikely to distort the internal market and therefore do not merit an *ex ante* review.

The FSR Guidelines also foster transparency regarding the Commission's exercise of a call-in by setting out the procedure that the Commission will follow. More concretely, once the Commission decides to initiate a call-in, the decision will be notified to the acquiring undertaking in accordance with Article 41(1) FSR. From the date of adoption of the decision, the concentration is deemed notifiable within the meaning of the FSR and will be subject to the provisions set out in Chapter 3 of the FSR. In public procurement procedures, the economic operator will be notified of the Commission's decision to call-in the notification of foreign financial contributions. The contracting authority will be informed as early as possible to ensure effective cooperation in the application of the FSR. Upon notification of the Commission decision the foreign financial contributions are deemed to be notifiable foreign financial contributions in a public procurement procedure, and will be subject to the provisions set out in Chapter 4 of the FSR.

## 4. CONCLUSION

The FSR Guidelines clarify several key concepts of the FSR. The FSR Guidelines have been built on the Commission's enforcement of the FSR to date and they have been subject to extensive consultations with interested stakeholders and Member States. As a result, the FSR Guidelines bring further predictability and ensure transparency for companies regarding the Commission's action under the FSR.

## ANNEX – SYNOPSIS REPORT ON CONSULTATIONS

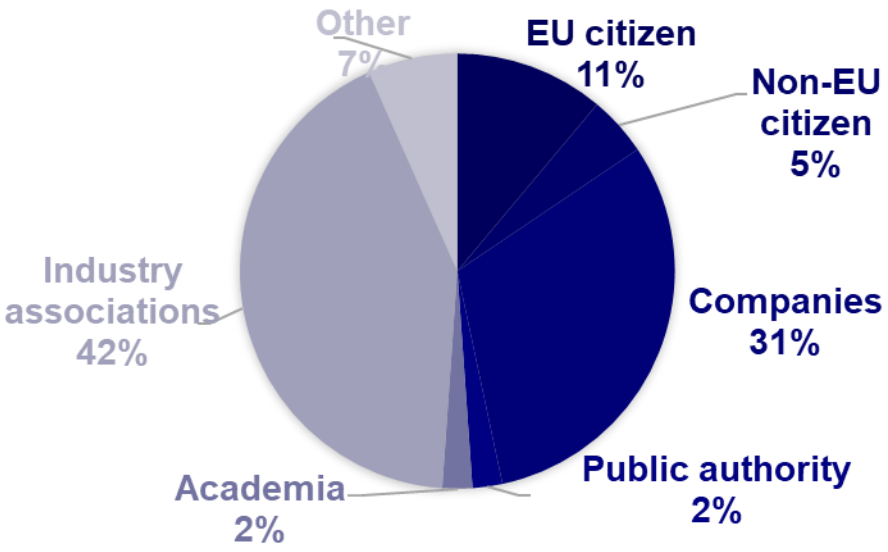
A. Overview of the consultations

Pursuant to Article 46(2) FSR, the Commission is required to conduct appropriate consultations with stakeholders and Member States before issuing guidelines.

On 5 March 2025, the Commission published a call for evidence and conducted targeted consultation activities with Member States and stakeholders. The consultation period ended on 2 April 2025.

The Commission received **45 contributions from interested stakeholders as reactions to the call for evidence**. In terms of types of stakeholders, industry associations and companies were the primary contributors to the call for evidence, 42% (19 out of the total 45 submissions) and 31% (14 out of the total 45 submissions), respectively (see Figure 1).

Figure 1: Call for evidence (% based on 45 submissions)




*Source: European Commission*

Eighteen Member States[8] and four other stakeholders[9] also provided **feedback during the targeted consultation** activities, via a dedicated questionnaire.

