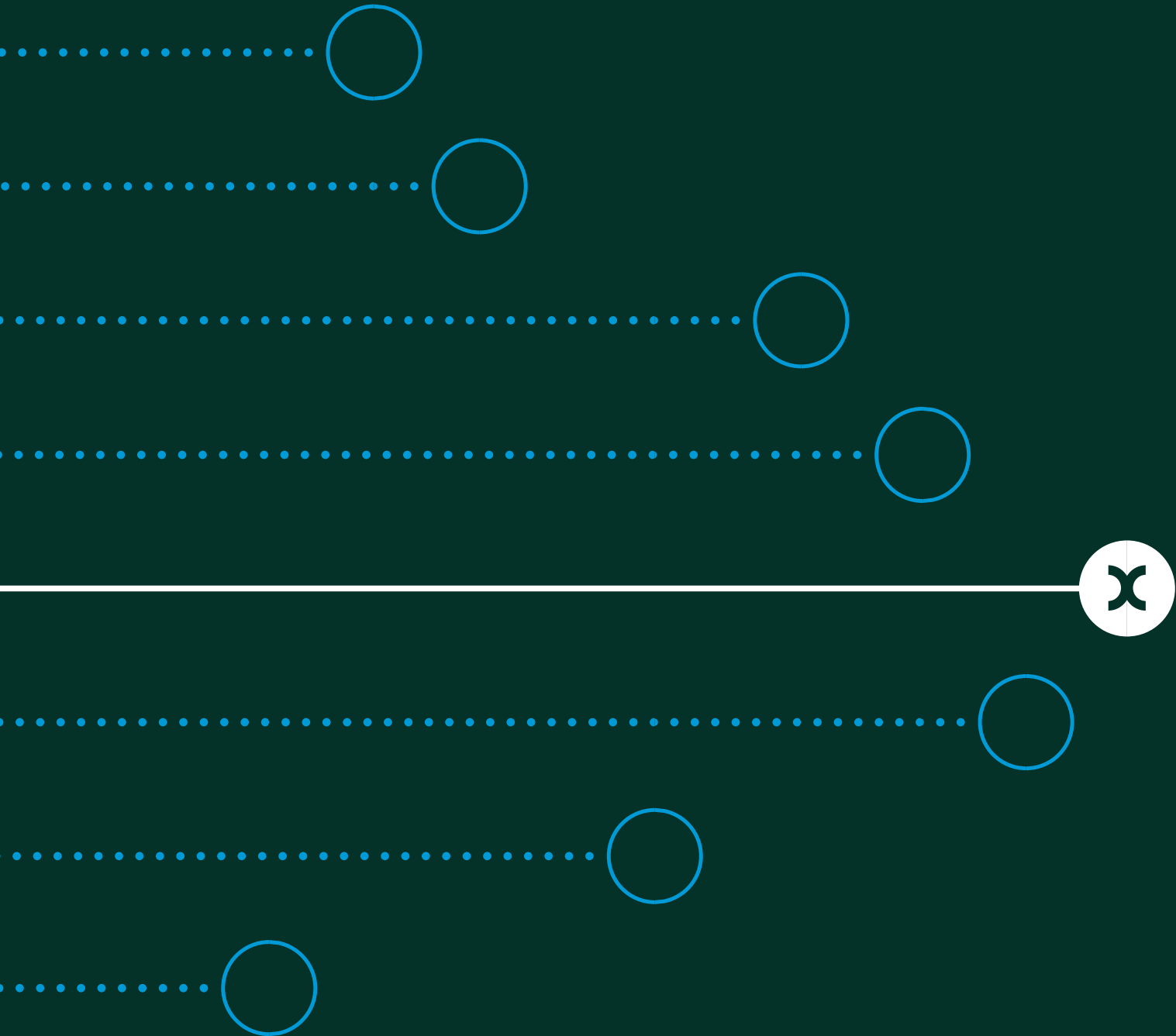


Comments on the Draft Guidelines on the application of
certain provisions of the Foreign Subsidies Regulation



Oxera Response to the Public Consultation

12 September 2025



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1 Introduction

- 1 Oxera welcomes the opportunity to contribute to the formulation of the Foreign Subsidies Regulation Guidelines. In this document, we respond to the public consultation on the Draft Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market ('the Draft Guidelines').

1.1 General reflections

- 2 We welcome the Commission's efforts to provide greater clarity and guidance on the enforcement of the Foreign Subsidies Regulation ('FSR').
- 3 In our response, we aim to contribute constructively to the discussions on the enforcement of the FSR by highlighting the main economic aspects where we consider that the Draft Guidelines could be improved to better align them with established economic principles.
- 4 In the Draft Guidelines, the Commission recalls that the purpose of the requirement to publish and update such guidelines is to 'foster the predictability' of the FSR.¹ The Commission explicitly sets out that the guidelines 'do not constitute a "checklist", to be applied mechanically', but rather they 'present the analytical approach that [it] will follow when applying the criteria'.²
- 5 While we understand that there are limitations that cannot result in full certainty at this stage due to the relatively recent introduction of the FSR, we note that 'predictability' remains a key objective. Therefore, we recommend that the final version of the guidelines are designed such that they provide a clear and practical framework for the relevant stakeholders, illustrated with practical examples (where possible), while still allowing for a case-by-case assessment, as appropriate.
- 6 As we set out in the sections below, some parts of the Draft Guidelines risk falling short of achieving the objective of 'predictability'. There are parts of the Draft Guidelines that—in our view—are unduly open-ended. This is likely to prevent companies from accurately assessing their exposure under the FSR.
- 7 In particular, the lack of a clear welfare standard implies that one of the typical benefits of guidelines (which is to bind the competition agency to a specific framework of assessment) is not achieved.

¹ Draft Guidelines, para. 5.

² Ibid., para. 7.

