



11.7.2022

PROVISIONAL AGREEMENT RESULTING FROM INTERINSTITUTIONAL NEGOTIATIONS

**Subject: Proposal for a regulation of the European Parliament and of the Council on
on foreign subsidies distorting the internal market
(COM(2021)0223 – C9-0167/2021 – 2021/0114(COD))**

The interinstitutional negotiations on the aforementioned legislative proposal have led to a provisional agreement. In accordance with Rule 74(4) of the Rules of Procedure, the provisional agreement and a number of accompanying statements (cf. Annex) are submitted to the Committee on International Trade for decision by way of a single vote.

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on foreign subsidies distorting the internal market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) A strong, open and competitive internal market enables both European and foreign undertakings to compete on merits. The Union benefits from a sophisticated and effective system of State aid control, aiming at ensuring fair conditions for all undertakings engaging in an economic activity in the internal market. This State aid control system prevents Member States from granting State aid that unduly distorts competition in the internal market.
- (2) At the same time, undertakings, both private and state-owned, might receive subsidies from third countries, which are then used, for instance, to finance economic activities in the internal market in any sector of the economy, such as participation in public procurement procedures, or acquisitions of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies. Such subsidies are currently not subject to Union State aid rules.

¹ OJ C [...], [...], p. [...].

- (2a) This Regulation should cover all economic sectors, including those that are of strategic interest to the Union and critical infrastructures, such as those mentioned in Article 4(1), point (a), of Regulation (EU) 2019/452 of the European Parliament and of the Council.
- (3) Foreign subsidies can distort the internal market and undermine the level playing field for various economic activities in the Union. This could in particular occur in the context of concentrations entailing a change of control over Union undertakings, where such concentrations are fully or partially financed through foreign subsidies, or if economic operators benefiting from foreign subsidies are awarded contracts in the Union.
- (4) No existing Union instruments address distortions caused by foreign subsidies. Trade defence instruments enable the Commission to act when subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned. Under the WTO Agreement on Subsidies and Countervailing Measures, the Union has the possibility to initiate State-to-State dispute settlement against certain foreign subsidies granted by WTO members and limited to goods.
- (5) It is therefore necessary to complement existing Union instruments with a new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field. In particular, the new tool complements Union State aid rules which deal with distortions in the internal market caused by Member State subsidies.
- (6) Rules and procedures to investigate foreign subsidies that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies could distort the internal market if the undertaking benefiting from the foreign subsidy engages in an economic activity in the Union. The proper application and enforcement of this Regulation should contribute to the resilience of the internal market against distortions caused by foreign subsidies and thereby contribute to the Union's open strategic autonomy. This Regulation should therefore establish rules for all undertakings, including public undertakings which are directly or indirectly controlled by the State, engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention is given to the impact of this Regulation on them.

- (7) To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission should be the sole authority competent to apply this Regulation. The Commission should have the power to examine any foreign subsidy to the extent it is in the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.
- (7a) This Regulation should be applied and interpreted in light of the relevant Union legislation, including those relating to State aid, mergers and public procurement.
- (7aa) Moreover, the implementation of this Regulation should be without prejudice to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU.
- (8) Foreign subsidy in the context of this Regulation should be understood as an intervention that meets the following cumulative conditions. There is (i) a financial contribution, (ii) provided directly or indirectly by a third country, (iii) conferring a benefit and (iv) limited to one or more undertakings or industries.
- (9) As to the second condition, the financial contribution may be granted through public or private entities. Whether a public entity provided a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment prevailing in the third country in which the entity operates including the government's role in the economy of that country. Financial contributions may also be granted through a private entity if its actions can be attributed to the third country. The concept of financial contribution includes a broad range of support measures which are not limited to monetary transfers, for instance, granting special or exclusive rights to an undertaking without receiving adequate remuneration in line with normal market conditions.
- (10) As to the third condition, such a financial contribution should confer a benefit to an undertaking engaging in an economic activity in the internal market. A financial contribution is considered to confer a benefit to an undertaking if it could not have been obtained under normal market conditions. The existence of a benefit should be

determined on the basis of comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service. If no directly comparable benchmarks are available, existing benchmarks could be adjusted or alternative benchmarks could be established based on generally accepted assessment methods. Benefits may notably be conferred in the context of the relationship established between public authorities and public undertakings, if such a relationship, and in particular any financing by the public authorities to public undertakings does not comply with normal market conditions. The provision or purchase of goods or services carried out following a competitive, transparent and non-discriminatory tender procedure, is presumed to be in line with normal market conditions. A financial contribution to an undertaking engaging in an economic activity in the internal market should not be considered as conferring a benefit when the benchmark assessment shows that the undertaking would have obtained that benefit under normal market conditions. Transfer pricing in the context of goods and services exchanged within an undertaking may confer a benefit if not in line with normal market conditions. The benefit conferred by a financial contribution may be passed-through to an undertaking engaging in an economic activity in the Union.

- (11) As to the fourth condition, the benefit should be conferred to one or more undertakings or industries. The specificity of the foreign subsidy could be established by law or in fact.
- (11a) A foreign subsidy should be considered granted from the moment the beneficiary obtains an entitlement to receive the foreign subsidy. The actual disbursement of the foreign subsidy is not a necessary condition for bringing a subsidy within the scope of this Regulation.
- (11b) A financial contribution that is provided exclusively to the non-economic activities of an undertaking does not constitute a foreign subsidy. However, if a financial contribution for a non-economic activity is used to cross-subsidise the economic activities of the undertaking, it can amount to a foreign subsidy falling under the scope of this Regulation. If an undertaking uses financial contributions, for instance in the form of special or exclusive rights, or those received to compensate for a burden imposed by public authorities, to cross-subsidise other activities, that could be an

indication that the special or exclusive rights are provided without adequate remuneration, or that the burden is overcompensated and thus amounts to a foreign subsidy.

- (12) Once the existence of a foreign subsidy is established, the Commission should assess on a case by case basis whether the foreign subsidy distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited.
- (13) The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of an undertaking and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market.
- (14) When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies in markets characterized by overcapacity or leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary

that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 4 million over a consecutive period of three financial years should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this Regulation. Foreign subsidies to a single undertaking not exceeding the amount of a de minimis aid as defined by Article 3(2) of Regulation 1407/2013 per third country over a consecutive period of three financial years should be considered as not distorting the internal market within the meaning of this Regulation.

- (15) Like certain types of State aid, also certain categories of foreign subsidies, such as unlimited guarantees, that is to say without any limitation as to the amount or the duration of such guarantee, are likely to create distortions in the internal market because of their nature. The same is true for an unduly advantageous tender, the advantageous nature of which, such as its price, cannot be justified by other factors. Moreover, subsidies in the form of export financing may, unless provided in line with the OECD Arrangement on officially supported export credits, be a cause of particular concern because of their distortive effects. Since those categories of foreign subsidies are most likely to create distortions in the internal market, it is not necessary for the Commission to perform a detailed assessment based on indicators. An undertaking could in any event show that the foreign subsidy in question would not distort the internal market in the specific circumstances of the case.
- (16) Member States, as well as any natural or legal persons may submit information on positive effects of a foreign subsidy, of which the Commission should take due account when carrying out the balancing. The Commission should consider the positive effects of the foreign subsidy on the basis of the evidence about such positive effects submitted during the investigation. The positive effects should relate to the development of the relevant subsidised economic activity on the internal market. Other positive effects should be taken into account, where warranted, in order to avoid that the balancing gives rise to unjustified discrimination. The Commission should also examine broader positive effects in relation to the relevant policy objectives, in particular those of the Union. These may include, in particular, high level of environmental protection and social standards, and the promotion of research and development. The Commission should weigh these positive effects against the negative effects of a foreign subsidy in terms of distortion on the internal market. In the context of a public procurement procedure, the Commission should take into account the availability of alternative

sources of supply for the goods and services concerned. The balancing may lead to the conclusion that redressive measures should not be imposed if the positive effects of the foreign subsidy outweigh its negative effects. In the case of categories of foreign subsidies that are deemed most likely to distort the internal market, positive effects are less likely to outweigh negative effects. If the negative effects prevail, the balancing may inform the appropriate nature and level of the redressive measures or commitments. In any event, as the balancing considers the positive effects of a foreign subsidy, applying such balancing should not lead to an outcome for the undertaking that would be worse than without the balancing. Where the Commission carries out a balancing for a foreign subsidy, it should set out its reasoning in the decision closing an in-depth investigation.

- (17) Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should include structural and non-structural remedies, and the repayment of the foreign subsidy. They should be suitable to remedy the distortion at stake and should be proportionate. That is, where the Commission considers alternative redressive measures, which would each fully and effectively remedy the distortion, the Commission should choose the one which is least burdensome for the undertaking under investigation.
- (18) The undertaking under investigation should have the possibility to offer commitments in order to remedy the distortion caused by the foreign subsidy. If the Commission considers that the commitments offered fully and effectively remedy the distortion, it could accept them and make them binding by decision. In that case, the Commission should not impose redressive measures.
- (19) The undertaking under investigation could offer to repay the subsidy, together with appropriate interest. The Commission should accept a repayment offered as a commitment if it can ascertain that the repayment fully remedies the distortion, is executed in a transparent and verifiable manner and is effective in practice, while taking into account the risk of circumvention of the objectives of this Regulation.
- (20) Unless the undertaking under investigation offers commitments that would fully and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a public contract before it takes place. Where

the concentration has already been implemented, notably in cases where no prior notification was required because the notification thresholds were not reached, the distortion may nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission could decide to remedy the distortion by ordering the undertakings to dissolve the concentration.

- (20a) The undertaking under investigation could offer or the Commission could, where warranted, proportionate and necessary, require the undertakings concerned to inform the Commission of their participation in future concentrations or public procurement procedures in the Union for an appropriate period of time. The submission of such information, or the response or absence of a response from the Commission cannot give rise to legitimate expectations on the part of the undertaking that the Commission may not later start an investigation of possible foreign subsidies to the undertaking participating in the concentration or in the public procurement procedure.
- (21) The Commission should have the power, on its own initiative, to examine any information on foreign subsidies. Member States and any natural or legal person or association could provide the Commission with information on alleged foreign subsidies distorting the internal market. The Commission could establish a contact point to facilitate the provision of such information in a confidential manner. The Commission should also be able to set up a cooperation mechanism with Member States. When Member States provide the Commission with relevant information on alleged foreign subsidies distorting the internal market, the Commission should ensure that such submissions receive an answer. To investigate foreign subsidies that may distort the internal market and to redress such distortions, the Regulation establishes a procedure consisting of two steps, namely a preliminary review and an in-depth investigation. An undertaking subject to any of these two steps is considered as an undertaking under investigation.
- (22) The Commission should be given adequate investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete,

incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of an undertaking or association of undertakings, or, if the third country concerned is officially notified and raises no objections, at its premises in the third country. In order to ensure an effective inspection, the Commission may ask the undertaking or association of undertakings to consent to the inspection. The Commission should also have the power to take decisions on the basis of facts available if the undertaking under investigation or third country that granted the subsidy does not cooperate.

