



Council of the  
European Union

Brussels, 21 April 2022  
(OR. en)

8225/22

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**Interinstitutional File:  
2021/0114(COD)**

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LIMITE

CODEC 501  
COMPET 244  
COMER 47  
MI 290  
RC 20

**NOTE**

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From: Presidency

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To: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council  
on foreign subsidies distorting the internal market

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In view of the Working Party on Competition of 26 April 2022, delegations will find attached a third Presidency compromise text on the above-mentioned Proposal for a Council Regulation. Changes in comparison to document ST 7213/22 REV 1 are marked in **bold underline** for additions and in ~~strikethrough~~ for deletions.

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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on foreign subsidies distorting the internal market**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) A strong, open and competitive internal market enables both European and foreign undertakings to compete on merits. The Union benefits from a sophisticated and effective system of State aid control, aiming at ensuring fair conditions for all undertakings engaging in an economic activity in the internal market. This State aid control system prevents Member States from granting State aid that unduly distorts competition in the internal market.

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<sup>1</sup> OJ C [...], [...], p. [...].

- (2) At the same time, undertakings might receive subsidies from third countries that provide public funds, which are then used, for instance, to finance economic activities in the internal market in any sector of the economy, such as participation in public procurement ~~tenders~~ **procedures**, or acquisitions of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies. Such subsidies are currently not subject to Union State aid rules.
- (3) Foreign subsidies can distort the internal market and undermine the level playing field for various economic activities in the Union. This could in particular occur in the context of concentrations entailing a change of control over Union undertakings, where such concentrations are fully or partially financed through foreign subsidies, or if economic operators<sup>2</sup> benefiting from foreign subsidies are awarded public contracts in the Union.
- (4) No existing Union instruments address distortions caused by foreign subsidies. Trade defence instruments enable the Commission to act when subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned. Under the WTO Agreement on Subsidies and Countervailing Measures, the Union has the possibility to initiate State-to-State dispute settlement against certain foreign subsidies granted by WTO members and limited to goods.
- (5) It is therefore necessary to complement existing Union instruments with a new tool to effectively deal with distortions in the internal market caused by foreign subsidies ~~and in~~ **order to** ensure a level playing field. In particular, the new tool complements Union State aid rules which deal with distortions in the internal market caused by Member State subsidies.

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<sup>2</sup> For the purpose of this Regulation, when public procurement procedures are concerned, the term undertaking will be understood as the economic operator pursuant to Directives 2009/81/EC, 2014/23/EU, 2014/24/EU and 2014/25/EU

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- (6) Rules and procedures to investigate foreign subsidies that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies could distort the internal market if the undertaking benefitting from the foreign subsidy engages in an economic activity in the Union. This Regulation should therefore establish rules for all undertakings engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them.
- (7) To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission should be the sole authority competent to apply this Regulation. The Commission should have the power to examine any foreign subsidy to the extent it is in the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.
- (7a) This Regulation, should be applied and interpreted -in light of the relevant ~~the~~ Union legislation, including those relating to State aid, mergers and public procurement.
- (8) Foreign subsidy in the context of this Regulation should be understood as an intervention that meets the following cumulative conditions.

- (9) There ~~should be~~ **is** a financial contribution provided, directly or indirectly, by a third country. The financial contribution may be granted through public or private entities. Whether a public entity provided a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment prevailing in the country in which the entity operates including the government's role in the economy of that country. Financial contributions may also be granted through a private entity if its actions can be attributed to the third country. Granting special or exclusive rights to an undertaking without receiving adequate remuneration in line with normal market conditions may constitute foregone State revenues, and may confer a benefit to the undertaking.
- (10) A financial contribution should confer a benefit to an undertaking engaging in an economic activity in the internal market. A financial contribution is considered to confer a benefit to an undertaking if it could not have been obtained under normal market conditions. The existence of a benefit should be determined on the basis of comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service. If no directly comparable benchmarks are available, existing benchmarks could be adjusted or alternative benchmarks could be established based on generally accepted assessment methods. Benefits may notably be conferred in the context of the relationship established between public authorities and public undertakings, if such a relationship, and in particular any financing by the public authorities to public undertakings does not comply with normal market conditions. The provision or purchase of goods or services carried out following a competitive, transparent and non-discriminatory tender procedure, is presumed to be in line with normal market conditions. A financial contribution to an undertaking engaging in an economic activity in the internal market should not be considered as conferring a benefit when the benchmark assessment shows that the undertaking would have obtained that benefit under normal market conditions.

- (11) The benefit should be conferred to one or more undertakings or industries. The specificity of the **foreign** subsidy could be established by law or in fact. The benefit conferred by a financial contribution may be passed-through to an undertaking engaging in an economic activity in the Union.
- (11a) A **foreign** subsidy should be considered granted from the moment the beneficiary obtains an entitlement to receive the **foreign** subsidy. The actual ~~payment~~ **disbursement** of the **foreign** subsidy is not a necessary condition for bringing a subsidy within the scope of this Regulation.
- (11b) A financial contribution that is provided exclusively to the non-economic activities of an undertaking does not constitute a **foreign** subsidy. However, if a financial contribution for a non-economic activity is used to cross-subsidise the economic activities of the undertaking, it can amount to a **foreign** subsidy falling under the scope of this Regulation. If an undertaking uses financial contributions, for instance in the form of special or exclusive rights, or **those** received to compensate for a burden imposed by public authorities, to cross-subsidise other activities, ~~this~~ **that** could be an indication that ~~said~~ **the** special or exclusive rights are provided without adequate remuneration, or **that** the burden is overcompensated and thus amounts to a **foreign** subsidy.
- (12) Once the existence of a foreign subsidy is established, the Commission should assess on a case by case basis whether the foreign subsidy distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited. Subsidies in the form of export financing may be a cause of particular concern because of their distortive effects. This is not the case if such financing is provided in line with the OECD Arrangement on officially supported export credits.

- (13) The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of an undertaking and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market.

(14) When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 5 million over a consecutive period of three financial years should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this Regulation. Foreign subsidies not exceeding EUR 200.000 **per third country** over a consecutive period of three financial years should be considered as not distorting the internal market within the meaning of this Regulation.

- (15) Like certain types of State aid, also certain categories of foreign subsidies, such as unlimited guarantees, that is to say without any limitation as to the amount or the duration of such guarantee, are likely to create distortions in the internal market because of their nature. The same is true for an unduly advantageous bid, the price of which does not reflect normal market conditions because of foreign subsidies. 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 ~~should not require~~ a detailed assessment based on indicators. An undertaking could in any event show that the foreign subsidy in question would not distort the internal market in the specific circumstances of the case.

(16) **Member States, as well as any natural or legal persons may submit information on potential positive effects of a foreign subsidy.** The Commission should take into account the positive effects of the foreign subsidy if an undertaking under investigation submits evidence of such positive effects. The positive effects should relate to **the** development of the relevant subsidised economic activity on the internal market including broader positive effects of the foreign subsidy in relation to **the relevant** policy objectives, such as those of the Union. **These may include, for example, environmental protection or research and development.** The Commission should weigh these positive effects against the negative effects of a foreign subsidy in terms of distortion on the internal market, ~~in order to determine, if applicable, the appropriate redressive measure or accept~~ **appropriate commitments.** In the context of a public procurement procedure, the Commission should also take into account the availability of alternative sources of supply for the goods and services concerned. The balancing may ~~also~~ lead to the conclusion that redressive measures should not be imposed if the positive effects of the foreign subsidy on the subsidised economic development including the broader positive effects outweigh its negative effects. **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 may inform the appropriate nature and level of the redressive measures or commitments. In any event, **as the balancing considers the potential positive effects of a foreign subsidy,** applying **such** the balancing **should** ~~cannot~~ lead to an outcome for the undertaking that would be worse than without the balancing. ~~Third parties can provide information on potential positive effects to the Commission. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects.~~ **Where the Commission carries out a balancing for a foreign subsidy, it should set out its reasoning in the decision closing an in-depth investigation.**

- (17) Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures **should include structural or non-structural remedies or the repayment of the foreign subsidy.** They should be ~~proportionate and~~ suitable to remedy the distortion at stake **and should be proportionate.** **That is, where alternative sets of redressive measures would each fully and effectively remedy the distortion, the Commission will choose the one which is least burdensome for the undertaking under investigation.** ~~They should include behavioural or structural remedies or the repayment of the foreign subsidy.~~
- (18) The undertaking under investigation should have the possibility to offer commitments in order to remedy the distortion caused by the foreign subsidy. If the Commission considers that the commitments offered fully and effectively remedy the distortion, it could accept them and make them binding by decision. In that case, the Commission will not impose redressive measures.
- (19) The undertaking under investigation could offer to repay the subsidy, together with appropriate interest. The Commission should accept a repayment offered as a commitment if it can ascertain that the repayment remedies the distortion, is executed in a transparent manner and is effective in practice, while taking into account the risk of circumvention of the objectives of this Regulation.
- (20) Unless the undertaking under investigation offers commitments that would fully and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a public contract before it takes place. Where the concentration has already been implemented, notably in cases where no prior notification was required because the notification thresholds were not reached, the distortion may nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission could decide to remedy the distortion by ordering the undertakings ~~concerned~~ to dissolve the concentration.

- (21) The Commission should have the power, on its own initiative, to examine any information on foreign subsidies. Member States and any natural or legal person can provide the Commission with information on alleged ~~distortive~~ foreign subsidies **distorting the internal market**. It is necessary to establish a procedure consisting of two steps, namely a preliminary review and an in-depth investigation. An undertaking subject to any of these two steps is considered as an undertaking under investigation.
- (22) The Commission should be given adequate investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of an undertaking or association of undertakings, or, subject to agreement by the undertaking or association of undertakings and the third country concerned, at their premises in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking under investigation or third country that granted the subsidy does not cooperate.
- (23) Furthermore, where necessary to prevent irreparable damage to competition on the internal market, the Commission should have the power to adopt interim measures. No interim measures should be taken with regard to public procurement procedures.
- (24) In all cases where, as a result of the preliminary review, the Commission has sufficient indications of the existence of a foreign subsidy distorting the internal market, the Commission should have the power to launch an in-depth investigation to gather additional relevant information to assess the foreign subsidy. The undertaking under investigation should be allowed to exercise its rights of defence.

