

The FSR Guidelines: What the Commission's Staff Working Document Reveals

July 16, 2026

On June 30, 2026, the European Commission published its Staff Working Document (the SWD)¹ accompanying the guidelines on its enforcement of the Foreign Subsidies Regulation (FSR) (the Guidelines)² published on January 9, 2026.³ The SWD sets out the feedback received through various rounds of consultation, and explains how this feedback was taken into account in the final Guidelines. This alert memorandum reviews the key stakeholder-driven changes reflected in the final Guidelines and their implications for the Commission's future enforcement practice.

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¹ See [here](#) for the Staff Working Document accompanying 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 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.

³ See Cleary's alert memorandum: *The Commission Publishes its Guidelines on the EU Foreign Subsidies Regulation*, January 26, 2026, accessible [here](#).

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1. Background

Since the FSR entered into force in July 2023, significant uncertainty has surrounded its application. The Guidelines provided important clarification on the criteria for determining the existence of a distortion, the application of the balancing test, and the exercise of call-in powers. They were preceded by an extensive consultation process in 2025 which drew widespread participation: a call for evidence attracting 45 submissions,⁴ a targeted consultation of Member States and selected stakeholders,⁵ and a public consultation on the draft Guidelines which received 56 submissions – around half from law firms, economists and EU industry associations.⁶

2. The Assessment of Distortions

Stakeholder feedback revealed a high level of uncertainty regarding the Commission's theories of harm and the practical application of the distortion test.⁷

In response, the final Guidelines provide a two-step framework: The Commission first assesses whether the subsidy could improve the beneficiary's competitive position in the internal market; and second, whether the subsidy actually or potentially distorts competition.

Step 1: Could the subsidy improve the beneficiary's competitive position?

Increased legal certainty around cross-subsidization. Stakeholders highlighted significant uncertainty around the distortion test for non-targeted subsidies, *i.e.*, foreign subsidies of a general scope or which support unrelated activities outside the EU.⁸ Respondents also criticized the draft Guidelines for appearing to shift the burden of proof to the undertaking under investigation and for lacking clear

guidance on factors that would prevent cross-subsidization. The SWD clarifies that the burden of proof is on the Commission.⁹ The risk of cross-subsidization must be established based on functional, economic, and organic links between the entity granted the subsidy and the entity active in the internal market.

List of non-distortive subsidies. Respondents called for safe harbor thresholds or examples of subsidies that would not improve an undertaking's competitive position. The Commission responded by identifying categories of non-distortive foreign subsidies, notably those (a) addressing a market failure outside the Union – particularly if they materially comply with State aid rules, (b) pursuing non-economic or social objectives, and (c) subsidies aimed at making good the damage caused by natural disasters or exceptional occurrence.¹⁰ Subsidies below the thresholds of Article 4(2) and (3) FSR or subsidies of insignificant scope relative to the undertaking's actual or potential economic activities in the internal market are also considered non-distortive – consistent with appreciability thresholds in merger control and antitrust. Due to its limited case experience at this stage, the Commission did not include in its Guidelines more extensive quantitative or qualitative safe harbors.¹¹

Step 2: Does the foreign subsidy negatively affect competition in the EU?

In response to stakeholder criticism regarding the lack of a clear causality test, the Commission refined the second step of the distortion assessment.¹² The final Guidelines introduce a two-fold test assessing (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

⁴ SWD, p. 22. The remaining contributors included EU citizens (11%), non-EU citizens (5%), public authorities (2%), academia (2%), and other respondents (7%).

⁵ SWD, p. 22. 18 Member States and four other stakeholders provided feedback.

⁶ SWD, p. 23. The remaining submissions came from third countries' authorities and industry associations (14%), EU public authorities (16%), companies (14%), citizens (7%) and academia (2%).

⁷ SWD, pp. 7, 23.

⁸ SWD, pp. 12, 23, 24.

⁹ SWD, pp. 12, 29. The final Guidelines however are not as explicit, see paras. 21 et seq.

¹⁰ Guidelines, Section 2.3.3.

¹¹ SWD, pp. 12, 13, 24.

¹² SWD, pp. 13, 14, 30.

dynamics to the detriment of rivals.¹³ While the Commission is not required to demonstrate an actual impact, the potential impact must meet an appreciability threshold - a standard that remains largely undefined in the Guidelines.

The final Guidelines list several factors that the Commission will consider when assessing how the foreign subsidy may impact the beneficiary's behavior, including competitive dynamics in the relevant sector and the characteristics of the subsidy such as its nature, amount, conditions, and frequency.

Distortions in public tenders. The SWD reveals that stakeholder feedback on the public procurement distortion assessment centered on three main concerns: (i) the assessment of intra-group subsidy flows in public procurement; (ii) the burden of proof; and (iii) the respective roles of the Commission and national contracting authorities.¹⁴

Assessment of intra-group subsidy flows in public procurement. The final Guidelines clarify that while the notification obligation under Article 28(1)(b) FSR is limited to entities within a linear controlling shareholding chain, the Commission's substantive review may extend to foreign subsidies granted to other group entities. The Commission will assess whether the subsidy is limited, in law or in fact, to the entity to which it was granted, or whether it may have been made available - directly or indirectly - to the economic operator/the main subcontractor/supplier involved in the tender. The final Guidelines introduce concrete analytical factors, including economic and financial interconnections, coordinated strategies, mutual economic dependencies, and intra-group transactions, such as the exchange of goods, services, or financial and intangible assets.