- (23) Furthermore, where necessary to prevent irreparable damage to competition on the internal market, the Commission should have the power to adopt interim measures.
- (24) In all cases where, as a result of the preliminary review, the Commission has sufficient indications of the existence of a foreign subsidy distorting the internal market, the Commission should have the power to launch an in-depth investigation to gather additional relevant information to assess the foreign subsidy. The undertaking under investigation should be allowed to exercise its rights of defence.
- (25) The Commission should close the in-depth investigation by adopting a decision. It should as far as possible endeavour to close the in-depth investigation within 18 months, taking into account, in particular, the complexity of the case as well as the level of cooperation of undertakings and third countries.
- (26) The Commission should have appropriate instruments to ensure the effectiveness of commitments and redressive measures. If an undertaking does not comply with a decision with commitments, a decision imposing redressive measures, or a decision ordering interim measures, the Commission should have the power to impose fines and periodic penalty payments of a sufficiently dissuasive nature. The Commission should take into account cases of repeated non-compliance when imposing such fines and periodic penalty payments. In order to reinforce the effectiveness of this Regulation, the Commission may apply redressive measures or commitments simultaneously with fines and periodic penalty payments.
- (27) In order to ensure the correct and effective application of this Regulation, the Commission should have the power to revoke a decision and adopt a new one, where the decision was based on incomplete, incorrect or misleading information, where an

undertaking acts contrary to its commitments or the redressive measures imposed, or where the redressive measures or commitments were not effective.

- (28) Given the potentially significant impact of concentrations on the internal market, the Commission should have the power, upon notification, to examine information on foreign financial contributions in the context of a proposed concentration. Undertakings should not be allowed to implement the concentration prior to the conclusion of the Commission's review.
- (29) This examination by the Commission should follow the same procedure as the one where a foreign subsidy is reviewed on the Commission's initiative, subject to adjustments to reflect the specificities of concentrations.
- (30) It is necessary to strike a balance between effective protection of the internal market and the need to limit the administrative burden on undertakings subject to this Regulation. Therefore, only concentrations meeting combined thresholds as defined in this Regulation based on the size of the turnover in the Union and the size of the foreign financial contributions should be subject to mandatory prior notification.
- (31) Below the notification thresholds, the Commission could require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a public contract, if it considers that the concentration or the bid would merit ex-ante review given their impact in the Union. The Commission should also have the possibility to carry out a review on its own initiative of already implemented concentrations or awarded public contracts in an ex officio review.
- (32) When reviewing a concentration, the assessment of whether there is a distortion in the internal market should be limited to the concentration at stake, and only foreign subsidies granted in the three years prior to the concentration should be considered in the assessment.
- (32a) In the context of the ex ante review mechanism for concentrations, undertakings may request pre-notification consultations with the Commission based on good faith, with the aim of receiving guidance on whether the thresholds for notification are met.
- (32b) When a concentration is notified to the Commission pursuant to Article 4 of Regulation (EC) No 139/2004 and to this Regulation, the Commission should endeavour to limit

the administrative burden for the notifying parties under this Regulation. In particular, undertakings should have the option to indicate the specific information submitted in the context of a proceeding under this Regulation that the Commission may also use in proceedings under Regulation (EC) No 139/2004.

- (33) The need to address distortive foreign subsidies is especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayer funds. The Commission should have the power, upon notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating economic operator in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council², Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council³ and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council⁴. The Commission may also request the prior notification of a foreign financial contribution during a public procurement procedure despite its estimated value being below the notification thresholds. The Commission should endeavour to limit interference with public procurement procedures, by taking into account the proximity to the award of the contract when choosing whether to request such prior notification.
- (33a) The balance between the development of a European defence and security equipment market, which is essential for maintaining a European Defence Technological and Industrial Base, and the protection of the national security of the Member States requires a specific regime for the defence and security contracts covered by Directive

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

2009/81/EC. Public procurements for the award of such contracts should therefore not be subject to notification requirements under this Regulation. Nonetheless, it should be possible to examine the foreign subsidies in the context of such contracts in an ex officio review. Furthermore, public procurement covered by Directive 2009/81/EC and exempted by that Directive or to which the conditions for the application of Article 346 TFEU are fulfilled⁵, should not be covered by this Regulation.

- (33b) The framework agreement is an efficient procurement technique widely used by contracting authorities and contracting entities. The flexibility offered to purchasers after the conclusion of the framework agreement should not be affected by the implementation of this Regulation. Therefore, the obligation to notify foreign financial contributions in public procurement procedures provided for in Chapter 4 of this Regulation should be limited to the procedure preceding the conclusion of a framework agreements and should not apply to contracts based on a framework agreement.
- (33c) Taking into account the urgent nature of procurement procedures conducted according to Article 27(3) or 28(6) of Directive 2014/24/EU or Article 45(3) of Directive 2014/25/EU, the Commission should exercise best efforts to prioritize such procedures during a preliminary review and an in-depth investigation to reach any conclusion as soon as meaningfully feasible. This should apply accordingly to similar procedures conducted according to Directive 2014/23/EU.
- (33d) Due to the specificities of multi-stage procedures in public procurement, the Commission should start a preliminary review with the relevant information available in a notification when submitting the request to participate. To ensure completeness of information and speed of investigation, an updated notification should be submitted with the final tender. The Commission should also have the right to ask for any supplementary information before the submission of the final tender.
- (33e) This Regulation does not address access by third-country economic operators to the Union procurement market. This matter is covered by the relevant Union law and international agreements.

⁵ *See for instance Recital 17 of Directive 2009/81/EC and Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement, COM(2006) 779 final.*

- (34) When a foreign financial contribution is notified in the context of a public procurement procedure, the assessment should be limited to that procedure.
- (34a) Where suitable, the Commission should seek ways to ensure the use of electronic means of communication for facilitating the fulfilment of obligations regarding public procurement under this Regulation.
- (35) It should be ensured that the principles governing public procurement, in particular proportionality, non-discrimination, equal treatment, transparency and competition, are respected as regards all economic operators involved in the public procurement procedure, regardless of investigations initiated and pending pursuant to this Regulation. This Regulation is without prejudice to Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council as regards the applicable obligations in the fields of environmental, social and labour law.
- (35a) Contracting authorities or contracting entities may decide to award a contract or a concession in the form of separate lots, in accordance notably with Article 46 of Directive 2014/24/EU and Article 65 of Directive 2014/25/EU and in observance of the prohibition of artificial splitting. Foreign financial contributions must be notified for tenderers applying for lots of a value above an applicable threshold.
- (35b) This Regulation should not affect the possibility for economic operators to rely on the capacities of other entities in accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU.
- (35ba) This Regulation should not affect the possibility of the contracting authority or contracting entity to require the economic operators to supplement, clarify or complete the relevant information or documentation, as provided by Directive 2014/24/EU, Directive 2014/25/EU or Directive 2014/23/EU or as provided by the national law implementing them, provided that such requests are made in full compliance with the principles of equal treatment and transparency.
- (35c) There is a strong tendency for public purchasers to centralise their purchases to achieve economies of scale and efficiency gains. Such central purchasing bodies are qualified as contracting authorities or contracting entities by Directives 2009/81/EC, 2014/24/EU and 2014/25/EU. It is therefore appropriate that the Commission should be able to examine foreign subsidies in the context of contracts awarded by such contracting authorities or contracting entities.

- (36) Foreign subsidies that enable an economic operator to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of a non-exhaustive set of indicators. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. The opportunity should be given to economic operators to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, regulating abnormally low tenders. The prohibition of the award should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified by other factors, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove the distortion. Accordingly, the prohibition of the award concerns the specific procedure in which the unduly advantageous tender was submitted. The Commission's finding that an economic operator benefitted from a distortive subsidy enabling it to submit an unduly advantageous tender therefore cannot be considered as an element giving rise to an exclusion pursuant to the facultative grounds for exclusion laid down in Article 57(4) of Directive 2014/24, Article 80 of Directive 2014/25/EU or Article 38(7) of Directive 2014/23/EU in the same or another public procurement procedure conducted in accordance with those Directives.
- (36a) An unduly advantageous tender may also result from foreign subsidies granted to a subcontractor or supplier because of its competitive impact on the tender submitted to a contracting authority or contracting entity. However, to limit administrative burden, only main subcontractors or main suppliers, that is those whose products or services relate to key elements of the contract or exceed a certain percentage of the value of the contract should notify foreign financial contributions. Elements of the contract may be considered to be key elements, in particular, on the basis of the specific relevance of the element to the quality of the tender including specific know-how, technology, specialised staff, patents and similar advantages available to the subcontractor or supplier, especially where they are relied upon for fulfilling the majority of at least one of the selection criteria in a public procurement procedure. In order to ensure a stable

factual basis for review, the preliminary review should take into account those main subcontractors and suppliers already known at the stage of the submission of the complete notification or declaration or updated notification or declaration in the case of multi-stage procedures. This Regulation should not affect the ability of economic operators to use new subcontractors in the execution of their contracts. As a result, changing subcontractors and suppliers after the submission of the complete notification or declaration or updated notification or declaration or during the execution of a contract should not create additional notification obligations, but the Commission may open an ex officio review if it has information, including from any Member State, natural or legal person or association, that these subcontractors and suppliers may have benefitted from foreign subsidies.

- (36b) In line with the Directives on public procurement, the most economically advantageous tender from the point of view of the contracting authority should be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which should be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.
- (36c) In the context of judicial remedies relating to the application of this Regulation concerning in particular public procurement procedures, a national court or tribunal within the meaning of Article 267 TFEU, which considers a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law, including this Regulation. However, in light of the settled case-law of the Court of Justice¹, that national court or tribunal may not refer a question on the validity of the decision of the Commission at the request of an economic operator concerned, which had the opportunity to bring an action for annulment of that decision, in particular if it was directly and individually concerned by that decision, but had not done so within the period laid down in Article 263 TFEU.
- (37) Taking into account the nature of the ex-ante review mechanism for concentrations and public procurement awards, and the need for legal certainty regarding these specific transactions, a concentration or public procurement tender notified and assessed under the respective procedures cannot be reviewed again by the Commission on its own

initiative. Financial contributions of which the Commission was informed through the notification procedure may however also be relevant outside the concentration or procurement procedure.

- (37a) Member States should cooperate effectively with the Commission in the application of this Regulation. To facilitate such cooperation, the Commission should be able to set up a cooperation mechanism.
- (37b) In order to gather information on foreign subsidies, the Commission should have the possibility to launch investigations regarding specific sectors of the economy, particular types of economic activity or the use of particular foreign subsidy instruments. The Commission should be able to use the information obtained from such market investigations to review certain transactions in the framework of the procedures under this Regulation.
- (37c) When the Commission suspects the existence of repeated distortive foreign subsidies or where several enforcement actions under this Regulation identify distortive foreign subsidies granted by the same third country, the Commission should be able to engage in a dialogue with the third country concerned to explore options aimed at obtaining the cessation or modification of the distortive subsidies with a view to eliminating their distortive effects in the internal market. Where a bilateral agreement between the Union and a third country provides for a consultation mechanism that covers distortive foreign subsidies falling within the scope of this Regulation, such a consultation mechanism could be used to facilitate the third-country dialogue. The dialogue with the third-country should not preclude the Commission from opening or continuing investigations under this Regulation. The Commission should keep the European Parliament and the Council informed of relevant developments.
- (37d) For reasons of legal certainty, it is appropriate to provide for a limitation period of 10 years from the date of granting of the foreign subsidy with regard to investigating a foreign subsidy.
- (38) For the same reasons, it is appropriate to provide for limitation periods for the imposition and enforcement of fines and periodic penalty payments.
- (39) In the interest of transparency and legal certainty, it is appropriate that the Commission publishes or makes public, where applicable either in full or in a summary form all decisions adopted by the Commission.

- (40) The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information, and business secrets, in accordance with Article 339 of the Treaty. The processing of personal data for the purposes of this Regulation should be carried out in accordance with Regulation (EU) No 2018/1725 and Regulation (EU) 2016/679, whichever is applicable for the processing in question.
- (41) In cases where information marked by the undertaking as confidential or business secret does not seem to be covered by obligations of professional secrecy, it is appropriate to have a mechanism in place according to which the Commission can decide the extent to which such information can be disclosed. Any such decision to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.
- (42) The undertakings under investigation under this Regulation should have the opportunity to submit their observations on the grounds on which the Commission intends to adopt a decision and should therefore be entitled to have access to the file. While ensuring preservation of the rights of defence of the undertakings under investigation, it is essential that business secrets be protected.
- (42a) If the provider of the information agrees, the Commission may also use information acquired under this Regulation in the application of other EU instruments.
- (42b) Member States and the Commission should take all necessary measures to ensure the protection of classified information in compliance with, in particular, Commission Decision (EU, Euratom) 2015/443, Commission Decision (EU, Euratom) 2015/444 and the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interest of the European Union.
- (43) The implementation of this Regulation by the Union should comply with Union law, the WTO Agreement and be consistent with commitments made under other trade and investment agreements to which the Union or the Member States are parties. This Regulation should complement the Union effort to improve multilateral rules on addressing distortive subsidies.

