

EU Foreign Subsidies Regulation Draft Guidelines

Cleary Gottlieb's Submission to the European Commission's Consultation

I. Executive Summary

1. We welcome the opportunity to comment on the European Commission's Foreign Subsidies Regulation ("FSR") draft guidelines (the "**Draft Guidelines**").¹ In the absence of a substantial body of decisional practice and case law, the Draft Guidelines provide welcome guidance on substantive assessments under the FSR and the economic concerns the regime aims to address. This guidance will help improve predictability and legal certainty for businesses seeking to evaluate and address risks from non-EU subsidies.
2. We strongly support the Draft Guidelines' economics-led approach to the FSR's distortion and balancing tests. The Draft Guidelines provide detailed reasoning on the potential concerns arising from foreign subsidies, and envisage a rigorous and evidence-based assessment of its competitive effects. The Draft Guidelines also establish a structured framework for conducting the substantive assessment which will help businesses to conduct their own analysis and prepare relevant information for notifications and *ex officio* proceedings.
3. In this contribution, we comment on issues that could be addressed or further clarified in the final Guidelines ("**Guidelines**"). Our key observations are as follows.

Assessment of a Distortion

4. The Guidelines should clarify a fundamental point on the nature of economic harms that are covered by the FSR, in advance of the section on the different categories of distortion that may be caused by foreign subsidies (Section 2.4.4). In our view, the FSR aims to address market inefficiencies that result in a loss of consumer welfare in the long-run (such as may arise from overcapacity or the expansion of inefficient players). Economic security or international competitiveness concerns stemming from the potential relocation of industries or technologies fall outside the FSR's scope and are also better addressed by other instruments, such as FDI screening.
5. The Guidelines should refine its guidance on the transfer of benefits from non-EU entities. They should recognize that intra-group transfers can take place on market terms and provide a benchmark to evaluate this (such as the OECD Transfer Pricing Guidelines). The Guidelines should also clarify how the Commission will assess the likelihood of cross-subsidization where a subsidy's effect is to provide financial support, since money is fungible.
6. In evaluating the distortive impact of subsidies, the Commission should specifically assess the position of rivals and how they may react to the improved competitive strength of the subsidized undertaking. A subsidy may have a neutral or positive

¹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of December 14, 2022 on foreign subsidies distorting the internal market.

competitive impact if rivals are in relatively strong market position to the subsidized party and the subsidy prompts more vigorous competition.

7. On the assessment of distortions from a public tender, the Guidelines could better clarify the meaning of an “advantageous” tender and consider the contracting authority’s own views on the relative attractiveness of different tenders under EU procurement law principles. There are limitations to benchmark assessments since different tenders will vary across the range of possible metrics. The Guidelines should also recognize the need for a causal link to the foreign subsidy as a discrete element of the assessment. Finally, the Guidelines should explicitly explain if there is a need for a standalone analysis of the distortive effects from the advantaged tender, or if the existence of a subsidy enabling an unduly advantageous tender – once demonstrated – suffices as a basis for intervention.
8. ***Application of the Balancing Test***
9. As a general principle, the Commission should apply a symmetrical and even-handed approach when assessing the negative and positive effects of a foreign subsidy, including in relation to evidentiary requirements and in assessing the likelihood that certain effects will materialize. The Draft Guidelines currently require “*cogent and consistent evidence*” for positive effects while relying on reasonable links for proving distortion.
10. The Guidelines should establish safe harbors for foreign subsidies that comply with EU State aid rules. Such safe harbors are necessary to avoid creating excessive legal uncertainty and to ensure non-discrimination between EU and foreign subsidies which pursue identical objectives.
11. The Guidelines should clarify how the Commission will assess subsidies from countries with established systems of subsidies control, creating risk of contradictory outcomes from overlapping regimes.
12. The Guidelines should provide more clarity on what weight will be given to EU State aid frameworks in the balancing test and provide more guidance on the “other positive effects” that may be considered beyond specific EU policy objectives.

The Commission’s Call-In Powers for Concentrations and Public Tenders

13. The Draft Guidelines provide limited guidance on the Commission’s powers to call-in concentrations and public tenders under Articles 21(5) and 29(8) FSR, raising concerns about legal certainty, proportionality, and predictability. The Guidelines should clarify that these powers are exceptional tools, exercisable only where there is a serious and reasoned suspicion of a subsidy may distort competition, and not merely because a transaction or tender is considered “strategic” or “sensitive.”
14. The Guidelines should also define (informal) procedural timelines on the use of these powers to limit disruption for mergers and public procurement procedures. Finally, the Guidelines should explain how and when the Commission would intervene against below-threshold mergers and public tenders using its call-in powers versus *ex officio* investigations.

II. Section 2 of the Draft Guidelines: Assessment of a distortion under Article 4(1) and Article 27 FSR

a. Section 2.2 of the Draft Guidelines: Determining whether the subsidized undertaking engages in an economic activity in the Union

15. **The Guidelines should align the notion of “economic activities in the internal market” to those that would be subject to the EU State aid rules.** The Draft Guidelines extend the concept of economic activities in the internal market that may benefit from foreign subsidies (and therefore be subject to FSR jurisdiction) to (i) purchases of goods and services in the internal market regardless of whether the undertaking offers these goods or services in the internal market and (ii) participation by the undertaking in an acquisition or investment process in the EU even if such participation ultimately does not give rise to an agreement. To avoid any discrimination, the Commission should ensure that the activities it intends to cover here would also be covered by EU State aid rules should the subsidy have been granted by an EU Member State.

b. Section 2.3 of the Draft Guidelines: Determining whether a foreign subsidy is liable to improve the competitive position of the undertaking in the internal market

