GSMA

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# GSMA Feedback on the draft FSR Guidelines

The GSMA welcomes the European Commission's (the "Commission") consultation on the draft Guidelines on the implementation of the Foreign Subsidies Regulation ("FSR Guidelines"). The draft FSR Guidelines are recognised as a positive step, offering much-needed practical guidance on several critical issues of the Commission's analytical approach. Specifically, the draft FSR Guidelines address and provide clarification on: (i) the finding of a distortion of competition caused by a foreign subsidy, (ii) the balancing test, and (iii) the Commission's power to request the prior notification of below the thresholds concentrations or of foreign financial contributions in public procurement procedures.

As highlighted by the GSMA in prior submissions and discussions with the Commission, the FSR has imposed notable new obligations on companies operating in the internal market. In particular, the FSR has introduced extensive monitoring and reporting obligations for foreign financial contributions, which are typically grounded in the routine activities of companies, such as telecommunication operators, both within and beyond the European Union. Therefore, the publication of the draft FSR Guidelines demonstrates that the Commission is on the right track towards providing greater predictability and transparency regarding this instrument. Nevertheless, the GSMA emphasises again the need for further procedural clarifications, which we will elaborate on briefly at the end of our submission.

Overall, the analytical approach adopted in the draft FSR Guidelines allows for further development and adaptation based on practical experience, thereby strengthening the necessary flexibility of the FSR. However, there is still room for more clarification. In order to help address the uncertainty surrounding individual decisions, the Commission should provide ongoing guidance based on concrete findings from its case practice, e.g., by publishing decisions promptly and continuously updating the Q&A materials. Given some of the uncertainty in individual decisions, it is crucial that the level of protection envisioned in the FSR is not weakened.

GSMA's remarks on the draft FSR Guidelines are structured according to the sections of the draft FSR Guidelines:

## 1) Draft FSR Guidelines: Section 2 Application of the criteria for determining the existence of a distortion according to articles 4(1) and 27 of Regulation 2022/2560

This section provides very useful guidance on the situations where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, the foreign subsidy can actually or potentially negatively affect competition in the internal market. In our view, the inclusion of concrete illustrations drawn from enforcement practice (e.g., the recent e& decision) is indispensable for undertakings seeking to achieve FSR compliance, because it enables them to conduct a robust, forward-looking risk assessment. We would therefore respectfully encourage the Commission to take into account the case experience acquired by enforcing FSR and, in that light, to publish relevant decisions and update the existing Q&As promptly and systematically.

As regards **the criteria for determining whether a foreign subsidy is liable to improve the competitive position of the undertaking** in the internal market:

- Paras. 21 and 22 of the draft FSR Guidelines establish that subsidies intended to support undertakings' activities in the internal market are typically liable to improve the undertakings' competitive position in the market. The Commission provides helpful practical examples: "*when the foreign subsidy is granted to support economic activities of the undertaking in the internal market (e.g. to subsidise the costs of manufacturing in the internal market, distribution activities that take place in the internal market, the provision of services to undertakings in the internal market or technology licencing to licensees active in the internal market) or when it is conditional on events related to an economic activity in the internal market (e.g. subsidies conditioned on investments or acquisitions in the internal market*)". However, these examples relate to common practices of shareholders' decisions in a company that cannot, per se, be considered as an advantage to the competitive position of an undertaking in the internal market. In these instances, a case-by-case analysis is necessary. The Commission should clarify that, where investments are made on market terms and in accordance with fair business practice, there should be no presumption of advantage, but the Commission must assess on a case-by-case basis. Such clarification is essential to avoid creating legal uncertainty regarding investors' decisions in the EU. In addition, it would be useful if the Commission provided clarification on how an undertaking may effectively rebut an allegation that a subsidy, which originally was not intended for use within the internal market, has, in practice, been so utilised. Clear guidance on the types of evidence, documentation, or factual circumstances that the Commission considers sufficient to demonstrate the absence of such use would enable undertakings to better ensure FSR compliance.

- The specific considerations of Section 2.3.3. are detailed and very useful to understand the Commission's analysis relating to situations where the foreign subsidy is neither intended nor directed at the internal market, and there is no clear indication as to how the undertaking uses or intends to use it. In fact, the factors listed in paras. 25-31 are very relevant to the analysis. However, these factors should always be present in the Commission's case-by-case analysis – not only when it is not clear if the subsidy is intended to improve the competitive position of an undertaking in the internal market. Moreover, certain elements could still benefit from further refinement. For instance, the legal design of the subsidy could be explicitly included as an assessment criterion. The legal structure and conditions of a subsidy can be highly indicative for determining its ultimate beneficiary or the geographical destination. Therefore, they provide valuable insight into a potential distortion. Also, the specific risk of a likely insolvency or bankruptcy in the near future should be assessed. This is critical where no formal insolvency or bankruptcy proceedings have yet been initiated, as in such circumstances, there may be opportunities or even incentives for the beneficiary to transfer the subsidy to another jurisdiction, thereby shielding it from claims by local creditors.

The GSMA welcomes the general guidance on the analysis of the negative impacts of subsidies. In particular, the clarification that, in any event, the potential subsidies need to have a likely negative impact on the playing field in the internal market, "*alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market*". However, the legal standard to establish the link between the existence of the subsidy, the improved competitive position and the negative impact gives the Commission a wide margin of discretion, i.e., the Commission only needs to prove a "*reasonable link*" (para. 41), and when there is no need to show actual impact (para. 42), the draft Guidelines do not clarify if there is a need for the Commission to at least prove a "*strong probability of an impact*". Therefore, further clarification is welcome.