- (44) Restrictions upon the freedoms set out in Articles 34, 49, 56 and 63 of the TFEU can be justified by the need to avoid unfair competition, provided that such restrictions, like other restrictions of fundamental freedoms comply with the general principles of Union law, such as proportionality, legal certainty, and with fundamental rights.
- (45) It is possible that the implementation of this Regulation may overlap with sectoral rules, in particular in the area of maritime and air transport. Therefore, it is necessary to clarify the relationship between this Regulation and sectoral instruments dealing with foreign subsidies, namely Regulation (EU) 2016/1035 of the European Parliament and of the Council⁶; Council Regulation (EEC) 4057/86⁷; and Regulation (EU) 2019/712 of the European Parliament and of the Council⁸.
- (45a) All decisions adopted by the Commission under this Regulation are subject to review by the Court of Justice in accordance with Article 263 TFEU. The Court of Justice should, in accordance with Article 261 TFEU, be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.
- (45b) In order to foster the predictability of this Regulation, the Commission should publish and regularly update guidelines regarding the criteria for determining the existence of a distortion caused by a foreign subsidy on the internal market, the application of the balancing, the application of its power to request a prior notification of any concentration or foreign financial contributions received by an economic operator in a public procurement procedure, and the assessment of a distortion in a public procurement procedure. When issuing such guidelines, the Commission should conduct appropriate consultations with stakeholders and Member States. In order to facilitate the implementation of this Regulation in the early stages of its application, the Commission should endeavour to make public clarifications on the application of these provisions before the publication of the guidelines.

⁶ Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels (OJ L 176, 30.6.2016, p. 1).

⁷ Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ L 378, 31.12.1986, p. 14).

⁸ Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ L 123, 10.5.2019, p. 4).

- (46) [Deleted]
- (47) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission in accordance with Article 291 of the TFEU. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and the Council and relate to: decisions ending the in-depth investigations, the imposition of interim measures, decisions on concentrations that have been implemented in breach of the notification obligation or in breach of a decision with commitments or of a decision prohibiting a notified concentration or the award of the contract in a public procurement procedure, the revocation of certain decisions, and the implementing powers relating to the various form, content, procedural details and related items regarding the preliminary review and the in-depth investigation.
- (47a) The Commission should have the possibility to establish a simplified procedure under which it treats certain concentrations or public procurement procedures on the basis that they appear less likely to give rise to distortions of competition on the internal market due to foreign subsidies.
- (48) In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio while limiting undue administrative burden, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission in respect of amending the notification thresholds for concentrations and for public procurement procedures, as well as reducing the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. Without prejudice to the possibility of amending the notification thresholds for concentrations and public procurement by means of a legislative proposal, including in the context of the review provided for by this Regulation, those thresholds may be amended by a delegated act once during the period of delegation under this Regulation. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be

conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

- (49) Where a concentration is notifiable pursuant to this Regulation, financial contributions to any of the parties to the concentration granted in the three years prior to the date of application of this Regulation should fall within the scope of this Regulation. In the context of a public procurement procedure, this Regulation should also apply to a financial contribution granted to an economic operator in the three years prior to the date of application of this Regulation,

HAVE ADOPTED THIS REGULATION:

Chapter 1:

General provisions

Article 1

Subject matter and scope

- (1) The purpose of this Regulation is to contribute to the proper functioning of the internal market by establishing a harmonized framework to address distortions caused, directly or indirectly, by foreign subsidies, with a view to ensuring a level playing field. This Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and notably in concentrations and public procurement procedures.
- (2) This Regulation addresses foreign subsidies granted to an undertaking, including a public undertaking which is directly or indirectly controlled by the State, engaging in an economic activity in the internal market. Among others, an undertaking acquiring control or merging with an undertaking established in the Union or an undertaking

participating in a public procurement procedure in the Union is considered to be engaging in an economic activity in the internal market.

- (2a) Procedures for awarding contracts falling under Directive 2009/81/EC of the European Parliament and of the Council⁹ which are exempted by Member States on the basis of Article 346 TFEU do not fall under this Regulation.
- (2b) For the purposes of this Regulation, when public procurement procedures are concerned, the term ‘undertaking’ shall be understood as the economic operator within the meaning of Directives 2014/23/EU, 2014/24/EU 2014/25/EU and 2009/81/EC.

Article 2

Existence of a foreign subsidy

- (1) For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides directly or indirectly a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market– and which is limited, in law or in fact, to one or more undertakings or industries.
- (2) For the purpose of this Regulation,
 - (a) a financial contribution shall include, inter alia:
 - (i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
 - (ii) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration;
or
 - (iii) the provision of goods or services or the purchase of goods or services;

⁹ *Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).*

- (b) the financial contribution provided by the third country shall include the financial contribution provided by:
 - (i) the central government and public authorities at all other levels;
 - (ii) any foreign public entity, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or
 - (iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

Article 3

Distortions on the internal market

- (1) A distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include, in particular, the following:
 - (a) the amount of the subsidy;
 - (b) the nature of the subsidy;
 - (c) the situation of the undertaking, including its size and the markets or sectors concerned;
 - (d) the level and evolution of economic activity of the undertaking on the internal market;
 - (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.
- (2) A foreign subsidy to an undertaking is unlikely to distort the internal market if its total amount does not exceed EUR 4 million over any consecutive period of three financial years.
- (2a) A foreign subsidy to an undertaking shall not be considered to distort the internal market if its total amount does not exceed the amount of a de minimis aid as defined

in Article 3(2), first subparagraph, of Regulation 1407/2013 per third country over any consecutive period of three financial years.

- (2aa) A foreign subsidy may be considered not to distort the internal market to the extent that it is aimed at making good the damage caused by natural disasters or exceptional occurrences.

Article 4

Categories of foreign subsidies most likely to distort the internal market

- (1) A foreign subsidy falling in any of the following categories is most likely to distort the internal market:
- (a) a foreign subsidy granted to an ailing undertaking, that is to say which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;
 - (b) a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, that is to say without any limitation as to the amount— or the duration of such guarantee;
 - (ba) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;
 - (c) a foreign subsidy directly facilitating a concentration;
 - (d) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking could be awarded the contract. For the purpose of this Regulation, when public procurement procedures are concerned, unless otherwise specified, the term "contract" shall be understood to cover the notions of "public contract" within the meaning of Directive 2014/24/EU, the notion of "contract" within the meaning of Directives 2009/81/EC and 2014/25/EU, as well as the notion of "concession" within the meaning of Directive 2014/23/EU.

- (2) An undertaking under investigation shall be granted the possibility to provide relevant information as to whether a foreign subsidy listed above does not distort the internal market in the specific circumstances of the case.

Article 5

Balancing

- (1) The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion on the internal market, according to Articles 3 and 4 with positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as broader positive effects in relation to the relevant policy objectives, in particular those of the Union.
- (2) The Commission shall take into account the balancing between the negative and positive effects when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments.

Article 6

Commitments and redressive measures

- (1) The Commission may impose redressive measures in order to remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, unless it has accepted commitments offered by the undertaking under investigation pursuant to paragraph 1a.
- (1a) The Commission may accept commitments offered by the undertaking concerned, where such commitments fully and effectively remedy the distortion on the internal market. When accepting such commitments, the Commission shall make them binding on the undertaking in a decision with commitments in accordance with Article 9(3). The undertaking's compliance with the commitments agreed upon shall, where warranted, be monitored.
- (2) Commitments or redressive measures shall be proportionate and fully and effectively remedy the distortion actually or potentially caused by the foreign subsidy in the internal market.

- (3) Commitments or redressive measures may consist, inter alia, of the following:
- (a) offering access under fair, reasonable, and non-discriminatory conditions to an infrastructure, including research facility, production capability or essential facility, that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union;
 - (b) reducing capacity or market presence, including by means of a temporary commercial activity restriction.
 - (c) refraining from certain investments;
 - (d) licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;
 - (e) publication of results of research and development;
 - (f) divestment of certain assets;
 - (g) requiring the undertakings to dissolve the concentration;
 - (h) repayment of the foreign subsidy, including an appropriate interest rate, calculated according to the methodology set out in Commission Regulation (EC) No 794/2004.
 - (i) requiring the undertakings concerned to adapt their governance structure.
- (4) The Commission shall, where appropriate, impose reporting and transparency requirements, including periodic reporting regarding the implementation of the commitments and redressive measures listed in paragraph 3.
- (5) [deleted]
- (6) Where the undertaking under investigation proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment only where it can ascertain that the repayment is transparent, verifiable and effective, while taking into account the risk of circumvention.

Article 6a

Information on future concentrations and public procurement procedures

In decisions adopted pursuant to Articles 9, 24 and 30 of this Regulation, and where warranted, proportionate and necessary, the undertaking concerned may be required to inform the Commission, for a limited period of time, of its participation in concentrations or procurement procedures. This is without prejudice to notification obligations pursuant to Articles 19 and 28.

Chapter 2:

Ex officio review and general provisions for the review of foreign subsidies

Article 7

Ex officio review of foreign subsidies

- (1) The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies. Such source may include the Member States and any natural or legal person or association.
- (2) Ex officio reviews into public procurements shall be limited to awarded contracts. These reviews shall not result in the cancellation of the decision awarding a public contract or concession or a termination of a public contract or concession.

Article 8

Preliminary review

- (1) When the Commission considers that the information referred to in Article 7 indicates that a distortive foreign subsidy may exist, it shall seek all the information it considers necessary to assess, on a preliminary basis, whether the financial contribution under examination constitutes a foreign subsidy and whether it distorts the internal market. To that end, the Commission may in particular:
 - (a) request information in accordance with Article 11; and
 - (b) conduct inspections in and outside the Union in accordance with Article 12 or Article 13.
- (1a) The Commission shall inform Member States that have informed the Commission that a relevant national procedure is envisaged or has been opened about the start of the

preliminary review. In particular, Member States that have notified the Commission about a national procedure pursuant Regulation EU 2019/452 should be informed about the start of the preliminary review. If the review is initiated in relation to a public procurement procedure, the Commission shall inform the contracting authority or contracting entity concerned.

- (2) Where the Commission, based on the preliminary review, has sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it shall:
 - (a) adopt a decision to initiate an in-depth investigation ('decision to initiate the in-depth investigation'), which shall summarise the relevant issues of fact and law and shall include the preliminary assessment of the existence of a foreign subsidy and of the actual or potential distortion on the internal market;
 - (b) inform the undertaking under investigation;
 - (ba) inform Member States and, if the in-depth investigation is initiated in relation to a public procurement procedure, the contracting authority or contracting entity concerned; and
 - (c) publish a notice in the Official Journal of the European Union, which invites views in writing within a prescribed period of time.
- (3) Where the Commission, after a preliminary assessment, concludes that there are no sufficient indications to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review, inform the undertaking under investigation, and Member States that were informed pursuant to paragraph 1, as well as the contracting authority or contracting entity concerned if the preliminary review is initiated in relation to a public procurement procedure.

Article 9

In-depth investigation

- (1) During the in-depth investigation, the Commission shall further assess the foreign subsidy that has been identified in the decision to initiate the in-depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13.

