

Alert: The Commission Publishes its Guidelines on the EU Foreign Subsidies Regulation

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On January 9, 2026, the European Commission published long-awaited guidelines on its enforcement of the Foreign Subsidies Regulation (“FSR”) (the “**Guidelines**”).¹ In addition to delineating the FSR’s jurisdictional scope, the Guidelines clarify three key concepts: (1) when a foreign subsidy distorts competition; (2) how a distortion’s negative and positive effects are balanced against each other (the “**Balancing Test**”); and (3) when the Commission may use its so-called “call-in powers” to request the prior notification of transactions and public bids that fall below the mandatory FSR thresholds.

1. Background

Since the FSR entered into force in July 2023, significant uncertainty has surrounded its application. Key questions have remained unanswered: When may the Commission require prior notification of below-threshold transactions and public bids? How will it balance a foreign subsidy’s positive and negative effects? The Commission’s enforcement practice has offered limited guidance. To date, the Commission has neither exercised its call-in powers nor adopted any definitive decision sanctioning foreign subsidies following *ex-officio* or procurement investigations. The only two in-depth merger reviews – *e&/PPF*² and *ADNOC/Covestro* – were resolved through remedies without a balancing exercise.³

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¹ See [here](#) for the Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market.

² Case FS.100011 *e&/PPF Telecom Group*, decision of September 24, 2024. The Commission briefly considered positive effects but concluded there were none and therefore not consider balancing.

³ Case FS.100156 *ADNOC / COVESTRO*, decision of November 14, 2025 (as of January 19, 2026, the decision’s non-confidential version is yet to be published); (“*ADNOC / COVESTRO*”).



Article 46 FSR mandates the Commission to adopt guidelines clarifying the criteria for determining the existence of a distortion, the application of the Balancing Test, and the application of call-in powers by January 12, 2026. The Guidelines, which were preceded by a public stakeholders consultation, are the Commission's response to this legal requirement.⁴ Published at a time when the Commission is intensifying FSR enforcement efforts – it recently opened an in-depth *ex officio* investigation into Nuctech – the Guidelines represent a first step towards increasing much-needed predictability on how the Commission plans to enforce the FSR in practice.⁵

2. Jurisdictional scope

The Guidelines helpfully clarify the FSR's jurisdictional scope. Consistent with established EU competition jurisprudence – recently endorsed by the General Court in *Nuctech* – the Commission considers that it can examine potential foreign subsidies as soon as the beneficiary engages in economic activity within the EU internal market.⁶ This threshold is met whenever the beneficiary offers or purchases goods or services in the EU, irrespective of its nationality or the location of its establishment.⁷ The Guidelines therefore confirm that the FSR has a wide application, impacting foreign companies that sell or purchase in the EU internal market.

3. The Assessment of Distortions

The Commission will assess a foreign subsidy's potential distortive effect in two steps.⁸ First, the Commission will consider if the subsidy can improve the beneficiary's competitive position in the internal market. Second, it will evaluate whether the subsidy actually or potentially distorts competition.

Step 1: Can the subsidy improve the beneficiary's competitive position? To identify potentially

problematic foreign subsidies, the Guidelines distinguish between targeted and non-targeted foreign subsidies, and identify subsidies that are unlikely to improve companies' competitive position:

- **Targeted subsidies.** Foreign subsidies that support activities within the EU are generally presumed to improve the beneficiary's competitive position and their distortive effects do not require further analysis. This includes subsidies that (1) are linked to economic activities in the EU, such as EU-located manufacturing and distribution subsidies; (2) are conditional on EU-related events, namely subsidies related to investment in the EU; (3) are related to activities that benefit activities in the EU, including *ex-EU* research activities that have potential EU-use; (4) reduce financing costs or risks related to activities in the EU; or (5) can be established to be (potentially) used for economic activities in the EU.⁹
- **Non-targeted subsidies.** Subsidies not specifically targeting EU activities are subject to detailed assessment of their potential to cross-subsidize EU operations. Non-targeted subsidies include general foreign financial contributions or contributions that support activities outside of the EU. The Commission will consider multiple factors such as the beneficiary's shareholding structure, cross-directorships, and other links (*e.g.*, veto rights, vertical integration), as well as the subsidy's design and its conditions, legal or contractual constraints on fund use, and the financial situation of the undertaking concerned.¹⁰ This assessment partly mirrors EU State aid criteria, allowing the Commission to determine which entities within a group are the actual beneficiaries of the subsidy.¹¹

⁴ Please read our contribution to the public consultation [here](#), and our contribution to the earlier call for evidence [here](#).

