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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

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Table of Contents

1.	Introduction	4
2.	Application of the criteria for determining the existence of a distortion according to Article 4(1) and Article 27 of Regulation (EU) 2022/2560	6
2.1.	Legal framework	6
2.2.	Application of the criteria for determining whether the subsidised undertaking engages in an economic activity in the Union	7
2.3.	Application of the criteria for determining whether a foreign subsidy is liable to improve the competitive position of the undertaking in the internal market	7
2.3.1.	Targeted foreign subsidies.....	8
2.3.2.	Non-targeted foreign subsidies.....	8
2.3.3.	Foreign subsidies which are considered not liable to improve the competitive position of the undertaking in the internal market	11
2.4.	Application of the criteria for determining when a foreign subsidy actually or potentially negatively affects competition in the internal market	12
2.4.1.	General principles applicable to establish whether a foreign subsidy actually or potentially negatively affects competition in the internal market	13
2.4.2.	Standard to establish that a foreign subsidy actually or potentially negatively affects competition in the internal market	13
2.4.3.	Steps in the assessment of whether a foreign subsidy actually or potentially negatively affects competition in the internal market	14
2.4.3.1.	Impact on the behaviour of the subsidised undertaking	15
2.4.3.2.	Alteration of, or interference with, competitive dynamics to the detriment of other economic actors.....	16
2.4.4.	Illustration of the main categories of distortions.....	18
2.4.4.1.	Distortion of competition in the acquisition of other undertakings	18
2.4.4.2.	Distortion of competition through the impact of the foreign subsidy on the operating decisions of the subsidised undertaking	19
2.4.4.3.	Alteration of investment decisions of the subsidised undertaking.....	20
2.4.4.4.	Distortion of activities at other levels of the value chain.....	21
2.5.	Application of the criteria for determining when a foreign subsidy causes or risks causing a distortion in the internal market in the context of public procurement procedures	22

2.5.1. Ability to submit an unduly advantageous tender.....	22
2.5.1.1. Advantageous nature of the tender.....	23
2.5.1.2. Undue nature of the advantage.....	24
2.5.1.3. Actual or potential negative effect	25
2.5.2. Procedural considerations	26
3. Application of the balancing test in accordance with Article 6 of Regulation (EU) 2022/2560.....	26
3.1. Legal framework	26
3.2. Positive effects to be considered	27
3.2.1. Positive effects on the development of the relevant subsidised economic activity on the internal market.....	28
3.2.2. Positive effects on other policy objectives	29
3.2.3. Public procurement: availability of alternative sources of supply	29
3.3. Principles applied by the Commission in balancing the positive and negative effects of a foreign subsidy	30
3.3.1. Specificity of the positive effects	30
3.3.2. Performance of the balancing.....	31
3.3.3. Outcome of the balancing test.....	32
3.3.4. Possibility of cumulative assessment	32
3.4. Procedural considerations	33
3.4.1. Burden of proof	33
3.4.2. Standard of proof.....	33
3.4.3. Timing for submitting information	33
3.4.4. Timing for assessing information.....	34
3.5. Illustration of the performance of a balancing test.....	34
4. Application of the Commission’s power to request the prior notification of any concentration in accordance with Article 21(5) of Regulation (EU) 2022/2560, or foreign financial contributions received by an economic operator in a public procurement procedure in accordance with Article 29(8) of Regulation (EU) 2022/2560.....	35
4.1. Legal framework	35
4.2. Conditions for the Commission to request the prior notification.....	36
4.2.1. Notion of concentration or public procurement procedure	37
4.2.2. Notion of non-notifiable concentration or of foreign financial contributions to an economic operator in a public procurement procedure which are not notifiable.....	37
4.2.3. Timing for requesting the prior notification.....	37
4.2.4. Suspicion that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration or that an economic operator	

may have benefited from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure	38
4.3. Impact in the Union of the concentration or foreign financial contributions received by an economic operator in a public procurement procedure	38
4.3.1. Notion of impact in the Union	38
4.3.2. Factors that the Commission will consider in assessing whether the concentration or foreign financial contributions received by an economic operator in a public procurement procedure merit ex ante review	39
4.4. Procedural considerations when exercising the power to request the prior notification of concentrations and of foreign financial contributions received by an economic operator in a public procurement procedure	41
4.4.1. Evidence to be produced	41
4.4.2. Procedural considerations after the request of prior notification	41
4.4.2.1. In concentrations	41
4.4.2.2. In public procurement procedures	42

1. INTRODUCTION

1. Regulation (EU) 2022/2560 of the European Parliament and of the Council¹ lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions.
2. The purpose of Regulation (EU) 2022/2560 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 field².
3. The proper application and enforcement of Regulation (EU) 2022/2560 should contribute to the resilience of the internal market against distortions caused by foreign subsidies and thereby contribute to the Union’s open strategic autonomy³.
4. For the purposes of Regulation (EU) 2022/2560, 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 industries⁴. 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 foreign subsidy distorts the internal market⁵.
5. In accordance with Article 46(1) of Regulation (EU) 2022/2560, the Union co-legislators required the Commission, in order to foster the predictability of that Regulation⁶, to publish and regularly update guidelines concerning: (a) the application of the criteria for determining the existence of a distortion in accordance with Article 4(1) of Regulation (EU) 2022/2560; (b) the application of the balancing test in accordance with Article 6 of Regulation (EU) 2022/2560; (c) the application of the Commission’s power to request the prior notification of any concentration⁷ in accordance with Article 21(5) of Regulation (EU) 2022/2560 or foreign financial contributions received by an economic operator⁸ in a public procurement procedure⁹ in

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/2022/2560/0j>).

² Article 1 of Regulation (EU) 2022/2560.

³ See in this regard the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Green Deal Industrial Plan for the Net-Zero Age (COM(2023) 62 final), section 2.4; the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Competitiveness Compass for the EU (COM(2025) 30 final), page 14; and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation (COM(2025) 85 final), Section 6.3.

⁴ Article 3 and Recital 11 of Regulation (EU) 2022/2560.

⁵ Recital 17 of Regulation (EU) 2022/2560.

⁶ Recital 73 of Regulation (EU) 2022/2560.

⁷ The term ‘concentration’ is used in these Guidelines within the meaning of Article 20(1), (2), (4), (5) and (6) of Regulation (EU) 2022/2560.

⁸ The term ‘economic operator,’ in a public procurement procedure is used in these Guidelines as defined in Article 2(1) of Regulation (EU) 2022/2560 referring to the respective definition in the Union public procurement directives and means ‘*any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market*’

accordance with Article 29(8) of Regulation (EU) 2022/2560; and, (d) the assessment of a distortion in a public procurement procedure in accordance with Article 27 of Regulation (EU) 2022/2560.

6. Pursuant to Article 46(2) of Regulation (EU) 2022/2560, the Union co-legislators require the Commission to conduct appropriate consultations with stakeholders and Member States before issuing guidelines. The Commission has published a call for evidence and has conducted targeted consultation activities with Member States and stakeholders¹⁰, and both groups have also been consulted on a draft text of these Guidelines¹¹.
7. In light of the early stage of the implementation of Regulation (EU) 2022/2560 and the wide range of market contexts to which it may apply, these Guidelines do not constitute a ‘checklist’ to be applied mechanically. Rather, each case should be assessed in light of its own facts and circumstances based on the approach and principles described in these Guidelines. The Commission’s aim in issuing these Guidelines is to enhance legal certainty.
8. In accordance with Article 46 of Regulation (EU) 2022/2560, the Commission will update these Guidelines regularly in light of future developments and case practice. These Guidelines are without prejudice to the interpretation of the relevant provisions which may be given by the Court of Justice of the European Union.
9. These Guidelines are structured as follows:
 - a. Section 2 provides guidance on the application by the Commission of the criteria for determining the existence of a distortion in accordance with Article 4(1) of Regulation (EU) 2022/2560 and in the context of a public procurement in accordance with Article 27 of Regulation (EU) 2022/2560;
 - b. Section 3 provides guidance on the application by the Commission of the balancing test in accordance with Article 6 of Regulation (EU) 2022/2560;
 - c. Section 4 provides guidance on the application by the Commission of its power to request the prior notification of any concentration in accordance with Article 21(5) of Regulation (EU) 2022/2560 or foreign financial contributions received by an economic operator in a public procurement procedure in accordance with Article 29(8) of Regulation (EU) 2022/2560.

(e.g. Article 2(1), point (10) of Directive 2014/24/EU and almost identical in wording in the other public procurement directives). An ‘economic operator’ may be one undertaking submitting a tender or requesting participation in a public procurement procedure. It may also be a consortium of undertakings submitting a joint tender.

⁹ The term ‘public procurement procedure’ is used in these Guidelines as defined in Article 2(3) of Regulation (EU) 2022/2560 referring to the respective definition in the EU public procurement directives and means ‘*any type of award procedure covered by Directive 2014/24/EU for the conclusion of a public contract or Directive 2014/25/EU for the conclusion of a supply, works and service contract*’ (and almost identical wording in the other public procurement directives).

¹⁰ See public call for evidence on the Foreign Subsidies Guidelines: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines_en.

¹¹ See public consultation on the draft FSR Guidelines: https://single-market-economy.ec.europa.eu/consultations/consultation-fsr-guidelines_en.

2. APPLICATION OF THE CRITERIA FOR DETERMINING THE EXISTENCE OF A DISTORTION ACCORDING TO ARTICLE 4(1) AND ARTICLE 27 OF REGULATION (EU) 2022/2560

2.1. Legal framework

10. Pursuant to the first sentence of Article 4(1) of Regulation (EU) 2022/2560, '*a distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market*'. Therefore, a foreign subsidy is considered distortive if it meets two cumulative conditions: *firstly*, it must be liable to improve the competitive position of the undertaking in the internal market; and *secondly*, as a result of the improvement of the competitive position of the undertaking, the foreign subsidy must actually or potentially negatively affect competition in the internal market.
11. Due to the lack of transparency concerning many foreign subsidies and the complexity of the commercial reality, it may be difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. For this reason, in order to determine the distortion, it will generally be necessary to use a non-exhaustive set of indicators¹².
12. Article 5(1) of Regulation (EU) 2022/2560 sets out the following categories of foreign subsidies which are most likely to distort the internal market: (a) a foreign subsidy granted to an ailing undertaking¹³, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and that plan includes a significant own contribution by the undertaking; (b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking¹⁴; (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) a foreign subsidy directly facilitating a concentration; and (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract. Since those categories of foreign subsidies are most likely to create distortions in the internal market, it is not necessary for the Commission to perform a detailed assessment based on indicators for such foreign subsidies¹⁵.
13. Pursuant to Article 27 of Regulation (EU) 2022/2560 '*foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly*

¹² Recital 18 of Regulation (EU) 2022/2560. This means that when, due to the lack of transparency, the relevant information about the foreign subsidy (in particular information about its scope or amount) is not available or the information obtained during the investigation is not reliable, the Commission may use any indicator as relevant benchmark depending on the circumstances of the case. In accordance with the second sentence of Article 4(1) of Regulation (EU) 2022/2560, those indicators include: (a) the amount of the foreign subsidy; (b) the nature of the foreign subsidy; (c) the situation of the undertaking, including its size and the markets or sectors concerned; (d) the level and evolution of economic activity of the undertaking on the internal market; and (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

¹³ Defined as '*an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy*' (Article 5(1) of Regulation (EU) 2022/2560).

¹⁴ Defined as a guarantee '*without any limitation as to the amount or the duration*' (Article 5(1) of Regulation (EU) 2022/2560).

¹⁵ Recital 20 of Regulation (EU) 2022/2560.

advantageous in relation to the works, supplies or services concerned. The assessment pursuant to Article 4 of whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure in question’.

14. Article 44(9) of Regulation (EU) 2022/2560 provides that ‘*no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures and granted by a third country which is a member of the World Trade Organisation*’.

2.2. Application of the criteria for determining whether the subsidised undertaking engages in an economic activity in the Union

15. A foreign subsidy can only distort the internal market if the undertaking that benefits, directly or indirectly, from the foreign subsidy (the ‘subsidised undertaking’) engages in an economic activity in the Union¹⁶¹⁷. In accordance with Article 4(1) of Regulation (EU) 2022/2560, a foreign subsidy will distort the internal market if it is liable to improve the competitive position of the undertaking in the internal market and to negatively affect competition in the internal market.
16. For the purposes of Regulation (EU) 2022/2560 and these Guidelines, the Commission will consider that an undertaking engages in economic activities in the internal market where that undertaking: (i) offers goods and services in the internal market regardless of where the undertaking is based or its nationality¹⁸; (ii) purchases goods or services in the internal market and uses these goods or services to offer goods or services to its customers, regardless of whether it offers these goods or services inside or outside the internal market; (iii) acquires control of, or merges with, an undertaking established in the Union; or (iv) participates in a public procurement procedure in the Union.