- (2) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5, it may adopt an implementing act in the form of a decision imposing redressive measures ('decision with redressive measures'). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (3) Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5 and the undertaking under investigation offers commitments, which the Commission deems appropriate and sufficient to fully and effectively remedy the distortion, it may adopt an implementing act in the form of a decision making these commitments binding on the undertaking ('decision with commitments'). A decision accepting the repayment of a foreign subsidy in accordance with Article 6(6) shall be considered a decision with commitments. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (4) The Commission shall adopt an implementing act in the form of a no objection decision where it finds that:
 - (a) the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or
 - (b) a distortion on the internal market is outweighed by positive effects within the meaning of Article 5.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (5) The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the in-depth investigation.

Article 10

Interim measures

- (1) To preserve competition in the internal market and prevent irreparable damage, the Commission may adopt an implementing act in the form of a decision ordering interim measures, where:
 - (a) there are sufficient indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and

- (b) there is a risk of serious and irreparable damage to competition on the internal market.
- (2) The interim measures may notably, but not exclusively, consist of the measures mentioned under Article 6(3) points (a), (c), and (d). No interim measures may be taken with regard to public procurement procedures.
- (3) The interim measures shall apply either for a specific time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

Article 11

Information requests

- (-1) To carry out the duties assigned to it by this Regulation, the Commission may require information in line with the provisions of this Article.
- (1) The Commission may require an undertaking under investigation to provide all necessary information, including information regarding its tender in a public procurement procedure.
- (2) The Commission may also request such information from other undertakings or associations of undertakings, including information regarding their tenders in a public procurement procedure, taking due account of the principle of proportionality.
- (3) A request for information pursuant to paragraph (1) or (2) shall:
 - (a) state its legal basis and its purpose, specify what information is required and set an appropriate time limit within which the information is to be provided;
 - (b) contain a statement that if the information supplied is incorrect, incomplete or misleading fines and periodic penalty payments provided for in Article 15 could be imposed;
 - (c) contain a statement that, pursuant to Article 14, a lack of cooperation allows the Commission to take a decision on the basis of the facts that are available.

- (4) At the request of the Commission, Member States shall provide it with all necessary information to carry out the duties assigned to it by this Regulation. Paragraph 3 point (a) applies *mutatis mutandis*.
- (5) The Commission may also request a third country to provide all necessary information. Paragraph 3 points (a) and (c) apply *mutatis mutandis*.
- (6) The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall:
 - (a) inform in advance the Member State in whose territory the interview takes place;
or
 - (b) obtain the agreement of the third country in whose territory the interview takes place.

Article 12

Inspections within the Union

- (1) In order to carry out the duties assigned to it by this Regulation, the Commission may conduct the necessary inspections of undertakings and associations of undertakings.
- (2) Where the Commission undertakes such an inspection, the officials authorised by the Commission to conduct an inspection shall be empowered:
 - (a) to enter any premises, land and means of transport of the undertaking or association of undertakings;
 - (b) to examine books and other business records, irrespective of the medium on which they are stored and to have the right to access any information which is accessible to the entity subject to the inspection, and to take, or request copies;
 - (c) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers;
 - (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection.

- (3) The undertaking or association of undertakings shall submit to inspections ordered by decision of the Commission. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a Commission decision:
- (a) specifying the subject matter and purpose of the inspection;
 - (b) containing a statement that, pursuant to Article 14, a lack of cooperation allows the Commission to take a decision on the basis of the facts that are available;
 - (c) referring to the possibility to impose fines and periodic penalty payments provided for in Article 15;
 - (d) stating the right to have the decision reviewed by the Court of Justice pursuant to Article 263 TFEU.
- (4) In good time before the inspection, the Commission shall give notice of the inspection to the Member State in whose territory it is to be conducted and of the date on which it is to begin.
- (5) Officials and other persons authorised or appointed by the Member State in whose territory the inspection is to be conducted shall, at the request of the Member State or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
- (6) Where officials or other accompanying persons authorised by the Commission find that an undertaking or association of undertakings opposes an inspection within the meaning of this Article, the Member State in which territory the inspection takes place shall provide them with the necessary assistance and shall request, where appropriate, the assistance of the police or of an equivalent enforcement authority so as to enable them to conduct their inspection. If the assistance provided for in this paragraph requires authorization from a judicial authority according to national rules, such authorization shall be applied for. Such authorization may also be applied for as a precautionary measure.
- (7) Upon request of the Commission, a Member State shall in its own territory carry out any inspection or other fact-finding measure under its national law in order to establish whether there is a foreign subsidy distorting the internal market.

Article 13

Inspection outside the Union

In order to carry out the duties assigned to it by this Regulation, the Commission may conduct inspections in the territory of a third country, provided that the government of that third country has been officially notified and raises no objection to the inspection. The Commission may also ask the undertaking or association of undertakings to give its consent to the inspection. Article 12(1), (2), and (3) points (a) and (b) shall apply by analogy.

Article 14

Non-cooperation

- (1) The Commission may take a decision pursuant to Article 8, Article 9, Article 24(3) point (c) or Article 30(2), on the basis of the facts available, if an undertaking under investigation or a third country that granted the foreign subsidy:
 - (a) provides incomplete, incorrect or misleading information in response to an information request under Article 11;
 - (b) fails to provide the information requested within the time limit prescribed by the Commission;
 - (c) refuses to submit to the Commission's inspection within or outside the Union ordered under Article 12 or Article 13; or
 - (d) otherwise impedes the preliminary review or the in-depth investigation.
- (2) Where an undertaking or association of undertakings, a Member State or the third country has supplied incorrect or misleading information to the Commission, that information shall be disregarded.
- (3) Where an undertaking, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit.
- (4) When applying facts available, the result of the procedure may be less favourable to the undertaking than if it had cooperated.

Article 15

Fines and periodic penalty payments

- (1) The Commission may impose by decision fines and periodic penalty payments where an undertaking or an association of undertakings, intentionally or negligently:
 - (a) supplies incorrect, incomplete or misleading information in response to a request made pursuant to Article 11, or does not supply the information within the prescribed time limit;
 - (b) produces the required books or other records related to the business in incomplete form during inspections under Article 12;
 - (c) in response to a question asked in accordance with Article 12(2), point (c),
 - (i) gives an incorrect or misleading answer,
 - (ii) fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
 - (iii) fails or refuses to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 12(3);
 - (d) refuses to submit to inspections ordered under Article 12 or has broken seals affixed in accordance with Article 12(2)(d).
 - (e) fails to comply with the conditions for access to the file or the terms of disclosure imposed by the Commission pursuant to Article 38(3).
- (2) Fines imposed in the cases referred to in paragraph 1 shall not exceed 1 % of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding financial year.
- (3) Periodic penalty payments imposed in the cases referred to in paragraph 1 shall not exceed 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned in the preceding financial year for each working day of delay, calculated from the date established in the decision, until it submits complete and correct information as requested by the Commission, or until it submits to an inspection.

- (4) Before adopting any decision in accordance with paragraph 1, point (a) the Commission shall set a final time limit of two weeks to receive the missing information from the undertaking or from the association of undertakings.
- (5) Where an undertaking does not comply with a decision with commitments pursuant to Article 9(3), a decision ordering interim measures pursuant to Article 10 or a decision imposing redressive measures pursuant to Article 9(2), the Commission may impose by decision:
- (a) fines not exceeding 10 % of the aggregate turnover of the undertaking concerned in the preceding financial year; and
 - (b) periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking concerned in the preceding financial year for each day of non-compliance, starting from the day of the Commission decision imposing such penalty payments, until the Commission finds that the undertaking concerned complies with the decision.
- (ba) The Commission may also impose such fines and periodic penalty payments where the undertaking does not comply with a decision adopted pursuant to Article 9, 24 or 30, which obliged the undertaking to inform the Commission of the undertaking's future participation in concentrations or public procurement procedures pursuant to Article 6a.
- (6) In fixing the amount of the fine or periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness.
- (7) Where the undertaking or association of undertakings concerned has satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce the definitive amount of the periodic penalty payment compared to that under the original decision imposing periodic penalty payments.

Article 16

Revocation

- (1) The Commission may revoke a decision taken pursuant to Article 9(2), (3) or (4), Article 24(3), and Article 30 (1), (2) or (3), and adopt a new implementing act in the form of a decision in any of the following cases:
 - (a) where the undertaking to which the initial decision was addressed acts contrary to its commitments or the redressive measures imposed;
 - (b) where the initial decision was based on incomplete, incorrect or misleading information.
 - (c) where redressive measures or commitments are not effective.
- (1a) Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (2) The revocation and adoption of a new decision by the Commission under paragraph 1 shall not affect the decision of the contracting authority or contracting entity awarding a public contract or concession. It also shall not affect a public contract or concession already concluded following such an award decision.

Chapter 3:

Concentrations

Article 17

Distortions on the internal market by foreign subsidies in concentrations

In a concentration, the assessment whether there is a distortion on the internal market within the meaning of Articles 3 or 4 shall be limited to the concentration at stake. Only foreign subsidies granted in the three financial years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest shall be considered in the assessment.

Article 18

Definition of and notification thresholds for concentrations

- (1) For the purposes of this Regulation, a concentration shall be deemed to arise where a change of control on a lasting basis results from any of the following:

- (a) the merger of two or more previously independent undertakings or parts of undertakings;
 - (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
- (2) The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1.
- (3) For the purposes of Article 19, a ‘notifiable concentration’ shall be deemed to arise where, in a concentration,
- (a) At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and
 - (b) all undertakings involved in the concentration were granted from third countries combined aggregate financial contributions in the three financial years prior to notification of more than EUR 50 million.
- (3a) A concentration shall not be deemed to arise where:
- (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

- (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies¹⁰ provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 19

Prior notification of concentrations

- (1) Notifiable concentrations shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
- (2) The undertakings concerned may also notify the proposed concentration when they demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced their intention to make such a bid, provided that the intended agreement or bid would result in a notifiable concentration under paragraph 1.
- (3) A concentration which consists in a merger within the meaning of Article 18(1), point (a) or in the acquisition of joint control within the meaning of Article 18(1), point (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be done by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

¹⁰ *OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).*

- (4) If the undertakings concerned fail to meet their obligation to notify, the Commission may review a notifiable concentration in accordance with this Regulation by requesting the notification of that concentration. In that case the Commission shall not be bound by the time limits referred to in Article 23(1) and (4).
- (5) The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 18 at any time prior to its implementation where the Commission suspects that foreign subsidies may have granted to the undertakings concerned in the three years prior to the concentration. That concentration shall be deemed to be a notifiable concentration for the purposes of this Regulation.

Article 20

Definition of control

- (1) For the purposes of Article 18, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
 - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
- (2) Control shall be acquired by persons or undertakings which:
- (a) are holders of the rights or entitled to rights under the contracts concerned; or
 - (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

Article 21

Calculation of turnover

- (1) Aggregate turnover shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover

of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover in the Union shall comprise products sold and services provided to undertakings or consumers in the internal market.

- (2) By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the object of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the latest transaction.

- (3) Instead of turnover, the following shall be used for the following categories of undertakings:

- (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC¹¹, after deduction of value added tax and other taxes directly related to those items, where appropriate:

- (i) interest income and similar income;
- (ii) income from securities:
 - income from shares and other variable yield securities,
 - income from participating interests,
 - income from shares in affiliated undertakings;
- (iii) commissions receivable;
- (iv) net profit on financial operations;
- (v) other operating income;

- (b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts

¹¹ Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums;

For the purposes of point (a), for a credit or financial institution in the internal market the turnover shall comprise the income items, as defined in that point, which are received by the branch or division of that institution established in the internal market.

