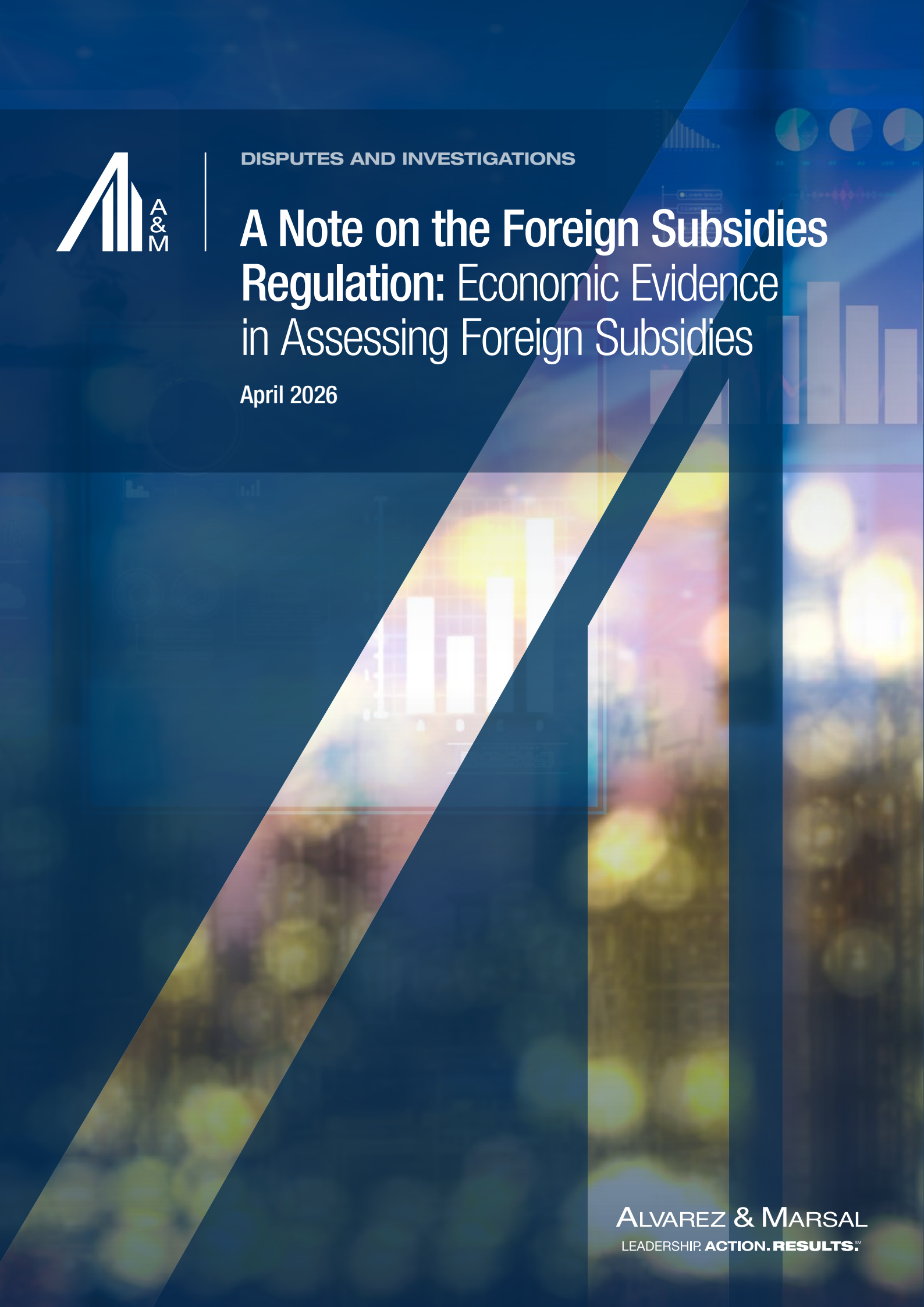
DISPUTES AND INVESTIGATIONS

A Note on the Foreign Subsidies Regulation: Economic Evidence in Assessing Foreign Subsidies

April 2026



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1 What is the FSR and what makes it unique

1.1 Brief overview

The EU's Foreign Subsidies Regulation (FSR) empowers the European Commission (EC) to scrutinise financial support granted by non-EU public authorities to undertakings active in the EU internal market.[1] The regime became fully applicable in July 2023. In January 2026, the EC published the first FSR guidelines, providing clarifications on its application.