- (25) The Commission should close the in-depth investigation by adopting a decision. It should as far as possible endeavour to close the in-depth investigation within 18 months, taking into account, **in particular**, the complexity of the case as well as the level of cooperation of undertakings and third countries.
- (26) The Commission should have appropriate instruments to ensure the effectiveness of commitments and redressive measures. If an undertaking -does not comply with a decision with commitments, a decision imposing redressive measures, or a decision ordering interim measures, the Commission should have the power to impose fines and periodic penalty payments.
- (27) In order to ensure the correct and effective application of this Regulation, the Commission should have the power to revoke a decision and adopt a new one, where the decision was based on incomplete, incorrect or misleading information, or where an undertaking acts contrary to its commitments or the redressive measures imposed.
- (28) Given the potentially significant impact of concentrations on the internal market, the Commission should have the power, upon notification, to examine information on foreign financial contributions in the context of a proposed concentration. Undertakings should not be allowed to implement the concentration prior to the conclusion of the Commission's review.
- (29) This examination by the Commission should follow the same procedure as the one where a foreign subsidy is reviewed on the Commission's initiative, subject to adjustments to reflect the specificities of concentrations.
- (30) It is necessary to strike a balance between effective protection of the internal market and the need to limit the administrative burden on undertakings subject to this Regulation. Therefore, only concentrations meeting combined thresholds as defined in this Regulation based on the size of the turnover in the Union and the size of the financial contribution should be subject to mandatory prior notification.

- (31) Below the notification thresholds, the Commission could require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a public contract, if it considers that the concentration or the bid would merit ex-ante review given their impact in the Union. The Commission should also have the possibility to carry out a review on its own initiative of already implemented concentrations or awarded public contracts in an ex officio review.
- (32) When reviewing a concentration, the assessment of whether there is a distortion in the internal market should be limited to the concentration at stake, and only foreign subsidies granted in the three years prior to the concentration should be considered in the assessment.
- (32a) When a concentration is notified to the Commission pursuant to Article 4 of Regulation (EC) No 139/2004 and Article 19 of this Regulation, the Commission should endeavour to limit the administrative burden for the notifying parties under this Regulation. In particular, undertakings should have the option ~~to notify only once~~ **provide in the same form** information **that is** relevant to ~~both parallel proceedings~~ **under both Regulations.**

(33) The need to address distortive foreign subsidies is especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayer funds. The Commission should have the power, upon notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating economic operator in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council<sup>3</sup>, Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council<sup>4</sup> and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council<sup>5</sup>. It should also apply to the main subcontractors and the main suppliers of undertaking. **The Commission may also request the prior notification of a contract being awarded despite its value being below the notification thresholds. In order to limit undue disruptions of public procurement procedures, the Commission should take into account the proximity to the award of the contract when choosing whether to request such prior notification or to launch an ex officio review.**

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<sup>3</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

<sup>4</sup> 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).

<sup>5</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

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- (33-a) The balance between the development of a European defence and security equipment market, which is essential for maintaining a European Defence Technological and Industrial Base, and the protection of the national security of the Member States requires a specific regime for the defence and security contracts covered by Directive 2009/81/EC. Public procurements for the award of such contracts should therefore not be subject to Chapter 4 of this Regulation. **However, but the examination of foreign financial contributions subsidies** in the context of such contracts should be limited to the ex officio review ~~referred to in Chapter 2 of the Regulation.~~ **Furthermore, public procurement covered by Directive 2009/81/EC and exempted by Member States to protect such essential security interests in accordance with Article 346 TFEU should not be covered by this Regulation**
- (33-b) The framework agreement is an efficient procurement technique widely used by contracting authorities and contracting entities. The flexibility offered to purchasers **after the conclusion of the framework agreement** should not be affected by the implementation of this Regulation. Therefore, the obligation to notify foreign financial contributions in public procurement procedures provided for in Chapter 4 of this Regulation should be limited to **the procedure preceding the conclusion of a** framework agreements and should not apply to contracts based on a framework agreement.
- (33c) Taking into account the urgent nature of procurement procedures conducted according to Article 27(3) or 28(6) of Directive 2014/24/EU or Article 45(3) of Directive 2014/25/EU, the Commission should exercise best efforts to prioritize such procedures during a preliminary review and an in-depth investigation to reach any conclusion as soon as meaningfully feasible. This shall apply accordingly to similar procedures conducted according to Directive 2014/23/EU**

- (33d) Due to the specificities of multi-stage procedures in public procurement, the Commission should start a preliminary review with the relevant information available in a notification when submitting the request to participate. To ensure completeness of information and speed of investigation, an updated notification should be submitted with the final tender. The Commission should also have the right to ask for any supplementary information before the submission of the final tender.**
- (33 ~~ee~~) This Regulation does not address access by third-country economic operators to the Union procurement market. This matter is covered by the relevant Union law and international agreements.
- (34) When a foreign financial contribution is notified in the context of a public procurement procedure, the assessment should be limited to that procedure.
- (34a) Where suitable, the Commission should seek ways to ensure the use of electronic means of communication for facilitating the fulfilment of obligations regarding public procurement under this Regulation.**
- (35) It should be ensured that the principles governing public procurement, notably **in particular** proportionality, non-discrimination, equal treatment, transparency and competition, are respected as regards all economic operators involved in the public procurement procedure, regardless of investigations initiated and pending pursuant to this Regulation.
- (35a) Contracting authorities or **contracting** entities may decide to award a contract or a concession in the form of separate lots, in accordance notably with Article 46 of Directive 2014/24/EU and Article 65 of Directive 2014/25/EU and in observance of the prohibition of artificial splitting. Foreign financial contributions must be notified for tenderers applying for lots of a value above an applicable threshold. They can be investigated if they fall below that threshold.

- (35 b) There is a strong tendency for public purchasers to centralise their purchases to achieve economies of scale and efficiency gains. Such central purchasing bodies are qualified as contracting authorities or contracting entities by Directives 2009/81/EC, 2014/24/EU and 2014/25/EU. It is therefore appropriate that the Commission should be able to examine foreign subsidies in the context of contracts awarded by such contracting authorities or contracting entities.
- (36) Foreign subsidies that enable an economic operator to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of the non-exhaustive set of indicators ~~described in recitals 13 and 14~~. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. ~~Similarly to the rules on abnormally low tenders in the relevant Directives on public procurement the~~ **The** opportunity should be given to economic operators to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, regulating abnormally low tenders. ~~The opportunity should be given to undertakings economic operator to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU.~~ The prohibition of the award should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified **by other factors**, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove the distortion. Accordingly, the prohibition of the award concerns the specific procedure in which the unduly advantageous tender was submitted. The Commission's finding that an ~~undertaking~~ **economic operator** benefitted from a distortive subsidy enabling it to submit an unduly advantageous tender therefore cannot be considered as an element giving rise to an exclusion pursuant to the facultative grounds for exclusion laid down in Article 57(4) of Directive 2014/24, Article 80 of Directive 2014/25/EU or Article 38(7) of Directive 2014/23/EU in this or another public procurement procedure conducted in accordance with those Directives.

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(36a) An unduly advantageous tender may also result from foreign subsidies granted to a subcontractor or supplier because of its competitive impact on the tender submitted to a ~~contracting authority or entity~~ **contracting authority or contracting entity**. However, to limit administrative burden, only main subcontractors or main suppliers, that is those whose products or services relate to key elements of the contract or exceed a certain percentage of the value of the contract should notify foreign financial contributions. These key elements may be based, in particular, on the particular **reliance of the element to the tender market position** including specific know-how, technology, specialised staff, patents and similar advantages available to the subcontractor or supplier, **especially where they are necessary for fulfilling the majority of at least one of the selection criteria in a public procurement procedure. In order to ensure a stable factual basis for review, the preliminary review should take into account those main subcontractors and suppliers already known at the stage of submitting a tender or the request to participate, as well as the final tender in the case of multi-stage procedures. This Regulation should not affect the ability of economic operators to use new subcontractors in the execution of their contracts. As a result, changing subcontractors and suppliers during the execution of a contract should not create additional notification obligations, but the Commission may open an ex officio review if it has information that these subcontractors and suppliers may have benefitted from foreign subsidies.**

**(36b) In line with the Directives on public procurement, the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.**

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- (37) Taking into account the nature of the ex ante review mechanism for concentrations and public procurement awards, and the need for legal certainty regarding these specific transactions, a concentration or public procurement tender notified and assessed under the respective procedures cannot be reviewed again by the Commission on its own initiative. Financial contributions of which the Commission was informed through the notification procedure may however also be relevant outside the concentration or procurement procedure.
- (37a) In order to gather information on foreign subsidies, the Commission should have the possibility to launch investigations regarding specific sectors of the economy, particular types of economic activity or the use of particular foreign subsidy instruments.
- (37b) For reasons of legal certainty, it is appropriate to provide for a limitation period of 10 years from the date of granting of the foreign subsidy with regard to investigating a foreign subsidy.
- (38) For the same reasons, it is appropriate to provide for limitation periods for the imposition and enforcement of fines and periodic penalty payments.
- (39) In the interest of transparency and legal certainty, it is appropriate **that the Commission** ~~to~~ publish **or make public, where applicable** either in full or in a summary form all decisions adopted by the Commission.
- (40) The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information, business secrets and personal data, in accordance with Article 339 of the Treaty. The processing of personal data for the purposes of this Regulation should be carried out in accordance with Regulation (EU) No 2018/1725 and Regulation (EU) 2016/679, **whichever is applicable for the processing in question**.