- 8 On the assessment of the improvement of the position of an undertaking in the internal market, we recommend that further guidance on the standard to be applied, and the evidence required, is provided to determine whether foreign subsidies are likely to free up resources or result in cross-subsidisation. We also recommend that the relevance of transfer pricing methodologies is recognised, subject to adjustments where needed.
- 9 In relation to the assessment of the effects on competition, we recommend that the Commission sets out a clear framework of relevant indicators to be used and that it further clarifies some aspects of the Draft Guidelines in the context of the acquisitions of undertakings.
- 10 As a general comment, we recommend that the final version of the guidelines clarifies the extent to which foreign subsidies mirroring the structure of compatible aid, according to any of the Commission's state aid guidelines, would positively contribute to the assessment.
- 11 To the extent possible, we also recommend that greater clarity is provided, with practical examples of the types of analysis and economic and financial indicators that the Commission expects to review or analyse as part of its assessment.

1.2 Structure of this document

- 12 This response is structured as follows:
- section 2 addresses the importance of defining a clear welfare standard to determine when a foreign subsidy actually or potentially negatively affects competition in the internal market;
 - section 3 discusses the criteria for determining whether a foreign subsidy is liable to improve the competitive position of an undertaking;
 - section 4 deals with the actual or potential effects of foreign subsidies on competition within the internal market.
- 13 For each section, we first briefly summarise our understanding of the Draft Guidelines, followed by our comments and recommendations. Key recommendations are summarised in a box at the end of each section.

1.3 About Oxera

- 14 Oxera is a leading European economics and finance consultancy with a long track record in competition policy, including state aid and subsidy control. We have acted as advisers and experts in a range of cases before the European Commission, national authorities and courts involving state aid, mergers, restrictive agreements, abuse of dominance and trade defence.
- 15 In the area of the FSR, we apply economic and financial tools to determine whether certain measures qualify as 'subsidies', and assess their impact on the internal market as well as their positive effects.

- 16 We also regularly contribute to policy debates in state aid and competition law. The Oxera Economics Council, which consists of leading European academics, interacts twice a year with policymakers and competition officials on policy questions relating to competition and regulation.
- 17 In addition, we regularly provide competition economics training to law firms, competition authorities and judges. We have also undertaken major studies for the European Commission, including a study on developing an economics framework to assess the impact of aid on competition.³

³ Oxera (2017), 'Ex post assessment of the impact of state aid on competition', Final report, November, available at: <https://op.europa.eu/en/publication-detail/-/publication/dba8ff2d-46fc-11ea-b81b-01aa75ed71a1/language-en>.

2 The standard for the assessment of distortive effects

2.1 The need for a clear 'welfare standard'

18 The Draft Guidelines open by recalling that the purpose of the FSR is 'to contribute to the proper functioning of the internal market by establishing a harmonised framework to address distortions caused, directly or indirectly, by foreign subsidies, with a view to ensuring a level playing field'.⁴

19 This is consistent with the FSR itself, which provides that '[a] distortion in 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, that foreign subsidy actually or potentially negatively affects competition in the internal market'.⁵

20 In other areas of EU competition law, the notion of competition is underpinned by a clear welfare standard, i.e. that of consumer welfare. For example, in the context of the enforcement of Article 102 of the Treaty on the Functioning of the EU ('TFEU'), which concerns abuse of dominance, the notion that harm to competition entails harm to consumers is well established. As a result, sound enforcement of Article 102 requires the identification of a 'theory of harm' in order to establish how exclusionary practices harm consumers, not just competitors.⁶

2.2 The Draft Guidelines do not set out a clear standard for the assessment of distortions

21 The Draft Guidelines do not define a clear welfare standard under which the 'effect on competition' and the 'level playing field' should be understood. In particular, they do not refer to the concept of 'competition on the merits', which the Commission had previously indicated would constitute the standard in order to operationalise the notion of the 'level playing field' and to assess the existence of distortions.⁷

⁴ Draft Guidelines, para. 2.

⁵ FSR, Art. 4(1).

⁶ Although reliance on consumer harm is explicit in the Commission's recent Draft Guidelines on exclusionary abuse under Article 102 TFEU, we note that the concept is not further developed or operationalised. See Oxera (2024), 'European Commission Draft Guidelines on Exclusionary Abuse under Article 102. Oxera Response to the Public Consultation', 31 October, pp. 11–13, available at: <https://www.oxera.com/insights/reports/oxeras-response-to-the-public-consultation-on-the-article-102-draft-guidelines/>.

⁷ European Commission (2024), 'Commission Staff Working Document – Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market', 26 July, SWD(2024) 201 final, p. 2, available at: https://competition-policy.ec.europa.eu/document/download/b4c8bb13-839b-4bfb-8863-78b188523d22_en?filename=20240726_SWD_clarifications_on_application_of_FSR.pdf.

- 22 The notion of ‘competition on the merits’ is used in other areas of competition law—in particular, in the enforcement of Article 102 TFEU. As such, the reliance on this concept in the FSR context would have provided a unifying link to more established areas of competition law, thereby helping to introduce an element of predictability.
- 23 For the assessment of the existence of an actual or potential negative effect on competition, the Draft Guidelines propose what is, to our knowledge, a new test, namely that there is an appreciable ‘alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market’.⁸
- 24 In this context, ‘economic actors’ are defined as ‘undertakings actually or potentially active in the internal market, or other categories of economic actors (e.g. consumers, workers)’ as well as potentially ‘[s]tates carrying out an economic activity’.⁹ As the notion of ‘economic actors’ is very broad, this definition does not provide adequate clarity regarding the underlying welfare standard that will be used by the Commission. It appears to encompass primarily other ‘undertakings’, with consumers (and workers) coming second. One interpretation is therefore that the standard for distortions is primarily competitor-centric. However, the notion of ‘undertakings’ is defined in the Draft Guidelines as broader than just competitors, and could also include undertakings that operate along the value chain as either suppliers or customers of the beneficiary of the subsidy.
- 25 This is confirmed by the ‘illustrations of the main categories of distortions’ in section 2.4.4 of the Draft Guidelines, which focus primarily on competitors, without articulating the harm to consumers, but also include effects on other types of actors. For example, the illustrations include distortions in acquisitions where foreign subsidies enable an undertaking to outbid or deter other bidders, thereby reducing the growth opportunities for competitors.¹⁰ Similarly, the Draft Guidelines articulate that foreign subsidies can lead to pricing or increased production ‘beyond the likely level absent the foreign subsidy’, reducing competitors’ sales and profits.¹¹ Section 2.4.4.4 of the Draft Guidelines broadens the scope by highlighting the potential for distortions along the value chain, such as suppliers and labour markets.¹² However, most notably, the impact on final consumers is not discussed.