2.3. Application of the criteria for determining whether a foreign subsidy is liable to improve the competitive position of the undertaking in the internal market

17. The Commission considers that a foreign subsidy improves the competitive position of an undertaking in the internal market if the foreign subsidy is liable to benefit, directly or indirectly, the economic activities in which that undertaking engages in the internal market, regardless of whether that benefit has actually materialised. The Commission may conduct that assessment for each foreign subsidy separately or in a combined way for some or for all foreign subsidies, depending on the circumstances of the case.
18. For the purposes of its assessment, the Commission distinguishes 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’). Section 2.3.1 analyses targeted foreign subsidies. Section 2.3.2 discusses non-targeted foreign subsidies. Based on the criteria set out in those two Sections, Section 2.3.3 provides examples of foreign subsidies which are considered not liable to improve the competitive position of the undertaking in the internal market.

¹⁶ See recital 7 of Regulation (EU) 2022/2560: ‘*Foreign subsidies could distort the internal market if an undertaking benefitting from the foreign subsidy engages in an economic activity in the Union*’.

¹⁷ See Article 1(2) of Regulation (EU) 2022/2560. The Commission may also consider that an undertaking engages in economic activities in the internal market when, on the basis of objective evidence in the file, it can conclude that there are real and concrete possibilities for the undertaking to enter the internal market.

¹⁸ However, the Commission is subject to the limitation established in Article 44(9) as regards the actions that it can take under Regulation (EU) 2022/2560 (see point 14).

2.3.1. *Targeted foreign subsidies*

19. Foreign subsidies that support, directly or indirectly, the undertaking's economic activities in the internal market are considered to improve its competitive position in the internal market and, generally, will not require further assessment in this respect. This applies to the following situations:

- when the Commission, based on an objective assessment of their purpose, nature and scope – or other relevant elements – can establish that the foreign subsidies support the undertaking's economic activities in the internal market. This may include the following instances:
 - foreign subsidies granted to support directly economic activities of the undertaking in the internal market: for example, to subsidise manufacturing or distribution activities that take place in the internal market, or the provision of services, including technology licencing, to undertakings in the internal market;
 - foreign subsidies conditional on events related to an economic activity in the internal market: for example, subsidies conditional on investments or acquisitions in the internal market;
 - foreign subsidies granted to support economic activities that do not take place in the Union but which indirectly benefit economic activities in the internal market: for example, foreign subsidies granted to fund research activities taking place outside the Union but in relation to technologies or know-how that are or can be used for the provision of services in the internal market or for products produced in the internal market;
 - foreign subsidies acting as a financial insurance or risk management tool (for example, a guarantee) including in their scope the activities of the undertaking in the internal market, since they may lower the financing costs of those activities and/or may prompt more risk-taking in relation to those activities.
- when regardless of the purpose, nature and scope of the foreign subsidies, the Commission can establish on the basis of other relevant evidence that the undertaking uses or intends to use the foreign subsidies for its economic activities in the internal market¹⁹.

2.3.2. *Non-targeted foreign subsidies*

20. This category includes foreign subsidies which do not support, directly or indirectly, the undertaking's economic activities in the internal market, and where there is no clear indication as to how the undertaking uses or intends to use them. It may include the following instances:

- foreign subsidies which are of a general scope or objective, so the undertaking remains free to use them for any of its economic activities, including those in the internal market;

¹⁹ To establish that an undertaking uses or intends to use the foreign subsidies for its economic activities in the internal market, the Commission may consider all available evidence, for example, the analysis of the accounts or internal documents of the undertaking.

- foreign subsidies supporting activities taking place outside the Union (for example, a foreign subsidy granted to build a manufacturing plant in a third country or to incentivise employment or to favour economic development in a third country), but which free up resources that the undertaking could use for any of its economic activities, including those in the internal market.

21. For this category of foreign subsidies, the Commission will assess whether the undertaking is liable to use the resources provided (or freed up) by the foreign subsidy to fully or partially cross-subsidise its economic activities in the internal market²⁰.

22. In this respect, the term ‘cross-subsidisation’ includes any situation in which the undertaking transfers those resources to its economic activities in the internal market or uses them in any way which can be beneficial for those activities²¹. If no credible legal or economic factors exist which prevent or render unlikely that transfer or use, the Commission may consider that the foreign subsidy is liable to improve the undertaking’s competitive position in the internal market. In this assessment, the Commission may consider several factors, including but not limited to the following:

- a. *shareholding structure*

23. To assess the potential for cross-subsidisation, the Commission may assess the shareholding structure of the recipient entity and the entity or entities of the same undertaking engaging in economic activities in the internal market.

24. The existence of a direct or common controlling shareholding between the recipient entity and another entity engaging in economic activities in the internal market could facilitate cross-subsidisation to the latter. By contrast, significant differences in the shareholder structure between both entities may prevent or disincentivise the transfer of a foreign subsidy between those entities. For example, that difference would be relevant where the participation of jointly controlling shareholders in the recipient entity may, in law or in fact, prevent or disincentivise that entity from transferring the foreign subsidy to another entity or activity where those jointly controlling shareholders have no participation. This would likely be the situation where the agreement of the jointly controlling shareholders is required. The Commission may also take into account whether the presence of minority shareholders without veto rights but with a significant participation in the recipient entity could impact in a relevant way the incentives of that entity to transfer the foreign subsidies to another entity active in the internal market where those minority shareholders are not present²². Whether that is the case, and the specific level of risk, will depend on the circumstances of the case. The Commission may also take into account whether the presence of significant shareholders in the entity active in the internal market who do not have a participation in the entity receiving the

²⁰ In assessing whether the undertaking is liable to cross-subsidise, the Commission may consider the ability or incentive of the undertaking to do so.

²¹ The Commission may consider whether a foreign subsidy granted for activities outside the Union is liable to free up resources that the undertaking can transfer to its activities in the internal market. For instance, this may be the case when the foreign subsidy provides funds for investments that the undertaking would have likely undertaken even without the foreign subsidy. Cross-subsidisation could take place even if the transfer of profit has not yet materialised. For instance, the subsidised undertaking may allow the entity operating in the internal market to operate at a loss or with very low margins, which could be offset at a later stage with the transfer of the foreign subsidy, if needed.

²² This is because, in theory, profit shifting from one entity to another entails a decapitalisation of the former which may result in economic harm for shareholders that have no participation in the latter.

foreign subsidy may prevent or disincentivise the latter to transfer the foreign subsidy to the former²³;

b. existence of other functional, economic and organic links

25. The Commission may assess the degree to which the group is involved itself directly or indirectly in the management of the entity active in the internal market, for instance if members of the management at group level are also appointed as members of the management or supervisory bodies of that entity (joint or overlapping management).
26. Other functional and organic links may also be relevant, such as the exercise of functions relating to direction and financial support (going beyond the simple placing of capital by an investor), the existence of common or coordinated strategies, veto rights or the need for prior authorisation from other group entities over budgets, management appointments, signing of contracts, or requesting external finance by the entity active in the internal market. Economic links such as the existence of group-level financial synergies, centralised or interconnected financing, economic interdependence and industrial or vertical integration may also be relevant factors. The closer and more numerous the functional, economic and organic links are between the entity receiving the foreign subsidy and the entity undertaking economic activities in the internal market, the more incentives there would be for cross-subsidisation;

c. design and conditions of the foreign subsidy

27. The Commission may also assess the design of the foreign subsidy as well as any direct or indirect conditions and obligations imposed on the undertaking by the granting authorities that may prevent or disincentivise cross-subsidisation;

d. agreements with third parties

28. Binding agreements with third parties may in certain circumstances prevent cross-subsidisation or disincentivise it. The Commission will assess, on a case-by-case basis, whether these agreements or obligations would prevent, in law or in fact, cross-subsidisation or render it unlikely. Its assessment will consider the content and enforceability of those agreements or obligations, as well as all the relevant circumstances of the case. For example, this could be the case of fiduciary duties in partnerships between limited partners and fund managers, as well as certain obligations in shareholders' agreements.
29. Provisions in the by-laws of the recipient entity or internal group guidelines, policies or management practices can typically be unilaterally modified by the undertaking at any moment. Therefore, in principle, they are not sufficient to exclude cross-subsidisation. The Commission, however, may take into account circumstances where modifications to such by-laws, internal group guidelines, policies or management practices or equivalent provisions would require third parties' consent. This could be the case when such provisions would reflect obligations laid down in binding agreements (such as in joint venture agreements) with third parties not participating in the business activities of the undertaking in the internal market²⁴;

²³ Such a transfer could be considered contrary to the behaviour of a rational economic operator, as it would lead to sharing the benefits of the foreign subsidy with third parties.

²⁴ The Commission may take into account the past behaviour of the undertaking in relation to transfers of resources. However, the absence of past transfers of resources is not a decisive factor for the Commission to exclude the potential for cross-subsidisation.

e. applicable laws

30. Laws, binding rules or regulatory provisions in certain sectors may also be relevant to the extent that they impose obligations or supervision mechanisms that may prevent or disincentivise cross-subsidisation. Examples are regulatory provisions imposing accounting or functional unbundling obligations between entities of the same group, or capital requirements of entities in the financial industry. Bankruptcy or insolvency laws typically contain provisions to protect creditors which may pose legal obstacles or limit the incentives of an entity subject to those laws to shift profit, in particular when the entity is subject to the supervision of a bankruptcy or insolvency trustee. The Commission will assess on a case-by-case basis whether these laws prevent or disincentivise cross-subsidisation, depending on their content and the circumstances of the case.
31. In principle, the Commission considers that transfer pricing rules are not sufficient to prevent cross-subsidisation or to make it unlikely, since those rules concern exclusively the allocation of profit between legal entities of the same group for tax purposes;

f. economic situation of the undertaking

32. Cross-subsidisation from entities in a distressed economic situation may be disincentivised in some situations, since profit shifting may worsen their economic situation and could be detrimental to creditors which are typically protected by bankruptcy laws. The Commission will assess this situation taking account of the specific circumstances of the case.

2.3.3. Foreign subsidies which are considered not liable to improve the competitive position of the undertaking in the internal market

33. The Commission considers that the following foreign subsidies are not liable to improve the competitive position of an undertaking in the internal market, either because they are not liable to free up any resources that can be transferred to the internal market, because the potential for cross-subsidisation would be low or because even if cross-subsidisation were to take place any potential effects in the internal market would be insignificant:
 - a. foreign subsidies granted for addressing a market failure outside the Union and exclusively for activities taking place outside the Union, do not support the activities of the undertaking in the internal market, to the extent that the foreign subsidies are designed to crowd-in private investment, namely, to mobilise private resources for projects that would otherwise not be undertaken²⁵. For instance, foreign subsidies granted for these activities which would materially comply with the Union rules on compatibility with the internal market had they been granted by a Member State are not liable to free up resources and, thus, to improve the competitive position of the undertaking in the internal market;
 - b. foreign subsidies pursuing purely non-economic or social objectives, such as the inclusion of minorities or persons with disabilities, will generally not be considered to liberate any financial resources and thus not give rise to any cross-subsidisation;
 - c. foreign subsidies aimed at making good the damage caused by natural disasters or exceptional occurrences, pursuant to Article 4(4) of Regulation (EU) 2022/2560;

²⁵ By contrast, when the foreign subsidy exceeds the need to overcome that market failure, it will crowd-out private investments and would liberate resources which could be transferred to the internal market.

- d. foreign subsidies that do not exceed the amounts set out in Article 4(2) and (3) of Regulation (EU) 2022/2560;
- e. regarding foreign subsidies exceeding the amounts set out in Article 4(2) and (3) of Regulation (EU) 2022/2560, the foreign subsidy is not liable to improve the undertaking's competitive position in the internal market when the amount of the foreign subsidy is insignificant in relation to the extent of the actual or potential economic activities of that undertaking in the internal market²⁶. The nature or type of the foreign subsidy may also play a role in this assessment. For instance, the types of foreign subsidies in Article 5 are less likely to benefit the economic activities of the undertaking in the internal market in an insignificant way. The Commission may conduct this assessment for each foreign subsidy separately or in a combined way for some or for all foreign subsidies, depending on the circumstances of the case.

2.4. Application of the criteria for determining when a foreign subsidy actually or potentially negatively affects competition in the internal market

- 34. As indicated in point 10, the finding that a foreign subsidy is liable to improve the competitive position of an undertaking is a necessary condition but is not sufficient to conclude that the foreign subsidy is distortive. Pursuant to Article 4(1) of Regulation (EU) 2022/2560, it is also necessary to assess whether the foreign subsidy actually or potentially negatively affects competition in the internal market²⁷.
- 35. This Section is structured as follows:
 - Section 2.4.1 addresses the general principles the Commission will apply when assessing whether a foreign subsidy actually or potentially affects negatively competition in the internal market;
 - Section 2.4.2 addresses the substantive standard to establish that a foreign subsidy actually or potentially negatively affects competition in the internal market;
 - Section 2.4.3, explains the steps the Commission will follow in this assessment, by examining firstly the impact of the foreign subsidy on the behaviour of the subsidised undertaking and secondly how that behaviour can alter, or interfere with, competitive dynamics to the detriment of other economic actors;
 - Section 2.4.4 provides examples of some categories of distortions and describes the type of assessment the Commission would carry out.