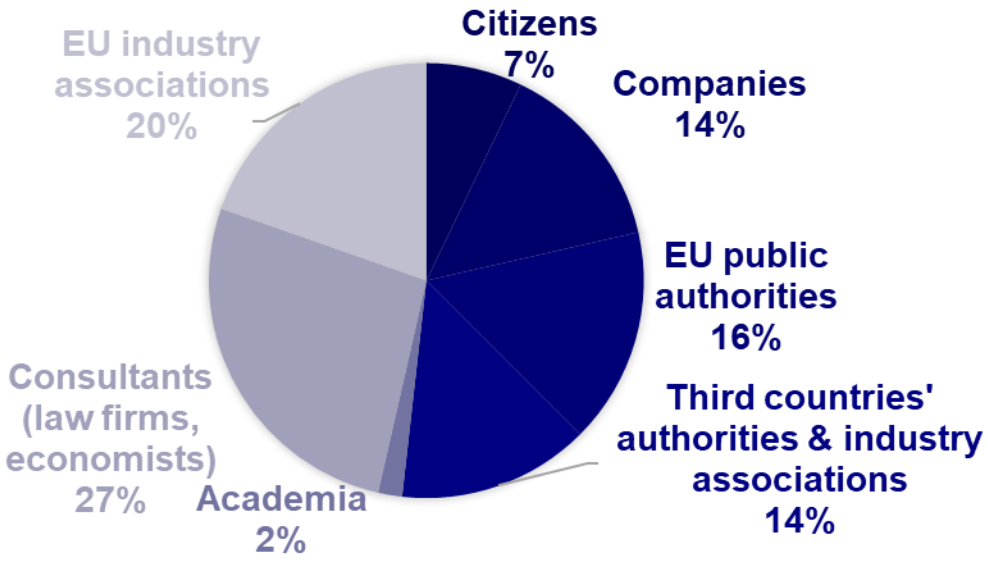
On 18 July 2025, the Commission published the draft text of the FSR Guidelines, which remained open for feedback to any interested stakeholder until 12 September 2025. The Commission received **more than 50 submissions from a wide range of stakeholders**, including consultants (legal and economic), EU industry associations and companies, EU public authorities and authorities and industry associations from third countries.

[8] Notably, Austria, Belgium, Bulgaria, Czechia, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, Spain and Sweden.

[9] Notably, Business Europe, the American Chamber of Commerce to the EU, the Chinese Chamber of Commerce to the EU and the International Chamber of Commerce

Consultants and EU industry associations accounted for almost half of the feedback received during the consultation on the draft FSR guidelines (see Figure 2).

Figure 2: Public consultation on draft FSR guidelines (% based on 56 submissions)




*Source: European Commission*

B. Main reactions to the call for evidence and targeted consultation with Member States and selected stakeholders as well as public consultation on the draft FSR guidelines

(a) Distortion

In relation to assessing distortion (Article 4(1)), respondents to the call for evidence expressed diverse views on the methodology, indicators and theories of distortions to be used:

– The indicators mentioned in Article 4(1) FSR should be assessed collectively and in a transparent way.

– The FSR Guidelines should clarify that the Commission should only intervene in cases involving potentially distortive subsidies when there is a strong likelihood of distortion.

– The FSR Guidelines should clarify the distortion test to be performed, and the theories of harm applied.

– The FSR Guidelines should clarify that the Commission should take into account the changes in the beneficiary's market position, power, production volume, capacity, and workforce utilisation on the internal market.

– While traditionally associated with price effects, a broader view in the distortion analysis should consider impact on quality, innovation, product variety, capacity, and output. Short-term benefits for consumers (e.g. lower prices), may contrast with long-term negative economic effects.

– Factors that should also be used in the assessment are the structure of the market involved, viable alternatives to the market, effects on upstream and/or downstream markets, spill-over effects or competitive behaviour of the subsidized entity in other markets and whether it affects a market in a strategic sector, investment imbalances, where the foreign subsidy enables more innovation by the subsidized firm as its risks are mitigated, and impact on regional development.