2.3 Oxera’s comments on the proposed approach

- 26 A clearly defined welfare standard is necessary to provide predictability to companies on what subsidies are likely to be found problematic and what types of arguments may be taken into account by the Commission during FSR

⁸ Draft Guidelines, para. 38.

⁹ Ibid., fn. 23.

¹⁰ Ibid., paras 59 and 61.

¹¹ Ibid., paras 65–66 and 68.

¹² Ibid., paras 74–76.

investigations. Therefore, we recommend that the Commission provides clarity on the welfare standard that it will apply. In particular, we recommend that the Commission clarifies whether the effects to be considered concern a total welfare standard or are limited to producer or consumer welfare. In the framework adopted in the Draft Guidelines, it is not clear whether foreign subsidies resulting in clear positive effects for consumers will be found to be problematic, and vice versa in case there are benefits for companies but consumers are likely to be negatively affected.

- 27 The Draft Guidelines rely on overly broad criteria for the main steps of the assessment set out by the Commission in sections 2.3 and 2.4, where, in practice, a very broad set of foreign subsidies could be found to be problematic. For example, once foreign subsidies are found to have a direct link to the internal market (see our comments on this assessment in section 3.2 of this response), the Draft Guidelines set out a large number of ways in which the foreign subsidies could affect the behaviour of the undertaking (see section 4 of this response). The approach of assessing distortions based on an appreciable 'alteration of, or interference with, competitive dynamics to the detriment of other economic actors',¹³ by virtue of the lack of a clear standard, could also identify a large number of potentially problematic subsidies. This leads to a situation where it is not possible to predict what foreign subsidies will be considered problematic.
- 28 This is not tempered by a restrictive approach to the evidence needed, or a high bar in terms of the significance of effects to be deemed problematic. Indeed, the Draft Guidelines set out that an alteration or interference can take place in relation to 'any of the activities in which the undertaking [...] is actually or potentially engaged in the internal market' or 'in relation to any downstream, upstream, related or otherwise indirectly affected sectors'.¹⁴ While the combined effects of multiple subsidies may be taken into account,¹⁵ the Draft Guidelines indicate that 'it is not necessary that [subsidies] be the only or even the main factor [to the negative impact on competition]'.¹⁶ Finally, it is sufficient for the impact to be only a potential impact, as the Commission would not be required 'to show an actual impact'.¹⁷
- 29 The only limiting factor in the assessment is that a 'negative impact on the level playing field is less likely when the alteration of, or interference with, competitive dynamics to the detriment of other economic actors is not appreciable'.¹⁸ However, the notion of what would be deemed not appreciable is not always clearly defined, and therefore does not narrow down the range of problematic subsidies. For example, the Draft Guidelines refer to turnover, profitability and investments as examples of the parameters used to measure the extent of the

¹³ Draft Guidelines, para. 38.

¹⁴ Draft Guidelines, para. 39.

¹⁵ Ibid., para. 40.

¹⁶ Ibid., para. 41.

¹⁷ Ibid., para. 42.

¹⁸ Ibid., para. 38.

relevant economic activities.¹⁹ However, the Draft Guidelines do not define how the subsidy should compare against these measures in order to be considered less likely to improve the competitive position of the undertaking receiving a foreign subsidy. Similarly, the reference to ‘the likely evolution of the relevant sector and of the economic activities of the undertaking in the internal market, and the dynamic across the relevant value chain’ is too generic and open to interpretation.²⁰ As a result, no clear line is drawn by the Draft Guidelines on what foreign subsidies are to be considered distortive.

- 30 The adoption of a quasi-presumption of distortion in the context of the FSR is likely to be problematic for two main reasons.
- 31 First, in contrast to state aid granted in the EU, foreign subsidies are likely to be granted primarily outside of the internal market. Therefore, a number of subsidies could have little to no direct or indirect impact in the EU. However, as explained in section 3 of this response, the Draft Guidelines set out a very low bar for (collections of) subsidies to be found to improve the competitive position of the beneficiary undertaking in the internal market.
- 32 Second, under state aid control, the balancing test is operationalised by checking that a number of criteria are met for individual aid measures or schemes. As the compatibility of the aid measure is assessed before aid is granted, this makes it easier than in the FSR context to ensure that state aid complies with the relevant criteria. In contrast, the FSR has been described as a ‘pure balancing’ regime, i.e. subsidies are not a priori prohibited, and only those found to be distortive on balance would be tackled through redressive measures.²¹ Given the context, a compatibility assessment similar to that used in state aid control may not be possible or feasible for foreign subsidies under the FSR, as it would require information and data that might not be available or would be difficult to obtain. Therefore, an ad hoc approach to balancing will be necessary. This is likely to be complex, as it involves the balancing of competing policy objectives, many of which are challenging to quantify.
- 33 Therefore, setting low bars for subsidies to be found to improve the competitive position and thereby being deemed distortive is likely to result in FSR enforcement relying heavily on the balancing test under Article 6 of the FSR as the primary mechanism to discriminate between subsidies that warrant redressive actions and ‘unproblematic’ subsidies. Given the complexities of the balancing assessment in the FSR context, this is likely to make the outcome of cases highly unpredictable and will require the Commission to make a number of policy trade-offs.

¹⁹ Ibid., fn. 19.

²⁰ Ibid., para. 34.

²¹ Hornkohl, L. (2023), ‘Protecting the Internal Market From Subsidisation With the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?’, *Journal of European Competition Law and Practice*, p. 145.

- 34 The lack of a clear standard for distortions and risk of overenforcement by the Commission runs contrary to the stated aim of the Draft Guidelines to ‘foster the predictability’ of the FSR.²² This may risk undermining incentives for companies to engage in procompetitive conduct in the internal market, potentially hampering competition, innovation and investment incentives in the long term.