- (4) Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned shall be calculated by adding together the respective turnovers of:
- (a) the undertaking concerned;
 - (b) those undertakings in which the undertaking concerned, directly or indirectly:
 - (i) owns more than half the capital or business assets,
 - (ii) has the power to exercise more than half the voting rights,
 - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings,
 - (iv) has the right to manage the undertakings' affairs;
 - (c) those undertakings which have in the undertaking concerned any of the rights or powers referred to in point (b);
 - (d) those undertakings in which an undertaking as referred to in point (c) has any of the rights or powers referred to in point (b);
 - (e) those undertakings in which two or more undertakings as referred to in points (a) to (d) jointly have any of the rights or powers referred to in point (b).
- (5) Where undertakings concerned jointly have the rights or powers listed in paragraph 4, point (b), in calculating the aggregate turnover of the undertakings concerned,
- (a) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, and this turnover shall be apportioned equally amongst the undertakings concerned;

- (b) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4, points (b) to (e).

Article 22

Aggregation of financial contributions

The aggregate financial contribution to an undertaking concerned shall be calculated by adding together the respective financial contributions provided by third countries to all undertakings referred to in Article 21(4), points (a) to (e).

Article 23

Suspension of concentrations and time limits

- (1) A notifiable concentration shall not be implemented before its notification.
In addition, the following time limits shall apply:
 - (a) where the Commission receives the complete notification, the concentration shall not be implemented for a period of 25 working days after that receipt;
 - (b) where the Commission initiates an in-depth investigation no later than 25 working days after receipt of the complete notification, the concentration shall not be implemented for a period of 90 working days after the opening of the in-depth investigation; that period shall be extended by 15 working days where the undertakings concerned offer commitments pursuant to Article 6 with a view to remedy the distortion on the internal market;
 - (c) where the Commission adopted a decision under Article 24(3), point (a) or point (b), the concentration may be implemented thereafter.

Each period shall begin on the working day following that of the receipt of the complete notification or of the adoption of the relevant Commission decision, respectively.

- (2) Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to

trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that:

- (a) the concentration is notified to the Commission pursuant to Article 19 without delay; and
 - (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.
- (3) The Commission may, upon request, grant a derogation from the obligations laid down in paragraphs 1 or 2. The request to grant a derogation shall state the grounds for the derogation. In deciding on the request, the Commission shall take into account in particular the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the risk of a distortion on the internal market posed by the concentration. Such a derogation may be granted subject to certain conditions and obligations in order to ensure that there is no distortion on the internal market. A derogation may be applied for and granted at any time, either before notification or after the transaction.
- (4) The time limits provided for in paragraph 1, point (b) shall be extended if the undertakings concerned make a request to that effect not later than 15 working days after the opening of the in-depth investigation pursuant to Article 8. The undertakings concerned may make only one such request. Likewise, at any time following the opening of the in-depth investigation, the time limits provided for in paragraph 1, point (b) may be extended by the Commission with the agreement of the undertakings concerned. The total duration of any extension or extensions pursuant to this paragraph shall not exceed 20 working days.
- (5) The time limits provided for in paragraph 1 may exceptionally be suspended where the undertakings have not supplied the complete information which the Commission has requested pursuant to Article 11 or have refused to submit to an inspection ordered by decision pursuant to Article 12.
- (6) The Commission may adopt a decision pursuant to Article 24(3) without being bound by the time limits referred to in paragraphs 1 and 4, in cases where:

- (a) it finds that a concentration has been implemented in breach of the commitments attached to a decision taken under Article 24(3), point (a), or
 - (b) a decision has been revoked pursuant to Article 24(1).
- (7) Any transaction carried out in breach of paragraph 1 shall be considered valid only after a decision pursuant to Article 24(3) has been adopted.
- (8) This Article shall have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller were aware or ought to have been aware that the transaction was carried out in breach of paragraph 1.

Article 24

Procedural rules applicable to the preliminary review and the in-depth investigation of notified concentrations

- (1) Articles 8, 9(1), (3) and (4), 10, 11, 12, 13, 14 and 16 shall apply to notified concentrations.
- (2) The Commission may initiate an in-depth investigation under Article 8(2) no later than 25 working days after receipt of the complete notification.
- (3) After the in-depth investigation, the Commission shall adopt an implementing act in the form of one of the following decisions:
- (a) a decision with commitments pursuant to Article 9(3);
 - (b) a no objection decision pursuant to Article 9(4);
 - (c) a decision prohibiting a concentration, where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5.
- Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (4) Decisions pursuant to paragraph 3 shall be adopted within 90 working days after the opening of the in-depth investigation at the latest, extended as the case may be pursuant to Article 23(1), point (b), (4) and (5). If the Commission does not adopt a decision within that time limit, the undertakings concerned shall be allowed to implement the concentration.

- (5) In any request for information to an undertaking, the Commission shall specify whether time limits will be suspended pursuant to Article 23(5), in the event the undertaking fails to provide complete information in the prescribed time limit.
- (6) The Commission may, where it finds that a concentration notifiable under Article 19(1) or which has been notified upon request of the Commission under Article 19(5) has already been implemented and that foreign subsidies in that concentration distort the internal market pursuant to Articles 3 to 5, adopt one of the following measures:
- (a) require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible;
 - (b) order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

The measures referred to in points (a) and (b) may be imposed either in a decision pursuant to paragraph 3, point (c), or by separate decision

The Commission may adopt an implementing act in the form of a decision any of the measures referred to in points (a) or (b) where it finds that a concentration has been implemented in breach of a decision taken pursuant to paragraph (3), point (a), which has found that, in the absence of the commitments, the concentration would fulfil the criterion laid down in paragraph 3, point (c).

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

- (7) The Commission may adopt an implementing act in the form of a decision ordering interim measures referred to in Article 10 also where:
- (a) a concentration has been implemented in breach of Article 19;
 - (b) a concentration has been implemented in breach of a decision with commitments under this Article, paragraph 3, point (a).

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

Article 25

Fines and periodic penalty payments applicable to concentrations

- (1) The Commission may impose fines and periodic penalty payments as set out in Article 15.
- (2) In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 1 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently, supply incorrect or misleading information in a notification pursuant to Article 19 or supplement thereto.
- (3) In addition, the Commission may impose by decision on undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently:
 - (a) fail to notify a notifiable concentration in accordance with Article 19 prior to its implementation, unless they are expressly authorised to do so by Article 23;
 - (b) implement a notified concentration in breach of Article 23;
 - (c) implement a notified concentration prohibited in accordance with Article 24(3), point (c).
 - (d) circumvented or attempted to circumvent pursuant to Article 35a(3) the notification requirements.

Chapter 4:

Public procurement procedures

Article 26

Distortions on the internal market by foreign subsidies in public procurement procedures

- (1) Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or

services concerned. The assessment of whether there is a distortion on the internal market pursuant to Article 3 and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure in question. Only foreign subsidies granted during the three years prior to the notification shall be taken into account in the assessment.

Article 27

Definition of and notification threshold in public procurement procedures

- (1) For the purposes of this Regulation, a public procurement procedure means:
 - (a) any type of award procedure covered by Directive 2014/24/EU for the conclusion of a public contract and Directive 2014/25/EU of the European Parliament and of the Council, for the conclusion of a supply, works and service contract;
 - (b) a procedure for the award of a works or a service concession covered by Directive 2014/23/EU of the European Parliament and of the Council;
 - (c) procedures for the award of contracts referred to in— Article 10(4), point (a) of Directive 2014/23/EU, Article 9(1), point (a) of Directive 2014/24/EU and Article 20(1) point (a) of Directive 2014/25/EU.
- (2) For the purpose of this Regulation, a notifiable foreign financial contribution in an EU public procurement procedure shall be deemed to arise where:
 - (a) the estimated total value of that public procurement or framework agreement net of VAT, calculated in accordance with the provisions laid down in Article 8 of Directive 2014/23/EU, Article 5 of Directive 2014/24/EU and Article 16 of Directive 2014/25/EU, or a specific procurement under the dynamic purchasing system, is equal to or greater than EUR 250 million; and
 - (b) the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions in the three financial years prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4 million per third country.

- (2a) Where the contracting authority or contracting entity decides to divide the procurement into lots, a notifiable foreign financial contribution in an EU public procurement procedure shall be deemed to arise where the estimated value of the procurement net of VAT exceeds the threshold laid down in paragraph 2(a) above and the value of the lot or the aggregate value of all the lots to which the tenderer applies is equal to or greater than EUR 125 million and the foreign financial contribution is equal to or greater than the threshold laid down in paragraph 2(b).
- (3) Procedures for the award of contracts falling within the scope of Directive 2009/81/EC of the European Parliament and of the Council¹² shall not fall under this Chapter.
- (3a) Procedures for the award of contracts provided by Article 32(2)(c) of Directive 2014/24/EU, and Article 50 point (d) of Directive 2014/25/EU shall be covered the provisions of Chapter 2 of this regulation and shall be excluded from the application of Chapter 4 of this Regulation.
- (3b) By way of derogation from Article 28(1), where the works, supplies or services can be supplied only by a particular economic operator, in accordance with Article 32(2)(b) of Directive 2014/24/EU, Article 50(c) of Directive 2014/25/EU and Article 31(4) of Directive 2014/23/EU and the estimated value of the contract is equal to or greater than the value set in Article 27(2)(a), economic operators submitting a tender or a request to participate shall inform the Commission of all foreign financial contributions as defined in Art. 27(2)(b). Without prejudice to the possibility to initiate a review under Chapter 2, the submission of such information shall not be considered a notification and shall not be subject to investigations under this Chapter.
- (4) For the purposes of this Chapter, the definitions of the terms “contracting authority” in Article 6 of Directive 2014/23/EU Article 2(1) of Directive 2014/24/EU, Article 3 of Directive 2014/25/EU, and “contracting entity” in Article 7 of Directive 2014/23/EU and Article 4 of Directive 2014/25/EU shall apply.
- (5) The contracting authority or contracting entity shall state in the contract notice or, in case a procedure without a prior publication is conducted, in the procurement

¹² Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

documents, that the economic operators are under the notification obligation as set out in Article 28 of this Regulation. However, the absence of such a statement is without prejudice to the application of this Regulation for contracts falling under its scope.

Article 28

Prior notification of foreign financial contributions in the context of public procurement procedures

- (1) When the conditions for the notification of financial contributions in accordance with Article 27(2) and (2a) are met, economic operators participating in a public procurement procedure, shall notify the contracting authority or contracting entity of all foreign financial contributions as defined in Article 27(2)(b). In all other cases, economic operators shall list in a declaration all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable in accordance with Article 27(2)(b). In an open procedure, the notification or declaration shall be submitted only once, together with the tender. In a public procurement procedure consisting of multiple stages, the notification or declaration shall be submitted twice, first with the request to participate and then as an updated notification or updated declaration with the submitted tender or final tender. For the purpose of this Regulation, a multi-stage procedure is to be understood as a procedure in accordance with Articles 28 to 32 of Directive 2014/24/EU and Articles 46 to 52 of Directive 2014/25/EU, either the restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership, or a similar procedure according to Directive 2014/23/EU.
 - (1a) Once the notification or declaration is submitted, the contracting authority or the contracting entity shall transfer the notification or declaration to the Commission without delay.
 - (1b) Where a notification or declaration is missing from the request to participate or the tender, the contracting authority or contracting entity may request the economic operators concerned to submit the relevant document within 10 working days. Tenders or requests to participate from economic operators subject to the obligations specified under this Article and ultimately not accompanied by the notification or declaration

submitted in accordance with paragraph 1 of this Article, despite a request made by the contracting authority or contracting entity in accordance with this paragraph, shall be declared irregular and rejected by the contracting authority or contracting entity. The contracting authority or contracting entity shall inform the Commission of this rejection.