Burden of proof. The final Guidelines clarify that it is for the Commission to establish that the foreign subsidy could potentially have impacted the tender's terms to an appreciable extent. A tender therefore runs

a higher risk of scrutiny where a subsidy covers a substantial portion of the estimated value of a contract.

Role of national procurement authorities. Pursuant to Article 69 of Directive 2014/24, national procurement authorities are required to review tenders that are abnormally low. This means their review runs in parallel to the Commission's review of the "unduly advantageous offer" under the FSR. According to Article 29(7) FSR, where a contracting authority suspects that foreign subsidies are the sole explanation for an abnormally low tender it must inform the Commission and refrain from conducting its own review on that basis. The final Guidelines clarify that it is the sole responsibility of the Commission to assess whether a tender is unduly advantageous and that national authorities must coordinate with the Commission when assessing the abnormally low nature of a tender.¹⁵ The SWD renders explicit that the two substantive assessments – abnormally low and unduly advantageous tender – have distinct goals: the contracting authority's review focuses on operational viability, seeking to determine if a price is so low that the economic operator will be unable to execute the contract, while the Commission's assessment focuses on determining if a foreign subsidy enabled the economic operator to submit an offer that is unduly advantageous.¹⁶

3. The Balancing Test

The SWD reveals that the balancing test – applied once the Commission identifies a distortive foreign subsidy – was one of the areas where the stakeholder feedback was most varied, leading the Commission to make several targeted revisions to the final Guidelines.¹⁷

Relevant positive effects. The Guidelines clarify that cognizable positive effects of subsidies include (i) the development of economic activity in the EU and (ii) the advancement of broader policy goals of the EU. Stakeholders' views substantially differed with regard to whether third country policy objectives should be

¹³ Guidelines, Section 2.4.

¹⁴ SWD, p. 32.

¹⁵ Guidelines, paras. 95-97.

¹⁶ SWD, p.14.

¹⁷ SWD, pp. 7-8, 10, 26-27, 33.

taken into account. The final Guidelines opted for a compromise by permitting the Commission to consider policy objectives other than those of the Union, such as those of third countries “*to the extent that they are nevertheless relevant to the Union*”.¹⁸

Subsidy-specific positive effects and State aid methodology. The Commission clarified that it will only consider positive effects that are specific to the foreign subsidy and will assess whether they could have been achieved through less distortive measures.¹⁹ The methodology of the FSR proportionality assessment was a point on which stakeholders had divergent views. The Commission opted for a methodology that reflects the analytical framework of the State aid rules while allowing for more flexible case-by-case assessments.²⁰

Further stakeholder-driven clarifications. The Commission also responded to stakeholder feedback by clarifying the types of admissible evidence, the relevance of the timing of positive effects, the possible outcomes of the balancing test, and allowed greater flexibility to submit evidence at any stage of the investigation.²¹ However, stakeholder requests to align the legal standard for admitting positive effects with the standard for establishing a distortion were not taken up.

4. The Commission’s Call-In Powers

The SWD provides guidance on the Commission’s powers to require prior notification of concentrations and public procurement procedures falling below the FSR’s mandatory filing thresholds. While some respondents opposed the existence of such powers altogether, most argued that the Commission’s discretion should be clearly circumscribed, calling for a requirement of substantiated suspicion or even positive evidence of a foreign subsidy with potential distortive effects.²²

The final Guidelines respond to a number of concerns while largely preserving the breadth of the Commission’s discretion.

They clarify that the Commission will exercise its call-in powers only where a concentration or public procurement procedure merits *ex ante* review in light of its “*impact in the Union*” based on factors such as patterns of investments and acquisitions, and contextual information indicating the possibility of a distortion.²³

In addition, the final Guidelines expand the guidance on the Commission’s safe harbors explaining the rationale for these exclusions by linking them to Articles 4(2) and 4(4) FSR and confirm that, in public procurement, procedures falling below the quantitative thresholds of the procurement Directive 2014/24/EU will generally not merit *ex ante* review.²⁴

Finally, responding to requests for greater procedural transparency, the final Guidelines clarify that (i) the call-in decision is formally notified to the acquiring undertaking/economic operator, (ii) in public procurement procedures the contracting authority will be informed as early as possible, and (iii) from the date of the Commission’s call-in decision the concentration or the foreign financial contributions in the public procurement procedure are deemed to be notifiable and become subject to the procedural rules set out in Chapters 3 and 4 FSR, respectively.²⁵

5. Conclusion

The SWD provides interesting insight into the considerations underlying the final Guidelines and confirms that the Commission engaged substantively with stakeholder feedback on several key issues – including the cross-subsidization test, the distortion assessment in public procurement, the methodology for the balancing test, and the safe harbors for call-in powers. More generally, the Guidelines provide a steer

¹⁸ Guidelines, para. 113. As requested by certain respondents, paragraph 113 also references welfare improvements.

¹⁹ See Case FS.100156, *ADNOC / COVESTRO*, decision of November 14, 2025.

²⁰ SWD, pp. 18-19, 33.

²¹ SWD, pp. 10, 19, 26-27, 33.

²² SWD, pp. 10-11, 28-29.

²³ Guidelines, Section 4.3.2.

²⁴ *Ibid.*

²⁵ Guidelines, Section 4.4.2.

on the substantive issues the Commission has considered in the FSR's first years of operation and improve our understanding of the scope and purpose of the regime.

On July 14, 2026, the Commission presented a report to the European Parliament on the ongoing review of the FSR's implementation and enforcement pursuant to Article 46 FSR. This report provides further clarity on how the Commission proposes to exercise its discretion, its priority areas of enforcement, and legislative proposals for refinement and simplification of the FSR.

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