16. **The Guidelines should clarify the meaning of “benefit to economic activities”.** The Draft Guidelines (para. 18) state that a foreign subsidy is only liable to improve an undertaking’s competitive position in the internal market if it “*is likely to benefit, directly or indirectly, the economic activities in which that undertaking engages in the internal market*”. As a preliminary matter, it would be helpful for the Draft Guidelines to explain what it means for a subsidy to “*benefit*” economic activities.
17. From the examples included in the section, it appears that this could occur in two main ways, and depends on the type of subsidy: (a) first, the foreign subsidy provides direct financial support to the beneficiary (*e.g.*, in the case of direct grants); and (b) second, the foreign subsidy frees up financial resources that the beneficiary can deploy elsewhere (*e.g.*, in the case of subsidies in the form of better-than-market-rate financing or goods/services, or subsidies that relieve financial obligations that would otherwise be payable).
18. **The Guidelines should clarify various aspects concerning the intragroup transfer of benefits.** The Draft Guidelines do not specifically distinguish between situations where a subsidy is granted to a beneficiary entity active within or outside the single market. Instead, they refer to general considerations that are relevant for assessing if a subsidy “*benefits*” economic activities undertaken in the single market: (a) first, whether the undertaking intends or actually uses the foreign subsidy in the single market; (b) second, whether the subsidy was intended to support, or is directed towards, the undertakings’ activities in the internal market; and (c) third, whether the subsidy cross-subsidizes economic activities in the internal market (paras. 20-24).
19. While we broadly agree with this approach, various aspects of the Draft Guidelines require further clarification.

20. ***“Intended to support, or directed towards”***. First, it is unclear what it means for a foreign subsidy to be “*directed towards*” the undertaking’s economic activities in the internal market (para. 21), and how this is distinct from a subsidy that is intended to support such activities. We recommend clarifying the term “directed towards” and replacing the subjective notion of intent with, for instance, an objective assessment based on the purpose, nature, and direct effect of the subsidy. Second, we disagree that a subsidy can be considered to benefit activities in the EU merely if it is granted to support activities taking place outside the Union, which support economic activities in the internal market, such as funding research activities taking place outside the Union for technologies “*which are likely to be used by the same undertaking for the provision of services [...] or for products produced and sold in the internal market*” (para. 22). This assumption is too broad and overlooks that technologies, products, and services may be transferred within the group without any pass-on of a subsidy’s benefit – notably if the transaction is carried out in line with market terms. This assumption is also inconsistent and discriminatory in comparison to EU State aid law, where the Commission cannot presume that another group entity is an indirect beneficiary of aid but must assess if this is the case based on a thorough assessment of the capital, organic, functional, and economic links between the group entities.
21. **Cross-subsidization**. The Draft Guidelines provide that a foreign subsidy can benefit economic activities in the Union if it is “*likely to free up resources that the undertaking can transfer to its activities in the internal market*” (para. 24 and fn. 14). This section of the Draft Guidelines could be clearer. First, the explanation of what cross-subsidization means (fn. 14) is crucial and should be set out in the main text of the Guidelines. Second, the Guidelines should provide more guidance on how the Commission assesses the “likelihood” of cross-subsidization between various entities of the same group, given the effect of many subsidies would be to provide financial support to the undertaking and money is fungible. Third, the Draft Guidelines state that the Commission would not “*in principle*” consider compliance with transfer pricing rules sufficient to prevent cross-subsidization. This position creates significant uncertainty for business, which need a clear and predictable benchmark for their intra-group transactions to minimize the risk of being found to have been granted distortive subsidies. It also appears to be inconsistent with the commitments the Commission accepted in *e&PPF*, which provide that arm’s length terms can be presumed if the transaction complies with the guidance set out in the OECD Transfer Pricing Guidelines.²
22. The Draft Guidelines (para. 28) provide that by-laws are not sufficient to prevent cross-subsidization or render it unlikely. However, where such by-laws reflect the terms of shareholders’ or joint venture agreements (as is commonly the case) governing the entity, the Commission would presumably consider them as potential restrictions on cross-subsidization, following its approach for these agreements (Draft Guidelines, para. 27).

² Commission Decision of 24 September 2024, FS.100011, *Emirates Telecommunications Group / PPF Telecom Group* (“*e&PPF*”), para. 399 and Commitments, Section A (Definition of ‘Arm’s Length Terms’) and paras. 10-11.

c. Section 2.4 of the Draft Guidelines: Determining when a foreign subsidy actually or potentially negatively affects competition in the internal market

23. **The Guidelines should refine certain aspects of the legal standard.** The Draft Guidelines (para. 41) provide that a foreign subsidy can negatively impact competition in the internal market if it is “*a contributing factor*”, and “*it is not necessary that it be the only or even the main factor*” of the beneficiary’s improved competitive position. We disagree with this approach and consider that there is only a legal basis for intervention under the FSR if the subsidy is the main factor contributing to the improved competitive position of the subsidized undertaking and the negative impact on competition. First, it would not be proportionate to intervene against a subsidy if it is only a contributing factor, as the Commission could have recourse to other instruments to tackle the main cause of the problem. Second, this standard would be consistent with the logic of using a counterfactual to evaluate the impact of the subsidy (as proposed in the Draft Guidelines, para. 55). If the subsidy is not the main cause of a market distortion, there would be no material difference with the competitive situation that would have existed in the counterfactual, and no proportionate basis for intervention.
24. The Draft Guidelines (para. 42) provide that the Commission does not need to show an actual effect on competition. While we agree with this stance, the draft Guidelines should specify that evidence of actual effects – or the lack thereof – remains a relevant factor that should be taken into account when assessing the subsidy’s impact on competition. For example, a lack of actual effects (*e.g.*, such as a change in the undertaking’s market share, pricing or other commercial practices) despite the subsidy having been granted some time ago (particularly in *ex officio* cases) would demonstrate that it is not likely to cause a competitive distortion, unless the counterfactual would clearly show a deterioration of the beneficiary’s competitive position absent the subsidy.
25. **The Guidelines should consider the position of rivals when assessing competitive impact.** The Draft Guidelines explain that the Commission will assess how – by changing the relative competitive strength of the subsidized undertaking – the subsidy impacts the competitive dynamics of the market, and lists various indicators relevant to this assessment (para. 56). While we agree with the indicators listed, there is an important omission.