2.4 Summary of Oxera’s recommendations on the notion of competition and the standard for distortions

- 35 In Box 2.1 below we provide our recommendations on the standard for the assessment of distortive effects for the final version of the guidelines, which are in addition to our recommendations on cross-subsidisation (see section 3.2 of this response), and a tighter demonstration of how subsidies affect the behaviour of the undertaking in the internal market (see section 4 of this response).



Box 2.1 Recommendations on the notion of competition and the standard for distortions

We recommend that the final version of the guidelines clarify the welfare standard to be applied. This is necessary to provide predictability to companies on what subsidies are likely to be found to be problematic and what types of arguments may be taken into account by the Commission in FSR investigations.

Source: Oxera.

²² Draft Guidelines, para. 5.

3 Determining whether a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market

36 The first part of the test to determine whether a foreign subsidy is likely to cause a distortion in the internal market according to Article 4(1) and Article 27 of the FSR is to assess whether a foreign subsidy is liable to improve the competitive position of the undertaking in the internal market. In section 2.3 of the Draft Guidelines, the Commission sets out the proposed criteria that will be applied for the purposes of this assessment.

3.1 Overview of the approach proposed in the Draft Guidelines

37 The Draft Guidelines establish two main categories of subsidy for which the Commission may conclude that they improve the competitive position of the undertaking in the internal market:

- foreign subsidies used in the internal market (section 2.3.1 of the Draft Guidelines), i.e. when there is evidence that the undertaking 'uses or intends to use' the subsidy for its activities in the internal market;
- foreign subsidies intended for, or directed to, the internal market (section 2.3.2 of the Draft Guidelines), which would be determined based on an assessment of the purpose and scope of the subsidies in question.

38 In addition, for 'other subsidies', the Draft Guidelines set out an ad hoc approach to assess whether they would, individually or collectively,²³ lead to an improvement of the competitive position of the undertaking in the internal market (section 2.3.3 of the Draft Guidelines). The Draft Guidelines refer to the notion of 'cross-subsidisation',²⁴ and set out two instances where this may arise:²⁵

- if a subsidy is 'general or non-specific in its purpose' such that the undertaking is free to use the subsidy in any of its economic activities;
- if a subsidy is 'granted for activities that take place outside the Union' that 'frees up resources that the undertaking could use in any of its economic activities'.

39 The Draft Guidelines establish a standard of 'likelihood' that such cross-subsidisation would take place,²⁶ based on the 'ability and incentive' of the undertaking to do this.²⁷ The Commission proposes a number of 'legal or economic' factors for the assessment of the likelihood of a transfer, which tend to

²³ Draft Guidelines, para. 18.

²⁴ Draft Guidelines, para. 23 and fn. 14.

²⁵ Draft Guidelines, para. 23.

²⁶ Draft Guidelines, para. 24.

²⁷ Ibid., fn. 15.

demonstrate that cross-subsidisation is prevented or unlikely.²⁸ In other words, we understand that the Commission's position is that, even if a subsidy (or a collection of subsidies) is not directed to, intended for, or used in the internal market (or if it frees up resources), it could still improve the competitive position of the undertaking in the internal market, unless there are credible legal or economic factors that prevent or render the transfer unlikely.

- 40 For all types of subsidy, the Draft Guidelines indicate that they would be liable to improve the competitive position of the undertaking in the internal market only if they benefit²⁹ the economic activities of the undertaking in the internal market in a 'non-insignificant' manner.³⁰

3.2 Oxera's comments on the proposed approach

- 41 We set out below our comments on the approach proposed in the Draft Guidelines to determine whether a foreign subsidy is liable to improve the competitive position in the internal market.

3.2.1 The standard set out in the Draft Guidelines for cross-subsidisation, i.e. that of 'likelihood', as assessed on the basis of the 'ability and incentive' of the undertaking, is too broad

- 42 For subsidies that are not directed to, intended for, or used in, the internal market, the Draft Guidelines propose a standard of 'likelihood', i.e. the Commission will consider that an improvement of the competitive position in the internal market is deemed to exist if cross-subsidisation and a transfer of resource are found to be likely.³¹ To assess this likelihood, the Draft Guidelines clarify that the Commission 'may consider the ability and incentive' of the undertaking to cross-subsidise and transfer resources.³²

- 43 In our view, such a standard sets too low a bar, i.e. it could result in many subsidies (or a collection of subsidies) being erroneously found to improve the competitive position in the internal market.

- 44 For example, in the case of a profitable foreign group that fully owns the legal entities that are active in the internal market, in the absence of any 'applicable laws' preventing a transfer, it is likely that none of the 'negative' factors set out in paras 25–31 of the Draft Guidelines would be applicable to a range of subsidies. In particular, the 'negative' factors include restrictions on the likelihood of cross-subsidisation arising from the design of the foreign subsidy, the shareholding structure, third-party agreements (such as fiduciary duties) and sectoral laws,

²⁸ Ibid., paras 24–31.

²⁹ Draft Guidelines, para. 32.

³⁰ Ibid., para. 35.

³¹ Draft Guidelines, para. 24.

³² Ibid., fn. 15.

among others.³³ If the only other criterion used to assess the likelihood of a transfer to improve the competitive position of an undertaking in the internal market is that of the 'ability' and 'incentive' for the group to do so, potentially any subsidy or collection of subsidies risks being deemed 'likely' to do so.

45 Therefore, in our view, if the guidelines are to remain based on a standard of 'likelihood', reflecting the ability and incentive of undertakings to cross-subsidise and transfer funds to their EU operations, the Commission should set out a stricter set of conditions to demonstrate that both the ability and incentive are verified, and/or provide indications of the types of evidence that might be deemed acceptable to demonstrate that this would not be the case.

46 In order to demonstrate that, even if resources are freed up, there is no (or a very weak) incentive and ability to cross-subsidise, the types of evidence that could be presented include showing that there may be more profitable uses of the 'freed up' resources within the group (such as more profitable entities in jurisdictions outside the EU), a particular need for the funds within the group (such as for investment purposes), or the potential that the business units in the EU are relatively independent of the rest of the group, with limited intragroup transactions.