To classify as a "foreign subsidy," a foreign financial contribution (FFC) must (i) confer a benefit not obtainable on market terms, and (ii) be specific to one or more undertakings or industries.[2]

Where the relevant thresholds are met, undertakings must notify the EC of certain concentrations involving an EU-established party and participation in large public tender procedures (see Table 2 in Appendix A).

The notification obligation is broad. FFCs include not only grants, loans, and guarantees, but also revenue foregone (such as tax measures) and commercial transactions with state-owned enterprises (SOE) on non-market terms, ensuring comprehensive disclosure.

Following notification, the EC conducts a preliminary review to determine, on a case-by-case basis, whether to initiate an in-depth investigation.[3] That investigation follows a two-step assessment: first, whether the foreign subsidy is liable to improve the undertaking's competitive position in the internal market, and second, whether such improvement actually or potentially distorts competition.

Where both conditions are met, the EC may accept commitments proposed by the parties during the in-depth investigation. Article 5 of the regulation lists subsidies that are most likely to distort competition. In these cases, the negative effects are presumed, and the burden of proof is on the parties to rebut that presumption, if they wish to do so.[4]

Where the EC identifies a potential distortion of competition, the undertaking may rely on the balancing test outlined in Article 6 to show that the foreign subsidy's positive effects outweigh that distortion, including by addressing market failures or advancing wider EU policy objectives.

Notably, the FSR guidelines indicate that the foreign subsidy does not need to be the sole cause of the competitive distortion, nor must the EC quantify the precise impact. The standard requires only that the effect be "appreciable" rather than of "serious nature," and the EC is not obliged to conduct a detailed market analysis. In contrast, the balancing test requires rigorous economic and financial analysis to meet the high evidentiary burden the EC requires. Also, there is no *de minimis* exception based on market share or competitive significance once the notification thresholds are met.

This note focuses on the impact of the FSR on concentrations.

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1 While State aid granted by EU Member States has long been subject to Commission control, comparable support from third countries previously escaped review.

2 Regulation recitals 13-14 and Article 3(1).

3 For concentrations, this decision must be taken within 25 working days of complete notification. For public procurement, the deadline is 20 working days (extendable by 10 working days upon request).

4 Article 5 lists the following five: (i) subsidies to ailing undertakings without viable restructuring; (ii) unlimited guarantees; (iii) non-OECD-compliant export financing; (iv) subsidies directly facilitating the notified concentration; and (v) subsidies enabling an unduly advantageous tender. Undertakings benefiting from these categories face near-automatic in-depth investigation and the burden of proof is reversed onto them.

1.2 Concentration facts & figures

1.2.1 Industries and HQs

The EC publishes high level FSR concentration data on its website. This includes the companies involved, the industry or industries they are involved in, and at which stage the case is (e.g. notification, in-depth investigation, closed). The EC has so far not published an equivalent FSR procurement dataset.

There was a total of 249 cases available in the data as per 2 April 2026, involving a total of 550 companies.

We processed this data to provide an indication of which industries appear to be most affected. We have used the data as provided by the EC, and only did one correction: the industry classifiers are a mix between old and new NACE industry codes. We have ensured consistency and replaced the old NACE industry codes with new ones, where appropriate.

Where companies involved are assigned to multiple industries, we counted them under each industry separate (e.g. if a company is involved in manufacturing and wholesale trade, we counted it in both categories separate).

Companies involved in manufacturing appear to be the most prominent (roughly 30%). This is followed by companies involved in wholesale and retail trade (roughly 19%), and companies involved in financial and insurance activities (roughly 11%).