⁵ See Case FS.100068 *Nuctech*, decision of December 11, 2025.

⁶ Case T-284/24 R, *Nuctech v Commission*, Order of the President of the General Court, paras. 40–41.

⁷ Guidelines, paras 15 *et seq.*

⁸ The Guidelines have a separate three-step test for assessing distortion in public procurement procedures, *see below*.

⁹ Guidelines, para. 19.

¹⁰ Guidelines, paras. 23–32.

¹¹ See *e.g.*, *Inter Mills* (Case 323/82), judgment of November 14, 1984, EU:C:1984:345; *Verlipack* (Case C-457/00), judgment of February 13, 2003, EU:C:2003:387; *Cassa di*

— **Subsidies not liable to improve competitive position.** The Guidelines identify subsidies that are unlikely to improve a competitive position in the EU and are therefore presumed to be non-distortive.¹² These include foreign subsidies granted for the purpose of: (1) addressing market failure outside the EU (and not exceeding what is needed to address the failure) and exclusively aimed at activities outside the EU; (2) pursuing purely non-economic or social objectives such as the inclusion of minorities or persons with disabilities; and (3) disaster relief. Without specifying a monetary threshold, certain “insignificant” foreign subsidies (either in absolute terms or in comparison to the extent of the relevant activities on the EU market) are also presumed to be non-distortive. Again, some of these criteria largely draw from EU State aid rules.

Step 2: Does the foreign subsidy affect competition in the EU? The Commission will assess (1) how the subsidy actually or potentially affects the beneficiary’s behavior in the internal market; and (2) how this change in behavior alters competitive dynamics to the detriment of rivals.

For assessing how the foreign subsidy impacts the beneficiary’s behavior, the Guidelines lists several criteria including the scope, purpose, conditions, nature

and frequency of the subsidy, *i.e.*, factors that may influence the beneficiary’s pricing, output or investment decisions.¹³ The Commission will also consider the competitive dynamics in the relevant sector.¹⁴

The Commission will then assess whether a subsidized undertaking’s behavior can potentially alter competitive dynamics, *e.g.*, whether the reduced financial constraints facilitate more aggressive commercial policy, or whether they potentially alter risk-taking incentives leading to the beneficiary’s entry, expansion or (artificial) maintenance of operations at the expense of competitors.¹⁵ The Commission considers several non-exhaustive indicators for this purpose, including: the amount, nature, purpose and conditions of the subsidy; the size and actual or potential market position of the undertaking; the characteristics of the sector (including overcapacity, competitive conditions, and barriers to entry), and the legal context within the sector.¹⁶ The Guidelines also provide a non-exhaustive list of potential distortions that may be triggered by foreign subsidies.¹⁷ These include (a) distortion of competition in M&A;¹⁸ (b) distortion of competition through the impact of the foreign subsidy on the operating decisions of the subsidized undertaking;¹⁹ (c) alteration of investment decisions;²⁰ and (d) distortion of activities at other levels of the value chain.²¹

Risparmio di Firenze (Case C-222/04), judgment of January 10, 2006, EU:C:2007:165; *British Airways v Commission* (Case C-95/04 P), judgment of March 15, 2007; *AceaElectrabel Produzione v Commission* (Case C-480/09 P), judgment of December 16, 2010, EU:C:2010:787.

¹² Guidelines, para. 33.

¹³ Guidelines, paras 48-54.

¹⁴ Guidelines, para. 54.

¹⁵ Guidelines, paras. 55 *et seq.*

¹⁶ Guidelines, paras. 57 *et seq.*

¹⁷ Guidelines, paras. 59-77.

¹⁸ *E.g.*, because the foreign subsidy allows the beneficiary to offer more attractive terms (such as a higher price, large upfront payments) for the target and that enables it to deter other investors.