47 In addition, as highlighted in section 3.2.3 of this response, even if an undertaking is found to be likely to transfer resources to its activities in the internal market, it may still be possible to demonstrate that the terms and conditions of these transfers do not result in the benefit of the subsidies being passed on to the activities in the internal market, i.e. do not result in an improvement of the competitive position in the internal market.

3.2.2 The Draft Guidelines set out restrictive tests to determine whether subsidies free up resources and whether the design of subsidies prevents cross-subsidisation, which are likely to be very complex to implement in practice

48 For foreign subsidies that are not directed to, intended for, or used in, the internal market, the Draft Guidelines focus on two types of subsidy that may be found to improve the competitive position of the undertaking in the internal market, i.e. subsidies that are 'general or non-specific' in their purpose and those that are 'granted for activities that take place outside the Union', but that 'free up resources that the undertaking could use in any of its economic activities', as set out above.³⁴

49 In order to determine whether a subsidy frees up resources that could be used in any of its economic activities, the Draft Guidelines indicate that the Commission would consider whether it 'provides funds for investments that the undertaking would have likely undertaken even without the foreign subsidy'.³⁵ Such a criterion

³³ Ibid., paras 25–31.

³⁴ Draft Guidelines, para. 23.

³⁵ Draft Guidelines, fn. 14.

resembles closely the criteria applied in the state aid context to determine whether an (investment) aid measure is compatible, and particularly the criteria of necessity and the incentive effects of aid.³⁶

- 50 For both types of subsidy (i.e. general subsidies and those that free up resources), the Draft Guidelines also set out a test resembling the compatibility assessment in state aid to assess whether the 'design and conditions' of the subsidy prevent cross-subsidisation or make it unlikely. In particular, the Draft Guidelines set out that, if a foreign subsidy were granted to address a market failure outside the EU, it could be deemed to free up resources if 'the foreign subsidy manifestly exceeds the need to overcome that market failure'.³⁷ By contrast, subsidies designed to crowd in private investment would be less likely to be deemed problematic.³⁸ Again, this resembles the compatibility criteria of proportionality, necessity and in some cases the appropriateness of state aid measures.
- 51 We do not necessarily agree with the Draft Guidelines when it comes to determining whether certain foreign subsidies do, in fact, free up resources or make cross-subsidisation likely. For example, it is unclear why foreign subsidies that manifestly exceed the need to overcome a certain market failure would automatically be likely to result in a finding of cross-subsidisation. However, we agree with the Draft Guidelines when it comes to ruling out the possibility of cross-subsidisation on that basis, i.e. we agree that a foreign subsidy that is necessary and proportionate to address a market failure outside the EU is unlikely to result in cross-subsidisation. In other words, in our view, demonstrating that foreign subsidies do fulfil criteria that are analogous to the state aid compatibility criteria is a sufficient condition to rule out cross-subsidisation in most cases, but not a necessary condition.
- 52 Furthermore, regardless of the conclusive value of such an assessment, we note that, in the state aid context, analysing the necessity, proportionality and incentive effects (and appropriateness) of state aid measures or schemes is typically undertaken on a case-by-case and an ex ante basis prior to the measure(s) being granted.
- 53 In the context of the FSR, it is likely to be difficult to apply these criteria in practice, both due to the number of foreign subsidies/financial contributions that could be assessed in any given case, and due to the limitations around the information that is likely to be available to assess individual measures. As a result, we recommend

³⁶ Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 167 of 30.6.2023, p. 1. See, for example, European Commission (2022), 'Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022', 18 February, OJ C 80. See, in particular, sections 3.1.2 (incentive effect) and 3.2.1.1 (necessity).

³⁷ Draft Guidelines, fn. 16.

³⁸ Ibid.

that the final guidelines at least set out examples of indicators or analysis, besides the 'negative' criteria listed in paras 25–31, that could be evaluated in order to demonstrate that these principles are met (i.e. that subsidies do not free up resources and/or that they do not result in cross-subsidisation), based on higher-level information than is typically required in the context of state aid notifications (e.g. detailed funding gap calculations). For example, this could take the form of demonstrating that the level of the undertaking's profitability operating in the internal market is not 'excessive' (i.e. that it is in line with comparable companies in the EU).

3.2.3 The Draft Guidelines dismiss the relevance of transfer pricing rules for the purposes of establishing the improvement of the competitive position of the undertaking in the internal market

54 The Draft Guidelines indicate that '[i]n principle, the Commission considers transfer pricing rules not sufficient to prevent cross-subsidisation or to make it unlikely, since those rules exclusively concern the allocation of profit between legal entities of the same group for tax purposes'.³⁹

55 In principle, we agree that transfer pricing rules ('TP rules') were not designed specifically with a view to preventing the benefit of subsidies received by international groups from being channelled to specific legal entities within the group. However, we do not agree with the Commission that this makes TP rules irrelevant for the assessment under the FSR.

56 In particular, the 2022 OECD Transfer Pricing Guidelines ('the 2022 TP Guidelines')⁴⁰ highlight the role of the 'arm's length principle'. The guidelines set out the principles that should be followed to ensure that transfer pricing reflects the arm's length principle, i.e. in order to replicate the terms and conditions that would be agreed between independent enterprises.⁴¹ In particular, the 2022 TP Guidelines explain that:⁴²

[w]hen independent enterprises transact with each other, the conditions of their commercial and financial relations (e.g. the price of goods transferred or services provided and the conditions of the transfer or provision) ordinarily **are determined by market forces**. [emphasis added]

57 In summary, the 2022 TP Guidelines provide a framework for applying the arm's length principle, which aims to replicate the outcome that would be observed between independent entities exposed to market forces.

³⁹ Ibid., para. 30.

⁴⁰ Organisation for Economic Co-operation and Development (2022), 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations', January, OECD Publishing, Paris, available at: <https://doi.org/10.1787/0e655865-en>.

⁴¹ Ibid., para. 1.6.

⁴² Ibid., para. 1.2.