- (41) In cases where information marked by the undertaking as confidential or business secret does not seem to be covered by obligations of professional secrecy, it is appropriate to have a mechanism in place according to which the Commission can decide the extent to which such information can be disclosed. Any such decision to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.
- (42) The undertakings under investigation under this Regulation should have the opportunity to submit their observations on the grounds on which the Commission intends to adopt a decision and should therefore be entitled to have access to the file. While ensuring preservation of the rights of defence of the undertakings under investigation, it is essential that business secrets be protected.
- (42a) Member States and the Commission should take all necessary measures to ensure the protection of classified information in compliance with, in particular, Commission Decision (EU, Euratom) 2015/443, Commission Decision (EU, Euratom) 2015/444 and the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union.
- (43) The implementation of this Regulation by the Union should comply with Union law, the WTO Agreement and be consistent with commitments made under other trade and investment agreements to which the Union or the Member States are parties.
- (44) Restrictions **upon the freedoms set out in** Articles 34, 49, 56 and 63 of the Treaty ~~Treaty~~ **TFEU** can be justified by the need to avoid unfair competition, provided that such restrictions, like other restrictions of fundamental freedoms comply with the general principles of Union law, such as proportionality, legal certainty, and with fundamental rights.

- (45) **It is possible that** ~~the~~ implementation of this Regulation may overlap with sectoral rules, in particular in the area of maritime and air transport. Therefore, it is necessary to clarify the relationship between this Regulation and sectoral instruments dealing with foreign subsidies, namely Regulation (EU) 2016/1035 of the European Parliament and of the Council<sup>6</sup>; Council Regulation (EEC) 4057/86<sup>7</sup>; and Regulation (EU) 2019/712 of the European Parliament and of the Council<sup>8</sup>. Moreover, the implementation of this Regulation should be without prejudice to ~~a Member State's~~ **the** sole responsibility **of Member States** for ~~its~~ **safeguarding their** national security, as provided for in Article 4(2) of the Treaty on the European Union. **It is also without prejudice to the protection of;** ~~the~~ **their** right of ~~each Member State to protect its~~ essential security interests in accordance with Article 346 of the ~~Treaty on the Functioning of the European Union~~ **TFEU**, and **as well as** the application of Regulation (EU) 2019/452 of the European Parliament and of the Council<sup>9</sup>;
- (45a) Since all decisions adopted by the Commission under this Regulation are subject to review by the Court of Justice in accordance with ~~the~~ Article 263 TFEU, the Court of Justice should, in accordance with Article 261 TFEU, be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines ~~and~~ **or periodic** penalty payments.
- (46)
- (47) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission **in accordance with Article 291 of the Treaty.** ~~in accordance with Article 291 of the Treaty.~~

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<sup>6</sup> Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels (OJ L 176, 30.6.2016, p. 1).

<sup>7</sup> Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ L 378, 31.12.1986, p. 14).

<sup>8</sup> Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ L 123, 10.5.2019, p. 4).

<sup>9</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I, 21.3.2019, p. 1).

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**(47a) The implementing powers relating to the imposition of redressive measures, the imposition of commitments, including in case of foreign subsidies in public procurement procedures, the conclusion to the absence of objection regarding a foreign subsidy, the imposition of interim measures, including when a concentration has been implemented in breach of the notification obligation or in breach of a decision with commitments, the prohibition of a notified concentration and the prohibition of the award of the contract in a public procurement procedure, as well as the possible revocation of each of the acts adopted pursuant to such implementing powers and the various form, content, procedural details and related items regarding the preliminary review and the in-depth investigation should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>10</sup>.**

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<sup>10</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

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8225/22 TIS/ae 24  
COMPET.2. LIMITE **EN**

(48) In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio **while limiting undue administrative burden**, the power to adopt ~~acts an act~~ in accordance with Article 290 of the Treaty ~~TFEU~~ should be delegated to the Commission in respect of ~~increasing~~ **raising** the notification thresholds for concentrations and for public procurement procedures, as well as ~~amending~~ **reducing** the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs ~~and avoids unnecessary administrative burden~~. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

**(48a) In order to facilitate the implementation and foster the predictability of this Regulation, the Commission should publish and update guidance regarding the criteria for determining the existence of a distortion caused by a foreign subsidy on the internal market, the application of the balancing test, and the application of its power to request prior notification of any concentration or foreign financial contributions received by an economic operator in a public procurement procedure. Such guidance should be adopted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016, notably through appropriate consultation of stakeholders and, in particular Member States.** -

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COMPET.2. LIMITE EN

- (49) Where a concentration is notifiable pursuant to this Regulation, financial contributions to any of the parties to the concentration granted in the three years prior to the date of application of this Regulation should fall within the scope of this Regulation. In the context of a public procurement procedure, this Regulation should also apply to a financial contribution granted to an economic operator in the three years prior to the date of application of this Regulation,

HAVE ADOPTED THIS REGULATION:

## CHAPTER 1: GENERAL PROVISIONS

### *Article 1*

#### *Subject matter and scope*

- (1) **The purpose of this Regulation is to contribute to the proper functioning of the internal market by establishing a harmonized framework to address potential distortions caused, directly or indirectly, by foreign subsidies, with a view to.** To ensure a level playing field, This Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and notably in concentrations and public procurement procedures.
- (2) This Regulation addresses foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. Among others, an undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure in the Union is considered to be engaging in an economic activity in the internal market.

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COMPET.2. LIMITE EN

**(2a) This Regulation is without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU. In particular, procedures for awarding contracts falling under Directive 2009/81/EC of the European Parliament and of the Council<sup>11</sup> and exempted by Member States to protect such essential security interests pursuant to Article 346 TFEU do not fall under this Regulation.**

*Article 2*

*Existence of a foreign subsidy*

- (1) For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides directly or indirectly a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more ~~individual~~ undertakings or industries. -
- (2) For the purpose of this Regulation,
- (a) a financial contribution shall include inter alia:
- (i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
  - (ii) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
  - (iii) the provision of goods or services or the purchase of goods or services;

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<sup>11</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

- (b) the financial contribution provided by the third country shall include the financial contribution provided by:
- (i) the central government and public authorities at all other levels;
  - (ii) any foreign public entities, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or
  - (iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances including those mentioned in subparagraph (ii).

### *Article 3*

#### *Distortions on the internal market*

- (1) A distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include, inter alia, the following:
- (a) the amount of the subsidy;
  - (b) the nature of the subsidy;
  - (c) the situation of the undertaking, including its size and the markets or sectors concerned;
  - (d) the level of economic activity of the undertaking on the internal market;
  - (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

- (2) A foreign subsidy to an undertaking is unlikely to distort the internal market if its total amount does not exceed EUR 5 million over any consecutive period of three financial years.

A foreign subsidy to an undertaking ~~is shall~~ not ~~be~~ considered to distort the internal market if its total amount does not exceed EUR 200.000 per third country over any consecutive period of three financial years.

**(2a) The Commission shall publish guidance on the application of this article in light of its enforcement practice.**

#### *Article 4*

##### *Categories of foreign subsidies most likely to distort the internal market*

- (1) A foreign subsidy falling in any of the following categories is most likely to distort the internal market:
- (a) a foreign subsidy granted to an ailing undertaking, that is to say which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;
  - (b) a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, that is to say without any limitation as to the amount or the duration of such guarantee;
  - (c) a foreign subsidy directly facilitating a concentration referred to in Article 18;
  - (d) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking could be awarded the public contract.

- (2) An undertaking shall be granted the possibility to provide relevant information to show that a foreign subsidy listed above does not distort the internal market in the specific circumstances of the case.

#### *Article 5*

##### *Balancing*

- (1) The Commission shall, where warranted, balance the negative effects of a foreign subsidy in terms of distortion on the internal market according to Articles 3 and 4 with positive effects on the development of the relevant subsidised economic activity on the internal market, including broader positive effects of the foreign subsidy.
- (2) The Commission shall take into account the balancing between the negative and positive effects when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments.
- (3) The Commission shall publish guidance on the application of this article **at the latest at [the date of application of this Regulation] and shall update it** in light of **its** enforcement practice.

#### *Article 6*

##### *Commitments and redressive measures*

- (1) To remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, the Commission may impose redressive measures. The undertaking under investigation may also offer commitments.
- (2) Commitments or redressive measures shall be proportionate and fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.

- (3) Commitments or redressive measures may consist, inter alia, of the following:
- (a) offering access under fair, reasonable, and non-discriminatory conditions to an infrastructure, including research facility, production capability or any other essential facility that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union;
  - (b) reducing capacity or market presence;
  - (c) refraining from certain investments;
  - (d) licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;
  - (e) publication of results of research and development;
  - (f) divestment of certain assets;
  - (g) requiring the undertakings to dissolve the concentration;
  - (h) repayment of the foreign subsidy, including an appropriate interest rate, calculated according to the methodology set out in Commission Regulation (EC) No 794/2004.
- (4) The Commission may impose reporting and transparency requirements, including periodic reporting regarding the implementation of the commitments and redressive measures listed in paragraph 3.
- (5) If an undertaking offers commitments which fully and effectively remedy the distortion on the internal market, the Commission may accept them and make them binding on the undertaking in a decision with commitments according to Article 9(3).
- (6) Where the undertaking under investigation proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.

## CHAPTER 2: EX OFFICIO REVIEW OF FOREIGN SUBSIDIES

### Article 7

#### *Ex officio review of foreign subsidies*

- (1) The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies. Such source may include, ~~among others,~~ the Member States and any natural or legal person **or association.**
- (2) Ex officio reviews into public procurements shall be limited to awarded contracts. **These reviews cannot result in the cancellation of the decision awarding a public contract or concession or a termination of a public contract or concession.**

### Article 8

#### *Preliminary review*

- (1) When the Commission considers that the information referred to in Article 7 indicates that a distortive foreign subsidy may exist, it may seek all the information it considers necessary to assess, on a preliminary basis, whether the financial contribution under examination constitutes a foreign subsidy and whether it distorts the internal market. To that end, the Commission may in particular:
  - (a) request information in accordance with Article 11; and
  - (b) conduct inspections in and outside the Union in accordance with Article 12 or Article 13.