The Commission should consider – as a standalone element of the assessment – how competitors are likely to react to the improved competitive strength of the subsidized undertaking. A subsidy may have a neutral or positive impact on competition if competitors hold a strong market position relative to the subsidized undertaking (even after the subsidy’s effects materialize) or competitors are likely to respond by competing more vigorously because they face increased competitive constraints (*e.g.*, by increasing their levels of investment, reducing prices or expanding output, *etc.*). In evaluating the likely market reaction, the Commission should consider various factors alongside rivals’ current market shares, including:

- a. Whether competitors have access to, or have received, comparable subsidies *e.g.*, from the EU, Member States or third countries. This would be the case if, for example, the foreign subsidy would be permitted under EU State aid rules if granted by an EU Member State. A subsidy is unlikely to distort competition if all competitors in the market could receive (or have received) subsidies with

comparable benefits – even if from a different source or of a different type or form. This assessment is also necessary to avoid structural discrimination between beneficiaries of national/ European subsidies and beneficiaries of third country subsidies, which would be incompatible with the EU’s obligations under applicable trade agreements.

- b. Competitors’ existing R&D and investment plans and whether these could change as a result of increased competition. For example, certain investments involve long-term commitments that are unlikely to be reversed if already made.
- c. Competitors’ existing resources relative to the subsidized entity *e.g.*, in terms of economies of scale, technology, reputation, *etc.* For example, an R&D subsidy is unlikely to have a material negative impact on rivals if they are far more advanced in technological development and expertise.

26. **The Guidelines should clarify the types of economic harms that the FSR is intended to address.** Section 2.4.4 of the Draft Guidelines describe the main categories of distortions that may be caused by a foreign subsidy, namely: (a) the distortion of competition in acquisitions; (b) the distortion of competition by impacting the operating decisions of the subsidized undertaking; (c) the distortion of competition by altering investment decisions of the subsidized undertaking; and (d) the distortion of activities at other levels of the value chain.
27. As a fundamental matter, the Guidelines should discuss the types of economic harm addressed by the FSR. There appear to be two possible types of harm:
- a. First, subsidies may lead to market inefficiencies, resulting in a loss of consumer welfare in the long-run (such as higher prices, lower output, reduced quality and innovation, *etc.*) . This arises if subsidies lead to overproduction or overcapacity in the market and enable the expansion of inefficient firms at the expense of more efficient rivals. These first three types of distortions discussed in the Draft Guidelines (Sections 2.4.4.1-2.4.4.3) essentially fall into this category.
 - b. Second, subsidies may give rise to economic security concerns or a loss of international competitiveness of the EU industry, by inducing the offshoring of industries or technologies. The last type of distortion discussed in the Draft Guidelines (Section 2.4.4.4) falls into this category.
28. We consider that the second form of economic harm falls outside the purview of the FSR. First, the FSR clearly explains that the basis for intervention is distortions of competition, as opposed to economic security or international competitiveness concerns.³ Second, economic security concerns are better addressed through other existing instruments – namely foreign investment control regimes or export controls. Under these regimes, legislators have identified areas of sensitive or strategic economic activity which should be subject to additional foreign investment screening to prevent offshoring or security risks – an example being the list of technologies set forth in Annex II of the proposed new regulation on foreign investments in the EU. Third, any remedies to address such concerns are likely to give rise to inefficiencies. The objective of such remedies would be to compel the company to reverse the relocation activities

³ See *e.g.*, Article 4 FSR and FSR recitals 1, 18, and 29.

and maintain its operations in the EU. However, there is no effective way to ensure the undertaking pursues these continued activities efficiently or with appropriate vigor. Monitoring adherence to predefined business plans would unduly hamper the business from adapting to market developments and competition. The undertaking involved may still pursue its investments in the same activities abroad and minimize its efforts in the EU. Fourth, many economies (including the EU) compete for private investment by offering subsidies. If the FSR were to pursue such theories of harm, this would raise comity issues in interfering with another economy's ability to use subsidies as a policy instrument to attract investment – and undermine the EU's own basis to do the same.

29. **The Guidelines should clarify the boundaries between the FSR and trade defense regimes.** The Draft Guidelines (para. 56(f)) state that the Commission may take into account anti-subsidy measures when assessing whether changes in the subsidized undertaking's relative competitive strength may have a negative impact. While it is helpful that the Draft Guidelines acknowledge the relevance of anti-subsidy measures, this does not provide sufficient guidance on their impact on the substantive assessment.
30. Under the EU's trade defense regime, the Commission has the power to address economic harm arising from subsidized imports, for example by imposing countervailing duties. The FSR, on the other hand, empowers the Commission to address distortions caused by foreign subsidies in the context of mergers, public tenders, or other activities in the single market. Article 44(9) provides that the EU cannot apply the FSR to a foreign subsidy where such action would be covered by trade defense measures. The two frameworks should therefore be mutually exclusive. Thus, the final Guidelines should explain whether the same subsidy could be investigated under both regimes, and how the Commission would ensure there is no duplicative or inconsistent enforcement. The Commission should not, for example, conclude a subsidy entirely benefitted one activity under the trade defense regime (leading to remedies), and then find the same subsidy benefitted a different activity under the FSR regime (also leading to remedies). The concern is particularly acute in relation to "generic" subsidies, such as preferential financing or subsidized utilities or real estate, which are not tied to a single product line and may affect multiple aspects of a company's business.

d. Section 2.5 of the Draft Guidelines: Determining when a foreign subsidy causes or risks causing a distortion in the internal market in the context of public procurement procedures