– Transfer of technology associated with production facilities was also highlighted as a critical aspect that needs consideration to protect EU innovation.

The main reactions to the public consultation were the following:

– 14 respondents considered that the text of the draft FSR Guidelines subject to public consultation left too much discretion to the Commission. In general, the substantive tests applicable in both legs of the distortion (improvement of competitive position and actual or potential negative effects on competition) test were judged too vague and general, posing no real constraint on the Commission.

– The cross-subsidisation test in the first leg (improvement of competitive position) as expressed in the draft FSR Guidelines was considered by three respondents to shift the burden of proof. Moreover, that test remains insufficiently concrete. Further guidance should be given on the standard to be applied and the evidence required, to determine whether foreign subsidies are likely to free up resources or result in cross-subsidisation, and not enough focus is put on incentives.

– One respondent proposed that the Commission should only presume that this condition is met where there is clear evidence that the subsidised activity will support the activities in the internal market. By contrast, two others advocated for a lower standard based on "mere likelihood".

– The draft FSR Guidelines do not leave any subsidies off the hook, according to three respondents, since even subsidies targeting activities outside the internal market can potentially give rise to cross-subsidisation since they can free-up resources.

– In the assessment of cross-subsidisation, four respondents proposed to give more weight to internal group policies and by-as effective deterrents against cross-subsidisation, especially in listed companies. Two respondents also indicated that transfer pricing policies and regulations should be taken into account.

– The "appreciability" or "significance" tests (in the first and second leg of the distortion test) should be more concrete and set out quantitative thresholds. In the context of the improvement of the competitive position, four respondents argued that the draft FSR Guidelines put too much focus on the amount of the subsidy, which in some circumstances may not be relevant, (e.g. if the market share of the beneficiary is low), proposing instead to focus on how the subsidy affects activities of the undertaking or strengthens its position.

– In the same line, seventeen respondents indicated that, in order to increase legal certainty, the FSR Guidelines should introduce quantitative or qualitative safe thresholds, qualifiers or examples of subsidies which are considered not to improve the undertaking's competitive position.

– According to eight respondents, the Commission should be requested to show a substantive causal link between the foreign subsidy and the distortion. Allowing the Commission to merely show that there should be a reasonable link between the foreign subsidy and the distortion and that, in any event, the foreign subsidy is a contributing factor and not even the only one to the alleged distortion would mean ending up with a confusing, unreasonable and unpredictable test where the Commission enjoys too much discretion.

– According to six respondents, the Commission would enjoy too much discretion to assess and possibly conclude on the distortion in the acquisition. For example, one respondent was sceptical for the Commission to be able to find a distortion in the acquisition process when potential acquirers have been possibly crowded out as this would risk leading to false positives and speculative assessments. In this respect, another respondent argues that the Commission should only consider these cases where a competing offer was actually made. At the same time, another respondent suggests that the Commission should indicate which tools it plans to use to carry out the relevant counterfactual analysis.

(b) Distortion in public procurement

– Thirteen respondents noted that Article 28(1)(b) of the FSR limits the notification requirement to certain undertakings. However, the draft FSR guidelines appear to go beyond this by also intending to take into account foreign subsidies granted to entities that belong to the same corporate group but are not subject to the notification requirement. Either the respondents saw it as an extension of the scope of the FSR to include subsidies from entities that are not subject to the notification requirement, or they saw it as necessary in any case to explain in a comprehensible manner under which circumstances the Commission considers that the subsidies may be used to cross-subsidise the tender. The possibility that subsidies from other group undertakings could be taken up would in any case require all financial contributions within the group to be recorded.

– In addition to the above responses, one respondent called on the Commission to provide an analytical framework for determining whether a tender could be cross-subsidised.