The Commission shall inform Member States about the start of the preliminary review and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned.

- (2) Where the Commission, based on the preliminary review, has sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it shall  :
- (a) adopt without undue delay a decision to initiate an in-depth investigation (‘decision to initiate the in-depth investigation’), which shall summarise the relevant issues of fact and law and shall include the preliminary assessment of the existence of a foreign subsidy and of the actual or potential distortion on the internal market;
  - (b) inform the undertaking under investigation-;
  - (ba) inform Member States and, if the review is initiated under Chapter 4 , the contracting authority or contracting entity concerned; and
  - (c) publish a notice in the Official Journal of the European Union, which invites views in writing within a prescribed period of time.
- (3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient indications to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review, inform the undertaking under investigation, and Member States and, if the review is initiated under Chapter 4, the contracting authority or contracting entity concerned.

#### *Article 9*

#### *In-depth investigation*

- (1) During the in-depth investigation, the Commission shall further assess the foreign subsidy that has been identified in the decision to initiate the in-depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13.
- (2) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5, it may impose redressive measures (‘decision with redressive measures’). Those implementing ~~decisions~~ acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (3) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5 and the undertaking under investigation offers commitments, which the Commission deems appropriate and sufficient to fully and effectively remedy the distortion, it may by a decision make these commitments binding on the undertaking ('decision with commitments'). A decision accepting the repayment of a foreign subsidy in accordance with Article 6(6) shall be considered a decision with commitments. Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (4) The Commission shall adopt without undue delay a no objection decision where it finds that:
- (a) the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or
  - (b) a distortion on the internal market is outweighed by positive effects within the meaning of Article 5.

Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (5) The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the in-depth investigation.

#### *Article 10*

##### *Interim measures*

- (1) To preserve competition in the internal market and prevent irreparable damage, the Commission may ~~take~~ **adopt** interim measures during the in-depth-investigation, where:
- (a) there are sufficient indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and

- (b) there is a risk of serious and irreparable damage to competition on the internal market.
- (2) The interim measures may notably consist of the measures mentioned under article 6(3) points (a), (c), **and** (d), ~~(e)~~, ~~(h)~~.
- (3) The interim measures shall be proportionate and shall apply either for a specific time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.

Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

## *Article 11*

### *Information requests*

- (0) To carry out the duties assigned to it by this Regulation, the Commission may require information in line with the provisions of this Article.
- (1) The Commission may require an undertaking under investigation to provide all necessary information, including the relevant information regarding its tender in a public procurement procedure.
- (2) The Commission may also request such information from other undertakings or associations of undertakings, including the relevant information regarding its **their** tenders in a public procurement procedure, taking due account of the principle of proportionality.
- (3) A request for information pursuant to paragraph (1) or (2) shall:
- (a) state its legal basis and its purpose, specify what information is required and set an appropriate time limit within which the information is to be provided;
  - (b) contain a statement that if the information supplied is incorrect, incomplete or misleading fines and periodic penalty payments provided for in Article 15 could be imposed;

- (c) contain a statement that, pursuant to Article 14, a lack of cooperation allows the Commission to take a decision on the basis of the facts that are available.
- (4) At the request of the Commission, Member States shall provide it with all necessary information to carry out the duties assigned to it by this Regulation. Paragraph 3 point (a) applies *mutatis mutandis*.
- (5) The Commission may also request a third country to provide all necessary information. Paragraph 3 points (a) and (c) apply *mutatis mutandis*.
- (6) The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall

- (a) inform in advance the Member State in whose territory the interview takes place; or
- (b) shall obtain the agreement of the third country in whose territory the interview takes place.

## *Article 12*

### *Inspections within the Union*

- (1) To carry out the duties assigned to it by this Regulation, the Commission may conduct the necessary inspections of undertakings and associations of undertakings.
- (2) Where the Commission undertakes such an inspection, the officials authorised by the Commission to conduct an inspection shall be empowered:
  - (a) to enter any premises and land of an undertaking or association of undertakings;

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

- (5) Officials and other persons authorised or appointed by the Member State in whose territory the inspection is to be conducted shall, at the request of the Member State or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
- (6) Where officials or other accompanying persons authorised by the Commission find that an undertaking or association of undertakings opposes an inspection within the meaning of this Article, the Member State in which territory the inspection takes place shall provide them with the necessary assistance and shall request, where appropriate, the assistance of the police or of an equivalent enforcement authority so as to enable them to conduct their inspection. If the assistance provided for in this paragraph requires authorization from a judicial authority according to national rules, such authorization shall be applied for. Such authorization may also be applied for as a precautionary measure-.
- (7) Upon request of the Commission, a Member State shall in its own territory carry out any inspection or other fact-finding measure under its national law in order to establish whether there is a foreign subsidy distorting the internal market.

### *Article 13*

#### *Inspection outside the Union*

In order to carry out the duties assigned to it by this Regulation, the Commission may conduct inspections in the territory of a third country, provided that the undertaking -or association of undertakings\_ has given its consent and the government of that third country has been officially notified and has agreed to the inspection. Article 12(1), (2), and (3) points (a) and (b) shall apply by analogy.

## Article 14

### *Non-cooperation*

- (1) The Commission may take a decision pursuant to Article 8, Article 9, Article 24(3) point (c) or Article 30(2), on the basis of the facts available, if an undertaking under investigation or a third country that granted the foreign subsidy:
  - (a) provides incomplete, incorrect or misleading information in response to an information request under Article 11;
  - (b) fails to provide the information requested within the time limit prescribed by the Commission;
  - (c) refuses to submit to the Commission's inspection within or outside the Union ordered under Article 12 or Article 13; or
  - (d) otherwise impedes the preliminary review or the in-depth investigation.
- (2) Where an undertaking or association of undertakings, a Member State or the third country has supplied incorrect or misleading information to the Commission, that information shall be disregarded.
- (3) Where an undertaking, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit.
- (4) When applying facts available, the result of the procedure may be less favourable to the undertaking than if it had cooperated.

## Article 15

### *Fines and periodic penalty payments*

- (1) The Commission may impose by decision fines and periodic penalty payments where an undertaking or an association of undertakings, intentionally or negligently:
  - (a) supplies incorrect, incomplete or misleading information in response to a request made pursuant to Article 11, or does not supply the information within the prescribed time limit;
  - (b) produces the required books or other records related to the business in incomplete form during inspections under Article 12;
  - (c) in response to a question asked in accordance with Article 12(2), point (c),
    - (i) gives an incorrect or misleading answer,
    - (ii) fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
    - (iii) fails or refuses to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 12(3);
  - (d) refuses to submit to inspections ordered under Article 12 or has broken seals affixed in accordance with Article 12(2)(d);
  - (e) fails to comply with the conditions for access to the file or the terms of disclosure imposed by the Commission pursuant to Article 38(3).
- (2) Fines imposed in the cases referred to in paragraph 1 shall not exceed 1 % of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding financial year.

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

*Article 16*

*Revocation*

- (1)** The Commission may revoke a decision taken pursuant to Article 9(2), (3) or (4), Article 24(3)(e), ~~and or~~ Article 30 **(1), (2) or (3)**, and adopt a new decision in any of the following cases:
- (a) where the undertaking to which the initial decision was addressed acts contrary to its commitments or the redressive measures imposed;
  - (b) where the initial decision was based on incomplete, incorrect or misleading information.

Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (2)** The revocation and adoption of a new decision by the Commission ~~according to~~ **under** to paragraph 1, ~~cannot result in the cancellation~~ **shall neither cancel** of the decision awarding a public contract or concession ~~nor a-terminate it~~ of a public contract or concession, **nor lead to any liability of the contracting authority or contracting entity for damages.**

CHAPTER 3: CONCENTRATIONS

*Article 17*

*Distortions on the internal market by foreign subsidies in concentrations*

In a concentration, the assessment whether there is a distortion on the internal market within the meaning of Articles 3 or 4 shall be limited to the concentration at stake. Only foreign subsidies granted in the three calendar years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest shall be considered in the assessment.

## Article 18

### *Definition of and notification thresholds for concentrations*

- (1) For the purposes of this Regulation, a concentration shall be deemed to arise where a change of control on a lasting basis results from any of the following:
  - (a) the merger of two or more previously independent undertakings or parts of undertakings;
  - (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
- (2) The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1.
- (3) For the purposes of Article 19, a ‘notifiable concentration’ shall be deemed to arise where, in a concentration,
  - (a) At least one of the merging undertakings, the acquired undertaking or, once created, the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 6500 million; and
  - (b) The undertakings involved in the concentration were granted from third countries combined aggregate financial contributions in the three calendar years prior to notification of more than EUR 50 million.

A concentration shall not be deemed to arise where:

- (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;
- (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies<sup>12</sup> provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

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<sup>12</sup> OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

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## Article 19

### *Prior notification of concentrations*

- (1) Notifiable concentrations shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
- (2) The undertakings concerned may also notify the proposed concentration when they demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced their intention to make such a bid, provided that the intended agreement or bid would result in a notifiable concentration under paragraph 1.
- (3) A concentration which consists in a merger within the meaning of Article 18(1), point (a) or in the acquisition of joint control within the meaning of Article 18(1), point (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be done by the person or undertaking acquiring control of the whole or parts of one or more undertakings.
- (4) If the undertakings concerned fail to meet their obligation to notify, the Commission may review a notifiable concentration in accordance with this Regulation by requesting the notification of that concentration. In that case the Commission shall not be bound by the time limits referred to in Article 23(1) and (4).
- (5) The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 18 at any time prior to its implementation where the Commission suspects that ~~the undertakings concerned may have benefited from been granted~~ foreign subsidies **may have been granted to the undertakings concerned** in the three years prior to the concentration. That concentration shall be deemed to be a notifiable concentration for the purposes of this Regulation. The Commission shall publish guidance on the application of this paragraph **at the latest at [date of application of this Regulation] and shall update it** in light of enforcement **its** practice.