- 58 One of the defining features of a foreign subsidy under the FSR is that it 'confers a benefit on an undertaking'.⁴³ The FSR itself explains that '[a] financial contribution should be considered to confer a benefit on an undertaking **if it could not have been obtained under normal market conditions**'.⁴⁴ [emphasis added]
- 59 Therefore, TP rules, which aim to replicate outcomes determined by market forces, can be relevant in the context of the FSR, where a 'benefit' is defined as a deviation from market conditions.
- 60 We therefore recommend that, in the final version of the Guidelines, it is recognised that, under certain conditions, TP rules can be used to assess whether foreign subsidies are likely to lead to an improvement of the competitive position of the undertaking in the internal market.
- 61 This does **not** mean that it should be sufficient to demonstrate that intra-group transactions are in line with the arm's length principle to rule out the improvement of the competitive position of the undertaking in the internal market. Indeed, it is possible that, in some circumstances, the terms of intra-group transactions and transfers will be found to be in line with those that would be agreed between independent companies, but that these will be affected by the presence of foreign subsidies granted by third countries (i.e. for TP rules based on costs, that the cost base could be lower than otherwise due to the presence of foreign subsidies). Therefore, adjustments may need to be incorporated in the FSR context prior to applying the standard TP rules.
- 62 In this regard, we note that the first final decision adopted by the Commission under the FSR (i.e. the *e&/PPF* Decision) recognised that it was possible for arm's length transactions to directly or indirectly 'channel' subsidies:⁴⁵
- A Relevant Transaction which has been entered into on Arm's Length Terms shall be presumed to be on market terms within the meaning of paragraph 10 unless, in view of all relevant circumstances, the Relevant Transaction allows the Notifying Party, any of its Affiliated Undertakings, the EIA or any EIA Affiliate to, directly or indirectly, channel any Foreign Subsidies to the Target Group [...]
- 63 This recognises that compliance with the arm's length principle is relevant in order to assess whether the benefits of foreign subsidies are channelled to improve the undertaking's competitive position in the internal market.

⁴³ FSR, Art. 3(1).

⁴⁴ FSR, recital 13.

⁴⁵ European Commission (2024), 'Commission Decision of 24.9.2024 finding that, with the binding commitments, the foreign subsidies in the concentration do not distort the internal market (Case FS.100011 – e&/PPF Telecom Group)', 24 September, C(2024) 6745 (final), para. 11 of the Commitments annexed to the Decision. Hereinafter 'the *e&/PPF* Decision'.

64 Therefore, in our view, it should be possible to demonstrate that foreign subsidies granted outside of the EU do not result in an improvement of the competitive position of the undertaking in the internal market if:

- it can be demonstrated that the relevant transactions (i.e. those that could, in principle, channel the benefits of the subsidies in question) are in line with the arm's length principle; **and**
- there is no mechanism whereby the arm's length terms would be affected by the granting of the subsidies in question, such that they appropriately reflect 'market terms' within the meaning of the FSR.

65 In this context, we recommend that the final version of the Guidelines recognises that TP rules can, in theory, be deemed suitable for this purpose.

3.3 Summary of Oxera's recommendations on the assessment of the improvement of the competitive position in the internal market

66 Overall, we consider that the approach proposed in the Draft Guidelines to determine the existence of an improvement in the competitive position in the internal market is too broad, and sets too low a bar. This is because, in addition to foreign subsidies that are used in, intended for, or directed to, the internal market, the Draft Guidelines set out a broad test for 'other subsidies'.

67 The only 'factors' set out in the Draft Guidelines that would enable the absence of cross-subsidisation to be demonstrated for these 'other subsidies' are restrictive as they encompass a limited set of very specific situations and, for some of them, would require an assessment that would be difficult to carry out in practice. This results in a very broad set of subsidies, whether or not they are linked (directly or indirectly) to the economic activities in the internal market being potentially found to improve the competitive position of the undertaking in the internal market.

68 The Draft Guidelines do not temper this broad remit with mechanisms that would enable any transfers of funds from non-EU activities to activities in the internal market to be shown to take place on market terms, thereby not allowing these economic activities to 'benefit, directly or indirectly'⁴⁶ from the subsidies.

69 In particular, in our view, using methodologies derived from TP analysis (with adjustments where needed), it should be possible to demonstrate that no benefit is passed on to the economic activities in the internal market, based on the fact that the relevant transfers of funds and resources take place on market terms.

70 Finally, we note that, if such a broad assessment were to be applied to determine the existence of an improvement of the competitive position in the internal market, it would also render the assessment of the second step (i.e. the actual or potential distortions to competition) more complex. In particular, in the absence of a clear

⁴⁶ Draft Guidelines, para. 18.

and demonstrable mechanism for funds to be transferred to the internal market, it is not possible to determine how such funds would affect the behaviour of the undertaking at all, let alone in a way that 'alters' or 'interferes with' the competitive dynamics to the detriment of other economic actors.⁴⁷

71

Box 3.1 summarises our key recommendations in this regard.



Box 3.1 Recommendations on assessing the improvement of the competitive position of an undertaking in the internal market

1. **Revise the standard to demonstrate the likelihood of cross-subsidisation, or provide guidance on ways to demonstrate that the ability and incentive to cross-subsidise are not met**

The Commission should set out a stricter set of conditions to demonstrate that both the ability and incentive are present, and/or provide indications of the type of evidence that might be deemed acceptable to demonstrate that this would not be the case.

2. **Provide guidance on the evidence that may be necessary to demonstrate that foreign subsidies do not free up resources, or that their design renders cross-subsidisation unlikely**

At the very least, the final version of the guidelines should include indicators that could be used to determine whether subsidies are unlikely to free up resources or result in cross-subsidisation. This could include demonstrating that the undertaking's profitability in the internal market is in line with that of comparable companies in the EU.

3. **Recognise the relevance of transfer pricing methodologies, subject to certain adjustments if needed**

In order to assess whether the competitive position of the undertaking in the internal market has improved, under certain conditions TP rules could be used, with adjustments, where needed, to take into account foreign subsidies that have been received.