– Four respondents pointed out that the Commission should have the obligation to investigate all factors to establish the actual impact of foreign subsidies on a tender, e.g. by proving direct or indirect cost advantages. Other respondents suggested that, to have a distortive effect, a foreign subsidy should either exceed a certain threshold in relation to the price offered in the tender or be of a substantial amount in any other way. Eleven respondents noted that the draft guidelines reverse the burden of proof as they appear to establish a negative presumption that a foreign subsidy has an impact on a tender in the absence of evidence to the contrary, especially as the foreign subsidy may not the main factor for the advantageous nature of the tender.

– According to five respondents, with regard to the assessment of a tender that seems abnormally low, particularly where there are indications of subsidies from third countries, the Commission should clarify the respective roles and responsibilities of the contracting authority and of the Commission.

– Nineteen respondents favoured the inclusion of more examples to improve clarity of the text, e.g. for subsidies that are unlikely to have a distortive effect, thus ensuring better risk assessment when participating in a tender.

(c) Balancing test

Respondents expressed diverse views as regards the balancing test. The main reactions were requests for further clarification of the positive effects to be taken into account by the Commission, of the methodology to be used by the Commission, and of the interaction with State aid. The main reactions collected in the context of the call for evidence and targeted consultations were the following:

– The FSR Guidelines should clarify the methodology to be used by the Commission in performing the balancing test.

– The FSR Guidelines should clarify whether and how the balancing test will incorporate methodological elements from State aid.

– The methodology should be tailored to the specifics of the case, rather than adopting a one-size-fits-all approach.

– The balancing test should consider the cumulative effects of subsidies.

– The FSR Guidelines should clarify whether and how positive effects regarding third country policy objectives are considered.

– It would be appropriate to capture a wide array of policy objectives, including positive effects that are not verifiable.

– Consumer welfare should be taken into account as a positive effect, while both consumer welfare and lower prices are insufficient in isolation.

– The FSR Guidelines should provide a non-exhaustive list of examples of relevant positive effects to consider, such as:

  – Greenfield investments and job creation in disadvantaged areas

  – Technology transfer and strengthening of local industrial skills

  – Supply resilience

  – Contribution to EU's strategic objectives

– The FSR Guidelines should clarify how positive effects are assessed and quantified (e.g. through impact analyses, sectoral benchmarking) and consider the timing of positive and negative effects.

– Certain negative effects should not be outweighed, such as the creation of overcapacity in a market in decline, or the creation or strengthening of a dominant position.

– Clarifications are required as to the possible outcomes of the balancing test.

The main reactions collected in the context of the public consultation were the following:

– The FSR Guidelines should clarify the methodology to be used by the Commission in performing the balancing test.

– The FSR Guidelines should clarify whether and how the balancing test will incorporate methodological elements from State aid.

– Three respondents requested that positive effects under assessment should include (all) policy objectives of third countries, in order to avoid discrimination, as well as possible retaliation against companies having received State aid. Two other respondents requested, on the contrary, that positive effects should not take into account the policy objectives of third countries, considering the fact that (i) the Commission is only taking account of negative effects in the EU and thus (ii) correspondingly, should only take account of positive effects which occur in the EU. One respondent expressed that policy objectives of third countries could indirectly contribute to EU or global policy objectives. Respondents indicate additionally that positive effects in third countries may be difficult to verify.

– Two respondents requested that the impact on total welfare (including consumer or shareholder welfare) should also be considered a positive effect.

– According to three respondents, the FSR Guidelines should include horizontal rules where certain foreign subsidies, such as those meeting the conditions for compatibility under State aid or falling under the State aid GBER, should be deemed to have their positive effects outweigh their negative effects, relying if necessary on rebuttable presumptions.

– Similarly, five respondents expressed the need to apply State aid compatibility methodological principles, such as the principles of necessity, incentive effect, or proportionality, to the FSR, in order to avoid discrimination.

– Six respondents expressed that foreign subsidies are significantly different than State aid where (i) positive effects under State aid are always achieved by design, whereas they may be accidental under the FSR, (ii) compatibility under State aid is appreciated *ex ante* under State aid, whereas the balancing test is performed *ex post* (after the foreign subsidy is granted) under the FSR, and (iii) information, accordingly, on the positive effects, may be less available or verifiable under the FSR. As such, those respondents expressed that State aid principles were irrelevant.