We also provide an indication of the headquarters (HQ) locations of companies involved. The data does not include information on the buyers' and sellers' HQ (but the case titles include some version of the names of the companies). To get a feel for where buyers and sellers involved in FSR cases have their HQ in, we classified the companies into their respective HQ on a country level. The purpose is not to provide an exact break-down, but rather to provide an indicative overview of how FSR affects companies around the world.

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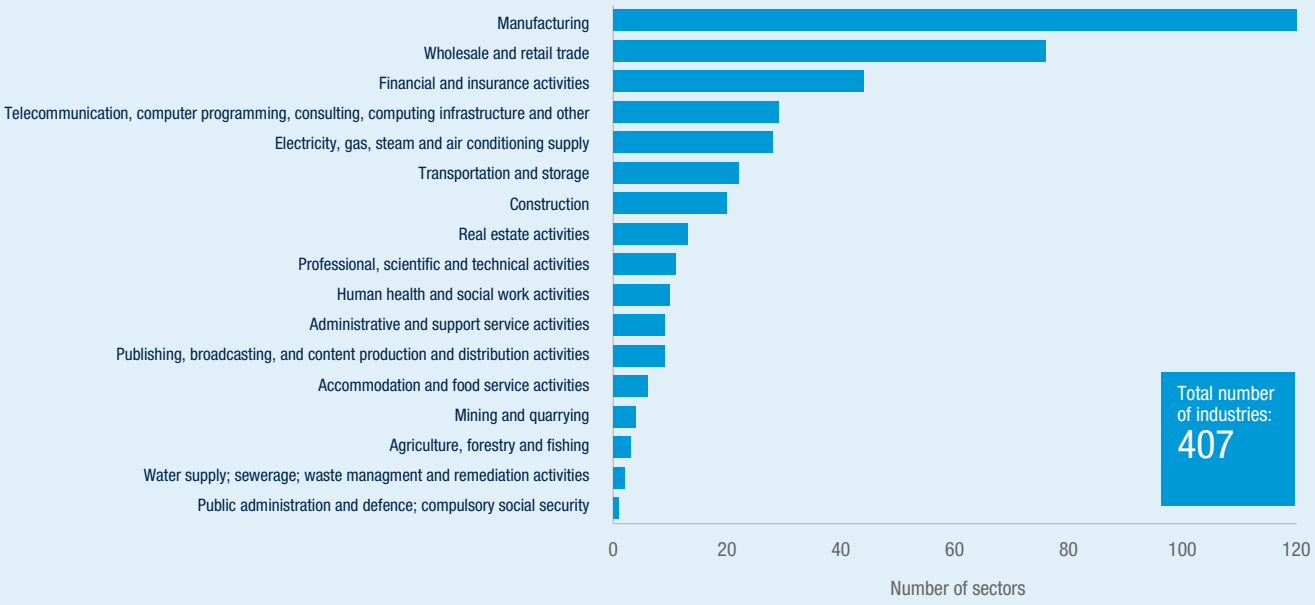
We note that, for some companies, identifying a single HQ location is not always straightforward, so a degree of judgment was required. We also identified a consistent pattern in the case titles whereby from the case title the company listed first is the buyer and the company listed thereafter is the seller. To identify the headquarters of the 550 companies involved, we used an AI agent based on Anthropic and OpenAI models. We were able to determine headquarters information for 548 of them. We then manually cross-checked a random sample of 80 companies, representing about 15% of the classifications, and found that all countries had been identified correctly, subject to the judgment calls noted above.