## *Article 20*

### *Definition of control*

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

## *Article 21*

### *Calculation of turnover*

- (1) Aggregate turnover shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover in the Union shall comprise products sold and services provided to undertakings or consumers in the internal market.

- (2) By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the object of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the latest transaction.

- (3) Instead of turnover, the following shall be used for the following categories of undertakings:
- (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC<sup>13</sup>, after deduction of value added tax and other taxes directly related to those items, where appropriate:
    - (i) interest income and similar income;
    - (ii) income from securities:
      - income from shares and other variable yield securities,
      - income from participating interests,
      - income from shares in affiliated undertakings;
    - (iii) commissions receivable;
    - (iv) net profit on financial operations;
    - (v) other operating income;

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<sup>13</sup> Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

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- (b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums;

For the purposes of point (a), for a credit or financial institution in the internal market the turnover shall comprise the income items, as defined in that point, which are received by the branch or division of that institution established in the internal market.

- (4) Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned shall be calculated by adding together the respective turnovers of:
- (a) the undertaking concerned;
  - (b) those undertakings in which the undertaking concerned, directly or indirectly:
    - (i) owns more than half the capital or business assets,
    - (ii) has the power to exercise more than half the voting rights,
    - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings,
    - (iv) has the right to manage the undertakings' affairs;
  - (c) those undertakings which have in the undertaking concerned any of the rights or powers referred to in point (b);
  - (d) those undertakings in which an undertaking as referred to in point (c) has any of the rights or powers referred to in point (b);
  - (e) those undertakings in which two or more undertakings as referred to in points (a) to (d) jointly have any of the rights or powers referred to in point (b).

- (5) Where undertakings concerned jointly have the rights or powers listed in paragraph 4, point (b), in calculating the aggregate turnover of the undertakings concerned,
- (a) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, and this turnover shall be apportioned equally amongst the undertakings concerned;
  - (b) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4, points (b) to (e).

*Article 22*

*Aggregation of financial contributions*

The aggregate financial contribution to an undertaking concerned shall be calculated by adding together the respective financial contributions ~~granted~~ **provided** by third countries to all undertakings referred to in Article 21(4), points (a) to (e).

*Article 23*

*Suspension of concentrations and time limits*

- (1) A notifiable concentration shall not be implemented before its notification.
- In addition, the following time limits shall apply:
- (a) where the Commission receives the complete notification, the concentration shall not be implemented for a period of 25 working days after that receipt;

- (b) where the Commission initiates an in-depth investigation no later than 25 working days after receipt of the complete notification, the concentration shall not be implemented for a period of 90 working days after the opening of the in-depth investigation; that period shall be extended by 15 working days where the undertakings concerned offer commitments pursuant to Article 6 with a view to remedy the distortion on the internal market;
- (c) where the Commission adopted a decision under Article 24(3), point (a) or point (b), the concentration may be implemented thereafter.

Each period shall begin on the working day following that of the receipt of the complete notification or of the adoption of the relevant Commission decision, respectively.

- (2) Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that:
  - (a) the concentration is notified to the Commission pursuant to Article 19 without delay; and
  - (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.
- (3) The Commission may, upon request, grant a derogation from the obligations laid down in paragraphs 1 or 2. The request to grant a derogation shall state the grounds for the derogation. In deciding on the request, the Commission shall take into account in particular the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the risk of a distortion on the internal market posed by the concentration. Such a derogation may be granted subject to certain conditions and obligations in order to ensure that there is no distortion on the internal market. A derogation may be applied for and granted at any time, either before notification or after the transaction.

- (4) The time limits provided for in paragraph 1, point (b) shall be extended if the undertakings concerned make a request to that effect not later than 15 working days after the opening of the in-depth investigation pursuant to Article 8. The undertakings concerned may make only one such request. Likewise, at any time following the opening of the in-depth investigation, the time limits provided for in paragraph 1, point (b) may be extended by the Commission with the agreement of the undertakings concerned. The total duration of any extension or extensions pursuant to this paragraph shall not exceed 20 working days.
- (5) The time limits provided for in paragraph 1 may exceptionally be suspended where the undertakings have not supplied the complete information which the Commission has requested pursuant to Article 11 or have refused to submit to an inspection ordered by decision pursuant to Article 12.
- (6) The Commission may adopt a decision pursuant to Article 24(3) without being bound by the time limits referred to in paragraphs 1 and 4, in cases where:
- (a) it finds that a concentration has been implemented in breach of the commitments attached to a decision taken under Article 24(3), point (a); or
  - (b) a decision has been revoked pursuant to Article 24(1).
- (7) Any transaction carried out in breach of paragraph 1 shall be considered valid only after a decision pursuant to Article 24(3) has been adopted.
- (8) This Article shall have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller were aware or ought to have been aware that the transaction was carried out in breach of paragraph 1.

## Article 24

### *Procedural rules applicable to the preliminary review and the in-depth investigation of notified concentrations*

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

Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (4) Decisions pursuant to paragraph 3 shall be adopted within 90 working days after the opening of the in-depth investigation at the latest, extended as the case may be pursuant to Article 23(1), point (b), (4) and (5). If the Commission does not adopt a decision within that time limit, the undertakings concerned shall be allowed to implement the concentration.
- (5) In any request for information to an undertaking, the Commission shall specify whether time limits will be suspended pursuant to Article 23(5), in the event the undertaking fails to provide complete information in the prescribed time limit.

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- (6) The Commission may, where it finds that a concentration notifiable under Article 19(1) or which has been notified upon request of the Commission under Article 19(5) has already been implemented and that foreign subsidies in that concentration distort the internal market pursuant to Articles 3 to 5, adopt one of the following measures:
- (a) require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible;
  - (b) order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

The measures referred to in points (a) and (b) may be imposed either in a decision pursuant to paragraph 3, point (c), or by separate decision

The Commission may adopt any of the measures referred to in points (a) or (b) where it finds that a concentration has been implemented in breach of a decision taken pursuant to paragraph (3), point (a), which has found that, in the absence of the commitments, the concentration would fulfil the criterion laid down in paragraph 3, point (c).

- (7) The Commission may order interim measures referred to in Article 10 also where:
- (a) a concentration has been implemented in breach of Article 19;
  - (b) a concentration has been implemented in breach of a decision with commitments under this Article, paragraph 3, point (a).

Those implementing ~~decisions~~ acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

## Article 25

### *Fines and periodic penalty payments applicable to concentrations*

- (1) The Commission may impose fines and periodic penalty payments as set out in Article 15.
- (2) In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently, supply incorrect or misleading information in a notification pursuant to Article 19 or supplement thereto.
- (3) In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently:
  - (a) fail to notify a notifiable concentration in accordance with Article 19 prior to its implementation, unless they are expressly authorised to do so by Article 23;
  - (b) implement a notified concentration in breach of Article 23;
  - (c) implement a notified concentration prohibited in accordance with Article 24(3), point (c).

*Article 26*

*Distortions on the internal market by foreign subsidies in public procurement procedures*

- (1) Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment of whether there is a distortion on the internal market pursuant to Article 3 and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure ~~at stake~~ **in question**. Only foreign subsidies granted during the three years prior to the notification shall be taken into account in the assessment.
- (2) The Commission shall publish guidance on the application of paragraph 1 **at the latest at [the date of application of this Regulation] and shall update it** in light of **its** enforcement practice.

*Article 27*

*Definition of and notification threshold in public procurement procedures*

- (1) For the purposes of this Regulation, a public procurement procedure means:
  - (a) any type of award procedure covered by ~~in~~ Directive 2014/24/EU and Directive 2014/25/EU of the European Parliament and of the Council for the conclusion of a public contract as defined in Article 2(1), point (5) of Directive 2014/24/EU or of a supply, works and service contract as defined in Article 2, point (1) of Directive 2014/25/EU;
  - (b) a procedure for the award of a works or a service concession covered by Directive 2014/23/EU of the European Parliament and of the Council;

- (c) procedures for the award of contracts referred to in Article 10(4), point (a) of Directive 2014/23/EU, Article 9(1), point (a) of Directive 2014/24/EU and Article 20(1) point (a) of Directive 2014/25/EU.
- (2) For the purpose of this Regulation, a notifiable foreign financial contribution in an EU public procurement procedure shall be deemed to arise where:
- (a) the estimated value net of value added tax (VAT) of that public contract, specific procurement under the dynamic purchasing system, or framework agreement is equal or greater than EUR ~~250~~**300** million; and
- (b) the economic operator, **their subsidiary companies without commercial autonomy, their holding companies, and, where applicable, their main subcontractors and suppliers** involved in the **same tender in the** public procurement procedure ~~was~~**were** granted from third countries combined aggregate financial contributions in the three calendar years prior to notification equal to or greater than EUR 5 million.
- (2a) Where the contracting authority or **contracting** entity decides to divide the procurement into lots, for the purpose of Article 28, a foreign financial contribution in such a procurement procedure subject to the notification requirement in ~~line~~**accordance** with the threshold set out in paragraph 2(a), shall not be deemed to arise where the estimated value net of VAT of the tender for each lot for which the economic operator is tendering less than EUR 50 million. However, where the aggregate value of all the lots the tenderer applies for is ~~50%~~**is equal or greater than EUR 125 million** ~~or more of the estimated value net of VAT of the procurement~~, foreign financial contributions must be notified for all such lots the estimated value of which ~~surpasses~~ is equal or greater than EUR 5 million.