¹⁹ *E.g.*, distortions in the form of aggressive pricing and production expansion when undertakings benefit from access to subsidized inputs (such as lower working capital cost, know how, or technology) leading to lower production costs.

²⁰ *E.g.*, a foreign subsidy that facilitates investments into capacity expansion is more likely to affect competition negatively where there is overcapacity already. Conversely, in a sector where new capacities need to be built, subsidies can give the beneficiary a head start and thereby discourage or delay investments by competitors. Importantly, in case of investments in capabilities (for example, know how, specialized workers or service providers, technologies) the size and the nature of those capabilities in the sector may also be relevant to determine whether there may be a detriment to competition.

²¹ *E.g.*, foreign subsidies may alter the dynamics at different levels of the value chain, where, for instance, they benefit intermediation service providers; contribute to the relocation of a given business or assets of a business outside the EU thereby disrupting supply or demand in the EU; or contribute to hindering access to know how, databases, patents or other IP used by companies active in the EU.

Importantly, the Guidelines clarify that there is no *de minimis* threshold for this assessment and that the Commission is not required to demonstrate that a foreign subsidy has produced actual effects on competition.²²

Distortions in public tenders. Under Article 27 FSR, distortive subsidies in procurement cases are those subsidies that “*enable an economic operator to submit a tender that is unduly advantageous*”.

The Commission will follow a three-step test for assessing distortions in public procurement procedures.²³

The Commission first assesses if the submitted tender is advantageous by comparing its terms to (1) comparable tenders in the same procedure, (2) the contracting authority's own estimates; or (3) to terms that would have been submitted absent the foreign subsidies (*i.e.*, a counterfactual scenario). The Guidelines highlight that subsidies provided to other entities within a group may impact the tender even if the bidder itself was not the direct beneficiary. The Guidelines also provide a practical clarification on the cooperation with national contracting authorities who should inform the Commission when they receive abnormally low offers and refrain from their own review.

The Commission, second, examines whether the advantage is “undue” as it stems to an appreciable extent from a foreign subsidy or “due” (*i.e.*, plausibly justified by factors other than the foreign subsidy such as cost-effectiveness, innovation or better access to certain supply sources). For this purpose, the Commission may draw on principles from EU public procurement law, *e.g.*, when evaluating abnormally low tenders. A tender runs a higher risk of scrutiny if a subsidy covers a “substantial portion” of the estimated value of a contract. Overall, the burden of proof for showing an undue advantage remains low because the foreign subsidy does not have to be the sole contributing factor for the submitted tender’s advantageous nature. Rather, it suffices if the Commission establishes that the

foreign subsidy could potentially have impacted the tender’s terms to an appreciable extent.

As a third step, the Commission will assess the actual or potential negative effect of the subsidized tender. However, the Guidelines clarify that foreign subsidies can distort competition in procurement not only by allowing the beneficiary to win the procedure, but also by deterring rival participation early on, thereby limiting the choice of the contracting authority, and by influencing negotiation on the conditions of the contract.²⁴

4. The Balancing Test

Article 6 FSR requires the Commission to, once it has identified a foreign subsidy with a potential distortive effect on competition in the internal market to balance the subsidy’s negative and positive effects if it intends to impose redressive measures or commitments. The Guidelines provide a first explanation on how the Commission intends to perform this Balancing Test.

— **Relevant positive effects.** The Guidelines clarify that such benefits include (i) the development of economic activity in the EU (which according to the Guidelines generally requires showing a market failure preventing the development of such activity) and (ii) the advancement of broader policy goals of the EU – the Guidelines, for example, refer to objectives protected by the Charter of Fundamental Rights, existing State aid frameworks, and in other Union policy documents as a relevant benchmark for defining these policy goals. The Guidelines highlight the promotion of environmental protection, economic development in disadvantaged areas of the Union, energy security, innovation, contribution to the Union economy’s competitiveness and resilience or contribution to the Union’s economic security or EU defense policy as relevant objectives.²⁵ In public procurement, positive effects include fostering alternative supply sources. Positive impacts on related markets (upstream or downstream) are also

²² Guidelines, para. 43.

²³ Guidelines, paras. 78-94.