²⁶ This assessment will depend on the circumstances of each individual case and of indicators such as the amount and nature of the foreign subsidy and the extent of the actual or potential activities of the subsidised undertaking in the internal market. The parameters used to measure the extent of the relevant economic activities (for example, turnover, profitability, investments) may vary depending on the facts of the case, in particular on the nature of the activities in question. The Commission may also consider for this assessment the likely evolution of the relevant sectors and of the economic activities of the undertaking in the internal market, as well the dynamics across the relevant value chain. For example, in certain instances (such as in the context of nascent sectors, or sectors characterised by bottlenecks in the supply chain or by an oligopolistic structure) the benefit may be more significant than it may at first appear.

²⁷ Article 4 of Regulation (EU) 2022/2560.

2.4.1. General principles applicable to establish whether a foreign subsidy actually or potentially negatively affects competition in the internal market

36. The Commission considers that a foreign subsidy ‘*actually or potentially negatively affects competition*’ within the meaning of Article 4(1) of Regulation (EU) 2022/2560 when it is liable to have a negative impact on the level playing field in the internal market²⁸. A negative impact on the level playing field takes place when there is an actual or potential alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market²⁹.
37. Such alteration or interference can take place in relation to any of the activities in which the undertaking under investigation is actually or potentially engaged in the internal market, including greenfield investments, the provision of services, sales of products manufactured in the Union, competitive processes (formal bidding processes or informal negotiations) for the acquisition of undertakings active in the internal market or participation in procurement procedures in the Union. It can also take place in relation to any downstream, upstream, related or otherwise indirectly affected sectors to those where the undertaking is present.
38. The Commission may take into account in its assessment the actual or likely evolution of the activities of the undertaking under investigation, or of its rivals, as well as the sectors directly or indirectly related to the undertaking’s economic activities in general.
39. In public procurement procedures, the Commission may look at the other tenders submitted in the same procedure to assess whether the subsidised tenderer had the potential to deter other operators from even participating in a given tender or outbid others and to be awarded the contract.
40. When the undertaking under investigation has benefitted from several foreign subsidies, the assessment of whether any of those subsidies have a negative impact on the level playing field may take into account the combined effect of some or all of those subsidies.

2.4.2. Standard to establish that a foreign subsidy actually or potentially negatively affects competition in the internal market

41. The Commission should in principle establish that the foreign subsidy, through its improvement of the undertaking’s competitive position in the internal market, actually or potentially alters, or interferes with, the competitive dynamics in the internal market to the detriment of other economic actors in the internal market. 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.
42. Showing that a foreign subsidy negatively affects competition in the internal market does not require the Commission to show an actual impact. In this regard, the fact that a foreign subsidy has failed to produce an actual impact on competition cannot, in itself, disprove its potential to affect competition. In other words, while the Commission may

²⁸ Recitals 4, 6, 8, 76 of Regulation (EU) 2022/2560.

²⁹ Unless otherwise specified, for the purpose of these guidelines the term ‘economic actor’ refers to undertakings actually or potentially active in the internal market, or other categories of economic actors (e.g. consumers, workers). States carrying out an economic activity can also be considered as ‘economic actors’ for the purpose of these guidelines.

take into account the actual impact of the foreign subsidy, this may not be considered as a decisive factor in its assessment.

43. The actual or potential negative impact on competition needs to be appreciable. However, beyond Article 4(2) and (3) of Regulation (EU) 2022/2560, there is no *de minimis* threshold for the purposes of determining whether a foreign subsidy distorts competition. Therefore, once it has been established that the foreign subsidy actually or potentially alters, or interferes with, competitive dynamics in the internal market to the detriment of other economic actors in the internal market, there is no need to prove that such distortion is of a serious nature.
44. For an undertaking already active in the internal market, the assessment of whether a foreign subsidy actually or potentially negatively affects competition will generally be based on the economic and legal context existing as of the moment it benefits from the foreign subsidy.
45. For an undertaking not yet active in the internal market, the assessment of whether a foreign subsidy actually or potentially negatively affects competition will generally be based on the economic and legal context existing at the moment when the subsidised undertaking contemplates engaging in an economic activity in the internal market (see Section 2.2). It is only at that moment, and not before, that one can assess whether the subsidy in question is liable to improve the competitive position of the subsidised undertaking in the internal market and, in doing so, whether it can actually or potentially affect negatively competition in the internal market³⁰. More specifically, in the case of undertakings not yet active in the internal market that are granted foreign subsidies in a concentration in the internal market or that are granted foreign subsidies enabling them to submit an unduly advantageous tender in the internal market, the assessment should typically be based on the economic and legal context at the moment when the undertaking contemplates taking part, or does take part, in the concentration or when it prepares and submits a tender or final tender in a public procurement procedure.
46. While foreign subsidies falling in the categories listed in Article 5(1) of Regulation (EU) 2022/2560 are most likely to distort the internal market, the Commission will assess whether they actually or potentially affect negatively competition in the internal market in accordance with the principles set out in this Section 2.4.2. However, it is not necessary for the Commission to perform a detailed assessment on the basis of indicators³¹. This is without prejudice to the possibility for the undertaking under investigation to provide elements aiming to prove that a foreign subsidy falling under one of the categories of Article 5 of Regulation (EU) 2022/2560 does not distort the internal market in the specific circumstances of the case.

2.4.3. Steps in the assessment of whether a foreign subsidy actually or potentially negatively affects competition in the internal market

47. The assessment of whether a foreign subsidy actually or potentially negatively affects competition in the internal market includes two steps: first, assessing how the subsidy

³⁰ For instance, if an undertaking without any activity in the internal market is granted a subsidy to develop a new technology for waste recycling, and two years later it considers investing in a new recycling plant in the internal market, it is only at the moment of considering the new investment that the undertaking can assess the foreign subsidy in light of Regulation (EU) 2022/2560, and any assessment by the Commission on that subsidy under Regulation (EU) 2022/2560 will be based in the economic and legal context existing at the moment of considering the investment.

³¹ Recital 20 of Regulation (EU) 2022/2560.

actually or potentially affects the behaviour of the undertaking in the internal market, and second, assessing the resulting alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market.

2.4.3.1. Impact on the behaviour of the subsidised undertaking

48. The Commission will assess how the foreign subsidy actually or potentially affects the undertaking's behaviour in the internal market in accordance with Section 2.4.2 of these Guidelines.
49. On some occasions, in order to determine whether the foreign subsidy actually or potentially affects a certain behaviour, it may be sufficient for the Commission to examine the scope, purpose or conditions of the foreign subsidy. If the foreign subsidy is conditional on the subsidised undertaking engaging in a certain behaviour in the internal market or if its purpose (explicit or implicit from its design and conditions) is to encourage certain behaviour from that undertaking in the internal market, this element will be sufficient for the Commission to find that the foreign subsidy actually or potentially affects such behaviour³².
50. On other occasions, foreign subsidies may not have a specific purpose, or conditions attached to them, such as non-targeted foreign subsidies, or these may be too general to draw any conclusion as to the potential impact on the undertaking's specific behaviour in the internal market. In these cases, the Commission will rely on other indicators to assess the link between the foreign subsidy and the undertaking's behaviour. These indicators may include, for instance, the nature of the foreign subsidy, its frequency or periodicity, as well as the characteristics, the competitive dynamics and the evolution of the sectors where the undertaking operates or the level and evolution of activity of the undertaking in the internal market.
51. The nature of a foreign subsidy is likely to shape the subsidised undertaking's behaviour. Depending on its form (for example, a grant, a loan, a debt consolidation or refinancing loan, a credit facility) and characteristics (for example, frequency or recurrence), the foreign subsidy might provide the subsidised undertaking with flexibility in its use, it might affect the undertaking's costs and, consequently, affect the competitive dynamics through its impact on pricing or output decisions. Alternatively, it could prompt strategic decisions such as investments in capacity, innovation, expansion into new products/services or geographies, or acquisitions.
52. For instance, changes in pricing or output decisions are more likely to stem from foreign subsidies linked to the level of the undertaking's economic activity (such as subsidies linked to the production of a certain amount of products, reductions in social security payments, reductions in CO₂ emission tax), or from foreign subsidies resulting in a reduction of the variable costs of the undertaking. Foreign subsidies in the form of recurring payments (for example, periodically payable grants, recurrent loans, credit facilities) granted for the acquisition of a certain input may equally affect pricing incentives or output decisions. Foreign subsidies which consist in the transfer of a fixed amount (for example, a one-off grant or loan for a fixed amount) may give flexibility to the subsidised undertaking as to their use, including also affecting pricing decisions.

³² For instance, if a foreign subsidy is granted for undertakings to finance investments in more sustainable production processes, then in principle the Commission may consider that the behaviour of the undertaking to which the foreign subsidy contributes will be the investment in sustainable production process, without the need of any further assessment.

Other changes of behaviour such as investments, expansions into new activities or acquisitions may stem from fixed subsidies, which may in turn indirectly affect prices to the extent they alter the undertaking's variable cost structure.

53. Foreign subsidies that are structured as expectations of financial support, such as guarantees or insurances below market level rates, may alter the subsidised undertaking's attitude towards risk and induce it to take higher risks either in the ordinary course of business or in its investment decisions.
54. The characteristics and competitive dynamics of the sectors where the undertaking operates, notably the factors that drive competition in those sectors, may also be informative. In sectors where competition is mainly driven by price, it is more likely that those foreign subsidies are used to lower prices or to expand output. By contrast, in sectors driven by innovation and product or service diversification, the undertaking may have an incentive to direct the subsidies to R&D investments. Moreover, the level of the economic activity of the subsidised undertaking and its financial and economic situation may play a role in this assessment. For instance, a producer which is constrained in its production capacity or in its production capabilities (for example, access to the relevant know-how or technology) in a way that limits its growth may have an incentive to use the foreign subsidy to invest in capacity or capability expansions.

2.4.3.2. Alteration of, or interference with, competitive dynamics to the detriment of other economic actors

55. The Commission should assess how the behaviour identified in accordance with Section 2.4.3.1 actually or potentially alters, or interferes with, the competitive dynamics to the detriment of other economic actors in the internal market.
56. The alteration of or interference with the competitive dynamics can take place in a number of different forms: for example, by relaxing financial constraints and reinforcing the financial strength of the subsidised undertaking, the foreign subsidy may facilitate the adoption by the undertaking of a more aggressive commercial policy at the expense of rivals. Another example would be a lowering of the output and/or investment costs of the subsidised undertaking, thus altering its risk-taking incentives and leading to its entry, expansion or (artificial) maintenance of operations at the expense of rivals. In concentrations, foreign subsidies granted to the potential acquirer may alter the outcome of negotiations for the acquisition of undertakings, including by deterring rival investors from participating in the negotiations or by impeding them from acquiring the undertaking.
57. Typically, in order to assess the extent to which changes in the relative competitive strength of the subsidised undertaking may negatively affect other economic actors, the Commission may consider several indicators, such as the following:
 - a. the scope, purpose and conditions of the foreign subsidy: for instance, when the third country designates a certain foreign subsidy as being intended to achieve, or directed towards, a certain objective related or relevant to the subsidised undertaking's activity in the internal market, this objective may be considered in the assessment. The type of activity or the costs targeted by the foreign subsidy can also be relevant;
 - b. the amount of the foreign subsidy: the higher the amount of the foreign subsidy, the larger the economic advantage received by the undertaking over its rivals and,

therefore, the more likely it is to affect the competitive dynamics of the internal market³³. The amount of the foreign subsidy – to the extent it can be determined based on the facts available to the Commission – can be considered both in absolute terms or in relation to other factors, such as, for instance, the size of the undertaking or of its activities in the internal market, the size of the sector where the undertaking under investigation is active in the internal market or the value of the investment. For example, if a foreign subsidy covers a substantial part of the purchase price, it is more likely to outbid or deter rival investors and thus distort the acquisition process³⁴. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are more likely to outbid or to deter other bidders and thus to distort competition in that procedure³⁵;

- c. the type of the foreign subsidy: for instance, direct grants or preferential financing in the form of interest-free loans to a State-owned enterprise for a concrete capacity investment in a certain sector is more likely to have a negative impact on competing undertakings active in that same sector. Foreign subsidies that fall within the categories of Article 5 of Regulation (EU) 2022/2560 are the most likely to affect competition negatively;
- d. the size of the undertaking, its actual or potential position in the internal market and the scope of its actual or potential activities: a foreign subsidy to a beneficiary that shows a low degree of economic activity in the internal market, with no real and concrete possibilities of expansion, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a significant level of economic activity in the internal market or that may use the foreign subsidy to expand its presence³⁶. The Commission may also take into account indicators of the importance of the undertaking's activities for the functioning of the internal market other than size, such as the role of the undertaking in the value chain;
- e. the characteristics of the sector where the undertaking operates or is likely to operate: these include in particular its size and likely evolution, competitive conditions, barriers to entry or expansion, the impact on downstream or indirectly affected sectors, etc. The Commission may consider in particular the factors that drive competition in those sectors. For example, in sectors where competition is mainly driven by price, the Commission may assess whether the foreign subsidy enables the subsidised undertaking to lower prices or to expand production to the detriment of rivals; in sectors characterised by capacity constraints, the Commission may assess whether the foreign subsidy enables the subsidised undertaking to invest in additional capacity to the detriment of rivals. Foreign subsidies in sectors characterised by overcapacity or that may lead to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity

³³ However, in certain situations, a foreign subsidy of a relatively limited amount may also impact the internal market (by way of example, in sectors with very low margins). This will depend on the specific circumstances of the case.