- (3) Procedures for the award of contracts falling within the scope of Directive 2009/81/EC of the European Parliament and of the Council<sup>14</sup> do not fall under this Chapter. ~~Procedures exempted under Directive 2009/81/EC which are not at the same time covered by paragraph 1 or procedures exempted under Article 346 TFEU do not fall under this Regulation.~~
- (3a) Procedures for the award of contracts falling under Article 32(2) (b) and (c) of Directive 2014/24/EU, ~~Article 31(3) of Directive 2014/23/EU~~ and Article 50 (4) point (c) and (d) of Directive 2014/25/EU shall fall under Chapter 2 and are excluded from the application of this Chapter. **Procedures for the award of concessions falling under Article 31(3) of Directive 2014/23/EU or similar procedures for awarding contracts falling under Article 32(2) (b) and (c) of Directive 2014/24/EU shall fall under Chapter 2 and are excluded from the application of this Chapter.**
- (4) For the purposes of this Chapter, the definitions of the terms “contracting authority” in Article 6 of Directive 2014/23/EU, Article 2(1) of Directive 2014/24/EU, Article 3 of Directive 2014/25/EU, and “contracting entity” in Article 7 of Directive 2014/23/EU and Article 4 of Directive 2014/25/EU shall apply.
- (5) Without prejudice to the application of this Regulation, the contracting authority or contracting entity shall state in the contract notice or, in case a procedure without a prior publication is conducted, in the procurement documents, that **the economic operators are under the notification obligation as set out in Article 28** ~~chapter 4~~ ~~of this regulation~~ **Regulation** ~~is applicable.~~ **However, the absence of such a statement is without prejudice to the application of this Regulation for contracts falling under its scope.**

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<sup>14</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

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*Prior notification of foreign financial contributions in the context of public procurement procedures*

- (1) When the contracting authority or **contracting** entity estimates the value of the procurement is equal or greater ~~at~~ **than** the value set in Article 27(2), it shall require that **the economic operator submits a notification or a declaration in line with Article 27(5) within 10 days. In an open procedure, the notification or declaration shall be submitted only once, together with the tender. In a public procurement procedure consisting of multiple stages, as provided for in Article 29(5), the notification or declaration shall be submitted twice, first with the request to participate and then as an updated notification with the submitted tender or final tender,** when submitting a tender in a public procurement procedure, or request to participate, the economic operator shall either submit a notification or a declaration. In a notification **or updated notification submitted in accordance in accordance with Article 27(2),** the economic operator shall indicate all foreign financial contributions ~~above the threshold in Article 27(2)(b) granted to them, their subsidiary companies without commercial autonomy, and their holding companies and, if applicable, their main subcontractors and suppliers~~ in the three years preceding that notification **or updated notification.** In the contrary case, the economic operator shall confirm in a declaration, that it did not receive any foreign financial contributions in the last three years. ~~When such a notification or declaration is missing from the tender, the contracting authority or entity may, unless otherwise provided by the national law implementing Directive 2014/24/EU, Directive 2014/25/EU or Directive 2014/23/EU, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.~~

**(1a) Without prejudice to provisions regarding the possibility of the contracting authority or contracting entity to require the economic operators to supplement, clarify or complete the relevant information or documentation, provided by Directive 2014/24/EU, Directive 2014/25/EU or Directive 2014/23/EU or as provided by the national law implementing them, when a notification or declaration is missing from the tender, the contracting authority or contracting entity may request the economic operators concerned to submit the relevant document within 10 working days, provided that such requests are made in full compliance with the principles of equal treatment and transparency. If no notification or declaration is presented after the request to submit the relevant information or documentation, the contracting authority or entity must reject the tender.**

(1aa) The Commission shall examine the content of the notification without undue delay. Where the Commission finds that the notification is incomplete ~~or, incorrect or contains any misleading information,~~ it will communicate its findings to the ~~contracting authority or entity~~ **contracting authority or contracting entity** and to the economic operator concerned, and **request that** ~~invite the economic operator to complete,~~ corrects or clarifies ~~its content without undue delay~~ **within 10 working days.**

(1b) Tenders **or requests to participate** from economic operators subject to the obligations specified under this Article and not accompanied by the notification or declaration submitted in accordance with this Article **shall be declared irregular and rejected by the contracting authority or contracting entity. It shall inform the Commission of this rejection. Tenders or request to participate** ~~or containing notifications that despite an invitation~~ **request** ~~to complete, correct or clarify, remain incomplete, incorrect or misleading, shall be considered~~ **declared** irregular **by the Commission within 10 days.** **The contracting authority or the contracting entity shall reject the tender or request to participate on that basis.** ~~The Commission shall reach a decision on whether the tender is irregular and on that basis the contracting authority or entity shall reject the tender.~~

- (2) The obligation to notify foreign financial contributions under this ~~paragraph~~ **Article** shall extend to economic operators, groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU, as well as main subcontractors and main suppliers known at ~~this~~ **the time of notification or declaration, or the time at which the request for the completion, correction or clarification of the notification or declaration is made** ~~stage of the procurement procedure~~. For the purposes of this Regulation, a subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds 20% of the value of the submitted tender, net of VAT.
- (3) On behalf of groups of economic operators, main subcontractors and main suppliers, the main contractor **or main concessionaire** within the meaning of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU shall ensure notification or declaration. For the purpose of Article 32, the main contractor is responsible only for the veracity of data linked to the foreign financial contributions it itself may have received.
- (4) The contracting authority or the contracting entity shall transfer the notification or declaration to the Commission without delay.
- (5) Where the **Commission had closed a preliminary review without adopting a decision and receives new information leading it to suspect that a submitted notification or declaration was incomplete, despite being required to be completed under this Article**, ~~economic operators or groups of economic operators referred to in paragraph 1 and 2 fail to notify a foreign financial contribution~~, or where such a notification or declaration is not transferred to the Commission, the Commission may initiate a preliminary review.

**(5a) Where the contracting authority or contracting entity in examining tenders suspects the presence of foreign subsidies, although a declaration was submitted, it shall communicate these concerns to the Commission without delay. The contracting authority or contracting entity shall not initiate an assessment of abnormally low tenders where such an assessment would be based on those suspicions alone. Other legal or natural persons may report to the Commission any information relating to distortive foreign subsidies and may communicate any suspicions that a false declaration has been made.**

(6) Where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may before the award of the contract request the notification of the foreign financial contributions ~~received by~~ **provided by third countries to** that economic operator in any public procurement procedure covered by Article 27, paragraph 1 which are not notifiable under Article 27(2) or fall within the scope of paragraph 5 of this Article, ~~at any time before the award of the contract.~~ **This is without prejudice of the possibility for the Commission to start an ex officio procedure.** If the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure and is subject to the provisions set out in Chapter 4 of this Regulation. **The Commission shall publish guidance on the application of this paragraph at the latest at the start of application of this Regulation and shall update it in light of its enforcement practice.**

#### *Article 29*

*Procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures*

(1) Articles 8, 9 (1), (3) and (4), 11, 12, 13, 14, 16 and 22 shall apply to notified financial contributions in public procurement procedures.

- (2) The Commission shall carry out a preliminary review no later than ~~30~~**20 working** days after it received the notification. In duly justified cases, the Commission may once extend this time limit by ~~15~~**10 working** days.
- (3) The Commission shall decide whether to initiate an in-depth investigation within the time limit for completing the preliminary review and inform the economic operator concerned and the contracting authority or the contracting entity without delay.
- (4) The Commission may adopt a decision closing the in-depth investigation no later than ~~150~~**110 working** days after it received the notification. This period may be extended once by 30 days, after consultation with the contracting authority or contracting/entity, in the following cases:
- (a) in exceptional circumstances;
  - (b) in the cases referred to in Article 14(1)(a) and (b);
  - (c) in exceptional circumstances in the investigations referred to in paragraph 5 of this Article.
- (5) Where the public procurement procedure applied is, in accordance with Articles 28 to 32 of Directive 2014/24/EU and Articles 46 to 52 of Directive 2014/25/EU, either the restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership, **or a similar procedure according to Directive 2014/23/EU, the preliminary review, based on the request to participate, is conducted in accordance with paragraph 3, the commission shall examine within 20 working days the information submitted without reaching a decision on opening an in-depth investigation. After the deadline of 20 working days elapses, the preliminary review shall be suspended until the submission of a final tender or a tender in the case of the restricted procedure. Once the tender or final tender containing an updated notification is submitted, the preliminary review will be resumed and the Commission has 20 working days to finalise it, taking into account any additional information. The decision closing any ensuing in-depth investigation shall be adopted within 70 working days from the submission of the completed updated notification.**

~~the preliminary review shall be conducted in line with paragraph 3, limited to the examination of the existence of a foreign subsidy. In this case, as an exception to paragraph 4, the initiation of the in-depth investigation will be suspended. Once the final tender or the tender in the case of the restricted procedure is submitted, the in-depth investigation will start from the date of the submission. The decision closing such an in-depth investigation shall be adopted within 120 days.~~

### *Article 30*

#### *Commission decisions*

- (1) Where, after an in-depth investigation, the Commission finds that an economic operator benefits from a foreign subsidy which distorts the internal market ~~and the public procurement procedure in question~~ pursuant to Articles 3 to 5, and where the economic operator concerned offers commitments that fully and effectively remove the distortion on the internal market, it shall adopt a decision with commitments pursuant to Article 9(3). Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2). The assessment under Article 5 shall not result in a modification of the ~~initial~~ tender **or final tender** submitted by the economic operator that is incompatible with Union law. ~~The economic operator may offer commitments only once and the Commission shall assess whether they fully and effectively remove the distortion without undue delay.~~
- (2) Where the economic operator concerned does not offer commitments or where the Commission considers that the commitments referred to in paragraph 1 are neither appropriate nor sufficient to fully and effectively remove the distortion it shall adopt a decision prohibiting the award of the contract to the economic operator concerned (“decision prohibiting the award of the contract”) **and on that basis the contracting authority or contracting entity shall reject the tender**). Those implementing ~~decisions~~ **acts** shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (3) Where, after an in-depth investigation, the Commission does not find that an economic operator benefits from a foreign subsidy which distorts the internal market, it shall adopt a decision pursuant to Article 9(4). Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (3a) Where, in the case provided for in Article 28(1b), the Commission finds that a notified or declared tender or application to participate is irregular, it shall adopt a decision to reject the tender on formal grounds. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).**
- (4) The review provided for in Article 263 of the Treaty on the Functioning of the European Union against one of the decisions referred to in paragraphs 1, 2 or 3 **and or Article 28(1b)**, and the references for preliminary rulings provided for in Article 267, paragraph 1(b) relating to same decisions may not have the effect of suspending an award procedure in the course of awarding a contract or of affecting the ~~award~~ **execution** of a contract already awarded. **A nullification of such a decision in those proceedings shall not give rise to damages to be borne by the contracting authority or contracting entity.**

#### Article 31

##### *Evaluations in public procurement procedures involving a notification and suspension of award*

- (1) During the preliminary review and the in-depth investigation, **all procedural steps in** the public procurement procedure, ~~including the evaluation of~~ may continue.
- (2) If a decision to open an in-depth investigation is taken pursuant to Article 29(3), the contract shall not be awarded to an economic operator submitting a notification under Article 28 until the Commission reaches a decision under Article 30(3) or the time limit set in Article 29(4) **or 29(5)** elapses. If the Commission has not adopted a decision within ~~this~~ **the applicable** time limit, the contract may be awarded to any economic operator, including the one submitting the notification.