31. The Draft Guidelines seek to address the key issues on the determination of distortion in public procurement procedures under Chapter 4 FSR, including the concept of an "unduly advantageous" tender.⁴ However, a number of aspects still require clarification and refinement.
32. **The Guidelines should recognize the need for a targeted approach on non-reportable foreign subsidies.** The Draft Guidelines (para. 81) provide that the Commission's substantive assessment may take into account foreign subsidies falling outside the scope of Article 28(1) FSR *e.g.*, foreign subsidies granted outside the economic operators' direct chain of ownership, foreign subsidies where the aggregate amount granted by the third country was under EUR 4 million in the last three years. From a practical perspective, the inclusion of these subsidies in the substantive review

⁴ Cleary Gottlieb Submission to Call for Evidence, Section IV(a).

creates uncertainty and could substantially increase the administrative burden for businesses, which may need to extend information collection efforts beyond the FSR reporting scope. Where the Commission seeks information on such potential subsidies, it should endeavor to focus its information requests to those most likely to be material to the investigation (e.g., by applying appropriate value thresholds, or to entities involved in significant intra-group transactions).

33. **The Guidelines should provide further clarification on the meaning of an “advantageous” tender.** The Draft Guidelines (paras. 85-85) refer to various ways in which a tender may be advantageous e.g., due to lower prices, greater quality, better terms on lead terms or support, and how the Commission will assess this based on benchmarks. However, the fundamental standard by which the Commission will determine if a tender is “advantageous” remains unclear. For example, would a tender be considered “advantageous” if any specific metric is more attractive than the benchmarks, or should the tender be evaluated in a holistic manner? If in a holistic manner, how would the Commission approach this, and would any specific metrics (e.g., price) be given the most weight? The Draft Guidelines should address the fact that different tenders will often vary across a range of metrics. To improve predictability, we reiterate our proposal for the Commission to rely on established EU principles applied by contracting entities when awarding contracts, including “*the most economically advantageous tender*” (MEAT) principle.⁵ In conducting its assessment, the Commission could focus on those tenders the contracting entity considers most attractive under its ordinary course practices for assessing and selecting tenders.
34. **The Guidelines should explicitly recognize the need for a causal link to the foreign subsidy.** Article 27 FSR establishes at least two conditions for intervention against a foreign subsidy in the context of a public procurement procedure: (a) first, there must be an “unduly advantageous” tender, and (b) second, this must have been enabled by a foreign subsidy i.e., there should be a causal link between the foreign subsidy and the “unduly advantageous” nature of the tender. The Draft Guidelines appear to overlook the second condition, and do not address how the Commission will assess this.
35. Instead, the Draft Guidelines (para. 88) appear to conflate the two conditions in suggesting that an “undue advantage” is established “*when the economic operator cannot plausibly justify the nature of the advantage by other factors*” than the foreign subsidy. The Draft Guidelines also appear to put the burden of proof on the economic operator to demonstrate this a tender is not “*unduly advantageous*”. This effectively discharges the Commission from demonstrating that the Article 27 FSR conditions are met once it has found that a tender is “advantageous” and is inconsistent with the Commission’s obligation to prove an infringement.⁶
36. As explained in our comments on the call for evidence,⁷ the determination of a causal link encompasses various factors. Some of these aspects are recognized in the Draft Guidelines, albeit not under a specific stage of the assessment focused on the enablement of the tender.

⁵ Cleary Gottlieb Submission to Call for Evidence, para. 26.

⁶ See e.g., *Baustahlgewebe v Commission* (C-185/95 P) EU:C:1998:608, para. 58.

⁷ Cleary Gottlieb Submission to Call for Evidence, Section VI(b).

- a. The subsidy must be granted to the economic operator, or somehow transferred to it (if granted to another group entity). The Draft Guidelines acknowledges this (para. 83), but should also address situations where a subsidy is granted to a main supplier or subcontractor, rather than the main contractor, and how the causal link with the overall tender is assessed.
 - b. A counterfactual assessment is relevant to show that the foreign subsidy led to the tender's advantages. The Draft Guidelines (para. 86(a)) state that the Commission will seek to "*determine what the tender would have looked like had it not benefited from foreign subsidies*", albeit in order to determine if a tender is "advantageous". While we agree this is an important question, it is not relevant to the assessment of the tender's "advantageous" nature, but whether such advantage is enabled by a foreign subsidy.⁸ The Draft Guidelines should be amended to reflect this.
 - c. The foreign subsidy does not enable the unduly advantageous tender if the bidding entity would have been able to submit the same tender absent the subsidy.⁹ The Draft Guidelines should recognize this.
37. **The Guidelines should affirmatively state if the FSR requires a standalone assessment of distortive effects from the advantaged tender.**
 38. The Draft Guidelines (Section 2.5.1.3) mention that that the Commission will examine "*actual or potential negative effects of foreign subsidies in public procurement procedures*". This raises a number of questions that the final Guidelines should clarify.
 39. First, can the Commission intervene against a public tender once it is established that it is an unduly advantageous tender enabled by a foreign subsidy, or it is also necessary to show that such tender has a negative impact on competition in the single market? If the latter, this would represent a separate stage of the assessment, where the Commission assesses how winning the tender would affect the competitive strength of the relevant undertaking. This assessment should take into account various factors – many of which are discussed in para. 56 of the Draft Guidelines – such as the market opportunity represented by the tender (*e.g.*, importance of the contracting authority, the size of tender value relative to others or total addressable market) and its strategic significance to market position (*e.g.*, to establish a track record or reputation, develop advanced or unique expertise, *etc.*), as well as the characteristics of the undertaking (*e.g.*, its size and market position relative to rivals) and the sector under investigation.
 40. Second, while Section 2.5.1.3 references paragraph 48-54 of the Draft Guidelines, these paragraphs do not appear to be pertinent to an assessment of competitive effects. They relate to whether the foreign subsidy changes the undertaking's behavior in the single market – which are considerations relevant to whether the foreign subsidy enables the advantageous nature of the tender, rather than the tender's competitive effects. As stated above, the relevant paragraph for an assessment of distortive effects would appear to be para. 56 of the Draft Guidelines, with appropriate adjustments for the public procurement context.