Source: Oxera.

⁴⁷ Draft Guidelines, para. 38.

4 Actual or potential effect on competition in the internal market

4.1 Overview of the approach proposed in the Draft Guidelines

72 As set out in section 2, in order to assess the second step of the test for distortions, i.e. the existence of an actual or potential negative effect on competition, the Draft Guidelines propose that there is an appreciable 'alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market'.⁴⁸

73 To determine whether such an alteration or interference is present, the Commission proposes a two-step test:⁴⁹

- first, to test whether the foreign subsidies have a likely effect on the behaviour of the undertaking in the internal market;⁵⁰
- second, to test whether, as a result, there is an alteration of interference with competitive dynamics to the detriment of other economic actors.⁵¹

74 In the sub-sections below, we present our comments and recommendations in relation to the assessment of the actual or potential negative effect on competition in the internal market, i.e. the two steps proposed.

4.2 Oxera's comments on the proposed approach

4.2.1 The Draft Guidelines do not set out a sufficiently robust methodology to relate foreign subsidies to specific behaviours (i.e. the first step)

75 As a principle, we consider it reasonable for the first step of the assessment to consist of determining how the behaviour of the undertaking is affected by those subsidies that are found to improve its competitive position in the internal market. Indeed, any robust 'theory of harm' linking foreign subsidies to distortive effects on 'economic actors' needs to be based on a description of how the behaviour of the beneficiary is affected before assessing whether this behaviour can result in competitive distortions.

76 In addition, a number of the 'indicators' proposed in the Draft Guidelines for this assessment are reasonable, such as the nature, frequency or periodicity of the

⁴⁸ Draft Guidelines, para. 38.

⁴⁹ Ibid., para. 47.

⁵⁰ Ibid., section 2.4.3.1.

⁵¹ Ibid., section 2.4.3.2.

foreign subsidies in question, as well as the scope, purpose and conditions of the subsidies.⁵²

77 However, we have two main comments in relation to the approach proposed in the Draft Guidelines.

78 First, in terms of some of the indicators proposed by the Commission in the case of foreign subsidies with no specific purpose or conditions attached to them or that are too general to draw any conclusion, such as the nature, frequency or periodicity of the foreign subsidies, the Commission does not sufficiently set out how these indicators would inform the assessment. For example, focusing on the changes in behaviour based on pricing and output decisions, the Draft Guidelines first indicate that such changes are 'more likely to stem from foreign subsidies linked to the level of the undertaking's economic activity'.⁵³ However, the subsequent section of the Draft Guidelines states the following:

Foreign subsidies in the form of **recurring payments** (e.g. periodically payable grants, recurrent loans, credit facilities) granted for the acquisition of a certain input may equally affect pricing incentives or output decisions. Foreign subsidies which consist in the transfer of a **fixed amount** (e.g. a one-off grant or loan for a fixed amount) may give flexibility to the subsidised undertaking as to their use, including also affecting pricing decisions. Other changes of behaviour such as investments, expansions into new activities or acquisitions may stem from **fixed subsidies, which may in turn indirectly affect prices** to the extent they alter the undertaking's variable cost structure.⁵⁴ [emphasis added]

79 As a result, the Draft Guidelines appear to deprive the indicators based on the frequency and periodicity of subsidies of any meaningful insights, as all types of subsidy with respect to these indicators can be found equally likely to affect (directly or indirectly) pricing decisions.

80 This appears to be inconsistent with the Commission's enforcement of state aid rules, where operating aid, i.e. aid that is 'aimed to reduce an undertaking's current expenditure',⁵⁵ is generally considered to be more distortive than investment aid, and is typically allowed only in specific cases and subject to stricter conditions.⁵⁶

⁵² Draft Guidelines, paras 49–53.

⁵³ Ibid., para. 52.

⁵⁴ Ibid.

⁵⁵ As defined, for example, in the 2021 Regional Aid Guidelines: European Commission (2021), 'Communication from the Commission Guidelines on regional State aid', 29 April, OJ C 153, para. 19(22), available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0429\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0429(01)).

⁵⁶ For example, the 2021 Regional Aid Guidelines explain that operating aid schemes would be appropriate only in cases where 'obstacles to attracting or maintaining economic activity may be so severe or permanent that investment aid alone is not sufficient for these areas to develop. See *ibid.*, para. 54. Similarly, the 2014 Aviation Guidelines initially envisaged that only operating aid to airports may be compatible for a transitional period of ten years, while investment aid could be allowed in the longer term. The 2014 Aviation Guidelines also state that 'operating aid constitutes, in principle, a very distortive form of aid and can only be authorised under exceptional circumstances'. See European Commission (2014), 'Communication from the Commission — Guidelines on State aid to airports and

- 81 While the link between variable/operating subsidies and prices can be more easily drawn, the way in which a lump sum subsidy (e.g. a subsidised loan or a grant) will affect prices is less obvious. In particular, a subsidised investment may or may not lead to greater efficiency; more favourable working capital management may not necessarily translate into more aggressive pricing; and a lower weighted average cost of capital does not necessarily translate into lower prices. In the final version of the guidelines, we recommend that differences in the degree of possible distortions resulting from recurring as opposed to fixed subsidies is recognised.
- 82 Second, even if the proposed indicators allowed the change in behaviour that is likely to be caused by specific subsidies of a certain nature to be robustly and reliably determined, with a certain periodicity and frequency, we note that the Commission's proposed approach to the improvement of the competitive position would not necessarily allow such indicators to play a role.
- 83 For example, the approach described in section 3.1 of this response can lead to a finding that such an improvement is deemed to exist based on the 'likelihood' that the undertaking would, given its incentive and ability to do so, use a collection of general subsidies and subsidies that free up funds in order to benefit its activities in the internal market. In other words, the Commission's finding of an improvement could be based on an amalgamation of subsidies with only an indirect effect on the position of the undertaking in the internal market.
- 84 In such a case, it may not always be possible to rely on the indicators to describe the likely change in behaviour of the undertaking in the internal market. This further emphasises the need for the Commission to adopt a more robust approach to the first step of the assessment of the negative impact, and to clearly explain and demonstrate the mechanisms through which the benefit of subsidies would be passed on to the activities in the internal market.
- 4.2.2 In the assessment of whether there is an alteration of, or interference with, competitive dynamics to the detriment of other economic actors (i.e. the second step), additional clarity is needed in the context of foreign subsidies facilitating the acquisition of other undertakings
- 85 In section 2.4.4.1 of the Draft Guidelines, the Commission discusses distortions of competition relating to the acquisition of other undertakings. In particular, the Draft Guidelines set out that, by enabling the subsidised bidder to offer more attractive terms (i.e. the affected behaviour), foreign subsidies could result in crowding out other investors by outbidding or deterring them (i.e. the negative impact).⁵⁷
- 86 The Draft Guidelines set out a two-step test to assess the presence of deterrence or outbidding effects: first, actual or potential other investors are identified;