– Requests were made to align the legal standard for the admission of positive effects with the legal standard for establishing a distortion.

– It was submitted that the timing of positive effects was also relevant, and that positive effects could be assessed cumulatively for foreign subsidies.

– Respondents requested clarity on the types of admissible evidence. According to two respondents, the Commission should accept quantitative analyses. Other respondents expressed that the balancing test was necessarily imprecise and could not be quantified.

– Two respondents requested flexibility in accepting comments further to the summary notice; whereas others stressed the need to not unduly delay investigations.

– Respondents requested that the FSR Guidelines provide examples of a balancing test.

– Respondents expressed that the Commission's assessment of the balancing test should be described in its final decisions.

(d) Call-ins

The main reactions regarding the call-in mechanism for non-notifiable concentrations and foreign financial contributions in public procurement procedures focused on concerns about legal certainty, predictability, and the need for clear guidelines.

The main reactions collected in the context of the call for evidence and targeted consultations were the following:

– Respondents recommended a cautious application of the power to call-in. Most of the respondents agreed that the Commission should carefully exercise its power to call-in notifications, due to the claims of lack of legal certainty in Articles 21(5) and 29(8) FSR. The respondents suggested clearer guidelines to define precise scenarios for applying these Articles.

– It was requested that clear criteria for call-ins be introduced, such as when foreign subsidies impact market structure, competitiveness, or consumer positions.

– It was suggested that some sectors, like defence, steel, energy, battery technology, and critical infrastructure, would warrant increased scrutiny regarding foreign subsidies, especially from countries with aggressive export policies. Specific industries such as rolling stock were identified as prone to distortive subsidies due to foreign State support, posing market distortion risks. The importance of intellectual property rights acquired by the undertakings, unique technologies, patents, know-how and access to resources was also highlighted.

– The Commission should have sufficient evidence to confirm a suspicion that foreign subsidies have been granted. To establish the suspicion, account should be taken of financial records, information about abnormal pricing behaviour, evidence of governmental participation and market studies. Most of the respondents preferred a higher standard of evidence for executing the call-ins.

– Respondents called for establishing a de minimis threshold.

– Respondents requested that the Commission should clarify rules and timelines related to call-in procedures.

– Respondents suggested gaining more experience in enforcement before extensive use of call-ins and recommended that companies voluntarily report transactions, while the Commission publishes criteria, methodologies, and outcomes.

The main reactions collected in the context of the public consultation were the following:

– Twenty-two respondents criticised the absence of objective criteria and transparency in the call-in process, where suspicion alone, without substantive evidence of foreign subsidies, may trigger proceedings. The broad discretionary power might result in arbitrary and discriminatory enforcement by the Commission, negatively impacting competition and innovation.

– Respondents pointed out the adverse effects on undertakings in the event of a call-in, in the form of unpredictability, increased costs due to the potential for prolonged

and indefinite assessments, and delays in concentrations and public procurement procedures.

– Specific sectors, like nuclear and renewable energy, may suffer due to disruptions caused by frequent call-ins; thus, respondents recommended minimising interference in certain strategic sectors.

– Five respondents recommended that call-ins should be reserved only for exceptional cases, or to establish specific thresholds for executing the call-ins. Regarding public procurement procedures, two respondents suggested a minimum procurement value which would justify the potential impact of a tender in the Union. Some respondents even proposed that the Commission should renounce its call-in powers altogether.

– The Commission should assess whether the identified suspected foreign subsidies may have a distortive effect.

– Respondents called for clear procedural safeguards and timelines for the call-in mechanism to ensure a fair and balanced approach across various sectors.

– Two respondents suggested providing more information regarding the call-in mechanism and the procedural consequences of the call-in of the tender of an economic operator for the other participants in the public procurement procedure and for the contracting authority or contracting entity.