⁸ Cleary Gottlieb Submission to Call for Evidence, para. 31.
⁹ *Ibid.*

III. Section 3 of the Draft Guidelines: Application of the balancing test under Article 6 FSR

a. Section 3.1 of the Draft Guidelines: Legal framework

41. The Draft Guidelines set out an analytical framework for the application of the balancing test under Article 6 FSR, by which the Commission weighs positive effects of the foreign subsidy against its distortive effects in the internal market. Whilst this framework represents a welcome development, several aspects merit further consideration and refinement.
42. **Relevance of positive effects in the FSR's assessment of foreign subsidies.** For general context and to promote understanding of the FSR's substantive underpinnings, it would be helpful if the Guidelines included a (brief) introductory section on the role of positive effects in the FSR's assessment of foreign subsidies. This section would explain why the FSR admits the consideration of positive effects, which may lead the Commission to determine that no, or lesser, redressive measures are warranted for foreign subsidies that distort competition within the single market.
43. There appear to be three principal reasons why the FSR considers positive effects. First, subsidies may generate consumer benefits by correcting market failures. Such benefits counterbalance any distortive effects on competition, and may result in a net positive economic outcome for consumers, *e.g.*, in terms of improved prices, output, quality, innovation of the relevant products or services. Second, the EU State aid framework recognizes that subsidies may be justified if they deliver certain social, environmental or other public policy objectives. It would be contrary to the fundamental principle of non-discrimination if foreign subsidies that furthered similar objectives were not accorded comparable treatment. Third, a foreign subsidy by definition encapsulates an advantage (or benefit), which might be captured in whole or in part by EU-based operators. For instance, a foreign subsidy leading to a decrease in prices will generate gains (at least in the short term) for EU customers and/or contracting authorities in the case of government procurement. Similarly, a subsidy that increases the valuation of EU-based companies may be passed on to these companies shareholders or investors, which may be based in the EU. These benefits contribute to the EU's total welfare and should be taken into consideration in addition to other positive effects resulting from externalities. The Draft Guidelines are currently silent on this point.
44. **The Draft Guidelines fail to establish a safe harbor for foreign subsidies in line with State aid rules.** The Commission in the Draft Guidelines appears to consider it is not possible to predetermine the features of foreign subsidies that are likely to pass the balancing test. As a result, the Draft Guidelines only provide "*guidance on the methodology*" that the Commission will apply in conducting the balancing test.¹⁰ Consequently, the Draft Guidelines fail to establish a safe harbor for foreign subsidies that fulfil the conditions of the General Regulation Block Exemption or various State aid sectoral guidelines.¹¹ They merely recognize that policy objectives covered by State aid guidelines will be of "*particular relevance*" for the balancing test.¹² By contrast,

¹⁰ Draft Guidelines, para. 98.

¹¹ Cleary Gottlieb Submission to Call for Evidence, paras. 18-20.

¹² Draft Guidelines, para. 109.

under established case law the Commission is bound by a number of guidelines it has issued in the area of State aid.¹³

45. We submit that in the interest of legal certainty and in compliance with the principle of non-discrimination that should guide FSR enforcement the Commission should reconsider this approach. First, the lack of a safe harbor would be a missed opportunity to simplify the regime and introduce much needed legal certainty without impairing the Commission's ability to pursue problematic subsidies (for instance, the Commission could consider that a safe harbor would only establish a rebuttal presumption against intervention). Second, this approach unjustifiably diverges from the EU State aid rules, which provide clear exemptions for certain categories of aid that are binding on the Commission. This undermines not only the principle of non-discrimination, but also the FSR's objective to "*ensure a level playing field throughout the internal market*" (FSR recital 8). As explained in our response to the Call for Evidence, there is generally no sound basis to distinguish between Member State and third country subsidies that have the same nature, scope, conditions, and pursue the same objectives:¹⁴
- a. While the positive effects of third country subsidies that are not specifically directed at the EU may be primarily felt in that country rather than in the EU, the same would apply to any possible distortive effects; and
 - b. It is unlikely that a foreign subsidy could tilt the playing field in favor of specific players if the same subsidy would (in principle) be available from an EU Member State.

46. **Assessment of subsidies granted by countries with systems of subsidies control.** The Draft Guidelines fail to clarify how the Commission will assess measures granted by countries with a system of subsidy control, particularly those enacted under international agreements with the EU.¹⁵ This is particularly relevant for EEA countries and EU accession candidate states, where national legislation and decisional practice often mirror EU standards and there is a risk of contradictory outcomes from these overlapping regimes that also apply EU rules. For all these reasons, the Commission would, in our view, improve regulatory efficiency and business confidence if the Guidelines specified the conditions under which subsidies from countries with existing subsidy control frameworks would nonetheless be subject to Commission scrutiny under the FSR.

b. Section 3.2 of the Draft Guidelines: Positive effects to be considered

47. The Draft Guidelines elaborate on the types of positive effects that can be taken into consideration under the balancing test. As mentioned above, these positive effects should also include the gains passed on to EU customers or investors as a result of the advantage encapsulated in the subsidy through lower prices or a higher valuation of companies held by EU investors.¹⁶

¹³ *Kotnik and Others* (C-526/14) EU:C:2016:570, para. 40.

¹⁴ Cleary Gottlieb Submission to Call for Evidence, para. 17.

¹⁵ Cleary Gottlieb Submission to Call for Evidence, para. 22(c).