airlines', 4 April, OJ C 99, paras 13 and 112, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0404\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0404(01)).

⁵⁷ Draft Guidelines, paras 60–61.

second, the Commission determines whether the offer submitted by the subsidised undertaking is likely to have led to a distortive outcome.⁵⁸ If there were other bidders, this could be the case 'when the consideration the subsidised undertaking would be willing to offer, absent the foreign subsidy, would be less than the consideration the second highest bidder offered'.⁵⁹ If no other bidders participated, the Commission 'may, for instance, benchmark the price offered with the price of similar past acquisitions, if available. The Commission may also assess the valuation model used [...] in order to assess deterrence'.⁶⁰

- 87 We welcome the indications provided in the Draft Guidelines as to the approach that the Commission will follow to assess distortions to the acquisition. However, we recommend that greater clarity is provided in the final version of the Guidelines in relation to the following two aspects. We note that these comments may also be relevant in the context of public procurements (in section 2.5 of the Draft Guidelines).
- 88 First, as regards the outbidding of other bidders that have actually submitted a bid, in some cases it may be demonstrated that, in the absence of foreign subsidies, the consideration offered by the subsidised undertaking would still have been sufficient to secure the acquisition (i.e. it would have had no impact on the ranking of the bids). It is not clear from the wording of the Draft Guidelines whether in this case the subsidies should be found to have had distortive effects. Indeed, while the Draft Guidelines indicate that there would be crowding out if the consideration of the subsidised bidder were less than that of the second-highest bidder in the absence of subsidies,⁶¹ this statement is followed by another, regarding 'other factors' that may be relevant for the analysis.⁶²
- 89 Therefore, we would welcome an explicit clarification of this aspect, in terms of a clear indication of whether it may be considered that, if the absence of subsidies would not have resulted in a different ranking of the bids, the Commission would conclude that there are no distortive effects on the basis of outbidding other actual bidders, or if other 'indirect' effects on the value chain should be considered in the assessment.
- 90 Second, as regards the possibility that foreign subsidies could have deterred other potential bidders from participating (if there were no other bidders), we agree that comparable past acquisitions as well as the valuation models used by the undertaking are relevant to consider.⁶³
- 91 However, the Commission should clarify whether, in such cases, a finding that a foreign subsidy (or a collection of foreign subsidies) had an impact on the valuation, however minor, would suffice to conclude that it had a distortive effect

⁵⁸ Ibid., paras 62–63.

⁵⁹ Ibid., para. 63.

⁶⁰ Ibid., para. 64.

⁶¹ Ibid., para. 63.

⁶² Ibid.

⁶³ Ibid., para. 64.

by potentially deterring other potential bidders. This could lead to an erroneous conclusion that the subsidies would have distorted the acquisition, despite their effect on the valuation being minor.

92 In this regard, we make three further recommendations in relation to the Draft Guidelines:

- first, we recommend that the final guidelines clarify that, when assessing the valuations based on similar past acquisitions and on valuation models, a range of outcomes, as opposed to a specific point estimate, could be consistent with undistorted market outcomes;
- second, in cases where no other bidders submit an offer, we recommend that the final guidelines also set out additional evidence that may be considered by the Commission to demonstrate that the probability that there would have been other bidders, absent the potential foreign subsidies under assessment, is sufficiently low;
- third, we suggest that the situation where the foreign subsidies enable the transaction in the first place (i.e. where there would be no deal without the subsidies regardless of the valuation), and the consequent implications in terms of the effect on competition, are explicitly discussed in the final version of the guidelines. This situation was assessed by the Commission in the *e&/PPF* case.⁶⁴

4.3 Summary of Oxera's comments and recommendations

93 In Box 4.1 below we summarise our recommendations in relation to the proposed methodologies to relate foreign subsidies to specific behaviours and the assessment of the effects on competition. In particular, we highlight the importance of the use of objective indicators and recommend that the Commission clarifies its position in the context of foreign subsidies facilitating the acquisition of other undertakings.

⁶⁴ European Commission (2024), Case FS.100011 – *e&/PPF Telecom Group*, para. 281.



Box 4.1 Recommendations on assessing actual and potential effects on competition

1. Clarify and recommend the use of objective indicators in the assessment

In order to ensure that there is a sufficiently robust methodology to relate subsidies to specific behaviours, we recommend that the Commission sets out a clear framework of relevant indicators that could be used in the assessment, assigning a primary role to indicators such as the nature, frequency and periodicity of the foreign subsidies. Furthermore, the different degree of potential distortions resulting from recurring as opposed to one-off subsidies should be adequately recognised.

2. Clarify the Commission's view on the distortions of competition relating to the acquisitions of other undertakings

We recommend that the final version of the guidelines (i) clarifies the Commission's view in case the foreign subsidies are found not to affect the ranking of the bids; (ii) considers a range of valuation outcomes, rather than a single figure, when assessing the distortive effects of the foreign subsidies on other potential bidders; (iii) sets out additional evidence that may be considered by the Commission in cases where no other bidders submit an offer to demonstrate that the probability that there would have been other bidders, absent the potential foreign subsidies under assessment, is sufficiently low; and (iv) discusses the implications of the foreign subsidies themselves enabling the transaction in the first place.

Source: Oxera.



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