- (1c) The Commission shall examine the content of the notification received without undue delay. Where the Commission finds that the notification is incomplete, it shall communicate its findings to the contracting authority or contracting entity and to the economic operator concerned, and request that the economic operator completes its content within 10 working days. Where a notification accompanying a tender or request to participate remains incomplete despite a request made by the Commission in accordance with this paragraph, the Commission shall adopt a decision declaring that tender irregular. In that decision the Commission shall also request the contracting authority or contracting entity to adopt a decision rejecting the tender or request to participate.
- (2) The obligation to notify foreign financial contributions under this Article shall apply to economic operators, groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU, as well as main subcontractors and main suppliers known at the time of submission of the complete notification or declaration, or complete updated notification or declaration. For the purposes of this Regulation, a subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds 20% of the value of the submitted tender.
- (3) On behalf of groups of economic operators, main subcontractors and main suppliers, the main contractor or main concessionaire within the meaning of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU shall ensure the submission of the notification or declaration. For the purpose of Article 32, the main contractor or main concessionaire is responsible only for the veracity of data linked to its own foreign financial contributions.
- (4) [deleted]
- (5) [deleted]

- (5a) Where the contracting authority or contracting entity in examining tenders suspects the presence of foreign subsidies, although a declaration was submitted, it shall communicate these concerns to the Commission without delay. Without prejudice to the powers of contracting authorities or contracting entities, laid down in Directives 2014/24/EU and 2014/25/EU, to examine whether a tender is abnormally low, the contracting authority or contracting entity shall not perform an assessment of whether a tender is abnormally low where such an assessment would be initiated on the suspicions of the presence of foreign subsidies alone. Where the Commission concludes that there is no unduly advantageous tender within the meaning of this Regulation, it shall inform the relevant contracting authority or contracting entity. Other legal or natural persons may report to the Commission any information relating to distortive foreign subsidies and may communicate any suspicions that a false declaration has been made.
- (6) Without prejudice of the possibility for the Commission to start an ex officio procedure, where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may before the award of the contract request the notification of the foreign financial contributions provided by third countries to that economic operator in any public procurement procedure covered by Article 27, paragraph 1 which are not notifiable under Article 27(2) or fall within the scope of Article 29(3). If the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure and is subject to the provisions set out in Chapter 4 of this Regulation.

Article 29

Procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures

- (1) Articles 8, 9 (1), (3) and (4), 11, 12, 13, 14, 16 and 22 shall apply to notified financial contributions in public procurement procedures.

- (2) The Commission shall carry out a preliminary review no later than 20 working days after it received the complete notification. In duly justified cases, the Commission may once extend this time limit by 10 working days.
- (3) The Commission shall decide whether to initiate an in-depth investigation within the time limit for completing the preliminary review and inform the economic operator concerned and the contracting authority or the contracting entity without delay.
- (3a) Where the Commission had closed a preliminary review without adopting a decision and receives new information leading it to suspect that a submitted notification or declaration was incomplete, or where such a notification or declaration is not transferred to the Commission, it may request additional information in accordance with Article 28 (1)(c). The Commission may reopen a preliminary review based on this new information. Where the preliminary review is initiated under this Chapter, and without prejudice to the possibility to initiate a preliminary review under Chapter 2, as the need may arise, the starting point for the determination of the duration of the preliminary review is the reception of the new notification or declaration by the Commission.
- (4) The Commission may adopt a decision closing the in-depth investigation no later than 110 working days after it received the complete notification. This period may be extended once by 20 working days, after consultation with the contracting authority or contracting entity, in duly justified exceptional cases including the investigations referred to in paragraph 5 of this Article or cases referred to in Article 14(1)(a) and (b).
- (5) By way of derogation from paragraph 2, where the public procurement procedure is a multi-stage procedure, the Commission shall examine the notification submitted with the request to participate within 20 working days from the reception of that complete notification, without closing the preliminary review or reaching a decision on opening an in-depth investigation. After the deadline of 20 working days elapses, the preliminary review shall be suspended until the submission of a final tender or a tender in the case of the restricted procedure. Once the tender or final tender containing a complete updated notification is submitted, the preliminary review shall be resumed and the Commission has 20 working days to finalise it, taking into account any additional information. The decision closing any ensuing in-depth investigation shall

be adopted within 90 working days from the submission of the completed updated notification.

Article 30

Commission decisions

- (1) Where, after an in-depth investigation, the Commission finds that an economic operator benefits from a foreign subsidy which distorts the internal market pursuant to Articles 3 to 5, and where the economic operator concerned offers commitments that fully and effectively remove the distortion on the internal market, it shall adopt an implementing act in the form of a decision with commitments pursuant to Article 9(3). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2). The assessment under Article 5 shall not result in a modification of the tender or final tender submitted by the economic operator that is incompatible with Union law.
- (2) Where the economic operator concerned does not offer commitments or where the Commission considers that the commitments referred to in paragraph 1 are neither appropriate nor sufficient to fully and effectively remove the distortion it shall adopt an implementing act in the form of a decision prohibiting the award of the contract to the economic operator concerned (“decision prohibiting the award of the contract”). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 43(2). Following that decision, the contracting authority or contracting entity shall reject the tender.
- (3) Where, after an in-depth investigation, the Commission does not find that an economic operator benefits from a foreign subsidy which distorts the internal market, it shall adopt a decision pursuant to Article 9(4). Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 43(2).

Article 31

Evaluations in public procurement procedures involving a notification and suspension of award

- (1) During the preliminary review and the in-depth investigation, all procedural steps in the public procurement procedure may continue, except for the award of the contract.

- (2) If a decision to open an in-depth investigation is taken pursuant to Article 29(3), the contract shall not be awarded to an economic operator submitting a notification under Article 28 until the Commission reaches a decision under Article 30(3) or the time limits set in Article 29(4) or 29(5) elapse. If the Commission has not adopted a decision within the applicable time limit, the contract may be awarded to any economic operator, including the one submitting the notification.
- (3) Where the contracting authority or contracting entity finds that the most economically advantageous tender was submitted by an economic operator, which submitted a declaration within the meaning of Article 28 and where the Commission has not opened a review in line with Articles 28 (6), 29(3) or 29(3a), the contract or concession may be awarded to the economic operator submitting such a tender before the Commission takes any of the decisions referred to in Article 30 or before the time limits laid down in Articles 29(2), 29(4) or 29(5) elapse or before the Commission takes any of the decisions referred to in Article 30 regarding other tenders under investigation.
- (4) Where the Commission issues a decision under Article 30(2) concerning a tender which the contracting authority or contracting entity has found to be the most economically advantageous tender, the contract may be awarded to the economic operator having submitted the next best tender not subject to a decision under Article 30(2).
- (5) Where the Commission adopts a decision in accordance with Article 30(1) or (3), the contract may be awarded to any economic operator having submitted the most economically advantageous tender, including, as the case may be, the economic operator having submitted the notification under Article 28.
- (6) The contracting authority or the contracting entity shall inform the Commission without undue delay of any decision relating to the cancellation of the procurement procedure, the rejection of the tender or request to participate by the economic operator concerned, the submission of a new tender by the economic operator concerned or the award of the contract.
- (7) The principles governing public procurement procedures, including proportionality, non-discrimination, equal treatment, transparency and competition, shall be observed as regards all economic operators involved in the public procurement procedure. The

investigation of foreign subsidies pursuant to this Regulation shall not result in the contracting authority or the contracting entity treating the economic operators concerned in a way that is contrary to those principles. Environmental, social and labour requirements shall apply to economic operators in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, or other Union law.

- (8) Each time limit shall begin on the working day following that of the receipt of the notification or of the adoption of the relevant Commission decision.

Article 32

Fines and periodic penalty payments applicable to financial contributions in the context of public procurement procedures

- (1) The Commission may impose fines and periodic penalty payments as set out in Article 15.
- (2) In addition, the Commission may impose by decision on the economic operators concerned fines not exceeding 1 % of their aggregate turnover in the preceding financial year, where they intentionally or negligently supply incorrect or misleading information in a notification or declaration pursuant to Article 28 or supplement thereto;
- (3) The Commission may impose by decision on the economic operator concerned fines not exceeding 10 % of their aggregate turnover in the preceding financial year where they, intentionally or negligently:
- (a) fail to notify foreign financial contributions in accordance with Article 28 during the public procurement procedure;
 - (b) circumvent or attempt to circumvent pursuant to Article 35a(3) the notification requirements.

Chapter 5:

Common procedural provisions

Article 33

Relation between procedures

- (1) A financial contribution notified in the context of a concentration under Article 19 or in the context of a public procurement under Article 28 may be relevant and assessed again under this Regulation in relation to another economic activity.
- (2) A financial contribution assessed in the context of an ex officio procedure in relation to a specific economic activity under Article 8 or Article 9 may be relevant and assessed again under this Regulation in relation to another economic activity.

Article 33a

Communication of information

- (1) Where a Member State considers that foreign subsidies may exist and may distort the internal market, it shall transfer this information to the Commission. The Commission may on the basis of this information decide to start a preliminary review pursuant to Article 8, or request a notification pursuant to Article 19(5) or Article 28(6).
- (2) A natural or legal person or association may communicate to the Commission any information it may have about foreign subsidies that may distort the internal market. The Commission may on the basis of this information decide to start a preliminary review pursuant to Article 8, or request a notification pursuant to Article 19(5) or Article 28(6).
- (3) The Commission shall make accessible to Member States and the Contracting Authorities or entities concerned, on a dedicated electronic database, the non-confidential versions of all decisions adopted under this Regulation.

Article 34

Market investigation

- (1) Where the information available substantiates a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market, the Commission may conduct a market investigation into the particular sector, the particular type of economic activity or into the use of the subsidy instrument concerned. In the course of that market investigation, the Commission may request the undertakings or associations of undertakings concerned to supply the necessary information and may

carry out the necessary inspections. The Commission may also request Member States or the third country concerned to supply information.

- (2) The Commission shall, where relevant, publish a report on the results of its market investigation into particular sectors, particular types of economic activity or particular subsidy instruments and seek comments.
- (3) The Commission may use the information obtained from such market investigations in the framework of procedures under this Regulation.
- (4) Articles 11, 12, 13 and 15 of this Regulation shall apply.

Article 34a

Third-country dialogue

- (1) Where, following a market investigation pursuant to Article 34, the Commission suspects the existence of repeated distortive foreign subsidies, or where several enforcement actions under this Regulation identify distortive foreign subsidies granted by the same third country, the Commission may engage in a dialogue with the third country concerned, to explore options aimed at obtaining the cessation or modification of such subsidies with a view to eliminating their distortive effects on the internal market. The Commission shall inform the European Parliament and the Council of any relevant developments.
- (2) That dialogue shall not prevent the Commission from taking action under this Regulation. Individual measures adopted pursuant to this regulation shall not be addressed within that dialogue.

Article 35

Limitation periods

- (1) The powers of the Commission under Articles 8 and 9 shall be subject to a limitation period of ten years, starting on the day on which a foreign subsidy is granted to the undertaking. Any action taken by the Commission under Articles 8, 11, 12 or 13 with respect to a foreign subsidy shall interrupt the limitation period. After each interruption, the limitation period shall start to run afresh.

- (2) The powers of the Commission to impose fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of three years, starting on the day on which the infringement referred to in Articles 15, 25 or 32 took place. In the case of continuing or repeated infringements, the limitation period shall start on the day on which the infringement ceases. Any action taken by the Commission with respect to an infringement referred to in Articles 15, 25 or 32 shall interrupt the limitation period for the imposition of fines or periodic penalty payments. After each interruption, the limitation period shall start to run afresh.
- (3) The powers of the Commission to enforce decisions imposing fines and periodic penalty payments under Articles 15, 25 and 32 shall be subject to a limitation period of five years, starting on the day on which the Commission decision imposing fines or periodic penalty payments was taken. Any action taken by the Commission, or by a Member State acting upon request of the Commission, intended to enforce payment of the fine or periodic penalty payment shall interrupt that limitation period. After each interruption, the limitation period shall start to run afresh.
- (4) The limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission:
 - (a) having taken a decision pursuant to Article 8 or 9 in the instances set out in paragraph 1; or
 - (b) having imposed a fine or a periodic penalty payment in the situation set out in paragraph 2.
- (5) The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

Article 35a

Anti-circumvention

- (1) An undertaking shall not in any way arrange financial operations or contracts to circumvent the notification requirements laid down in Article 19(1) and (5) and Article 28(1), (2) and (6).