¹⁶ In industries involving complex value chains, these benefits may spill over to upstream or downstream operators in the EU. These effects could be covered by an assessment similar (all things equal) to the

48. **Positive effects on the development of the relevant subsidized economic activity.** We agree with the Draft Guidelines (para. 105) that subsidies which remedy market failures are likely to fall into this category.¹⁷ In referring to a “*change in the development*” of the relevant economic activity, the Draft Guidelines acknowledge that the correction of such market failures may not necessarily involve an *increase* in the relevant economic activity, but could also take the form of quality or innovation enhancements.
49. We agree with the Draft Guidelines (para. 105) that the cognizable positive effects should encompass all public benefits and avoided costs arising from the correction of market failures, *e.g.*, through a reduction in pollution or improved public health. As mentioned above, they should include but not be limited to private gains or collective benefits accruing solely to consumers of the goods or services impacted by the subsidy’s distortive effects.
50. **Positive effects on other EU policy objectives.** The Draft Guidelines provide insufficient guidance on the “*other positive effects*” that may be considered under Article 6(1) FSR.
51. First, the Draft Guidelines fail to establish a safe harbor for foreign subsidies that conform to EU State aid rules and principles, and we refer to our comments above (paras. 44-45 of this submission). Additionally, the Draft Guidelines fail to clarify what weight will be given to communications, guidelines, or other frameworks adopted by the Commission in relation to State aid, which the Draft Guidelines identify as being “*of particular relevance*” to the balancing test under the FSR (para. 109).
52. Second, we welcome the Draft Guideline’s clarification (para. 112) that foreign subsidies “*that create positive effects for the EU and/or contribute to a global welfare improvement or the preservation of global public goods*” will be recognized under the balancing test, even if they do not relate to specific EU policy objectives. However, the examples given (*e.g.*, climate change mitigation, biodiversity protection, human rights protection) are also EU policy objectives. The EU pursues such goals within the single market and under its international development policies.¹⁸ The Guidelines should explain whether this paragraph means that positive effects entirely taking place in third countries may be valued in the context of the balancing test, provided they at least indirectly contribute to EU or global policy objectives, including with respect to development, the EU accession process, or the EU’s trade policy.

“Union interest test” in trade defense proceedings, where the Commission considers the effects of potential remedies to a foreign subsidy (in that case, in the form of customs duties) on the broader EU economy.

¹⁷ Cleary Gottlieb Submission to Call for Evidence, para. 22(a).

¹⁸ *See e.g.*, the goals pursued by the EU’s International Partnerships, which focus on these policy area: climate, environment and energy; digital and infrastructure; gender equality; human development; migration and forced displacement; peace and governance; sustainable growth and jobs; and youth (European Commission, International Partnerships Policies, available at: https://international-partnerships.ec.europa.eu/policies_en) (Accessed September 6, 2025).

c. Section 3.3 of the Draft Guidelines: Principles applied by the Commission in balancing test

i. Section 3.3.1 of the Draft Guidelines: Specificity of the positive effects

53. The Draft Guidelines (para. 117) provide that for positive effects to be taken into account in the balancing test, they must be specific to the foreign subsidy. This is the case if, absent the foreign subsidy, the positive effects “*would not occur*” or would occur “*not to the same degree*.” In practice, this requires establishing “*with a certain degree of likelihood*” that the foreign subsidy leads or is likely to lead to “*a change in behaviour*” of the benefitting undertaking resulting in positive effects (para. 118).
54. **Incentive effect.** Whilst the Commission avoids using the term “incentive effect”, the language of the Draft Guidelines suggests that analogous reasoning to EU State aid law. In State aid an incentive effect exists when the aid “*induce[s] the recipient undertakings to adopt conduct*”¹⁹ that they would not adopt otherwise, thereby changing their behavior. In this respect, the Guidelines should confirm whether the test to be applied with respect to foreign subsidies is indeed the same as that for State aid – with appropriate modifications to reflect the fact that the FSR does not involve an *ex ante* approval regime for subsidies.
55. **Standard for assessment.** The wording of the Draft Guidelines suggests that foreign subsidies must be necessary for the positive effects to materialize at all or to the same extent. However, this standard diverges from the Commission’s approach in *e&/PPF*, where the assessment focused on whether the foreign subsidies were “*necessary*” for the alleged positive effects to occur or “*contribute[d] to those positive effects in any way*.”²⁰ It is therefore unclear whether it suffices that subsidies “*contribute to*” the positive effects occurring (or occurring to the same degree), or if it is necessary to carry out a proportionality test to demonstrate necessity. The approach in *e&/PPF* is preferable because it allows for a more nuanced and straightforward assessment of causation, recognizing that positive effects may arise from multiple factors, whilst still requiring a meaningful causal link to the subsidy. This flexibility seems appropriate given foreign subsidies may have been adopted for other reasons in the relevant third country and are not specifically tailored to the FSR regime. The Commission should therefore reflect this approach in the Guidelines.

ii. Section 3.3.2 of the Draft Guidelines: Performance of the balancing test

56. The Draft Guidelines appropriately avoid requiring precise quantification of positive and negative effects. The Draft Guidelines (para. 125) recognize that “*the balancing test does not constitute a numerical computation*” and that, accordingly, neither the negative nor the positive effects “*have to be precisely quantified*.” This reflects the practical reality that it may be complex to value the economic effects of distortions or, more importantly, the positive effects of advancing policy objectives.
57. In the absence of precise quantification, the Draft Guidelines refer to broad indicators to assess the relative significance of negative and positive effects (paras. 121 and 124),

¹⁹ *HGA v Commission* (C- 630–633/ 11 P) EU:C:2013:387, para 104.
²⁰ *e&/PPF* Decision, para. 375.

and distinguish between negative effects that are unavoidable to achieve the relevant policy objectives and those which go beyond this (para. 123). We agree with this approach.