- (3) Where the ~~evaluation~~ **contracting authority or contracting entity** has established that the economic operator, submitting a declaration that it did not receive any **notifiable** foreign financial contributions in the last three years ~~nor under Article 28~~, has submitted the most economically advantageous tender<sup>15</sup>, the contract or concession may be awarded to that economic operator before the Commission takes any of the decisions referred to in Article 30 or before the time limits laid down in Articles 29(2), ~~and 29(4)~~ **or 29(5)** elapse. ~~Information relating to distortive foreign subsidies including any suspicions that a false declaration has been made, may be reported to the Commission.~~
- (4) Where the Commission issues a decision under Article 30(2) ~~concerning a tender for~~ which the ~~evaluation~~ **contracting authority or contracting entity** has shown **found** to be the most economically advantageous tender<sup>16</sup>, the contract may be awarded to the economic operator having submitted the next best tender not subject to a decision under Article 30(2).
- (5) Where the Commission adopts a decision in accordance with Article 30(1) or (3), the contract may be awarded to any economic operator ~~having~~ submitted the most economically advantageous tender, including, as the case may be, the economic operator having submitted the notification under Article 28.
- (6) ~~In all cases,~~ **The** contracting authority or the contracting entity shall inform the Commission of any decision relating to the cancellation of the procurement procedure, the rejection of the tender or request to participate by the economic operator concerned, the submission of a new tender by the economic operator concerned or the award of the contract. ~~Where the contracting authority or entity in examining tenders suspects the presence of foreign subsidies, it shall communicate these concerns to the Commission without delay. The contracting authority or entity shall not initiate an assessment of~~

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<sup>15</sup> ~~In line with the Directives on public procurement, the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. //~~

<sup>16</sup> ~~idem~~

~~abnormally low tenders where such an assessment would be based on those suspicions alone.~~

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- (7) The principles governing public procurement, including proportionality, non-discrimination, equal treatment, transparency and competition, shall be observed as regards all economic operators involved in the public procurement procedure. The investigation of foreign subsidies pursuant to this Regulation shall not result in the contracting authority or the contracting entity treating the economic operators concerned in a way that is contrary to those principles.
- (8) Each time limit shall begin on the working day following that of the receipt of the notification or of the adoption of the relevant Commission decision.

*Article 32*

*Fines, periodic penalty payments and sectoral measures applicable to financial contributions in the context of public procurement procedures*

- (1) The Commission may impose fines and periodic penalty payments as set out in Article 15.
- (2) In addition, the Commission may impose by decision on the economic operators concerned fines not exceeding 1 % of their aggregate turnover in the preceding financial year, where they intentionally or negligently supply incorrect or misleading information in a notification or declaration pursuant to Article 28 or supplement thereto;
- (3) The Commission may impose by decision on the economic operator concerned fines not exceeding 10 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently, fail to notify a subsidy in accordance with Article 28 during the public procurement procedure.

- (4) In the case ~~event~~ of repeated behaviour ~~infringements set out~~ indicated under paragraphs 2 and 3 of this Article leading to the imposition of fines, the Commission may decide, to the extent that such measure is proportionate and necessary, to ~~by decision~~ restrain economic operators from participating, directly or indirectly, in new public procurement procedures in the internal market or in some of them for a limited period of time and in accordance with the principles governing public procurement contracts. The Commission shall maintain a publicly accessible list of these economic operators. Contracting authority or entity shall reject the tender submitted by an economic operator listed by the Commission or the tender which shows that this economic operator participates in it. The economic operator affected by such a decision may submit evidence to the Commission to demonstrate its reliability notwithstanding such previous infringements. While it is upon the economic operator to establish its reliability, the Commission may request further relevant information from the economic operator to clarify the matter. If the Commission considers that the evidence submitted is sufficient to establish reliability of the operator, the Commission shall revoke its decision adopted in accordance with this paragraph within 60 working days from the submission of the evidence by the operator or the response by the operator to the Commission's request for information. ~~provide evidence to demonstrate its reliability despite such previous offences. If such evidence is considered as sufficient, the Commission decision under this paragraph shall be revoked.~~

*Article 33*

*Relation between procedures*

- (1) A financial contribution notified in the context of a concentration under Article 19 or in the context of a public procurement under Article 28 may be relevant and assessed again under this Regulation in relation to another economic activity.
- (2) A financial contribution assessed in the context of an ex officio procedure in relation to a specific economic activity under Article 8 or Article 9 may be relevant and assessed again under this Regulation in relation to another economic activity.

*Article 33a*

Communication of information

- (1) Where a Member State ~~determines~~ **considers** that a foreign subsidies may exist and may distort the internal market, it shall transfer this information to the Commission. The Commission may on the basis of this information decide to start a preliminary review pursuant to Article 8, **or request a notification pursuant to** Article 19(5) or Article 28(6).
- (2) A natural or legal person may communicate to the Commission any information it may have about foreign subsidies ~~distorting~~ **that may distort** the internal market. The Commission may on the basis of this information decide to start a preliminary review pursuant to Article 8, **or request a notification pursuant to** Article 19(5) or Article 28(6).

## *Article 34*

### *Market investigation*

- (1) Where the information available substantiates a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market, the Commission may conduct a market investigation into the particular sector, the particular type of economic activity or into the use of the subsidy instrument concerned. In the course of that market investigation, the Commission may request the undertakings or associations of undertakings concerned to supply the necessary information and may carry out the necessary inspections. The Commission may also request the Member State or third country concerned to supply information.
- (2) The Commission may publish a report on the results of its market investigation into particular sectors, particular types of economic activity or particular subsidy instruments and seek comments.
- (3) The Commission may use the information obtained from such market investigations in the framework of procedures under this Regulation.
- (4) Articles 11, 12, 13 and 15 of this Regulation shall apply.

## *Article 35*

### *Limitation periods*

- (1) The powers of the Commission under Articles 8 and 9 shall be subject to a limitation period of ten years, starting on the day on which a foreign subsidy is granted to the undertaking. Any action taken by the Commission under Articles 8, 11, 12 or 13 with respect to a foreign subsidy shall interrupt the limitation period. After each interruption, the limitation period shall start to run afresh.

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- (2) The powers of the Commission to impose fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of three years, starting on the day on which the infringement referred to in Articles 15, 25 or 32 took place. In the case of continuing or repeated infringements, the limitation period shall start on the day on which the infringement ceases. Any action taken by the Commission with respect to an infringement referred to in Articles 15, 25 or 32 shall interrupt the limitation period for the imposition of fines or periodic penalty payments. After each interruption, the limitation period shall start to run afresh.
- (3) The powers of the Commission to enforce decisions imposing fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of five years, starting on the day on which the Commission decision imposing fines or periodic penalty payments was taken. Any action taken by the Commission, or by a Member State acting upon request of the Commission, intended to enforce payment of the fine or periodic penalty payment shall interrupt that limitation period. After each interruption, the limitation period shall start to run afresh.
- (4) The limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission
- (a) having taken a decision pursuant to Article 8 or 9 in the instances set out in paragraph 1; or
  - (b) having imposed a fine or a periodic penalty payment in the situation set out in paragraph 2.

The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

## *Article 35a*

### *Anti-circumvention*

- (1) An undertaking shall not in any way arrange financial operations or contracts to circumvent the notification requirements laid down in Article 19(1) and (5) and Article 28(1) and (6).
- (2) The Commission may, when it suspects that an undertaking engaged in a practice referred to in paragraph 1, require such undertaking to provide any information that it deems necessary to determine whether the undertaking engaged in the practices referred to in paragraph 1.
- (3) Where an undertaking circumvents or attempts to circumvent the notification requirements in Article 19(1) and (5) or Article 28(1) and (6) engaging in a practice referred to in paragraph 1, the Commission shall initiate a review pursuant to Article 19(4), or Article 28(5) and may adopt measures pursuant to Article 25(3) point a and Article 32(3). Where a concentration has been implemented in breach of Article 19, the Commission may adopt measures pursuant to Article 24(6) and (7), and fines pursuant to Article 25(3).

## *Article 36*

### *Publication of decisions*

- (1) The Commission shall make public a summary notice of the decisions adopted pursuant to Article 8(2) point (a), allowing any natural or legal person, Member States or the third country that granted the foreign subsidy, to express their views.
- (2) The Commission shall publish the decisions adopted pursuant to Article 9(2), (3) and (4), Article 24(3) and 6, and Article 30(1), (2) and (3) in the Official Journal of the European Union.

- (3) When publishing summary notices and decisions, the Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information.

*Article 37*

*Addressees of decisions*

- (1) The Commission shall notify a decision addressed to an undertaking or to an association of undertakings to the addressee without delay and shall give the addressee the opportunity to indicate to the Commission which information in the decision it considers to be confidential.
- (1a) The Commission shall inform the contracting authority or the contracting entity concerned about a decision pursuant to Article 30(1) and (3) -addressed to an undertaking participating in a public procurement procedure.
- (1) Decisions adopted pursuant to Article 30(2) shall be addressed to the contracting authority or the contracting entity concerned. The Commission shall provide the undertaking to which the award of the public contract is prohibited with a copy of that decision.

