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## The European Commission publishes initial guidance on key notions of the Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market

After the first year of enforcing Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (the “FSR”), the European Commission has published a document entitled “Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market” (“Guidance”).

The Guidance provides welcome clarifications on (i) distortion in the internal market caused by a foreign subsidy; (ii) application of the test to balance the harm and the benefits stemming from the subsidy; and (iii) assessment of distortion in public procurement procedures.

### Background

The FSR projects complements the EU State aid rules, setting up a vetting system of monetary flows originating from non-EU States. The vetting system rests on three limbs:

- a mandatory notification tool regarding concentrations, when the target has EU revenues above 500 million EUR;
- a mandatory notification tool concerning public tenders, when the tendered amount is above 250 million EUR, and
- an *ex officio* investigation tool, by which the Commission has ample investigative powers to scrutinize companies that are suspected of benefitting of third-State public monies.

In this first year, the Commission has reviewed around 100 cases under the first limb (including both prenotifications and notifications), opening one in-depth investigation in connection with UAE telecom operator e& (Etisalat) acquisition of PPF Telecom Group B.V.. The case is still ongoing, but e& has proposed remedies to assuage the Commission’s concerns.

With over 800 notifications, the public procurement tool is taking the lion’s share in terms of enforcement efforts. Three in-depth investigations were opened, but the parties have withdrawn from the tenders.

Finally, the *ex officio* tool has been used so far in two instances, concerning the wind sector and a producer of security equipment, which contested the inspection before the General Court (pending case T-284/24).

### The Guidance document

As regards the concept of “distortion”, the Commission clarified that it must be interpreted with a view to the objectives of the FSR, that is, to guarantee a level playing field for EU and non-EU enterprises.

- The Commission reminded that Article 4, paragraph 1, sets out two cumulative conditions, i.e., that the foreign subsidy (i) must improve the competitive position of an undertaking in the internal market, thereby (ii) negatively affecting competition on the internal market.
- Also, the Guidance clarifies that financial contributions received by the group entities directly involved in a potential transaction (e.g., a group sub-holding that directly controls the buyer) are more likely to be distortive than those received by group entities that are not involved (e.g., a subsidiary that is only active in a third country).

- Moreover, the Guidance clarified that the notions of “distortion in the internal market” and that of “distortion of competition” under Article 107, paragraph 1, TFEU must be distinguished: in principle, a higher standard of proof is needed for the FSR.

As regards the balancing test, the Guidance indicates that it is still early days. However, the Guidance underlines the role of Member States in providing information about possible positive effects.

Finally, as regards distortions in public procurement, the Guidance highlights that there must be a link between the subsidy and the tender offer, demonstrating that such subsidy caused – or risked causing – a distortion.

## Conclusion

The publication of the Guidance and the sharing of the experience gathered after the first year is a tangible proof that the Commission is determined to make the FSR work. With one in-depth investigation likely headed for a decision with remedies, the merger tool is already shaping the way in which foreign investors operate.

The public procurement tool is an absolute novelty, compared to the merger tool (which can bank on the experience of the EU Merger Regulation). The part of the Guidance dealing with public procurement is therefore particularly valuable, also because the volume of notifications keeps growing.

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