Overall, the respondents expressed substantial concern about the operational implications of the call-in power, urging more predictability and more restrained exercise of these powers by the Commission in order to protect legal certainty and prevent undue administrative burden.

C. How the reactions shaped the final FSR Guidelines

The Commission took note of the feedback submitted by Member States and stakeholders in the context of the consultation activities, including the call for evidence, targeted consultations, consultation on the draft text of the FSR Guidelines and other meetings or exchanges.

(a) Assessment of distortions

As regards the first condition (improvement of the competitive position), in order to enhance the clarity and readability of the text, this section of the Guidelines was streamlined and introductory paragraphs were included to explain the structure of each sub-section. Superfluous paragraphs and unnecessary legal references were removed.

The final text of the FSR Guidelines is unambiguous in that the burden of proof on establishing the improvement of the competitive position lies on the Commission. In particular, it is clear that there is no presumption of cross-subsidisation. On the test for cross-subsidisation, new elements to consider in this assessment were added, in particular the existence of functional, economic or organic links between the group entity benefitting from the subsidy and the group entity active in the internal market, while others were redrafted for clarity purposes, without changing the substance. The final text clarifies how the assessment should take into account these elements, in particular the incentives and obstacles to cross-subsidisation and provides specific examples of each type of factor that can be considered in the assessment. To address some of the comments

received, it has also been clarified in which instances internal group policies and companies' by-laws could be considered as possible barriers to cross-subsidisation.

In light of the limited case experience at this stage, some of the comments received, relating to changing substantially the legal standard included in the draft text of the FSR Guidelines or to include safe harbours, have not been considered. However, in order to enhance predictability, a new subsection 2.3.3 has been included with categories of foreign subsidies not liable to improve the competitive position of the undertaking in the internal market. In this section, in addition to the cases already mentioned in Articles 4(2) to 4(4) FSR, other categories have been included, namely foreign subsidies pursuing non-economic or social objectives and foreign subsidies addressing market failures outside the Union and designed to crowd-in private investment. In this context, the FSR Guidelines clarify that subsidies which would comply materially with compatibility State aid rules, had they been granted by a Member State, will be considered not liable to improve the competitive position of the undertaking in the internal market. In the same section, foreign subsidies have been included when their amount is insignificant in relation to the extent of the actual or potential economic activities of that undertaking in the internal market. In line with the "significance" or "appreciability" thresholds in merger control or antitrust, it was not considered pertinent to include strict quantitative thresholds, but rather to leave this assessment to case teams on the basis of the specific circumstances of each cases, noting that whether the amount of a subsidy is or not "significant" may depend considerably on the nature of the activities, of the specific industry, the size and market penetration of the undertaking, and many other factors which should be weight on a case-by-case basis.

As regards the second condition (whether the subsidy actually or potentially negatively affect competition in the internal market), the definition of "affecting" and of "negative impact" was strengthened by making even clearer that: (i) the former consists in the liability for the foreign subsidies at issue (in isolation or combined) to have a negative impact and that (ii) the latter consists in an actual or potential alteration of or interference with the level-playing field, to the detriment of other economic actors. In that context, it has been clarified that such alteration of or interference with the level-playing field can occur in relation to any of the EU activities of the subsidised undertaking and that, for this purpose, the Commission may carry out a dynamic and prospective assessment, hence taking into account how these activities and the sector in which they operate are likely to evolve in the near future.