Lastly, the criteria for determining when a foreign subsidy causes or risks causing a distortion in the internal market in the context of public procurement procedures are also very useful. As expressed before, the Commission has a wide margin of discretion to prove a negative effect of a subsidy, as the test is whether the subsidy enables "*actually or potentially*" an economic operator to submit an unduly advantageous tender. Thus, the Commission should conduct a careful assessment. Considering this, the test should prove a "*strong probability of an impact*", rather than just a potential impact (para. 79).

2) **Draft FSR Guidelines: Section 3 Application of the balancing test in accordance with Article 6 of the Regulation 2022/2560**

The GSMA welcomes the guidance on the positive and negative effects to be considered in the balancing test by the Commission. In particular, and despite the fact that there is still room for improvement, the information on the burden of proof, the methodology for weighing the evidence, and the deadlines is helpful. Nevertheless, greater openness regarding the quantification of the effects of financial contributions would be desirable. Even if the effects of a financial contribution cannot always be quantified, the Commission should not dismiss the idea outright. Further, GSMA observes that the burden of proving positive effects placed on the parties is different compared to the burden for proving distortion of competition by the Commission. Whilst the Commission has a wide margin of discretion in proving the harm through "*reasonable*" or "*possible*" standards, in the effects analysis, the Commission requires from the parties a higher degree of likelihood: "*likely to lead to a change in the behaviour…*" (para. 118; *see also* para. 135). In coherence with GSMA's arguments on standards of proof in merger control, the Commission should set proportionate standards of proof for all the parties involved in the analysis. However, the balancing test as a whole must not result in foreign subsidies being approved if the EU market is already adequately supplied by EU-based or non-subsidised suppliers.

3) **Draft FSR Guidelines: Section 4 Application of the Commission's power to request the prior notification of any concentration according to Article 21(5) of Regulation 2022/2560, or foreign financial contributions received by an economic operator in a public procurement procedure according to Article 29(8) of Regulation 2022/2560**

The GSMA appreciates the additional guidance on this section. However, similar to GSMA's position on competition authorities' call-in powers in merger control for concentrations below the established legal thresholds, GSMA believes that Articles 21 and 29 of the FSR Regulation create legal uncertainty. While this tool can be beneficial in achieving the objectives of the FSR, it also places a significant burden on affected undertakings, which in some cases may have no indication that the Commission has identified their case, in particular if it is a public procurement procedure, as liable to cause a distortion in the internal market. Thus, the Commission must apply a balanced and cautious approach when exercising its margin for intervention. In doing so, the Commission should act with foresight, particularly regarding the timing of intervention.

Generally, it is essential, in light of increasing global competition and geopolitical challenges, that European companies are effectively protected from unequal competitive conditions resulting from third-country interference. That being said, the Commission should consider a wider revision of the FSR Regulation to ensure legal certainty and preserve the attractiveness of the internal market for EU and non-EU companies. We elaborate on some of the revisions we deem necessary below.

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While the GSMA wants to focus on sharing its views on the draft FSR Guidelines in this response, it is important to note that GSMA members have, to date, had only limited exposure to the substantive provisions of the FSR. Accordingly, the GSMA welcomes this opportunity to raise several additional issues which, although not explicitly addressed in the draft FSR Guidelines, are highly relevant to the day-to-day operations of (telecommunications) companies across Europe. This includes, as detailed in our previous submission(s), notably in our feedback on the FSR draft Implementing Regulation, the following:

- **Reporting obligations**: The current system requires companies to conduct systematic and proactive monitoring and analysis of financial transactions generated by routine group activities. This process results in considerable expenses for GSMA members compared to the limited concerns identified in specific instances. The GSMA therefore recommends streamlining the existing reporting requirements related to foreign financial contributions for concentrations or public procurement notifications, making them more targeted and efficient by limiting them to particular types of subsidies and cases with a high probability of causing market distortions. Further, more practical guidance on the application of exemptions would be welcomed.

- **Public procurement procedures**: There is a significant inconsistency regarding the requirements to declare when notification thresholds are not reached. Under the current regulations, declarations to public procurement authorities necessitate more comprehensive data collection compared to the notification obligations applicable when thresholds are met, resulting in additional administrative burdens for companies. Furthermore, many public authorities still have limited experience with the FSR, and there have been cases where tender notices omit references to the obligation to submit an FSR notification or declaration. The Commission should ensure that national authorities enforce these rules appropriately, without imposing disproportionate burdens on companies seeking to comply with the FSR. This becomes obvious, considering that many authorities are not yet fully aligned with the official requirements set out in the FSR and its Implementing Regulation. For instance, some national authorities request information from bidders that goes beyond what is legally required, or they mandate the use of forms that differ from the official Form FS-PP. In other cases, authorities ask for FSR notifications or declarations even when the relevant financial thresholds triggering such obligations are not met, sometimes including these requests as part of the general commercial tender requirements.

- **Scope of the FSR**: The Commission should reconsider whether companies whose ultimate parent entities have their headquarters in the EU (or a country that has a free trade agreement covering subsidies with the EU) should be subject to notification requirements, as they are unlikely to receive significant foreign subsidies distorting the internal market. Considering this, the broad notification and reporting obligations appear disproportionate.

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