³⁴ However, if the foreign subsidy covers a small part of the purchase price, this does not preclude the existence of distortion.

³⁵ Recital 19 of Regulation (EU) 2022/2560.

³⁶ Recital 19 of Regulation (EU) 2022/2560.

expansions that would otherwise not have been built, may distort competition as they might exclude or marginalise more efficient actors³⁷;

f. the legal context: The Commission may also consider laws, sectoral regulations, and other measures adopted by the Union or its Member States. The Commission may also consider whether a foreign subsidy, when coupled with other measures which, when taken in isolation are considered non-problematic, may reinforce or amplify the negative impact on the competitive dynamics of the internal market generated by the foreign subsidy in question³⁸.

58. The list of indicators in point 57 is non-exhaustive. Moreover, those indicators that are relevant for a given case should not be taken in isolation but examined in combination with one another to assess the foreign subsidy's negative impact.

2.4.4. *Illustration of the main categories of distortions*

59. This section illustrates, in a non-exhaustive way, some categories of distortion. For each of them, it analyses how the foreign subsidy might affect the behaviour of the undertaking, the actual or potential negative impact on competition in the internal market and, finally, the type of assessment that could be carried out by the Commission, including the indicators that could be used in that assessment.

2.4.4.1. Distortion of competition in the acquisition of other undertakings

60. In the context of an acquisition process, the Commission will firstly consider whether foreign subsidies may have facilitated an acquisition by the undertaking under investigation that otherwise may not have taken place, or may not have taken place in the same way (for example, only on a smaller scale or scope, or on different terms) had it not been for the foreign subsidies³⁹. Secondly, the Commission will consider whether, by improving the competitive position of the acquirer, the foreign subsidy actually or potentially negatively affects competition in relation to the acquisition process.

61. The foreign subsidy may facilitate the offering by the undertaking under investigation of more attractive terms for the acquisition of the target than those that would prevail in a normal market context. More attractive terms can consist, for example, in offering a higher purchase price⁴⁰, which could be facilitated, for example, by foreign subsidies lowering the acquirer's cost of capital. More attractive terms may also consist in an improved financing structure of the offer for the sellers, such as a larger proportion of cash payment or a larger proportion of upfront payments as well as any additional financing commitments. More attractive terms may also consist in an attempt to accommodate different perimeters of the transaction more desirable to the seller⁴¹.

62. The foreign subsidy may negatively affect competition in relation to the acquisition process, for instance, if it crowds out other investors, either by outbidding them or by deterring them from participating in that acquisition. The maximum price that an investor is ready to pay for the acquisition of an undertaking is usually a factor of that undertaking's expected profitability and the cost of financing incurred to carry out the acquisition. In turn, the expected profitability will depend, among other factors, on the

³⁷ Recital 19 of Regulation (EU) 2022/2560.

³⁸ For example, loans at market terms which have been enabled by a subsidised guarantee.

³⁹ See Commission Decision of 24.09.2024 in Case FS.100011 – e&/PPF Telecom Group, C(2024) 6745 final, recital 281.

⁴⁰ See Commission Decision in Case FS.100011 – e&/PPF Telecom Group, recital 284.

⁴¹ See Commission Decision in Case FS.100011 – e&/PPF Telecom Group, recital 281.

efficiency gains brought about by the acquisition (for example, gains due to synergies arising from combining the acquiring business and the target). A subsidised investor enjoying a reduced cost of financing, all other factors being equal, is more likely to be ready to pay a higher price for the target than a non-subsidised rival, even if the latter brings the same or greater efficiencies to the business. Consequently, the foreign subsidy may lead to inefficient allocation of resources by reducing the growth opportunities of rivals through acquisitions or making their acquisitions more expensive, potentially limiting the possibility of efficiency gains (for example, through achieving economies of scale or scope) and for innovation (for example, through access to or combination of key technologies).

63. The Commission's assessment will rely on several indicators depending on the facts and circumstances of the case. For instance, a foreign subsidy that covers a substantial part of the purchase price of the target is likely to lead to negative impacts on competition⁴².
64. The comparison with other competing offers may not always be possible. In these situations, the Commission may, for instance, benchmark the price offered with the price of comparable past acquisitions, if available. The Commission may also rely on internal documents, including valuation models, to determine whether the foreign subsidy is capable of leading to an offer that would not prevail in a normal market context. The Commission may also assess whether the presence of the subsidised interested buyer may have deterred other investors from participating in the acquisition process, submitting a competing offer or even entering negotiations^{43,44}.

2.4.4.2. Distortion of competition through the impact of the foreign subsidy on the operating decisions of the subsidised undertaking

65. The foreign subsidy may affect an undertaking's behaviour in the internal market by, for instance, facilitating the offer of lower prices or improved sales terms and/or the expansion of production or sales beyond the likely level absent the foreign subsidy. In sectors characterised by economies of scale or economies of scope, the subsidisation of production expansion may have a multiplier effect, leading to further cost advantages.
66. More specifically, aggressive pricing and expanding (or 'artificially' maintaining) sales and production could take place when the undertaking's activities in the internal market benefit from access to subsidised inputs, including in the form of lower working capital cost or subsidised know-how or technologies and hence from the undertaking's lower production costs. Even if the foreign subsidies do not alter production costs, by increasing the undertaking's financial resources (for example via capital injections), they may facilitate a loss-making strategy that would allow that undertaking to reduce prices for a given cost level. For the purpose of assessing whether the foreign subsidy may lower the variable production costs of the undertaking under investigation or facilitate the reduction of prices, the Commission may take into account qualitative and/or quantitative elements, depending on the circumstances of the case. If, however, the information about the costs of the undertaking under investigation is not available to the Commission or is simply not reliable, the Commission may use any other relevant benchmarks depending on the circumstances of the case. A foreign subsidy which

⁴² Recital 19 of Regulation (EU) 2022/2560.

⁴³ See Commission Decision in Case FS.100011 – e&/PPF Telecom Group, point 282.

⁴⁴ The Commission may also consider the strategic nature or scarcity of assets acquired, since that may impact their value. The economic rationale of the acquisition may also be a relevant factor in the assessment.

allows artificially long payment terms for the supply of inputs or a foreign subsidy consisting in the granting of short-term loans or other liquidity instruments at below market rates can lower the undertaking's financing costs.

67. Foreign subsidies may facilitate the offering by the subsidised undertaking of other advantageous sales terms to its customers, such as long payment terms, additional and/or extended guarantees, for instance, by extending trade credit to its customers. Guarantees, and in particular unlimited guarantees⁴⁵, may also facilitate a more aggressive commercial policy by the subsidised undertaking⁴⁶.
68. The negative impact on competition may consist, for instance, in a reduction of sales and profits of rivals present in the same sector, resulting in their potential downsizing, marginalisation and/or reduction of their incentives to invest and, at the extreme, their exit.
69. The indicators which may be relevant to the assessment will vary depending on the type of distortion. The nature and type of foreign subsidy may be relevant to assess the beneficiary's likely behaviour: low prices or expansion of production levels are more likely to be triggered by foreign subsidies that affect the variable costs of the undertaking such as recurring loans or foreign subsidies directly linked to production levels or to certain production cost items, rather than by one-time foreign subsidies. This, however, does not imply that foreign subsidies that are related to fixed costs cannot also affect pricing decisions under certain circumstances. When assessing the distortion linked to foreign subsidies aimed at increasing production levels, it may be relevant to evaluate the subsidised undertaking's spare capacity and/or its ability to increase production capacity. Economies of scale may also be relevant for assessing whether the foreign subsidy may have a multiplier effect and give rise to further advantages, hence expanding the potential negative impact of the foreign subsidy. The pre-existence of financial constraints that might be relieved by the foreign subsidy, facilitating a price reduction or a capacity expansion, could also be relevant. The amount of the foreign subsidy (absolute or relative to the prices or operating costs) as well as the relative size of the subsidised undertaking and other undertakings in the same sector may be helpful to understand the magnitude of the distortion in the internal market.

2.4.4.3. Alteration of investment decisions of the subsidised undertaking

70. The foreign subsidy may affect the undertaking's behaviour in the internal market in a way that lowers investment costs and facilitates certain investments that it may not otherwise have undertaken, with an impact on production levels. Similarly, some foreign subsidies, such as unlimited guarantees, may enable the subsidised undertaking to undertake higher risk investments, by mitigating the negative consequences of such risk-taking behaviour.⁴⁷

⁴⁵ Foreign subsidies in the form of unlimited State guarantee are guarantees granted directly or indirectly by a third country without any limitation as to the amount and/or the duration of such guarantee. Unlimited guarantees are capable to have a negative impact on competition because they alter the limited liability nature of the beneficiary undertaking.

⁴⁶ Ultimately, an unlimited guarantee may lead to the subsidised firm's inefficient entry, expansion or (artificial) maintenance of operations at the expense of rivals whose sales and profits may be reduced, leading to lower investment, marginalisation and, at the extreme, exit.

⁴⁷ In some instances, the very existence of the unlimited State guarantee may, for example, improve the credit rating of the beneficiary undertaking, which may directly or indirectly translate in more attractive

71. The negative impact on competition may vary depending on the type of investment. For example, an investment leading to the increase in the production of the subsidised undertaking or an improvement and/or diversification of its products/services may contribute to lowering the expected profits of rivals, or to discouraging future investments on their part. An investment in excess capacity may deter their entry or lead to the exclusion of rivals, especially in stagnating or declining industries. For the purposes of this assessment, the Commission may also examine how rivals would likely react to the foreign subsidy.
72. The indicators which may be relevant in the assessment will vary depending on the type of distortion. The nature and type of foreign subsidy may be relevant to assess the behaviour of the beneficiary. As an example, investment decisions are more likely to be affected by foreign subsidies that are not related to the variable costs of the undertaking such as one-time loans or grants, as well as by foreign subsidies that lower the cost of capital of the beneficiary. This, however, does not imply that foreign subsidies that are related to variable costs cannot affect investment decisions.
73. In the case of capacity investments, the size of that capacity relative to the installed capacity in the sector may also be relevant to determine the detriment to other economic actors. It may also be useful to analyse whether there is overcapacity and the evolution of the activity in the sector. For instance, when there is overcapacity, a foreign subsidy that facilitates capacity expansion is more likely to affect competition negatively. Conversely, in a sector where new capacities need to be built, for example due to a transition, investment subsidies can give the beneficiary a head-start and thereby discourage or delay investments by competitors. In case of investments in capabilities (for example, know-how, specialised workers or service providers, technologies) the size and the nature of those capabilities in the sector may also be relevant to determine whether there may be a detriment to competition.

2.4.4.4. Distortion of activities at other levels of the value chain

74. The foreign subsidy may affect the behaviour of the undertaking in a way that negatively impacts the value chain.
75. For instance, the expansion of the subsidised activity may increase the demand for a certain input, which could render it more difficult or more costly for competitors to access those inputs, increase competitors' costs, or even crowd them out. Conversely, for instance, the reduction of rivals' operations may negatively affect demand for inputs from competing suppliers. As a result, those suppliers may have reduced profitability and therefore invest less in their own products or potentially exit.
76. Similarly, foreign subsidies may interfere with or alter the dynamics of competition in the internal market at different levels of the value chain, where, for instance, they benefit intermediation service providers; contribute to the relocation of a given business or assets of a business outside the Union thereby disrupting supply or demand in the internal market; or contribute to hindering access to know-how, databases, patents or other IP used by companies active in the internal market.

financial terms of loans or credit facilities. Higher risk-taking may, for example, reflect in first mover advantage in entering certain sectors as well as increased capacity for R&D or know-how related investments compared to rivals. Ultimately, a higher risk-taking behaviour may lead to the subsidised undertaking's inefficient entry or expansion at the expense of unsubsidised rivals whose sales and profits may be reduced, leading to lower investment, marginalisation and, at the extreme, exit.

77. The type of indicators that could be used in the assessment may depend on the specific distortion that is being analysed. In general, the type and amount of the foreign subsidy may be relevant. In particular, the Commission is more likely to consider a relatively high amount of foreign subsidies as distortive. The degree of vertical integration of the subsidised undertaking across the value chain is also relevant, as it can facilitate the control of important inputs. The characteristics of the sector in which the subsidised undertaking is active, together with other economic actors, may also shed light on the potential for the foreign subsidy to impact other levels of the value chain. For instance, the Commission may pay particular attention to the presence of economies of scale or scope as well as dependencies across the supply or value chain.