In the context of the section dealing with the FSR substantive standards, the concerns raised by some respondents to the call for evidence and to the public consultation were taken into account. According to some of these respondents, there would be no need for the Commission to show a link between the alleged foreign subsidy and the alleged distortion, while the previous choice of the wording would be confusing. To address these concerns, the final text of the FSR Guidelines has been improved in terms of clarity, without, however, changing the substance of the test and of the underlying counterfactual analysis. For example, the wording throughout the distortion section has been harmonised referring always (and exclusively) to the "capacity" of the foreign subsidy to negatively affect competition in the EU internal market. Moreover, the final text of the FSR Guidelines now clarifies that "*it is not necessary for the foreign subsidy to be the sole*

*reason for the negative impact on competition in the internal market. It is sufficient that the foreign subsidy contributes to the negative impact on competition in the internal market*". At the same time, the FSR Guidelines make clear that, while the Commission does not need to prove an actual impact, the impact needs to be appreciable.

As regards the steps that the Commission will take when assessing whether a foreign subsidy actually or potentially negatively affects competition, a two-steps assessment was maintained, consisting in: (i) examining the impact of the foreign subsidy on the behaviour of the subsidised undertaking; (ii) examining how that behaviour can alter or interfere with the competitive dynamics to the detriment of other economic actors such as competitors or players active across the value chain or other affected sectors. It has been clarified even further that the assessment will be based on several possible indicators such as the nature, the amount, the frequency, the conditions and scope of the foreign subsidy as well as the size of the subsidised undertaking and dynamic characteristics of the sector(s) directly or indirectly affected or the evolution of the activities in the EU internal market of the undertaking under investigation.

As regards the non-exhaustive examples of theories of distortion, even more meaningful descriptions have been provided in regard to the type of assessment the Commission may carry out under each scenario.

First, it has been clarified further that the Commission may look into possible distortions in the acquisition of other undertakings. More specifically, it has been explained that the Commission will first consider whether there is any foreign subsidy that may have facilitated an acquisition that, absent the foreign subsidy, it would have happened in a different way or it would have not happened at all. The FSR Guidelines clarify that this is the case where, for example, the foreign subsidy may facilitate the offering of financial terms that would be more attractive than what available absent the foreign subsidy. In this context, the FSR Guidelines clarify that the negative impact raises from the crowding out of actual or potential alternative acquirers. In this respect, some respondents to the call for evidence and to the public consultation raised concerns that the approach taken by the Commission in the FSR Guidelines would be too broad. To address such concerns, the final text of the FSR Guidelines has been further refined with further and clearer examples taken from the most recent case practice. The fact that the examples have been indeed taken from the most recent case practice is also the reason why the Commission considered that no change of substance was required.

Second, it has been clarified further that the Commission may look into distortions in the operating decisions of the subsidised undertaking. This is the case where, for instance, the foreign subsidy would facilitate the offer of lower prices or improved sales terms or market expansion beyond the likely levels absent the foreign subsidy causing rivals to reduce sales, profits and hence downsize or exit the market.

Third, it has been clarified further that the Commission may look into distortions in the investment decisions of the subsidised undertaking. This is the case where, for example, the foreign subsidy may affect the undertaking's investment decisions and hence either allow the subsidised undertaking to carry out investments that would have not been likely, absent the foreign subsidy, or discourage investments by other players.

Fourth, it has been clarified further that the Commission may look into distortions across the value chain and related sectors. This is the case, for example, when the foreign subsidy may lead to an increased demand for a certain input whose access is more costly or difficult for rivals of the subsidised undertaking, hence leading to their market downsizing or exit. The FSR Guidelines also clarify that the Commission can look in possible business relocations outside the EU internal market and all the related alterations of the competitive dynamics that may result in a distortion.

Importantly, for all above steps of the Commission's assessment, the FSR Guidelines outline a set of indicators (such as the nature, the amount and the type of foreign subsidy as well as the level of vertical integration across the value chain and the characteristics of the sector at issue or the evolution of the activities in the EU internal market of the undertaking under investigation) that may be used by the Commission.