d. Section 3.4 of the Draft Guidelines: Procedural Considerations

58. **Standard of Proof.** The Commission should adopt a symmetrical and even-handed approach when assessing distortion and positive effects and ensure that both sides of the balancing test are subject to equivalent standards of verifiability, evidence and substantiation. As the Draft Guidelines insist on “*a cogent and consistent body of evidence*” proving positive effects, the same should apply to the assessment of distortive effects. The Commission should also recognize that the Parties do not have the information-gathering powers of the Commission, and should gather evidence from third parties and other public agencies as part of its market tests, where relevant to supplement the Parties’ information.
59. More generally, it is clear from the Draft Guidelines – and this is consistent with the FSR’s provisions²¹ – that the Commission’s assessment will be more detailed than that carried out in EU State aid cases, where the assessment of negative and positive effects may be “*succinct*”.²²
60. **Practical evidentiary and timing challenges.** The Draft Guidelines (paras. 137-138) helpfully affirm that the Commission will “*make every reasonable effort*” to consider information on the positive effects of a foreign subsidy, which may be submitted at any stage of the investigation. This is important to ensure a duly robust and rigorous investigation and procedural fairness, since (as explained in our comments to the Call for Evidence²³) it may not be clear which subsidies raise potential concerns and need to be justified with positive effects until a relatively late stage of the assessment. However, these paragraphs appear to be inconsistent with another provision in the Draft Guidelines (para. 140), stating that undertakings under investigation must provide the Commission with information on positive effects within a period fixed by the Commission, which shall normally not exceed one month from the date of the decision to open an in-depth investigation.²⁴ The Commission should reconcile these inconsistencies and consider potential amendments to the Implementing Regulation.

²¹ See e.g. FSR, recitals 17-19 (“*the Commission should assess on a case-by-case basis whether it distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited*”) and Article 4, which requires the Commission to assess distortion based on different indicators.

²² *Scandlines v Commission* (T-390/20) EU:T:2024:126, para. 284.

²³ Cleary Gottlieb Submission to Call for Evidence, para. 23.

²⁴ Draft Guidelines, para. 140, which refers to Article 8(1) of Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023, OJ L 177, according to which “*the time limit within which the undertaking under investigation, . . . may submit their comments in writing shall be fixed by the Commission and shall normally not exceed one month from the date on which the undertaking under investigation has been informed about the decision, or from the date of publication of the summary notice of the decision in the Official Journal of the European Union.*”

61. At a practical level, the Commission can take various steps to ensure positive effects are given a fair hearing in the investigation process:
 - a. The Commission should aim to identify potentially problematic subsidies as early as possible in the proceedings (and ideally during prenotification of concentrations or public procurements).²⁵
 - b. The Commission should engage in open and constructive discussions with the parties on the forms of evidence relevant to demonstrate positive effects, taking into consideration time limitations of the review process (e.g., statutory time limits) and the real-world timetable of the merger and public tenders (e.g., time limits under public takeover rules or the public contracting authority's procedures). The Commission should adopt a reasonable, proportionate, and pragmatic approach to evidentiary requirements. Evidence of positive effects may involve detailed and complex analytical work, and potentially economic analyses, expert opinions, and supporting documentation from multiple jurisdictions, which may be extremely time-consuming and resource-intensive to collect, and the Commission should give serious thought to whether the level of evidence required is justified in the circumstances of the case and consistent with the standard applied to evaluate distortive effects.
 62. The Draft Guidelines (para. 139) state that third parties providing information on positive effects should "*endeavour*" to do so within one month of the publication of the notice to open an in-depth investigation. While encouraging third parties to submit feedback early in proceedings makes sense for time-bound merger and public procurement reviews, the Commission should maintain flexibility to accept meaningful input at all stages of its assessment, particularly in *ex officio* investigations where there are no binding time-limits for the process and the scope of the investigation may continue to evolve over time.
 63. More fundamentally, the Commission should recognize that its notices opening in-depth investigations typically contain only high-level descriptions of the subsidies under review, making it difficult for third parties to provide substantive and targeted commentary. Rather than relying solely on voluntary submissions based on limited information, the Commission should proactively use its investigative powers to solicit relevant evidence from third parties, market participants, and other stakeholders. This approach would ensure a more comprehensive evidentiary record and align with the principle of even-handed assessment that should characterize the Commission's approach to both positive and negative effects in the balancing test as discussed above (para. 58).
- IV. Section 4 of the Draft Guidelines: The Commission's power to request prior notification of concentrations and public tenders (Article 21(5) FSR and Article 29(8) FSR)**
64. The Draft Guidelines do not provide satisfactory guidance on the Commission's use of its powers to review below-threshold concentrations and public tenders. We highlight

²⁵ Cleary Gottlieb Submission to Call for Evidence, para. 23.

key areas where further clarification is needed to ensure legal certainty, predictability, and proportionality in the operation of the FSR's *ex ante* review regime.