2.5. Application of the criteria for determining when a foreign subsidy causes or risks causing a distortion in the internal market in the context of public procurement procedures

78. In the context of public procurement procedures, Article 27 of Regulation (EU) 2022/2560 provides that '*[f]oreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned.*' Moreover, Article 27 states that the assessment pursuant to Article 4 of Regulation (EU) 2022/2560 of whether there is a distortion in the internal market, including the assessment of whether a tender is unduly advantageous, is limited to the public procurement procedure in question. In its assessment, while the Commission is to consider the improvement of the competitive position of the economic operator due to foreign subsidies and the actual or potential negative effect of the subsidies in the public procurement procedure, the focus of its assessment is whether a foreign subsidy enables, actually or potentially, an economic operator to submit an unduly advantageous tender.

2.5.1. Ability to submit an unduly advantageous tender

79. A tender which is advantageous in relation to the works, supplies and services concerned by the public procurement procedure is impacted by the foreign subsidy if this foreign subsidy enables the economic operator to submit a tender accommodating more attractive terms, such as its price, than absent the foreign subsidy and if these terms cannot plausibly be explained by other factors.

80. A subsidy that enables an economic operator to submit an unduly advantageous tender is in principle expected to be a subsidy that was granted to either the economic operator or one of the entities listed in Article 28(1), point (b), of Regulation (EU) 2022/2560. The existence of the linear controlling shareholding link between entities referred to in Article 28(1), point (b), of Regulation (EU) 2022/2560 which belong to the same corporate group as the economic operator, may both incentivize and facilitate the transfer of a foreign subsidy between these entities. Accordingly, all group entities forming part of this linear structure are included in the notification requirement under Regulation (EU) 2022/2560. However, under certain circumstances, a foreign subsidy granted to an entity within the corporate group of the economic operator or that of a main subcontractor or a main supplier, but outside the scope of Article 28(1), point (b), of Regulation (EU) 2022/2560 may also enable the economic operator (within the meaning of Article 27 of Regulation (EU) 2022/2560) to submit a tender that is unduly advantageous in relation to the works, supplies or services.

81. It is, therefore, worth noting that the fact that a foreign subsidy is not granted to the economic operator or to the main subcontractor or to the main supplier, but to an entity

within their corporate group is not sufficient to exclude that the foreign subsidy may enable the economic operator to submit an unduly advantageous tender. Similarly, in such cases, the mere fact that the foreign subsidy was granted to another company in the economic operator's or in the main subcontractor's or main supplier's group is not sufficient to exclude that the foreign subsidy actually or potentially improves the economic operator's competitive position in the context of the public procurement procedure.

82. The economic operator, the main subcontractor or the main supplier may benefit from such a foreign subsidy, in particular, where a foreign subsidy granted to an entity in their corporate group is not limited in law or in fact to that entity and thus may be available to the economic operator, to the main subcontractor or to the main supplier to use or benefit from, directly or indirectly, for its tender⁴⁸. In this respect, point 26 of these Guidelines applies in public procurement procedures as well, which describes potential incentives for cross-subsidization. As an example, this would be the case when there may be clear incentives to transfer subsidies between group entities within a distinct business area, even in the absence of a formal relationship of dependency between the entities. These incentives arise from the economic and financial interconnections within the business area, which may be rooted in coordinated strategies, mutual economic dependencies and intra-division transactions such as the exchange of goods and services, or financial or other tangible and intangible assets and synergies.

2.5.1.1. Advantageous nature of the tender

83. The Commission will first assess whether the tender submitted by the economic operator is *advantageous* in relation to the works, supplies, or services concerned.

84. The advantage may consist, for example, in reducing the price, in increasing the quality or in offering better terms related to delivery and lead times, warranties and after-sales support, payment terms, service level agreements, contractual flexibility, compliance with technical specifications, risk management, innovation, social and sustainability values in relation to the procurement concerned.

85. The Commission may come to the conclusion that a tender is advantageous through various ways, in particular by:

- assessing the tender by comparing its terms to those of other comparable tenders submitted in the same public procurement procedure to identify the typical elements, factors and economic assumptions commonly used for the calculation of that specific tender, thereby enabling the Commission to establish a comparative benchmark. The objective is to determine what the tender would have looked like had it not benefitted from foreign subsidies. Therefore, when comparing tenders, the Commission may examine whether there are any indications of foreign subsidies in the tenders used for comparison. The purpose of this is to eliminate from the comparison any tenders that benefitted from foreign subsidies, as only

⁴⁸ When the Commission identifies a foreign financial contribution granted to a company within the corporate group of the economic operator but outside the scope of Article 28(1), point (b) of Regulation (EU) 2022/2560, the Commission may issue a request for information to confirm whether that foreign financial contribution: (i) constitutes a foreign subsidy, and (ii) indirectly benefits the economic operator. The purpose of this assessment is to verify whether a foreign subsidy granted directly to a company within the economic operator's corporate group, but outside the scope of Article 28(1), point (b) of Regulation (EU) 2022/2560, may enable the economic operator to submit an unduly advantageous tender.

tenders that did not benefit from foreign subsidies can constitute a valid benchmark. The larger the number of tenders the more significance the Commission may attribute to their terms to establish a valid basis for comparison;

- b. assessing the tender to further compare its terms with the contracting authority's or contracting entity's own estimates, including on price, quality and other relevant selection and award criteria used as an approximation. To do so, the Commission may consult any preparatory documents used or produced by the contracting authority⁴⁹. This will include documents the contracting authority used for the preparation of the procurement including any research and information on internal budget available for the procurement, preliminary consultations and other assessments made by the contracting authority as well as the relevant parts of the procurement documents including economic and financial capacity, selection and award criteria;
- c. assessing the offer of the tenderer under investigation to determine whether its terms are better than those that would likely otherwise have been submitted absent the foreign subsidy. In such cases, the Commission may assess the impact of a foreign subsidy on the terms of a tender by comparing the submitted tender to the tender that would have been submitted in the absence of such a foreign subsidy. As a result, this assessment includes both the assessment of advantage as well as the due or undue nature of this advantage. This type of comparison may be used where relevant, e.g. when the advantageous nature of a tender can be attributed to specific types of foreign subsidies, such as unlimited guarantees. In such cases, the effect of a third-country guarantee can be effectively evaluated by comparing a tender with and without the foreign subsidy.

86. In addition, the Commission may also rely on other factors such as publicly available information, information provided by competitors, or the result of its own investigation to establish whether a tender is advantageous vis-à-vis the works, supplies or services concerned.

2.5.1.2. Undue nature of the advantage

87. Where the Commission finds the tender to be advantageous, it will then examine the nature of the advantage. The advantage is "undue" if it stems to an appreciable extent⁵⁰ from a foreign subsidy. The advantage is "due" if it can plausibly be justified by factors other than the foreign subsidy⁵¹. In the latter case, the advantage is considered to be "due" to those factors, and not due to foreign subsidies. When the economic operator cannot plausibly justify the nature of the advantage by other factors, the Commission will assess whether the advantage may be considered "undue" – by reason of the foreign subsidy.

88. Such other factors that may be adduced by the economic operator to justify that the advantage is "due" may concern, in particular, the elements listed in Article 69(2) of

⁴⁹ For the purposes of these guidelines references to a 'contracting authority' pursuant to Article 2(4) of Regulation (EU) 2022/2560 in these guidelines also comprise a 'contracting entity' as defined in Article 2(5) of Regulation (EU) 2022/2560.

⁵⁰ See Point 43 above.

⁵¹ Recitals 20 and 53 of Regulation (EU) 2022/2560.

Directive 2014/24/EU⁵² or Article 84(2) of Directive 2014/25/EU⁵³ to justify abnormally low tenders⁵⁴, such as the cost-effectiveness of the relevant production process, innovations or novel technical solutions, or exceptionally favorable conditions from which the economic operator benefits in the supply of goods and services.

89. In that regard, the principles developed by the Court of Justice of the European Union in analysing abnormally low tenders⁵⁵ may be applied where appropriate, namely to assess whether the abnormally low tender is justified by the elements referred to in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, regulating abnormally low tenders.
90. However, the Commission may use other relevant criteria to assess whether the abnormally low tender is justified. The economic operator may adduce further factors in addition to the list of elements in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, which may also demonstrate that the tender's advantageous nature is not due to a foreign subsidy.
91. In case the economic operator cannot plausibly explain the advantageous nature of its tender with factors listed, for example, in Article 69(2) of Directive 2014/24/EU, the Commission will, on the basis of the information available to it, examine whether foreign subsidies may have rendered the tender advantageous. The assessment is carried out on a case-by-case basis, in which the Commission will consider various indicators and whether they are liable to affect the terms of the tender. The explanations provided in points 49 to 54 of these Guidelines apply in this context. In any case, subsidies that cover a substantial portion of the estimated value of a contract are highly likely to have an impact on the terms of the tender⁵⁶.
92. It is not necessary that the foreign subsidy be the sole contributing factor for the advantageous nature of the tender. It is sufficient for the Commission to establish that the foreign subsidy could potentially have impacted the terms of the tender to an appreciable extent.

2.5.1.3. Actual or potential negative effect

93. The existence of an unduly advantageous tender in relation to the works, supplies, or services concerned may have actual or potential effects on the public procurement in question firstly, by allowing the economic operator to be awarded the contract or secondly, by allowing this economic operator the possibility to be awarded contracts based on a framework agreement for which it has been selected or, thirdly, by allowing

⁵² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65, ELI: <http://data.europa.eu/eli/dir/2014/24/oj>).

⁵³ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243, ELI: <http://data.europa.eu/eli/dir/2014/25/oj>).

⁵⁴ Recital 53 of Regulation (EU) 2022/2560.

⁵⁵ Judgment of the Court of 11 May 2023, Sopra Steria, C-101/22 P, ECLI:EU:C:2023:396; Judgment of the Court of 15 September 2022, Veridos, C-669/20, ECLI:EU:C:2022:684; Judgment of the Court of 10 September 2020, Tax-Fin-Lex, C-367/19, ECLI:EU:C:2020:685; Judgment of the Court of 19 October 2017, Agriconsulting Europe SA, C-198/16, ECLI:EU:C:2017:784; Judgment of the General Court of 2 February 2017, European Dynamics, T-74/15, ECLI:EU:T:2017:55; Judgment of the Court of 27 November 2001, Impresa Lombardini, C-285/99, ECLI:EU:C:2001:640.

⁵⁶ Recital 19 of Regulation (EU) 2022/2560.

this economic operator to influence the results of the public procurement procedure, for example, in the context of a negotiated procedure.

94. The foreign subsidy could also negatively impact the competitive outcome in a public procurement procedure in which economic operators with a potential interest are discouraged or deterred from participating by the expectation that they will be competing against a subsidised economic operator. This may be particularly the case when economic operators become aware of the identities of other participants in the same public procurement procedure, or when, due to participation in recurring procedures, they anticipate the participation of certain subsidised economic operators in that same procedure.

2.5.2. Procedural considerations

95. It is the sole responsibility of the Commission to assess whether a tender is unduly advantageous. However, it should be borne in mind that under the Union public procurement directives, the contracting authority is likewise obliged to investigate the reasons for an abnormally low tender, in order to prevent later performance failures and to ensure compliance with legal and social standards. Accordingly, coordination is required between the Commission and the contracting authority in cases where the Commission assesses the unduly advantageous nature of a tender pursuant to foreign subsidies, and the contracting authority assesses the abnormally low nature of a tender pursuant to reasons other than foreign subsidies.

96. In accordance with Article 69 of Directive 2014/24/EU, the contracting authority is obliged to request explanation where a tender appears to be abnormally low. However, if it has indications that the tender is abnormally low because of foreign subsidies alone – for example, because of foreign subsidies in the form of an unlimited guarantee or of an export financing measure within the meaning of Article 5 of Regulation (EU) 2022/2560 – it is to inform the Commission of this suspicion and refrain from conducting its own review.

97. The contracting authority may only reject the tender where the evidence supplied does not satisfactorily justify the abnormally low nature of the tender. In such cases, the contracting authority is to inform the Commission without undue delay pursuant to Article 32(6) of Regulation (EU) 2022/2560. If the contracting authority decides not to reject the tender, Article 32(1) of Regulation (EU) 2022/2560 applies.

3. APPLICATION OF THE BALANCING TEST IN ACCORDANCE WITH ARTICLE 6 OF REGULATION (EU) 2022/2560

3.1. Legal framework

98. Pursuant to Article 6(1) of Regulation (EU) 2022/2560, the Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 of Regulation (EU) 2022/2560, against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union.

99. The performance of the balancing test is a case-by-case assessment that takes into account the specific circumstances of the case, and in particular the actual or potential distortion resulting from the foreign subsidy in the context of the relevant economic

activity in the internal market, and the positive effects of the foreign subsidy in each specific case.

