



# Draft Regulation on distortive foreign subsidies – where do we stand?

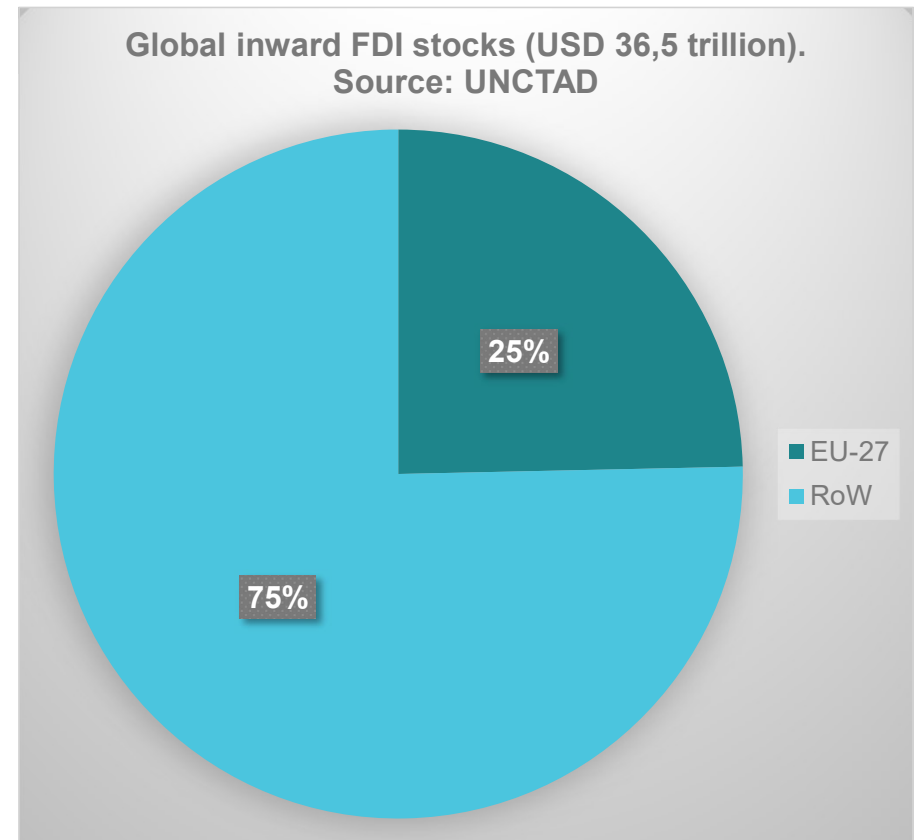
*Conference: The protection against foreign subsidies distorting the internal market, 5 May 2022*