(b) Distortion in public procurement

Based on the feedback received, the Guidelines provide the following clarifications, as follows:

First, the Commission noted that many respondents struggled to understand why, although the obligation to notify foreign financial contributions is restricted to some undertakings belonging to a corporate group ('public procurement module' pursuant to Article 28(1)(b) FSR), the Commission still considers foreign subsidies granted to group undertakings outside the scope of notification in its assessment pursuant to Article 27 FSR. To address this, the Guidelines first explain in more detail why the notification requirement and the scope of the assessment under Article 27 FSR differ in the area of public procurement. The reasons for considering foreign subsidies from undertakings outside the scope of notification correspond to those set out in the chapter on distortion, in particular as regards the improvement of the competitive position. Here, too, further clarification and legal certainty has been provided. In addition to the reference to that chapter, the Commission also included explanations and examples, where possible, to clarify the matter in the context of public procurement.

Secondly, the Commission has taken note of the concerns expressed by some respondents regarding the assessment of whether and to what extent foreign subsidies are liable for the advantageous nature of a tender. Those respondents argued that the burden of proof would be reversed if the Commission could establish a negative presumption that the foreign subsidy had an impact on the tender in the absence of evidence to the contrary. To address these concerns, it has now been clarified that it is for the Commission to demonstrate the impact of foreign subsidies on the tender submitted. It has also been clarified, in line with chapter 2.4.2 on distortion, that the advantage must stem to an appreciable extent from the foreign subsidies.

In addition, concerning the requests for further clarification on how contracting authorities and the Commission should cooperate when evaluating low tenders, the Guidelines clarify that these tenders should be examined to determine whether they are abnormally low and whether they are unduly advantageous. This is explained in more detail in a separate section on procedural considerations in the final version of the FSR Guidelines.

As requested by stakeholders, and to the extent possible given the limited case law, examples have been provided to illustrate its explanations in the Guidelines.

(c) Balancing test

Based on the feedback received, the draft guidelines have been amended, as follows.

First, respondents expressed diverse views on the necessity to take into account the policy objectives of third countries. To address these comments, the Guidelines have now clarified in which cases the Commission would take into account policy objectives of third countries that are relevant to the Union (for instance, for foreign subsidies that create positive effects for the Union and/or contribute to a global welfare improvement or the preservation of global public goods).

Second, respondents expressed diverse views on the relevance of State aid methodological principles and existing State aid compatibility and exemption rules. It has been considered that, to ensure that the application of the FSR does not result in unjustified discrimination against companies receiving foreign subsidies, it would be appropriate to reflect the legal and analytical framework devised under State aid. However, in view of (i) the structural differences between the FSR and State aid, (ii) the fact that, under the FSR, one should precisely identify how the foreign subsidies distort the internal market and (iii) the fact that foreign subsidies may lead to positive and negative effects which are not evenly geographically allocated, it is considered appropriate to apply more flexible principles under the balancing test than under State aid rules and to perform the balancing test on a case-by-case basis.

Finally, it has been clarified, as requested, the types of admissible evidence in support of positive effects, and provided a theoretical illustration of the balancing test.

(d) Call-ins

Based on the feedback received, further clarifications were introduced in the FSR Guidelines with regard to the call-in mechanism. In view of the limited experience in exercising the call-in powers so far, thresholds were not created, nor were specific sectors identified in which call-ins should be exercised or excluded. This approach aims to preserve the effectiveness of the call-in mechanisms as provided under the FSR. However, the FSR Guidelines reiterated that the Commission will only exercise its call-in powers where a case merits *ex ante* review due to its impact in the Union. The FSR Guidelines also clarified the elements that will be taken into account in that respect.

To enhance legal certainty for undertakings, the FSR Guidelines also introduced safe harbours for foreign subsidies falling under Articles 4(2) or 4(4) FSR. It was considered that those excluded foreign subsidies are unlikely to distort the internal market. For bids in public procurement procedures with a low value, the FSR Guidelines recalled that bids with a value below the thresholds set out in Article 4 (a) to (c) of Directive 2014/24/EU[10] are unlikely to have an impact in the Union, so that, consequently, those cases would not merit *ex ante* review.

[10] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94, 28.3.2014, pp. 65–242