²⁴ Guidelines, paras. 93 *et seq.*

²⁵ Guidelines, paras. 105-113.

relevant to the extent that they support these policy goals.²⁶

- **Subsidy-specific positive effects.** The Commission only considers positive effects that are specific to the foreign subsidy and will assess whether they could be achieved through less distortive measures instead, in line with the classic proportionality test applied under State aid rules. In *ADNOC/Covestro*, for example, the Commission rejected positive effects that stemmed from the transaction rather than the subsidy. Where less distortive alternatives exist, the Commission is likely to require remedies to address the distortion.

The Balancing Test shares similarities with the assessment of efficiencies in EU merger control. First, positive effects need to be subsidy-specific. Second, the burden for showing positive effects rests on the party claiming it (which typically includes the beneficiary, although Member States and third parties may also provide relevant information).²⁷ The Guidelines helpfully clarify that the Balancing Test does not consist of a purely quantitative assessment. At the same time, claims will have to be well-evidenced and concrete.

5. The Commission's Call-In Powers

The Commission has wide discretion on whether to require prior notification of transactions or public bids that do not meet the mandatory FSR thresholds provided. The Guidelines outline how the Commission intends to use its “call-in” powers:

- **Time limits.** The Commission may require prior notification where it suspects that foreign subsidies were granted in the three years preceding the transaction or the submission of the bid. Under articles 21(5) and 29(8) FSR it must “call in” the notification before the transaction has closed or tender contracts have been awarded.
- **Factors for intervention.** The Commission will use the following non-exhaustive factors to decide whether to call in: (1) if the target's turnover fails to reflect its actual or future economic significance;

- (2) if the sector or asset is of strategic importance;
- (3) prior FSR decisions involving the parties; and
- (4) if the subsidies are likely to distort the internal market (*e.g.*, by directly facilitating a transaction).

- **Safe harbor.** The Commission will not require notification for (1) low-value public procurement procedures;²⁸ (2) foreign subsidies received < €4 million during the three years prior to the transaction or the bid; and (3) subsidies addressing extraordinary circumstances.

6. Conclusion

The Guidelines, which are based on sound general economic concepts on the effects of subsidies, provide some much-needed clarity on the Commission's FSR enforcement. They take a pragmatic approach to the Balancing Test by not requiring a purely quantitative assessment. Moreover, the limited call in-safe harbors provide welcome certainty.

At the same time, the Guidelines do not meaningfully constrain the Commission's broad powers under the FSR. Significant questions remain unanswered. For instance, although the Guidelines list criteria for cross-subsidization risks, they do not provide safe harbors or examples of possible application of these criteria. Similarly, on the assessment of distortions and the subsidies' impact on competition the Guidelines do not explain how the Commission will take into account subsidies granted by European or foreign authorities to rivals of the investigated company. The Guidelines also do not seem to envisage any role for subsidies disciplines in trade arrangements with certain partners of the EU as a mitigating factor to be taken into account in the investigation. In practice, the FSR's enforcement will only truly crystallize through decisional practice and specific theories of harm.

Given the lack of relevant decisional practice and the Commission's remaining wide margin of discretion, it is critical that businesses maintain robust tracking of foreign financial contributions and assess substantive risks early in deal negotiations and before public

²⁶ Guidelines, paras. 114-117.

²⁷ Guidelines, paras. 135-136.

²⁸ Including public works contracts with a VAT value <€5.5 million.

procurement bids. Furthermore, parties that have received foreign financial contributions exceeding €4 million in the past three years must factor timing uncertainty into transactions and public bids that fall below the FSR's mandatory notification thresholds.

The Guidelines also leave unanswered criticism that the FSR imposes a significant regulatory burden by capturing many transactions that present no real FSR risk, while failing to call in potentially problematic deals. These concerns are the focus of the Commission's ongoing review of the FSR's implementation and enforcement, on which it is due to present a report to the European Parliament by July 14, 2026.²⁹

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²⁹ Cleary contributed to a related public consultation which ran until 18 November 2025. See also Cleary's alert memorandum on the Commission's review of the FSR [*Our*](#)

[*Response to the Commission's Review of the EU Foreign Subsidies Regulation*](#) (November 26, 2025).