*DG COMP Taskforce Foreign subsidies*

# Context



Trade accounts for 35% of the EU's GDP



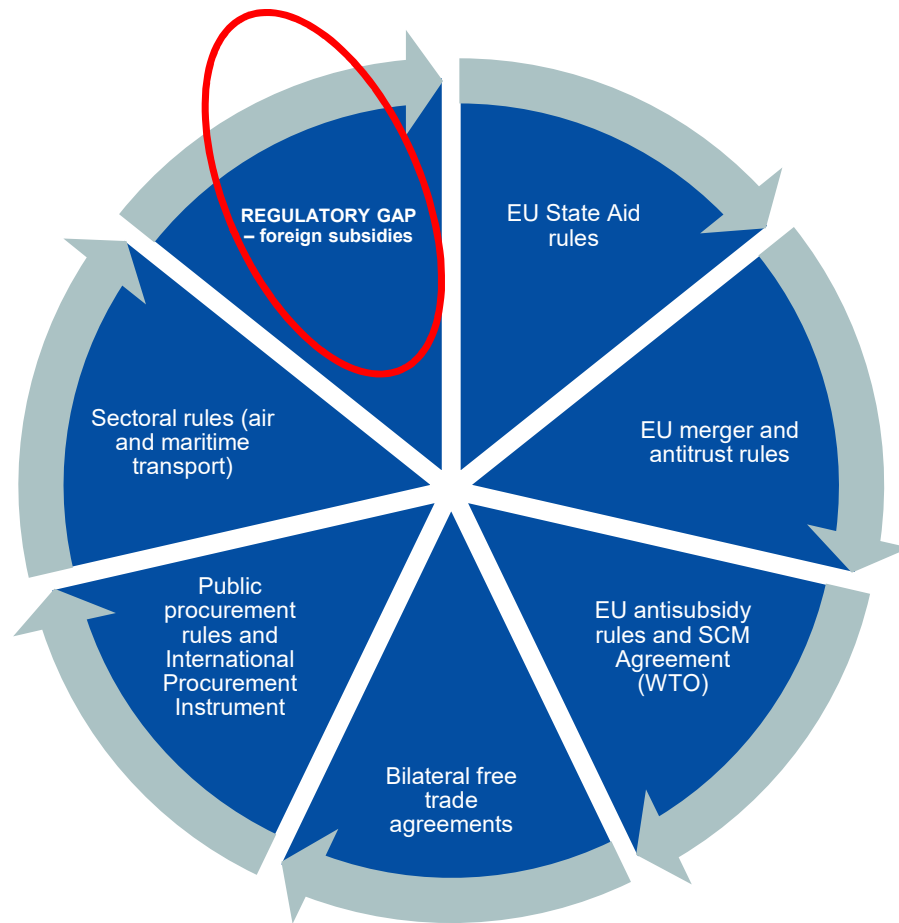
100,000 foreign companies in the EU

# Purpose and problem definition (I)

**Objective:** Ensure level playing field

- EU control of State aid granted by Member States, but no control of foreign subsidies
- Instances of foreign subsidies impacting the internal market investigated in the Impact Assessment Report
  - Subsidised acquisitions
  - Subsidised bids in public procurement tenders
  - Other market situations such as subsidised investments, ‘operating aid’ etc.