100. Hence, 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. Therefore, these guidelines provide guidance on the methodology that the Commission will typically apply in performing the balancing test, including concerning positive effects that the Commission can take into account, and the procedure that the Commission will follow when performing the balancing test in individual cases.
101. Member States, as well as any natural or legal persons can submit information on the positive effects of a foreign subsidy, of which the Commission should take due account when carrying out the balancing test. The Commission will consider the positive effects of the foreign subsidy on the basis of the evidence about such positive effects submitted during the investigation⁵⁷.
102. Pursuant to recital 21 of Regulation (EU) 2022/2560, '*[t]he positive effects should relate to the development of the relevant subsidised economic activity on the internal market. Other positive effects should be taken into account, where appropriate, in order to avoid that the balancing gives rise to unjustified discrimination. The Commission should also examine broader positive effects in relation to the relevant policy objectives, in particular those of the Union. Those policy objectives can include, in particular, a high level of environmental protection and social standards, and the promotion of research and development. In the context of a public procurement procedure, the Commission should take into account the availability of alternative sources of supply for the goods and services concerned.*' When performing the balancing test, the Commission should weigh those positive effects against the negative effects of a foreign subsidy in terms of distortion in the internal market⁵⁸.
103. Pursuant to Article 6(2) of Regulation (EU) 2022/2560, the Commission is to take into account the balancing test assessment when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments. The balancing test can lead to the conclusion that it is not necessary to impose redressive measures, or that commitments are not necessary, namely where the positive effects of the foreign subsidy outweigh its negative effects. The more distortive the foreign subsidy is, the less likely it is that its negative effects will be outweighed by its positive effects. Thus, in the case of categories of foreign subsidies that are deemed most likely to distort the internal market, positive effects are less likely to outweigh negative effects. If the negative effects prevail, the balancing test can help to determine the appropriate nature and level of the commitments or redressive measures.
104. Where the Commission carries out a balancing test on the basis of the information received, it will set out its reasoning in the decision closing an in-depth investigation.⁵⁹

3.2. Positive effects to be considered

105. In line with Article 6(1) of Regulation (EU) 2022/2560, the positive effects taken into consideration as part of the balancing test should relate to the development of the

⁵⁷ Recital 21 of Regulation (EU) 2022/2560.

⁵⁸ Recital 21 of Regulation (EU) 2022/2560.

⁵⁹ Recital 21 of Regulation (EU) 2022/2560.

relevant subsidised economic activity on the internal market and other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union. The Commission should base itself on the information provided to it by all persons, as further detailed in point 136. The positive effects may be different from those initially intended by the third country providing the subsidy.

3.2.1. Positive effects on the development of the relevant subsidised economic activity on the internal market

106. Positive effects may occur when the foreign subsidies enable the development of the economic activity in the internal market, i.e. where they make it possible for the subsidised economic activity to exist at all or trigger a change in the development of that subsidised economic activity.
107. Such can be the case for example when the subsidy remedies a market failure in the internal market. A market failure arises when the market on its own does not deliver an efficient allocation of resources in the economy, leading to inefficient market outcomes (such as non-competitive prices, suboptimal innovation levels or quality of products). Situations can arise where market forces are unlikely to produce efficient outcomes for society, for instance in the presence of positive externalities such as those associated with R&D, negative externalities, such as those associated with pollution, and more generally activities relating to public goods or characterised by imperfect information or coordination problems. The simple fact that a particular project or activity may not be profitable does not necessarily imply market failure, since that lack of profitability may be the result of a well-functioning market (for example, the lack of profitability may be due to cost inefficiencies or overcapacity, and a well-functioning market would require that such project or activity be unprofitable and ultimately driven out). Rather, the existence of a market failure should be duly demonstrated by the party invoking the positive effects.
108. 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. Positive effects on other undertakings, notably the impact of the economic activity on downstream, upstream or on other related activities will be assessed, if relevant, in the context of the broader positive effects in relation to relevant policy objectives described in Section 3.2.2. This could for instance be the case if the relevant subsidised economic activity contributes to the security of supply of the Union in a strategic sector, thus bringing positive effects to other undertakings in the value chain, or supports capacity building of a European Union base in the overall supply chain. Similarly, positive effects on a different economic activity carried out by the same undertaking would not be considered part of the relevant economic activity and should be assessed, if relevant, in the context of the broader positive effects in relation to relevant policy objectives described in Section 3.2.2.

3.2.2. *Positive effects on other policy objectives*

109. According to recital 21 of Regulation (EU) 2022/2560, the Commission can take into account other positive effects of the foreign subsidies in relation to relevant policy objectives, and in particular those of the Union⁶⁰.
110. In the context of the balancing test, relevant policy objectives could include for instance policy objectives which are recognised in Union law, such as those established by the Treaties and policy objectives aiming at promoting or protecting rights guaranteed by the Charter of Fundamental Rights. They can concern, in particular, a high level of environmental protection and social standards, and the promotion of research and development.
111. In addition, policy objectives reflected in non-binding acts of the Union can be relevant for identifying policy objectives in the context of Regulation (EU) 2022/2560. For instance, policy objectives which are covered by communications, guidelines, or other frameworks adopted by the Commission in relation to State aid are of particular relevance when applying the balancing test in the context of Regulation (EU) 2022/2560. In addition, the Commission could also take into account, where relevant, other non-binding acts not related to State aid that identify policy objectives of the Union⁶¹.
112. For example, such relevant policy objectives could include the promotion of environmental protection, economic development in disadvantaged areas of the Union, energy security, innovation, contribution to the Union economy's competitiveness and resilience or contribution to the Union's economic security or the Union defense policy.
113. The positive effects of a distortive foreign subsidy may also relate to policy objectives other than those of the Union, to the extent that they are nevertheless relevant to the Union. This could be the case, 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, such as those that have the effect of promoting a high standard of environmental protection (such as climate change mitigation in a third country, protection of biodiversity) and social standards (including human rights protection), or the promotion of research and development activities that result in the availability of innovative products or technology.

3.2.3. *Public procurement: availability of alternative sources of supply*

114. As explained in recital 21 of Regulation (EU) 2022/2560, in the context of a public procurement procedure, the Commission should consider the availability of alternative sources of supply for the goods and services when performing the balancing test⁶².
115. The purpose of this consideration is to ensure that, when balancing distortion due to foreign subsidies, the Commission takes into account in its assessment the fact that contracting authorities acquire works, products or services by means of a public contract to fulfil public objectives. When contracting authorities are unable to effectively procure, public services may remain unavailable which may have serious repercussions.

⁶⁰ Other positive effects may have to be taken into account in order to avoid a situation in which the balancing would result in unjustified discrimination. However, the Commission is yet to identify such situation in the cases that it has investigated since the entry into force of Regulation (EU) 2022/2560.

⁶¹ Such as the Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument.

⁶² Recital 21 of Regulation (EU) 2022/2560.

As a result, it appears necessary to consider a subsidised tender also in light of available alternative sources of supply. The Commission may therefore take the availability of alternative sources of supply into account especially in deciding whether to accept commitments, and the nature and scope of those commitments.

116. In this regard, the possibility to conclude a public contract may be considered as a positive effect, where alternative sources of supply are not available, even when that public contract is concluded with a subsidised tenderer⁶³. While the assessment is carried out when performing the balancing test, the positive effect is not considered to be a positive effect of the subsidy itself. Rather, the existence of alternative sources of supply depends on whether other economic operators express interest and submit eligible tenders. Thus, the positive effect is rather the possibility of the contracting authority to effectively fulfil its functions.
117. For the Commission to assess the availability of alternative sources of supply, the terms and conditions of a tender should be designed so that non-subsidised tenderers can realistically meet its terms as well, instead of being structured in a way that renders the participation of non-subsidised tenderers unlikely to be successful due to the design of those terms. Instead, the issue of missing alternatives for supply may be relevant in specific cases, e.g. in the context of procurement of innovation, where a particular technology is not yet available on the internal market; where the subject matter of a public procurement is to ensure critical public services or where the subsidised tenderer is the only tenderer that does not present a risk to security or public order.

3.3. Principles applied by the Commission in balancing the positive and negative effects of a foreign subsidy

3.3.1. Specificity of the positive effects

118. For positive effects to be taken into account for the balancing test, such positive effects should be specific to the foreign subsidy found to be distortive. In assessing the positive effects stemming from foreign subsidies, the Commission will consider whether, absent the foreign subsidies, such positive effects would not occur, or otherwise not to the same degree.
119. In practice, for the positive effects to be specific to the foreign subsidies, the person invoking those positive effects should be able to establish that the foreign subsidies have led, lead, or are likely to lead to a change in behaviour of the undertaking benefiting from the foreign subsidy, resulting in those positive effects, based, for example, on a counterfactual analysis.
120. The claimed positive effects should be evaluated in an objective manner. That evaluation does not depend on the intention of the third country granting the foreign subsidies. In particular, whether the positive effects are a deliberate consequence of the subsidy or are accidental is generally not relevant to the Commission's assessment under the balancing test.

⁶³ This may be relevant in particular in reviews conducted pursuant to Chapter 2 of Regulation (EU) 2022/2560 in the context of public procurement procedures covered by Article 32(2), point (b), of Directive 2014/24/EU, when products or services are protected by exclusive rights.

3.3.2. *Performance of the balancing*

121. Pursuant to Article 6(1) of Regulation (EU) 2022/2560, the Commission may balance the negative effects of a foreign subsidy in terms of distortion in the internal market according to Articles 4 and 5 of Regulation (EU) 2022/2560, against the positive effects.
122. The balancing test implies a comparison of the respective significance of both the negative effects in terms of distortion in the internal market and of the positive effects.
123. The significance of the negative effects in terms of distortion in the internal market relates to its severity, which may depend on a number of factors, in particular the nature, purpose, conditions, use and amount of the foreign subsidy, as well as the features of the distortion on the internal market established by the Commission, including the sectors affected. Similarly, in the case of categories of foreign subsidies that are deemed most likely to distort the internal market pursuant to Article 5(1) of Regulation (EU) 2022/2560, positive effects are less likely to outweigh negative effects⁶⁴. That is because such foreign subsidies have a particularly distortive nature or effect, which implies that the distortion associated with such foreign subsidies is more severe than with other subsidies that may achieve the same positive effects⁶⁵.
124. The extent to which the foreign subsidies contribute to relevant positive effects should be assessed by taking into account, amongst others:
 - a. the nature of the positive effects on the development of the relevant subsidised economic activity on the internal market, or their relation to the relevant policy objectives;
 - b. the intensity of the positive effects, that is to say, the materiality of the impact of the foreign subsidy on the development of the relevant subsidised economic activity on the internal market or how much the foreign subsidy contributes to the relevant policy objectives;
 - c. the timing of the positive effects, that is to say, how soon they are liable to occur.
125. Since the balancing test is not a numerical calculation, neither the negative effects of the foreign subsidies in terms of distortion in the internal market nor the positive effects need to be precisely quantified.
126. The extent to which the distortion identified exceeds that which is necessary to achieve the positive effects will be taken into account in the assessment of the positive effects in the balancing test. As exemplified in State aid practice, positive effects may be achieved while minimising negative effects, for instance by minimising the level of subsidies necessary to lead the subsidised undertaking to adopt the desired behaviour. That minimum level may bring with it a distortion that is therefore unavoidable to achieve the policy objective.
127. In the balancing test under Regulation (EU) 2022/2560, the Commission should aim to differentiate the negative effects that are unavoidable if the relevant policy objective is to be achieved, from the negative effects that go beyond what is necessary to achieve the positive effects. Foreign subsidies that entail unnecessary or avoidable negative

⁶⁴ Recital 21 of Regulation (EU) 2022/2560.

⁶⁵ However, even foreign subsidies falling under Article 5(1) of Regulation (EU) 2022/2560 may be found, in the specific circumstances of each case, to have distortive effects outweighed by specific positive effects.

effects are liable to lead to greater distortions; in turn, distortions that are avoidable are less likely to be outweighed by the positive effects.

3.3.3. Outcome of the balancing test

128. The balancing assessment can lead to the conclusion that it is not necessary for the undertaking under investigation to propose commitments or that it is not necessary to impose redressive measures. This is the case namely where the Commission finds that the positive effects of the foreign subsidy outweigh its negative effects⁶⁶.
129. If the negative effects prevail, the balancing test can help determine the appropriate scope and nature of the commitments or redressive measures.
130. The Commission, in that context, may take into account whether the commitments or redressive measures are suitable to limit the distortion to what is necessary to achieve the positive effects, if it considers that the remaining negative effects in terms of distortion would be outweighed by those positive effects. In some specific cases, the Commission may find that, even if the distortion is unavoidable to the occurrence of the positive effects, the negative effects still prevail; so that it remains necessary to accept commitments or adopt redressive measures that fully and effectively remedy the distortion.
131. When assessing the scope and nature of the commitments to be accepted or deciding on the redressive measures to be imposed, the Commission may also consider whether those commitments or redressive measures are also suitable to preserve the positive effects. In certain cases, it may not be possible to identify redressive measures that would remedy the distortion in the internal market whilst being suitable to maintain the positive effects.
132. In any event, given that the balancing test considers the positive effects of a foreign subsidy, applying that balancing test should not lead to an outcome for the undertaking that would be worse than if the balancing test had not been applied⁶⁷.