*Article 38*

*Disclosure and rights of defence*

- (1) The Commission shall, before adopting a decision pursuant to Articles 9, 10, 15, 16, 24(3), 25, 30 or 32 give the undertaking under investigation the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision.
- (1a) By way of derogation from paragraph 1, a decision pursuant to Article 10 may be taken provisionally, without the undertaking investigated being given the opportunity to submit its observations beforehand, provided that the Commission gives it that opportunity as soon as possible after having taken its decision.

- (2) The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations.
- (3) To be able to exercise their right pursuant to paragraph 1, the undertaking under investigation shall be entitled to have access to the file of the Commission.

The right of access to file shall not extend to confidential information and internal documents of the Commission or the Member States. In particular, the right of access to file shall not extend to correspondence between the Commission and the Member States.

The right of access to file shall be subject to the legitimate interest of undertakings in the protection of their business secrets and other confidential information. The Commission may ask the undertaking under investigation and the undertakings that provided information to the Commission to agree on terms to disclose the information. In case of disagreement between the undertakings, the Commission shall have the power to impose the terms to disclose the information.

Nothing in this paragraph shall prevent the Commission from using and disclosing to the extent necessary information showing the existence of a distortive foreign subsidy.

#### *Article 39*

##### *Professional secrecy and confidentiality*

- (1) Information acquired under this Regulation shall be used only for the purposes for which it was acquired, unless the provider of the information agrees otherwise.
- (2) Member States and the Commission, their officials and other persons working under their supervision shall ensure the protection of confidential information acquired in application of this Regulation in accordance with Union and the respective national law, and to this end, shall not disclose information covered by the obligation of professional secrecy that they have acquired pursuant to this Regulation.

- (3) Paragraphs 1 and 2 shall not prevent publication of statistics and reports which do not contain information allowing to identify specific natural persons, undertakings or associations of undertakings.
- (4) The disclosure of any information communicated under this Regulation shall not prejudice essential security interests of Member States.

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## INSTRUMENTS

### *Article 40*

#### *Relationship to other instruments*

- (1) This Regulation is without prejudice to the application of Articles 101, 102, 106, 107 and 108 of the Treaty ~~TEU~~, Council Regulation (EC) No 1/2003<sup>17</sup> and ~~of~~ Council Regulation (EC) No 139/2004<sup>18</sup>.
- (2) This Regulation is without prejudice to the application of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016<sup>19</sup>.
- (3) This Regulation is without prejudice to the application of Regulation (EU) 2019/452 of the European Parliament and of the Council<sup>20</sup>

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<sup>17</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>18</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

<sup>19</sup> Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

<sup>20</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I, 21.3.2019, p. 1).

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- (4) This Regulation takes precedence over Regulation (EU) 2016/1035 of the European Parliament and of the Council until that Regulation becomes applicable pursuant to its Article 18. Where, after that date, a foreign subsidy falls within the scope of application of both Regulation (EU) 2016/1035 and this Regulation, Regulation (EU) 2016/1035 takes precedence. However, the provisions applicable to public procurement and concentrations of this Regulation take precedence over Regulation (EU) 2016/1035.
- (5) This Regulation takes precedence over Council Regulation (EEC) No 4057/86.
- (6) This Regulation is without prejudice to the application of Regulation (EU) 2019/712 of the European Parliament and of the Council. Concentrations, as defined in Article 18 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 3. Public procurement procedures, as defined in Article 27 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 4.

- (6a) This Regulation **shall be interpreted consistently with** ~~is without prejudice to the application of Directives 2009/81/EC<sup>21</sup>, 2014/23/EU<sup>22</sup>, 2014/24/EU<sup>23</sup> and 2014/25/EU<sup>24</sup> of the European Parliament and of the Council, and Council Directives 89/665/EEC<sup>25</sup> and 92/13/EEC<sup>26</sup> as amended by Directive 2007/66/EC<sup>27</sup>, of the European Parliament and of the Council.~~
- (6b) This Regulation is without prejudice to the application of [Regulation XXX of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries]

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- <sup>21</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.08.2009, p.76).
- <sup>22</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.03.2014, p.1).
- <sup>23</sup> 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, 28.03.2014, p.65).
- <sup>24</sup> Directive 2014/25/EU of the European Parliament and 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, 28.03.2014, p. 243).
- <sup>25</sup> Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts
- <sup>26</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- ~~<sup>27</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p.31).~~
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- (7) An investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into. In particular, no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures. This Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements.

*Article 40a*

In accordance with Article 261 of the ~~Treaty on the Functioning of the European Union~~ **TFEU**, the Court of Justice of the European Union ~~has~~ **shall have** unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

*Article 41*

*Article 42*

*Implementing acts*

- (1) The Commission is empowered to adopt implementing acts concerning:
- (a) the form, content and procedural details of notifications of concentrations pursuant to Article 19, taking utmost account of the goal of limiting administrative burden for notifying parties pursuant to Article 19 **of this Regulation** and Article 4 of Regulation (EC) No 139/2004;
  - (b) the form, content and procedural details of notifications of foreign financial contributions and declaration of no foreign financial contribution in public procurement procedures pursuant to Article 28;
  - (bb) procedural details for oral statements pursuant to Article 11(6), Article 12(2) point c and Article 13;**
  - (c) details of the disclosure pursuant to Article 38 and professional secrecy pursuant to Article 39 **applicable to the preliminary review pursuant to Article 8 and to the in-depth investigation pursuant to Article 9;**
  - (d) the form, content and procedural details of transparency requirements;

- (e) detailed rules on the calculation of time limits;
  - (f) the procedural **details** and time limits for proposing commitments under Article 24 and 30;
  - (g) detailed rules on the procedural steps referred to in Article 28, 29, 30 and 31 concerning investigations regarding public procurement procedures.
- (2) Implementing acts referred to in paragraph 1 shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (3) Before the adoption of any measures pursuant to paragraph 1, the Commission shall ~~publish~~ **make public** a draft thereof and seek comments within the time limit it lays down, which may not be less than four weeks.

*Article 43*

*Committee procedure*

- (1) The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
- (2) Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 44

Delegated acts

The Commission is empowered to adopt delegated acts in accordance with Article 45 for the purposes of:

- (1) ~~increasing~~ **raising**, if necessary, the thresholds for notifications as set out in Articles 18(3) and 18(4) for concentrations and ~~in~~ **Articles 27 (2) and 27 (2a)** for public procurement procedures, after **having:**
  - (a) ~~the Commission has~~ assessed those thresholds in the light of its practice in preceding years of application of this Regulation, taking into account the administrative burden for the Commission and the undertaking concerned, as well as the effectiveness of the application of the Regulation, and
  - (b) ~~has~~ concluded on the necessity of **raising** increasing them in order to:
    - (i) capture more accurately distortive foreign subsidies subject to the notification procedures set out in Chapter 3 and Chapter 4 ; and
    - (ii) ensure a reasonable administrative burden on the Commission and the undertakings concerned.
  - (c) In particular, **the thresholds for notifications in Articles 18(3),) and Article 27(2) and 27(2a) shall be increased-raised** if the practice of the Commission during the preceding years of application of this Regulation ~~shows~~
    - (i) **shows** that a large part of notifications made pursuant to Chapters 3 ~~and-or~~ 4 resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting, following the in-depth investigation, a non-objection decision pursuant to Article 9(4), and

~~(ii)~~ provides indications that the thresholds for notifications as set out in Articles 18(3), 18(4) and Article 27(2) **and 27(2a)** are set too low in terms of administrative burden for the Commission and the undertakings concerned, **or**

~~(iii)~~ **provides** as well as any other additional indications ~~provided by the application of this Regulation supporting such conclusion, the thresholds for notifications in Articles 18(3), 18(4) and Article 27(2) shall be increased.~~

~~(2)~~ **reducing the timelines for preliminary review and in-depth investigations as set out in Article 24(2) and Article 24(4) for notified concentrations and in Article 29(2) and in Article 29(4) for notified financial contributions in public procurement procedures. The Commission may adopt such delegated acts where the practice of the Commission in the application of this Regulation shows that the average duration of the Commission's assessment can be performed more quickly than the timelines foreseen in this Regulation and hence can justify to shorten the timelines in Articles 24(2), 24(4), 29(2) and 29(4).**

#### *Article 45*

##### *Exercise of the delegation*

- (1) The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
- (2) The power to adopt delegated acts referred to in Article 44**(1) and Article 44(2)** shall be conferred on the Commission for a period of five years, on [...]two years after the date of entry into force of this Regulation]. **The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period.** The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

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

#### **Article 45a**

##### **Separate delegated acts for different delegated powers**

**The Commission shall adopt a separate delegated act in respect of each power delegated to it pursuant to this Regulation**

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Article 46

Review

**By ... [OJ: insert the date five years after the entry into force of this Regulation] [and every five years thereafter]** ~~Within five years after the entry into force of this Regulation at the latest,~~ the Commission shall present a report to the European Parliament and the Council on the application of this Regulation, accompanied, where the Commission considers it appropriate, by relevant legislative proposals.

Article 47

Transitional provisions

- (1) This Regulation shall apply to foreign subsidies granted in the seven years prior to the date of application of this Regulation where such foreign subsidies distort the internal market after the start of application of this Regulation.
- (2) **By way of derogation to paragraph (1),** ~~T~~ this Regulation shall apply to foreign financial contributions granted in the three years prior to the date of application of this Regulation where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.
- (3) **By way of derogation to paragraph (1),** ~~T~~ this Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before the date of application of the Regulation.
- (4) **By way of derogation to paragraph (1),** ~~T~~ this Regulation shall not apply to public procurement contracts that have been awarded, or procedures initiated before the date of application of the Regulation.

*Article 48*

*Entry into force and date of application*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date: six months after entry into force].

By way of derogation from the second paragraph of this Article, Articles **12(5), 12(6) and 12(7)** shall apply from [date: ~~twelve~~ **eighteen** months after entry into force].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*

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