# Purpose and problem definition (II)



## Regulatory gap

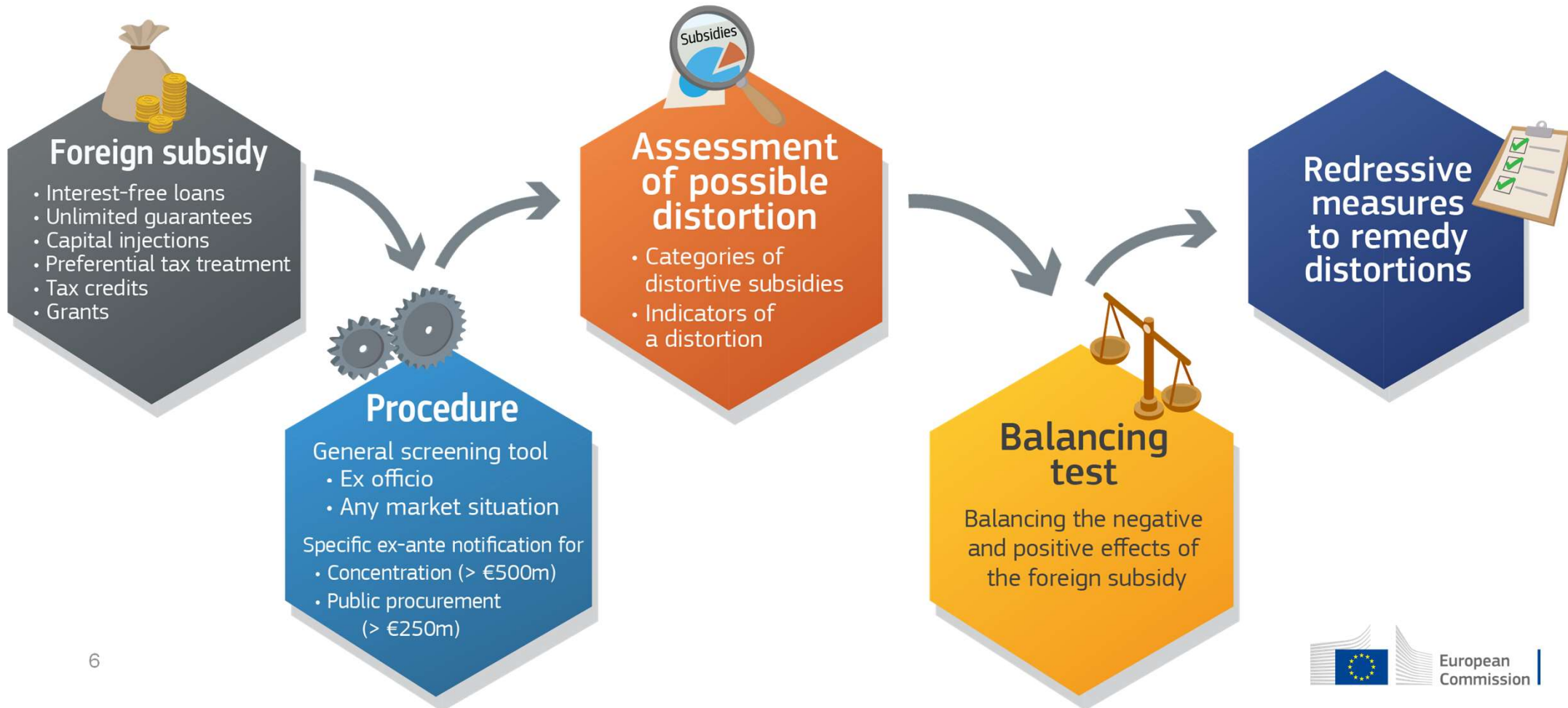
Existing legislation, bilateral and multilateral agreements do not adequately tackle distortions that foreign subsidies can cause in the internal market:

- competition policy
- trade policy
- public procurement rules
- sectoral legislation
- FTAs
- WTO rules

# Some guiding principles

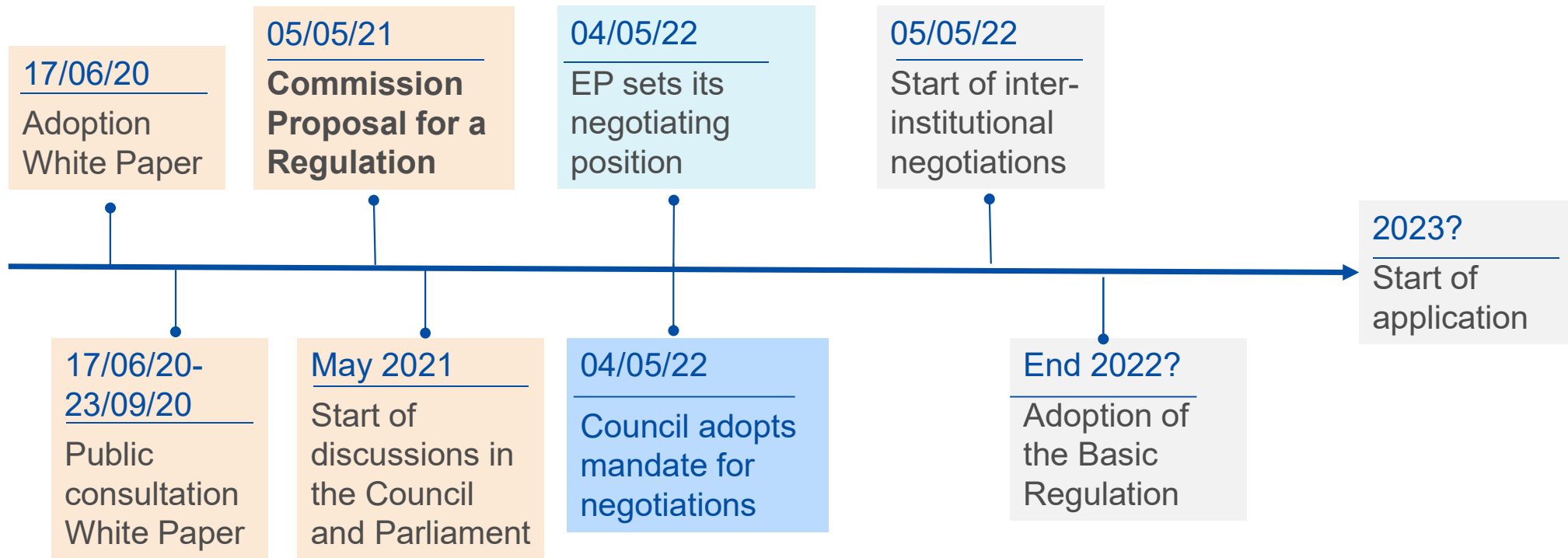
- **Maintain trade and investment flows**
  - Target most distortive foreign subsidies
  - Minimise administrative burden
    - e.g. high thresholds, alignment with EUMR concepts and timelines
- **Respect international obligations, in particular WTO compatibility**
  - Comply with non-discrimination, national treatment principles
  - Avoid conflict with existing rules (e.g. ASCM)