3.3.4. Possibility of cumulative assessment

133. In instances where the Commission has established that an undertaking has received several foreign subsidies and has established the particular and distinguishable distortive impacts of each of those foreign subsidies, the person invoking the positive effects should provide information to the Commission establishing how each alleged positive effect is specific to a distortive foreign subsidy. The Commission should on this basis carry out the balancing test for each type of distortion identified.
134. However, in certain circumstances, the negative impact of each foreign subsidy may be intertwined with, not easily distinguishable from, and even reinforce, the negative impact of other foreign subsidies. In its assessment of the distortion, the Commission may accordingly (see point 40) assess the aggregate distortive impacts of several foreign subsidies on an undertaking under investigation. Correspondingly, the Commission may assess the aggregate positive effects of several foreign subsidies.

⁶⁶ Recital 21 of Regulation (EU) 2022/2560.

⁶⁷ Recital 21 of Regulation (EU) 2022/2560.

3.4. Procedural considerations

3.4.1. Burden of proof

135. Under Article 6 of Regulation (EU) 2022/2560, the Commission performs the balancing test on the basis of the information received. It is therefore for the person interested in having the positive effects taken into account (including notably the undertaking under investigation) to provide information that establishes the existence of such positive effects.
136. Information pertaining to the positive effects may be submitted to the Commission by Member States and any natural or legal person⁶⁸, including the undertaking under investigation, other interested parties, which can for instance include companies active in the same value chain as the undertaking under investigation, certain parties to a concentration or a public procurement procedure, trade associations or third countries.

3.4.2. Standard of proof

137. The relevant information and documents to be provided to the Commission should include the following:
 - a. the nature, likelihood and significance of the positive effects, as well as when such positive effects would likely occur;
 - b. why the positive effects are specific to the foreign subsidy, based, for example, on a counterfactual analysis;
 - c. an analysis enabling the Commission to determine whether the distortive effects resulting from the foreign subsidies go beyond that which is necessary to generate the positive effects relied on;
 - d. why the positive effects mitigate or outweigh the distortion established by the Commission.
138. The more precise the positive effects claimed and the more convincing the evidence submitted in support of the existence of those claimed effects, the better the Commission can evaluate the claims. Vague, general or theoretical claims, or claims which rely exclusively on the person's own commercial interests are not sufficient to establish the existence of the claimed positive effects to a sufficient degree of likelihood. Proving such effects requires a cogent and consistent body of evidence, especially where the persons supplying evidence may be better placed than the Commission to disclose their existence or demonstrate their relevance.
139. The evidence and the facts claimed should also be verifiable by the Commission. As such, the evidence and information to be provided should not be theoretical. In support of their claims, the persons can include a quantitative or qualitative analysis based on case-specific, solid, empirical data, such as financial data. The Commission can also complement its assessment of the existence of relevant positive effects with other available information, for instance public information.

3.4.3. Timing for submitting information

140. Information pertaining to the positive effects of a foreign subsidy may be submitted to the Commission at any stage of the investigation.

⁶⁸ Recital 21 of Regulation (EU) 2022/2560.

141. To ensure the Commission can make a proper assessment of the information, the undertaking under investigation, any other natural or legal person, Member States and the third country that granted the foreign subsidy should provide the Commission with information pertaining to the positive effects of the foreign subsidies identified in the decision to open an in-depth investigation pursuant to Article 10(3) of Regulation (EU) 2022/2560 within the time limit prescribed by the Commission according to Article 8(1) of Commission Implementing Regulation (EU) 2023/1441⁶⁹.
142. The Commission should make every reasonable effort to consider and incorporate all evidence submitted. However, to ensure that the Commission's ability to adopt its decision is not unduly delayed, the Commission is not obliged to take into account evidence submitted at a late stage of the procedure.
143. In the context of notified concentrations and public procurement procedures, that information should complete the information that the notifying parties are invited to submit pertaining to the positive effects of the foreign subsidies in the notification forms provided in Implementing Regulation (EU) 2023/1441.
144. The undertaking under investigation may provide additional information pertaining to the positive effects of the foreign subsidies identified when submitting observations on the grounds on which the Commission intends to adopt its decision (the 'Statement of Grounds'). Pursuant to Article 17(1) of Implementing Regulation (EU) 2023/1441, the Commission is not obliged to take into account submissions by the undertaking under investigation received after the expiry of the time period prescribed by the Commission in its Statement of Grounds.

3.4.4. Timing for assessing information

145. On the basis of the information received, the Commission will perform the balancing test at the stage of the in-depth investigation conducted under Article 11 of Regulation (EU) 2022/2560 and set out its assessment of the information received in its final decision.

3.5. Illustration of the performance of a balancing test

146. The following example aims to illustrate the Commission's approach when applying the balancing test. It does not prejudge in any way the outcome of such assessment in a concrete case.
147. This example concerns an in-depth – theoretical – investigation where the Commission considers that there are sufficient indications of a distortive foreign subsidy granted by a third-country government to an undertaking active in the construction sector, specifically in the building of energy-efficient affordable housing in certain Member States.
148. In its submission, the undertaking under investigation outlines its contribution to the development of the energy-efficient construction sector in the Union, arguing that the foreign subsidy enabled it to develop innovative construction techniques and materials. The undertaking under investigation and certain consumer associations, also outline the undertaking under investigation's contribution to the Union policy objectives on

⁶⁹ 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 (OJ L 177, 12.7.2023, p. 1, ELI: http://data.europa.eu/eli/reg_impl/2023/1441/oj).

sustainable and affordable housing in the Union and climate change. Competing industries submit information regarding the negative impact of the alleged foreign subsidies such as the effect of marginalising competitors and the ensuing reduction of competition and, in the long term, a risk of price increases for energy efficient housing and a negative impact on innovation in the sector. Member States where the undertaking under investigation is active submit data regarding housing needs and the energy-efficiency objectives identified.

149. To assess the alleged positive effects, the Commission would first determine whether they are specific to the foreign subsidy, that is to say, whether they would materialise even without the foreign subsidy. To support the Commission's assessment, the parties could be invited to submit a counterfactual analysis.
150. The Commission would then assess the nature of the alleged positive effects specific to the foreign subsidy, by assessing, in particular, whether the foreign subsidy enables the undertaking under investigation to develop and deploy innovative technologies. It would assess the impact on the availability of affordable housing and the intensity of the positive effects – taking into account, for instance: the number of housing projects completed and planned by the undertaking concerned; the overall building capacity in the Member States where the undertaking is active; and housing needs identified in these Member States.
151. Once the specific positive effects of the foreign subsidy have been assessed, the Commission would balance them against the negative effects linked to the distortion. For example, a foreign subsidy could lead to a reduction in sales and profits of undertakings active in the same sector, resulting in their potential downsizing, marginalisation and/or reduction in incentives to invest. In extreme cases, it could lead to their exit and therefore to less competition and higher prices for energy-efficient housing in the Union. To the extent that the foreign subsidy is disproportionate to achieve the positive effects, such that the same positive effect could be achieved by less distortive means, it may be necessary to address the avoidable part of the distortion through commitments or redressive measures.
152. For example, if the foreign subsidy had taken the form of an unlimited guarantee, given the inherently distortive nature of such measures, it is unlikely that the specific positive effects identified would outweigh the negative effects identified, notably if the unlimited guarantee would be disproportionate to the positive effects and lead to avoidable distortions. By contrast, a foreign subsidy that is proportionate to achieve the positive effects may be considered, depending on the circumstances of the case, to have its distortive effects outweighed by the positive effects achieved.

4. APPLICATION OF THE COMMISSION'S POWER TO REQUEST THE PRIOR NOTIFICATION OF ANY CONCENTRATION IN ACCORDANCE WITH ARTICLE 21(5) OF REGULATION (EU) 2022/2560, OR FOREIGN FINANCIAL CONTRIBUTIONS RECEIVED BY AN ECONOMIC OPERATOR IN A PUBLIC PROCUREMENT PROCEDURE IN ACCORDANCE WITH ARTICLE 29(8) OF REGULATION (EU) 2022/2560

4.1. Legal framework

153. Pursuant to Article 21(5) of Regulation (EU) 2022/2560, the Commission may request the notification of any concentration which is not notifiable, at any time prior to its

implementation, where it suspects that foreign subsidies may have been granted to the ‘*undertakings concerned*’⁷⁰ in the three years prior to that concentration.

154. Pursuant to Article 29(8) of Regulation (EU) 2022/2560, where the Commission suspects that an economic operator may have benefited from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may, before the award of the contract, request the notification of the foreign financial contributions provided by third countries to that economic operator in any public procurement procedure which are not notifiable under Article 28(1) or fall within the scope of Article 30(4).
155. It follows from the wording of those two Articles that, where the conditions set out therein are fulfilled, the Commission enjoys a margin of discretion in deciding to request the prior notification of a concentration or of the foreign financial contributions provided by third countries to an economic operator participating in a public procurement procedure.
156. Those provisions should be interpreted in light of recitals 36 and 40 of Regulation (EU) 2022/2560. Recital 36 indicates that the Commission can require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a contract, if it considers that the concentration or the bid would merit *ex ante* review given its impact in the Union. Recital 36 clarifies that the Commission should also have the possibility to carry out a review on its own initiative of concentrations already implemented or contracts already awarded under the *ex officio* procedure.
157. Recital 40 of Regulation (EU) 2022/2560 also emphasises that, in the context of the Commission’s power to request the prior notification of a foreign financial contribution during a public procurement procedure whose estimated value is below the notification thresholds, the Commission should endeavour to limit interference with public procurement procedures, by taking into account how close the date of the award of the contract is when deciding whether to request such prior notification.
158. When the Commission requires the notification of a concentration or of a foreign financial contribution granted to an undertaking participating in a public procurement procedure, such concentration or such foreign financial contribution is deemed to be notifiable and, therefore, subject to the provisions set out in Chapters 3 and 4 of Regulation (EU) 2022/2560, respectively⁷¹.

4.2. Conditions for the Commission to request the prior notification

159. Under Article 21(5) of Regulation (EU) 2022/2560, the Commission may request the prior notification of any (i) concentration (ii) which is not a notifiable concentration within the meaning of Article 20 of Regulation (EU) 2022/2560 (iii) at any time prior to its implementation (iv) where the Commission suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration.
160. Under Article 29(8) of Regulation (EU) 2022/2560, the Commission may request the notification of the foreign financial contributions provided by third countries to an

⁷⁰ The notion of ‘*undertakings concerned*’ mean, in accordance with Article 20(3), point (b), of Regulation (EU) 2022/2560, the parties to the concentration, that is to say: for a merger, the merging undertakings; for an acquisition of control, the acquiring undertaking(s) and the acquired undertaking(s); and for the creation of a joint venture, the undertakings creating the joint venture.

⁷¹ Articles 21(5) and 29(8) of Regulation (EU) 2022/2560.

economic operator (i) in any public procurement procedure (ii) which are not notifiable under Article 28(1) of Regulation (EU) 2022/2560 or fall within the scope of Article 30(4) of Regulation (EU) 2022/2560 (iii) before the award of the contract (iv) where the Commission suspects that that economic operator may have benefited from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure.

161. In the remainder of Section 4.2, the Commission will provide guidance on each of these conditions.

4.2.1. Notion of concentration or public procurement procedure

162. The Commission's powers under Articles 21(5) and 29(8) of Regulation (EU) 2022/2560 can only apply in relation to, respectively, concentrations and public procurement procedures. These notions should be understood as defined under Regulation (EU) 2022/2560.⁷²

4.2.2. Notion of non-notifiable concentration or of foreign financial contributions to an economic operator in a public procurement procedure which are not notifiable

163. The Commission may only request, by virtue of Article 21(5) of Regulation (EU) 2022/2560, the prior notification of concentrations for which at least one of the thresholds set out in Article 20(3) of Regulation (EU) 2022/2560 is not met.

164. In addition, the Commission may only request, by virtue of Article 29(8) of Regulation (EU) 2022/2560, the prior notification of foreign financial contributions provided by third countries to an economic operator in a public procurement procedure where the foreign financial contributions (a) are not notifiable as at least one of the thresholds set forth in Article 28(1) of Regulation (EU) 2022/2560 is not met or (b) fall within the scope of Article 30(4) of Regulation (EU) 2022/2560.

165. With regard to the latter, foreign financial contributions fall within the scope of Article 30(4) of Regulation (EU) 2022/2560 where, although a notification or declaration was previously submitted either: (i) the Commission had closed a preliminary review without adopting a decision, but receives new information leading it to suspect that a submitted notification or declaration was incomplete; or (ii) such a notification or declaration is not transferred to the Commission.

4.2.3. Timing for requesting the prior notification

166. Under Article 21(5) of Regulation (EU) 2022/2560, the Commission may only request the prior notification of concentrations '*at any time prior to their implementation*'. For the purposes of Article 21(5) of Regulation 2022/2560, 'implementation' should be understood as the full (and not merely partial) implementation of the concentration.⁷³

167. Under Article 29(8) of Regulation (EU) 2022/2560, the Commission may only request the prior notification of foreign financial contributions to an economic operator in a

⁷² See reference to the definitions in footnotes 7 and 9.