65. **The Guidelines should expressly acknowledge that the Commission's call-in powers should only be used in exceptional situations.** The Draft Guidelines rightly recognize (para. 165) that the FSR's combination of an *ex ante* regime and an *ex officio* investigative power was designed to balance effective enforcement while ensuring a reasonable administrative burden for business.²⁶ The Draft Guidelines should also recognize that the *ex ante* regime was intended to deliver a clear and predictable framework in line with the general EU law principle of legal certainty.²⁷
66. To avoid undermining these objectives, the Commission's use of the call-in powers under Articles 21(5) and 29(8) must be confined to exceptional cases involving a manifest risk of distortive subsidies. The Guidelines should recognize this, alongside providing detailed guidance on how the Commission will determine appropriate cases for use of these powers.
67. **The Guidelines should provide that the call-in powers are only exercisable on a serious suspicion that subsidies were granted.** Under Articles 21(5) and 29(8) FSR, the Commission's powers to call in concentrations and tenders apply if it "*suspects*" the parties have been granted foreign subsidies. The Draft Guidelines interpret this to mean a mere possibility that such subsidies exist (para. 160). Such a low threshold is unsatisfactory and inconsistent with the need to protect legal certainty. The Guidelines should hold the Commission to a higher evidentiary standard: the Commission should have reasonable grounds for considering that there is a foreign subsidies (or subsidies), and that such subsidies are sufficiently significant to lead to competitive distortions through the concentration or public procurement procedure concerned.
68. This would reflect the standards developed under EU law for other intrusive investigatory procedures, notably unannounced inspections (dawn raids). As they entail a serious interference with undertakings' rights against arbitrary or disproportionate intervention in their private activities, the EU Courts have established that inspection decisions must be based on reasonable grounds for suspecting an infringement, and cannot be exercised for fishing expeditions.²⁸ Similarly, the call-in of a concentration or public tender can significantly disrupt transaction timetables and jeopardize time-sensitive commercial opportunities. Accordingly, these powers must not be exercised for vague or unsubstantiated concerns, and should be based on sufficiently concrete indications rather than conjecture.
69. **The Draft Guidelines should clarify that "impact in the Union" refers to potential distortive effects on competition.** Under the FSR (recital 36), the call-in powers may be used where the Commission "*considers that the concentration or the bid would merit ex ante review given its impact in the Union.*" The Draft Guidelines discuss the relevant factors it will consider to evaluate this "impact", such as target's economic significance or the nature of the economic activity concerned (Section 4.4).

²⁶ Cleary Gottlieb Submission to Call for Evidence, para. 34.

²⁷ Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, May 5, 2021, SWD(2021) 99 final, pp. 54, 59, 76.

²⁸ *Michelin v European Commission* (Case T-188/24) ECLI:EU:T:2025:686, paras. 50-59.

70. However, the Draft Guidelines fail to clarify a fundamental point – which is the nature of the impact considered. Since the FSR is aimed at addressing distortions of competition from subsidies, the central question in assessing whether a case merits *ex ante* review should be the likely impact of the concentration or public tender on competition in the single market. The Guidelines should make this clear, to affirm that the Commission would not seek to intervene merely because an undertaking or sector is considered “strategic” or “sensitive” from an industrial policy or national security perspective. Such considerations fall outside the remit of the FSR and risk conflating it with other policy instruments.
71. The factors listed in Section 4.4 are generally relevant to assessing competitive impact, subject to these comments:
- a. In relation to the target’s economic significance specifically (para. 169(a)), the Commission should also look at the current and future market structure and the position of the allegedly subsidized undertaking relative to its competitors.
 - b. In relation to financial information or business plans (para. 169(d)), the Guidelines should clarify how the Commission expects to use these documents/information and why they may be relevant. The Guidelines should also address the procedural aspects of reliance on the parties’ documents in the use of the call-in powers. In particular, it is unclear whether the Commission can request documents prior to calling in a concentration or tender (as Article 13 FSR, which governs requests for information, only applies to “*an undertaking under investigation*”).
72. **The Guidelines should provide clear procedural timelines to limit disruption in public procurement procedures and concentrations.**
73. ***Public procurement procedures.*** The FSR requires the Commission to “*endeavour to limit interference with public procurement procedures, by taking into account how close the date of the award of the contract is when deciding whether to request such prior notification*” (recital 40). It is unfortunate that the Draft Guidelines simply reiterate this recital and fail to address how the Commission will fulfil these obligations.
74. We reiterate our request in the call for evidence for the Guidelines to define clear deadlines for the exercise of the call-in power.²⁹ This is important to provide legal certainty, minimize disruption, and maintain level competition in the public procurement procedure.
75. If – given the diversity of Member State procurement timelines – a general timetable is not feasible at this stage, the Guidelines should still establish informal deadlines that the Commission shall seek to follow, unless a departure is justified in the specific circumstances of the procedure. For example, the Commission could commit to making a decision on whether to exercise its call-in power within 10 business days of becoming aware of a possible subsidy. The Commission should also generally avoid calling in a tender once a provisional award has been made, even if a legally binding contract has not yet been signed.

²⁹ Cleary Gottlieb Submission to Call for Evidence, para. 45.

76. **Concentrations.** The Draft Guidelines describe when a concentration formally becomes notifiable under Chapter 3 of the FSR following a Commission decision under Article 21(5) FSR. As with public procurement procedures, the Guidelines should establish deadlines for the Commission to issue its decision after receiving information on a possible subsidy. Such deadlines would also allow parties to mitigate uncertainty by consulting with the Commission if they consider their transaction to be at risk of a call-in.
77. **The Guidelines should address how the use of call-in powers interacts with its *ex officio* powers.**
78. Under the FSR, the Commission may also review below-threshold concentrations and public procurement procedures using its *ex officio* powers (recital 36). The existence of these overlapping powers creates significant uncertainty for businesses, which face the risk of both a call-in and an *ex post ex officio* investigation that can be initiated for subsidies granted up to 10 years prior (FSR, Article 38). We reiterate our request in the call for evidence for the Guidelines to clarify whether, and in what circumstances, the Commission may open an *ex officio* investigation into public procurement procedures and mergers below the notification thresholds.³⁰ We submit that:
- a. The Guidelines should clarify if the Commission could invoke its *ex officio* power to investigate and potentially unwind below-threshold concentrations agreed after the FSR came into effect and that were not called in before they were completed.
 - b. The Guidelines should explain how the Commission will determine whether to use the call-in power or *ex officio* power to investigate below-threshold concentrations or public tenders – in principle, the same criteria should apply in both situations.
 - c. The Guidelines should provide an indicative limitation period for investigating completed concentrations and public tenders under the *ex officio* power (beyond the limitation periods already provided for in the FSR).

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³⁰ Cleary Gottlieb Submission to Call for Evidence, paras. 46-47.