# The Commission proposal at a glance



# State of play

# Milestones





# EP negotiating position – main elements (I)

- Limit notion of financial contribution on provision of goods & services
- Equivalent third country subsidy control system – may be taken into account in assessment of distortion
- Balancing test: focus on the internal market; cater for public policy objectives
- Expand list of redressive measures (e.g. reducing market presence)

# EP negotiating position – main elements (II)

- Decreasing notification thresholds for concentrations and limiting notification obligation as regards joint ventures
- Decreasing notification thresholds for public procurement, shorter deadlines
- No delegated acts
- Obliging Commission to draw up guidelines on certain provisions
- Retrospectivity (7 instead of 10 years)

# Council negotiating position - main elements (I)

- Granting of special or exclusive rights could be a financial contribution
- 'Hard' de minimis threshold of EUR 200.000
- Balancing test: consider broader positive effects and focus on the internal market
- Enabling Commission to oblige undertakings to inform about participation in future procurements/concentrations

# Council negotiating position – main elements (II)

- Increasing notification thresholds for concentrations, limiting notification obligation as regards joint ventures
- Increasing notification thresholds for public procurement, shorter deadlines, clarifications on details (for example lots)
- Obliging Commission to draw up guidelines on certain provisions
- Shortened retrospectivity (5 instead of 10 years)

# Thank you



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# Back-up slides: Main elements of the Commission proposal

# Definition of foreign subsidy

## Three cumulative conditions

**Financial contribution**  
granted by a third  
country

Confers a  
**benefit** to an  
undertaking(s)

it is '**selective**'

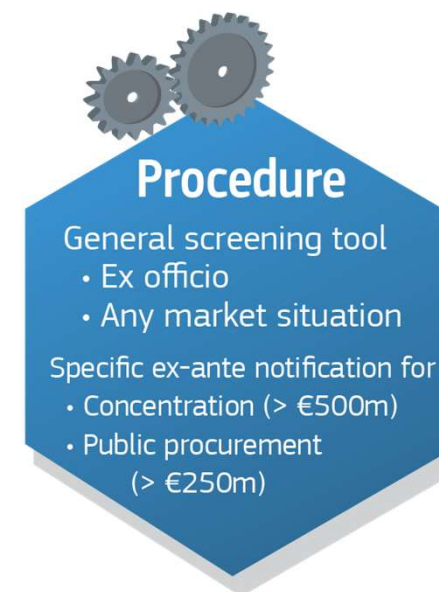


### Foreign subsidy

- Interest-free loans
- Unlimited guarantees
- Capital injections
- Preferential tax treatment
- Tax credits
- Grants