- (2) The Commission may, when it suspects that an undertaking engaged in a practice referred to in paragraph 1, require such undertaking to provide any information that it deems necessary to determine whether the undertaking engaged in the practices referred to in paragraph 1.
- (3) Where an undertaking circumvents or attempts to circumvent the notification requirements in Article 19(1) and (5) or Article 28(1), (2) and (6) engaging in a practice referred to in paragraph 1, the Commission may initiate a review pursuant to Article 19(4), or Article 29(3a).

Article 36

Publication of decisions

- (1) The Commission shall make public a summary notice of the decisions adopted pursuant to Article 8(2) point (a), allowing any natural or legal person, Member States or the third country that granted the foreign subsidy, to express their views.
- (2) The Commission shall publish the decisions adopted pursuant to Article 9(2), (3) and (4), Article 24(3) and (6), and Article 30(1), (2) and (3) in the Official Journal of the European Union.
- (3) When making public summary notices and decisions, the Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information.

Article 37

Addressees of decisions

- (1) The Commission shall notify a decision addressed to an undertaking or to an association of undertakings without delay and shall give the addressee the opportunity to indicate to the Commission which information in the decision it considers to be confidential.
- (1a) The Commission shall inform the contracting authority or the contracting entity concerned about a decision pursuant to Article 30(1) and (3) addressed to an undertaking participating in a public procurement procedure. (2) Decisions adopted pursuant to Article 30(2) and (3a) shall be addressed to the contracting authority or the

contracting entity concerned. The Commission shall provide the undertaking to which the award of the public contract is prohibited with a copy of that decision.

Article 38

Disclosure and rights of defence

- (1) The Commission shall, before adopting a decision pursuant to Articles 9, 10, 15, 16, 24(3), 25, 30 or 32 give the undertaking under investigation the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision.
- (1a) By way of derogation from paragraph 1, a decision pursuant to Article 10 may be taken provisionally, without the undertaking investigated being given the opportunity to submit its observations beforehand, provided that the Commission gives it that opportunity as soon as possible after having taken its decision.
- (2) The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations.
- (3) To be able to exercise their right pursuant to paragraph 1, the undertaking under investigation shall be entitled to have access to the file of the Commission. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the Member States. In particular, the right of access to file shall not extend to correspondence between the Commission and the Member States. The right of access to file shall be subject to the legitimate interest of undertakings or associations of undertakings in the protection of their business secrets and other confidential information. The Commission may ask the undertaking under investigation and the undertakings or associations of undertakings that provided information to the Commission to agree on terms to disclose the information. In case of disagreement between the undertakings or associations of undertakings, the Commission shall have the power to impose the terms to disclose the information. Nothing in this paragraph shall prevent the Commission from using and disclosing to the extent necessary information showing the existence of a distortive foreign subsidy.

Article 39

Professional secrecy and confidentiality

- (1) Information acquired under this Regulation shall be used only for the purposes for which it was acquired, unless the provider of the information agrees otherwise.
- (2) Member States and the Commission, their officials and other persons working under their supervision shall ensure the protection of confidential information acquired in application of this Regulation in accordance with the relevant applicable rules, and to this end, shall not disclose information covered by the obligation of professional secrecy that they have acquired pursuant to this Regulation.
- (3) Paragraphs 1 and 2 shall not prevent publication of statistics and reports which do not contain information allowing to identify specific undertakings or associations of undertakings.
- (4) The disclosure of any information communicated under this Regulation shall not prejudice essential security interests of Member States.

Chapter 6:

Relationship to other instruments

Article 40

Relationship to other instruments

- (1) This Regulation is without prejudice to the application of Articles 101, 102, 106, 107 and 108 of the TFEU, Council Regulation (EC) No 1/2003¹³ and of Council Regulation (EC) No 139/2004¹⁴.
- (2) This Regulation is without prejudice to the application of Regulation (EU) 2016/1037 of the European Parliament and of the Council¹⁵.

¹³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

¹⁵ Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

- (3) This Regulation is without prejudice to the application of Regulation (EU) 2019/452 of the European Parliament and of the Council¹⁶.
- (3a) This Regulation is without prejudice to the application of Regulation (EU) 2022/... of the European Parliament and of the Council¹⁷.
- (4) This Regulation takes precedence over Regulation (EU) 2016/1035 of the European Parliament and of the Council until that Regulation becomes applicable pursuant to its Article 18. Where, after that date, a foreign subsidy falls within the scope of application of both Regulation (EU) 2016/1035 and this Regulation, Regulation (EU) 2016/1035 takes precedence. However, the provisions applicable to public procurement and concentrations of this Regulation take precedence over Regulation (EU) 2016/1035.
- (5) This Regulation takes precedence over Council Regulation (EEC) No 4057/86.
- (6) This Regulation is without prejudice to the application of Regulation (EU) 2019/712 of the European Parliament and of the Council. Concentrations, as defined in Article 18 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 3. Public procurement procedures, as defined in Article 27 of this Regulation, involving air carriers shall be subject to the provisions of Chapter 4.

¹⁶ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I , 21.3.2019, p. 1).

¹⁷ ***Regulation (EU) 2022/... of the European Parliament and of the Council on the access of third-country economic operators, goods and services to the Union's public procurement market and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement markets of third countries (International Procurement Instrument - IPI) (OJ L ...).***

- (6a) This Regulation shall be interpreted consistently with Directives 2009/81/EC¹⁸, 2014/23/EU¹⁹, 2014/24/EU²⁰ and 2014/25/EU²¹ of the European Parliament and of the Council, and Council Directives 89/665/EEC²² and 92/13/EEC²³.
- (7) An investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into. In particular, no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures and granted by a third country which is a member of the World Trade Organisation. This Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements.

Chapter 7:

Transitional and final provisions

¹⁸ *Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.08.2009, p.76).*

¹⁹ *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.03.2014, p.1).*

²⁰ *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, p.65).*

²¹ *Directive 2014/25/EU of the European Parliament and the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.03.2014, p. 243).*

²² *Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts*

²³ *Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors*

Article 40a

Review by the Court of Justice

In accordance with Article 261 of the TFEU, the Court of Justice of the European Union shall have unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 40b

Guidelines

- (1) The Commission shall publish, at the latest on [date: three years after entry into force], and shall regularly update thereafter, guidelines regarding:
 - (a) the application of the criteria for determining the existence of a distortion according to Art. 3(1),
 - (b) the application of the balancing in accordance with Art. 5,
 - (c) the application of its power to request prior notification of any concentration according to Art. 19(5) or foreign financial contributions received by an economic operator in a public procurement procedure according to Art. 28(6), and
 - (d) the assessment of a distortion in a public procurement procedure according to Art. 26(1).
- (2) Before issuing the guidelines referred to in paragraph 1 of this article, the Commission shall conduct appropriate consultations with stakeholders and Member States. The guidelines shall be built on the practice of application of this Regulation.

Article 41 [deleted]

Article 42

Implementing acts

- (1) The Commission is empowered to adopt implementing acts concerning:

- (a) the form, content and procedural details of notifications of concentrations pursuant to Article 19, including a possible simplified procedure, taking utmost account of the goal of limiting administrative burden for notifying parties pursuant to Article 19 of this Regulation and Article 4 of Regulation (EC) No 139/2004;
 - (b) the form, content and procedural details of notifications of foreign financial contributions and declaration of no foreign financial contribution in public procurement procedures pursuant to Article 28, including a possible simplified procedure;
 - (ba) procedural details for oral statements pursuant to Article 11(6), Article 12(2) point c and Article 13;
 - (c) details of the disclosure pursuant to Article 38 and professional secrecy pursuant to Article 39;
 - (d) the form, content and procedural details of transparency requirements;
 - (e) detailed rules on the calculation of time limits;
 - (f) the procedural details and time limits for proposing commitments under Articles 24 and 30;
 - (g) detailed rules on the procedural steps referred to in Article 28, 29, 30 and 31 concerning investigations regarding public procurement procedures.
- (2) Implementing acts referred to in paragraph 1 shall be adopted in accordance with the advisory procedure referred to in Article 43(2).
- (3) Before the adoption of any measures pursuant to paragraph 1, the Commission shall make public a draft thereof and seek comments within the time limit it lays down, which may not be less than four weeks.
- (4) The first implementing acts mentioned in paragraph 1 shall be adopted by the date of application of this Regulation provided in Article 48(2).

Article 43

Committee procedure

- (1) The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
- (2) Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 44

Delegated acts

- (1) The Commission is empowered to adopt a delegated act in accordance with Article 45 for the purposes of amending, if necessary, the threshold for notifications as set out in Article 18(3)(a) for concentrations by increasing by up to 20% or decreasing by up to 20%, after having:
 - (a) assessed this threshold in the light of its practice of application of this Regulation, and
 - (b) established the necessity of amending that threshold in order to:
 - (i) capture more accurately distortive foreign subsidies subject to the notification procedures set out in Chapter 3;
 - (ii) ensure a reasonable administrative burden on the Commission and the undertakings concerned; and
 - (iii) enhance the effectiveness of the application of the Regulation.
- (1a) For the purposes of evaluating the necessity of amending the threshold for notification, pursuant to paragraph 1, the Commission shall conduct its assessment, concerning a defined period of time which cannot be shorter than two years, in particular on the basis of the following objective criteria:
 - (a) the proportion of notifications pursuant to Article 19(1) which resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting a non-objection decision pursuant to Article 24(3)(b) in relation to the overall number of notifications pursuant to Article 19(1);
 - (b) the proportion of notifications pursuant to Article 19(1) which resulted either in the Commission adopting a decision prohibiting a concentration pursuant to

Article 24(3)(c) or a decision with commitments pursuant to Article 24(3)(a), in relation to the overall number of notifications pursuant to Article 19(1);

- (c) the proportion of notifications pursuant to Article 19(5) which resulted in the Commission adopting either a decision prohibiting a concentration pursuant to Article 24(3)(c) or a decision with commitments pursuant to Article 24(3)(a) in relation to the overall number of notifications pursuant to Article 19(5);
- (d) the proportion of decisions with redressive measures pursuant to Article 9(2) and with commitments pursuant to Article 9(3), following an ex officio review pursuant to Article 7 in the context of concentrations which were not notifiable concentrations within the meaning of Article 18 in relation to the overall number of ex officio reviews pursuant to Article 7 in the context of concentrations which were not notifiable concentrations within the meaning of Article 18;
- (e) the comparison between the threshold set out in Article 18(3)(a) and the average actual aggregate turnover referred to in Article 18(3)(a) in the cases which resulted with either a decision prohibiting a concentration pursuant to Article 24(3)(c) or a decision with commitments pursuant to Article 24(3)(a);
- (f) the number of notifications pursuant to Article 19(1) and its evolution.

(1aa) In order to raise the thresholds in Article 18(3)(a), the assessment referred to in paragraph (1a) shall demonstrate that:

- (a) a large part of decisions prohibiting a concentration pursuant to Article 24(3)(c) or decisions with commitments pursuant to Article 24(3)(a) concerned cases where the actual aggregate turnover referred to in Article 18(3)(a) was substantially higher than the threshold set out in Article 18(3)(a); or
- (b) a large part of notifications pursuant to Article 19(1) resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting a non-objection decision pursuant to Article 24(3)(b) in relation to the overall number of notifications pursuant to Article 19(1).