⁷³ In the interests of clarity, the Commission notes that 'implementation' for the purposes of the suspension obligation set out in Article 21(1) of Regulation, is to be interpreted consistently with the Court of Justice's judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraphs 41 to 46, 52, 53, 59 and 61 and judgment of 9 November 2023, *Altice Group Lux v Commission*, Case C-746/21 P, EU:C:2023:836, paragraph 137, in that the implementation of a concentration arises as soon as the parties to a concentration implement operations contributing to a lasting change in the control of the target undertaking.

public procurement procedure ‘*before the award of the contract*’. In this context, ‘*award of contract*’ should be understood as the legally binding conclusion of the contract between the contracting authority and the particular tenderer whose tender was selected based on predefined award criteria.⁷⁴

4.2.4. *Suspicion that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration or that an economic operator may have benefited from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure*

168. The Commission may only request the prior notification of concentrations or of foreign financial contributions by third countries to an economic operator in a public procurement procedure if the Commission suspects that foreign subsidies, as defined under Article 3 of Regulation (EU) 2022/2560, have been granted in the three years prior to the concentration or the submission of the tender or request to participate in the public procurement procedure, respectively, to the undertakings concerned by the concentration or to the economic operator participating in the public procurement procedure (including in situations where that economic operator benefits from potential foreign subsidies granted to other entities listed in Article 28(1)(b) of Regulation 2022/2560 that are concerned by the tender that the economic operator submitted in the public procurement procedure).

169. With respect to Article 29(8) of Regulation (EU) 2022/2560, it is not necessary for the suspected foreign subsidies to have been granted directly to the economic operator itself. It would also be sufficient if the suspected foreign subsidies were granted to a main subcontractor or main supplier which is involved in the same public procurement procedure as the economic operator, as such foreign subsidies could also potentially have a distortive effect on the relevant tender. On the basis of this suspicion, the Commission may request prior notification pursuant to Article 29(8) of Regulation (EU) 2022/2560, for which the scope is set out by Article 28(1), point (b), of that Regulation.

4.3. **Impact in the Union of the concentration or foreign financial contributions received by an economic operator in a public procurement procedure**

170. In line with recital 36 of Regulation (EU) 2022/2560, the Commission may require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a contract, where it considers that the concentration or the bid would merit *ex ante* review given its impact in the Union, despite the fact that the concentration or bid does not meet the notification thresholds set out in Regulation (EU) 2022/2560.

4.3.1. *Notion of impact in the Union*

171. The notion of ‘*impact in the Union*’ should be understood in light of the fundamental objective of Regulation (EU) 2022/2560, which is to ensure a level-playing field by

⁷⁴ In several Member States, the award of a contract and the conclusion of the contract are regarded as two separate and distinct legal acts. The award, governed by public law, should be announced, and only once it is no longer legally contestable the civil law contract will be concluded. In other Member States, by contrast, the prevailing principle is that the award and the conclusion of the contract occur simultaneously. In such systems, the award of the contract by the contracting authority in response to a bidder’s tender is treated as the acceptance of the tenderer’s making the civil law contract legally binding. In any case, the date of award should be considered as the date on which a contracting authority concludes a legally binding agreement for the provision of goods, services, or works.

addressing distortions in the internal market caused by foreign subsidies⁷⁵. In applying that notion, the Commission will, therefore, seek to strike a balance between the effective protection of the internal market and the need to minimise the administrative burden on undertakings.

172. The notion of '*impact in the Union*' should be understood as covering both actual and potential impacts in the Union and may imply impacts through several channels, for example, the production of goods or the performance of services in the Union by the undertakings concerned, access to technology or intellectual property rights, or the availability of services.

4.3.2. *Factors that the Commission will consider in assessing whether the concentration or foreign financial contributions received by an economic operator in a public procurement procedure merit ex ante review*

173. In assessing whether cases merit an *ex-ante* review given their impact in the Union, the Commission will consider, amongst other things, the importance in the Union of the concentration or public procurement procedure concerned.
174. For the purpose of the examination as to whether the case merits *ex ante* review given its impact in the Union, the Commission will consider, amongst others, the following elements:
 - a. in concentrations, contextual information that indicates that the level of the relevant economic activity of the target (and in particular its turnover) does not reflect its actual or future economic significance.
 - b. the strategic or important character of the current or future economic activity concerned, of the underlying or related sector, of the relevant supply or value chain, as well as, in concentrations, the strategic or important character of the undertakings concerned (and in particular the target), notably when they own strategic assets such as critical infrastructure⁷⁶ or innovative technologies⁷⁷; in public procurement procedures, the strategic importance of the object of the public procurement procedure.
 - c. patterns in investments, acquisitions or participation in public procurement procedures⁷⁸ throughout which influence or economic presence is built up in those sectors.
 - d. whether the Commission has already adopted a final decision pursuant to Regulation (EU) 2022/2560 which established that the undertakings concerned (and in particular the acquirer in concentrations or the economic operator in public procurement procedures) or related undertakings, have already received distortive foreign subsidies, or whether the Commission has already adopted a decision to

⁷⁵ Recital 6 of Regulation (EU) 2022/2560.

⁷⁶ Recital 3 of Regulation (EU) 2022/2560 with reference to Article 4(1), point (a), of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 I, 21.3.2019, p. 1, ELI: <http://data.europa.eu/eli/reg/2019/452/oi>).

⁷⁷ Recital 2 of Regulation (EU) 2022/2560.

⁷⁸ The Commission could consider in its assessment the following patterns in investments, acquisitions or participation in public procurement procedures: numerous past, current or expected acquisitions or participations in public procurement procedures, above or below thresholds, by the same or related undertakings, and/or concerning the same or similar targets or public procurement procedures, e.g. in the same or related sectors.

initiate an in-depth investigation pursuant to the Regulation (EU) 2022/2560 which established that there were sufficient indications thereof.

- e. contextual information indicating the possibility of a distortion, which could relate to (i) whether the possible foreign subsidies identified may be considered ‘most likely to distort the internal market’ under Article 5 of Regulation (EU) 2022/2560, especially foreign subsidies that directly facilitate the concentration concerned, or enable the economic operator to submit an unduly advantageous tender, respectively, or (ii) the indicators listed in Article 4(1) of Regulation (EU) 2022/2560, in combination with the guidance and elements listed in point 57 of these Guidelines⁷⁹.

175. The Commission will not request the prior notification of a concentration or of foreign financial contributions in a public procurement procedure when the Commission can determine with sufficient certainty – without the need for a notification – that the aggregate amount of the foreign subsidies it suspects have been granted to the relevant undertakings or economic operators do not exceed, in the three years prior to the concentration or to the submission of the tender or request to participate in the public procurement procedure, the threshold of EUR 4 million laid down in Article 4(2), or if those foreign subsidies meet the conditions of Article 4(4) of Regulation (EU) 2022/2560.⁸⁰ In accordance with Regulation (EU) 2022/2560, such foreign subsidies are unlikely to distort the internal market, so that the case does not merit *ex ante* review.

176. Bids in public procurement procedures with an estimated value that falls below the applicable thresholds set out in Article 4, points (a), (b) and (c) of Directive 2014/24/EU, are unlikely to have an impact in the Union such that the case would merit *ex ante* review.

177. In public procurement procedures, the Commission should endeavour to limit interference with the public procurement procedure concerned, by taking into account how close the date of the award of the contract is when deciding whether to request such prior notification⁸¹. At the same time, it is important to note that due to the specificities of public procurement procedures that do not fall under the notification obligation pursuant to Article 29(1) of Regulation (EU) 2022/2560, the Commission is unable to set a specific time limit for requesting prior notification.

178. The elements listed in this Section are not exhaustive and the Commission may also consider other elements for the purposes of assessing the concentration’s or the public procurement procedure’s impact in the Union.

⁷⁹ The Commission may, for instance, consider the characteristics of the foreign subsidies, such as their amount, nature, purpose, conditions and use. The Commission may also consider, for instance, contextual information, for instance found in financial information, press releases or business plans, pertaining to the concentration or public procurement procedure, or the parties to the concentration or the economic operator in a public procurement procedure, taking into account the situation of the undertaking, including its size and the markets or sectors concerned, or the level and evolution of economic activity of the undertaking on the internal market.

⁸⁰ Recital 19 and Article 4(2) and (4) of Regulation (EU) 2022/2560.

⁸¹ Recital 40 of Regulation (EU) 2022/2560.

4.4. Procedural considerations when exercising the power to request the prior notification of concentrations and of foreign financial contributions received by an economic operator in a public procurement procedure

4.4.1. Evidence to be produced

179. Pursuant to Article 35 of Regulation (EU) 2022/2560, Member States (and in particular, in public procurement procedures, the contracting authorities⁸²) and any natural or legal persons (and in particular competitors of the undertakings concerned) may contact the Commission services and inform them about a foreign subsidy that may distort the internal market. The Commission may, on the basis of that information, request a prior notification according to Article 21(5) or Article 29(8) of Regulation (EU) 2022/2560. To enable the Commission to assess whether or not to request a prior notification, the informant should include sufficient information (to the extent that it is available) to make a preliminary assessment possible on whether the criteria for prior notification are met. The Commission will verify, insofar as possible, the accuracy and plausibility of the information provided to it.
180. The Commission may also, on its own initiative, collect information on concentrations and public procurement procedures that may subsequently be subject to a request of prior notification, including by collecting information from the undertakings involved in the concentration or public procurement procedure, from Member States (in particular, in public procurement procedures, the contracting authorities) or from any other natural or legal persons.
181. When adopting a decision to request the prior notification of concentrations or of foreign financial contributions received by an economic operator in a public procurement procedure (or main subcontractor or main supplier which is involved in the same public procurement procedure), the Commission should provide details of the evidence⁸³ which leads it to suspect that foreign subsidies have been granted to the undertakings concerned by the concentration or that the economic operator benefited from foreign subsidies in the public procurement procedure, taking into account the definition of foreign subsidies in Article 3 of Regulation (EU) 2022/2560, and the potential impact in the Union of the concentration or foreign financial contributions benefitting an economic operator in a public procurement procedure.

4.4.2. Procedural considerations after the request of prior notification

4.4.2.1. In concentrations

182. The Commission decision requesting the prior notification of a concentration under Article 21(5) of Regulation (EU) 2022/2560 will be notified to the acquiring undertaking in accordance with Article 41(1) of Regulation (EU) 2022/2560.
183. Upon adoption of the Commission decision requesting the prior notification of the concentration under Article 21(5) of Regulation (EU) 2022/2560, the concentration will be deemed a ‘notifiable concentration’ for the purposes of Regulation (EU) 2022/2560.
184. As a result, the concentration will, as of that date, be subject to the application of Chapter 3 of Regulation (EU) 2022/2560 (in particular, Article 24 on the suspension of

⁸² See footnote 49 for the explanation of this term.

⁸³ The details of the evidence shall account for professional secrecy and confidentiality in accordance with Article 43 of Regulation (EU) 2022/2560.

concentrations) and to Implementing Regulation (EU) 2023/1441 (in particular, Article 4 and Annex I thereto).

4.4.2.2. In public procurement procedures

185. The Commission decision requesting the prior notification of foreign financial contributions under Article 29(8) of Regulation (EU) 2022/2560 will be notified to the economic operator. The contracting authority will be informed as early as possible to ensure effective cooperation in the application of Regulation (EU) 2022/2560 in particular to prevent the award of the contract to the economic operator to which the Commission requests a prior notification⁸⁴.
186. Upon notification of the Commission decision requesting the prior notification of the foreign financial contribution under Article 29(8) of Regulation (EU) 2022/2560, the foreign financial contribution is deemed to be a notifiable foreign financial contribution in a public procurement procedure.
187. As a result, the foreign financial contribution is subject to the provisions set out in Chapter 4 of Regulation (EU) 2022/2560 with the exception of the requirement to reach the threshold values of Article 28(1) of Regulation (EU) 2022/2560, and it will be subject to Implementing Regulation (EU) 2023/1441 (and in particular Articles 5 and 7 thereof and Annex II thereto). In accordance with Article 29(5) of Regulation (EU) 2022/2560, the obligation to notify foreign financial contributions is to apply to economic operators, groups of economic operators as well as to main subcontractors and main suppliers involved in the same tender, if known at the time of the complete notification. The notification of the foreign financial contributions should be submitted to the contracting authority using the form set out in Annex II to Implementing Regulation (EU) 2023/1441. The provisions of Chapter 4, including the deadlines set in Article 30 of Regulation (EU) 2022/2560, apply to the economic operator subject to a request for prior notification pursuant to Article 29(8) of Regulation (EU) 2022/2560. Similarly, contracting authorities may continue to carry out all procedural steps in the public procurement process. Therefore, a tender submitted by an economic operator that was not requested to submit a prior notification may be awarded a contract even before the Commission closes the assessment of the prior notification, provided that it constitutes the most economically advantageous tender. A procedural delay may thus arise only where the most economically advantageous tender has been submitted by the economic operator that was requested to submit a prior notification.

⁸⁴ Recital 58 of Regulation (EU) 2022/2560.