# Investigative tools and procedure (1)

- **The Commission enforces the three tools**
  - Uniform application of the rules
  - Member States involved through an advisory procedure
- **Ex officio review – general screening tool**
  - Scope: undertaking engaged in an economic activity
  - Gathering information
    - Individual cases
    - Market investigation
  - Non-cooperation: ‘based on the facts available’





# Investigative tools and procedure (2)

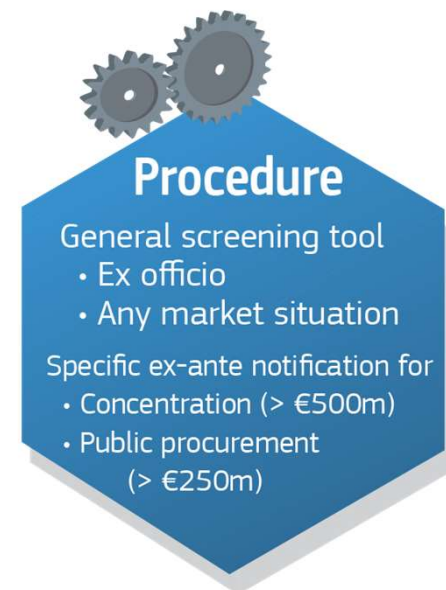
## ➤ Ex ante notification tools

### ➤ for large concentrations

- EU turnover: at least EUR 500 million of EU target
- Financial contribution: at least EUR 50 million in last three years

### ➤ for large public procurement procedures

- Value of procurement more than EUR 250 million
- Ad hoc notifications for concentrations or procurements below thresholds
- Suspensive effect



# Legal standard

## When is a foreign subsidy distortive?

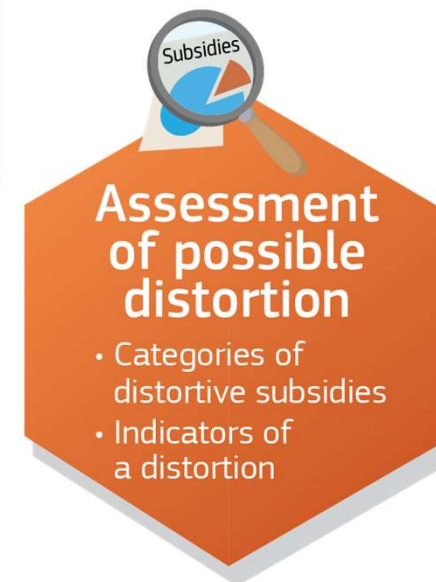
- improves the competitive position of the undertaking concerned in the internal market and where, in doing so, actually or potentially negatively affects competition on the internal market.

## How to establish it? => using indicators such as:

- amount, nature, purpose of the subsidy
- situation of the undertaking or the markets concerned
- level of economic activity of the undertaking in the EU

## Categories of most likely distortive FS

- subsidy to ailing undertaking without restructuring plan
- unlimited guarantee
- direct facilitation of a concentration
- submission of unduly advantageous bid



Foreign subsidies below EUR 5m are unlikely to be distortive

# Balancing test

- **What is the balancing test?**
  - A foreign subsidy may also have positive effects
  - Balancing the negative with the positive effects
- **What are the possible outcomes of the test?**
  - Positive effects outweigh negative effects: No redressive measures
  - Otherwise, positive effects taken into account when establishing redressive measures or commitments



# Remedying the distortions

## Process

- The undertaking may offer commitments which the Commission would accept if they are effective
- The Commission could also impose redressive measures

## Types of redressive measures



### Structural

- Divestment of assets



### Behavioural

- Give access to infrastructure
- Reducing market share



### Repaying the subsidy



### Prohibiting the transaction

- concentration
- Public procurement

Redressive measures to remedy distortions