(1aaa) In order to decrease the thresholds in Article 18(3)(a), it shall be required that the assessment referred in paragraph (1a) shows that:

- (a) a large part of notifications pursuant to Article 19(5) resulted in the Commission adopting either a decision prohibiting a concentration pursuant to Article 24(3)(c) or a decision with commitments pursuant to Article 24(3)(a); or
 - (b) a large part of ex officio reviews of foreign subsidies in the context of concentrations which were not notifiable concentrations within the meaning of Article 18 resulted in the Commission adopting either a decision with redressive measures pursuant to Article 9(2) or a decision with commitments pursuant to Article 9(3).
- (1ab) The Commission is empowered to adopt a delegated act in accordance with Article 45 for the purposes of amending, if necessary, the thresholds for notifications as set out in Articles 27 (2)(a) and 27 (2a) for public procurement by increasing by up to 20% or decreasing by up to 20%, after having:
- (a) assessed those thresholds in the light of its practice of application of this Regulation, and
 - (b) established the necessity of amending those thresholds in order to:
 - (i) capture more accurately distortive foreign subsidies subject to the notification procedures set out in Chapter 4;
 - (ii) ensure a reasonable administrative burden on the Commission and the undertakings concerned; and
 - (iii) enhance the effectiveness of the application of the Regulation.
- (1ac) For the purposes of evaluating the necessity of amending the threshold for notifications, pursuant to paragraph 1ab, the Commission shall conduct its assessment, concerning a defined period of time which cannot be shorter than two years, in particular on the basis of the following objective criteria :
- (a) the proportion of notifications pursuant to Article 28(1) which resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting a non-objection decision pursuant to Article 30(3) in relation to the overall number of notifications pursuant to Article 28(1);
 - (b) the proportion of notifications pursuant to Article 28(1) which resulted either in the Commission adopting either a decision prohibiting the award of the contract

- pursuant to Articles 30(2) or a decision with commitments pursuant to Article 30(1), in relation to the overall number of notifications pursuant to Article 28(1);
- (c) the proportion of notifications of foreign financial contributions in public procurement procedures pursuant to Article 28(6) which resulted in the Commission adopting either a decision prohibiting the award of the contract pursuant to Articles 30(2) or a decision with commitments pursuant to Article 30(1) in relation to the overall number of notifications pursuant to Article 28(6);
 - (d) the proportion of decisions with redressive measures pursuant to Article 9(2) and with commitments pursuant to Article 9(3), following an ex officio review pursuant to Article 7 in the context of foreign financial contribution in a public procurement procedure which were not notifiable within the meaning of Article 27(2) or fell within the scope of Article 29(3a) in relation to the overall number of ex officio reviews pursuant to Article 7 in the context of foreign financial contribution in a public procurement procedure which were not notifiable within the meaning of Article 27(2) or fell within the scope of Article 29(3a);
 - (e) the comparison between the respective thresholds set out in Articles 27(2)(a) and 27(2a) and the average actual estimated value of the contract referred to in Article 27(2)(a) or the average actual estimated value of the lot or lots referred to in Article 27(2a) in the cases which resulted with either a decision prohibiting the award of the contract pursuant to Articles 30(2) or a decision with commitments pursuant to Article 30(1);
 - (f) the number of notifications pursuant to Article 28(1) and its evolution.
- (1aca) In order to increase the thresholds the assessment referred to in paragraph 1ac shall demonstrate that:
- (a) a large part of decisions prohibiting the award of the contract pursuant to Article 30(2) and decisions with commitments pursuant to Article 30(1) concerned cases, where the actual estimated value of the contract referred to in Article 27(2)(a) or the actual estimated value of the lot or lots referred to in Article 27(2a) was substantially higher than the respective thresholds set out in Articles 27(2)(a) and 27(2a); or

- (b) a large part of notifications pursuant to Article 28(1) resulted either in the Commission closing the preliminary review pursuant to Article 8(3) or in the Commission adopting a non-objection decision pursuant to Article 30(3) in relation to the overall number of notifications pursuant to Article 28(1).
- (1acb) In order to decrease the thresholds, it shall be required that the assessment referred to in paragraph 1ac shows that:
- (a) a large part of notifications pursuant to Article 28(6) resulted in the Commission adopting either a decision with commitments pursuant to Article 30(1) or a decision prohibiting the award of the contract pursuant to Articles 30(2); or
 - (b) a large part of ex officio reviews of foreign subsidies in the context of foreign financial contribution in a public procurement procedure which were not notifiable within the meaning of Article 27(2) or fell within the scope of Article 29(3a) resulted in the Commission adopting either a decision with redressive measures pursuant to Article 9(2) or a decision with commitments pursuant to Article 9(3).
- (2) The Commission is empowered to adopt delegated acts in accordance with Article 45 for the purposes of reducing the timelines for preliminary review and in-depth investigations as set out in Article 24(2) and Article 24(4) for notified concentrations and in Article 29(2) and in Article 29(4) for notified financial contributions in public procurement procedures. The Commission may adopt such delegated acts where the practice of the Commission in the application of this Regulation shows that the duration of the Commission's assessment can be performed more quickly than the timelines foreseen in this Regulation and hence can justify to reduce the timelines in Articles 24(2), 24(4), 29(2) and 29(4).

Article 45

Exercise of the delegation

- (1) The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

- (1a) The power to adopt delegated acts referred to in Articles 44(1) and Article 44(1ab) shall be conferred on the Commission for a period of five years from [two years after the date of entry into force of this Regulation].
- (2) The power to adopt delegated acts referred to in Article 44(2) shall be conferred on the Commission for a period of five years from [...] [two years after the date of entry into force of this Regulation]. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
- (3) The delegation of power referred to in Article 44(1), Article 44(1ab) and Article 44(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union-or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
- (4) Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.
- (5) As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
- (6) A delegated act adopted pursuant to Article 44(1), Article 44(1ab) and Article 44(2) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 45a

Separate delegated acts for different delegated powers

The Commission shall adopt a separate delegated act in respect of each power delegated to it pursuant to this Regulation

Article 46

Reporting and review

- (-1) The Commission shall present an annual report on the application and implementation of this Regulation to the European Parliament and to the Council.
- (1) By three years after the start of application of this Regulation and every three years thereafter, the Commission shall review its enforcement practice, in particular on the application of Articles 3 to 5, 7, and the notification thresholds set out in Articles 18(3), 27(2) and 27(2a), and present a report to the European Parliament and the Council, accompanied, where the Commission considers it appropriate, by relevant legislative proposals. In the context of its review, the Commission shall report on developments in international relations regarding third countries' subsidy control systems.
- (1a) Where the Commission considers appropriate to combine the report with relevant legislative proposals, such proposals may include:
 - (a) amending the thresholds for notifications as set out in Articles 18 and 27;
 - (b) exempting certain categories of undertakings concerned from the obligation to notify pursuant to Articles 19 and 28, especially where the practice of the Commission enables the identification of economic activities where foreign subsidies are unlikely to distort the internal market;
 - (c) establishing specific thresholds for notifications for certain economic sectors or differentiated thresholds for different types of public procurement contracts, especially where the practice of the Commission enables the identification of economic activities where foreign subsidies are more likely to distort the internal market, including as regards strategic sectors and critical infrastructure;
 - (d) amending the timelines for review and in-depth investigations as set out in Articles 24 and 29;
 - (e) abrogating the present Regulation, if the Commission considers that multilateral rules to address distortive subsidies have rendered this Regulation fully redundant.

Article 47

Transitional provisions

- (1) This Regulation shall apply to foreign subsidies granted in the five years prior to the date of application of this Regulation where such foreign subsidies distort the internal market after the start of application of this Regulation.
- (2) By way of derogation to paragraph (1), this Regulation shall apply to foreign financial contributions granted in the three years prior to the date of application of this Regulation where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.
- (3) This Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before the date of application of the Regulation.
- (4) This Regulation shall not apply to public procurement contracts that have been awarded or procedures initiated before the date of application of the Regulation.

Article 48

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from [date: six months after entry into force].

By way of derogation from the second paragraph of this Article, Articles 42 and 43 shall apply from [date: entry into force] and Articles 12(5), 12(6) and 12(7) shall apply from [date: twelve months after entry into force].

By way of derogation from the second paragraph of this Article, Articles 19 and 28 shall apply from [date: nine months after entry into force].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

Declaration of the European Commission, pursuant to Article 40b

Declaration of the European Commission on clarifications as regard the application of Regulation [number]

The Commission commits to clarifying the application of Article 3(1) of Regulation [add number] on the existence of a distortion caused by a foreign subsidy on the internal market, the application of the balancing test set out in Article 5 of this Regulation, and the assessment of a distortion in a public procurement procedure set out in Article 26(1) of this Regulation.

The Commission will make such initial clarifications public at the latest 12 months after the date of application of these provisions.

Guidelines issued pursuant to **Article [40b]** of Regulation [add number] may replace these initial clarifications.

Joint declaration of the European Parliament, the Council of the EU and the European Commission

The Union remains committed to an open and rules-based multilateral trading system with a modernised WTO at its core and to further enhancing the effectiveness of the multilateral framework on subsidies. It reaffirms its commitment to support the modernisation of the WTO rules to address distortions to trade and to competition. In particular, the Union will engage in modernising rules on industrial subsidies to enhance the proper functioning of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and to promote compliance and enforcement.

Declaration of the European Commission on multilateral rules to address distortive foreign subsidies

On [date of the agreement], the European Parliament, the Council and the European Commission reached an agreement on the Regulation on foreign subsidies distorting the internal market [add reference to Commission proposal]. This Regulation complements the existing European and international disciplines on subsidies and subsidy control. It deals with distortions caused by foreign subsidies in the Union's internal market.

Subsidies may have a negative impact on international trade and can lead to distortions of competition in both traditional sectors and new technologies. In some cases, uncontrolled subsidies may also result in excess capacities, to the detriment of healthy market dynamics. The EU needs to continue to reap the benefits of international opportunities while developing tools to confront unfair trading practices, both internally and externally¹. This Regulation should contribute to improving the resilience of the EU internal market, in particular when it comes to protecting it against distortions caused by foreign subsidies. This way, the Union complements its toolbox in view of achieving the objectives of the Union's open strategic autonomy.

With a view to addressing the negative impacts of subsidies, and recognising that WTO rules may not be sufficiently effective in tackling the negative spillovers of state intervention in the economy, including for certain industrial sectors, the European Commission remains committed to further enhancing the effectiveness of the multilateral framework on subsidies, and is determined to strongly push for a legal framework that is well equipped to address distortions to trade and to competition and for a level playing field²⁴. In particular, the Commission is committed to modernising rules on industrial subsidies to enhance the proper functioning of and to promote compliance with the WTO Agreement on Subsidies and Countervailing Measures (ASCM). In this context, the European Commission recalls its ongoing trilateral cooperation with Japan and the United States.

Rules on subsidies are laid down in particular in the ASCM, which sets out prohibitions of certain subsidies and actions to counter adverse effects of subsidies in the context of trade in goods. In respect of the Union, these rules are, insofar as they relate to countervailing subsidisation, implemented by Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union²⁵. The scope of Regulation (EU) 2016/1037 is determined by the scope of the ASCM.

The Regulation on foreign subsidies distorting the internal market is in line with the Union's international obligations, including in particular those resulting from the ASCM. The European

²⁴ Commission Communication Trade Policy Review – An Open, Sustainable and Assertive Trade Policy of 18 February 2021, COM/2021/66 final.

²⁵ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55.

Commission will ensure that any action taken in the application of this Regulation is consistent with its international obligations.

The Commission intends to make full use of this new Regulation to address distortions caused by foreign subsidies in the internal market.

** [The Provisional political agreement concluded to have these statements published in the C-Series of the Official Journal and to have a reference and a link to them in the L-Series, together with the legislative act]*