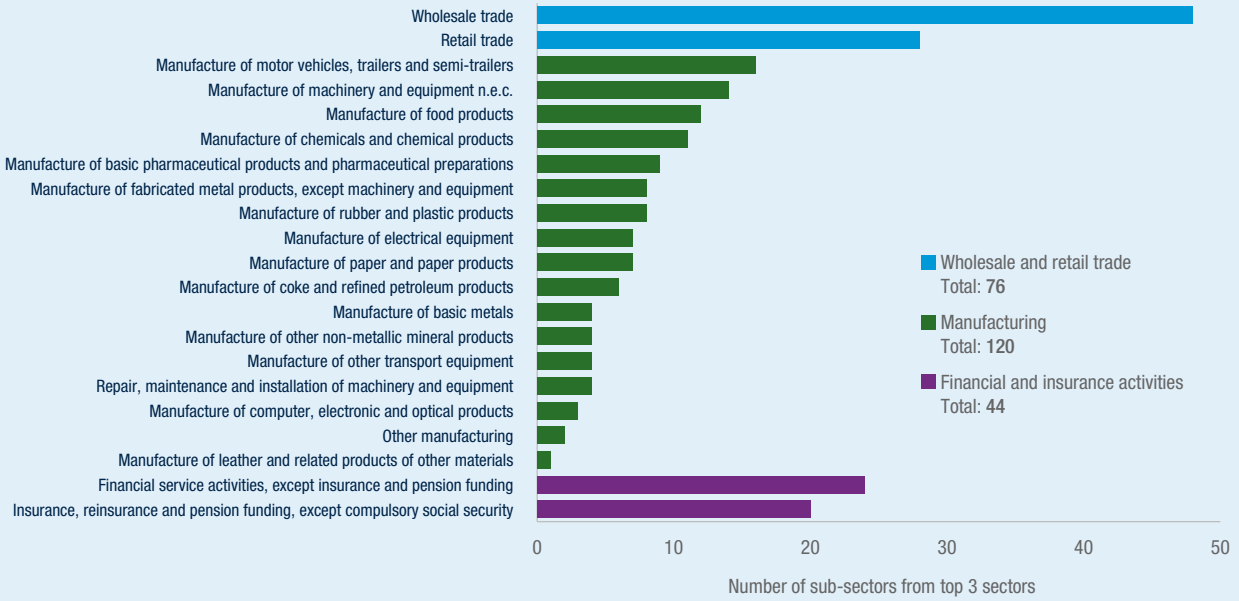
Buyers with a HQ located in the US are the largest category (roughly 27%). This is followed by France (roughly 11%), Germany (roughly 8%) and Italy (roughly 7%). Provided the substantial number of buyers with a HQ in the EU, this highlights that FSR also affects companies inside the EU: what matters is the financial foreign contribution and the various links a company has to foreign financial contributions or guarantees outside the EU.

Roughly 75% of sellers had their HQ in the EU.

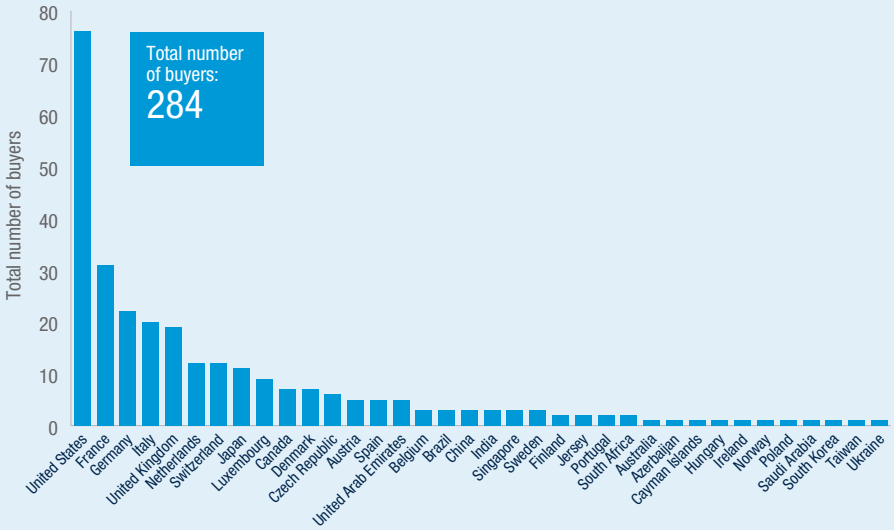
Sector



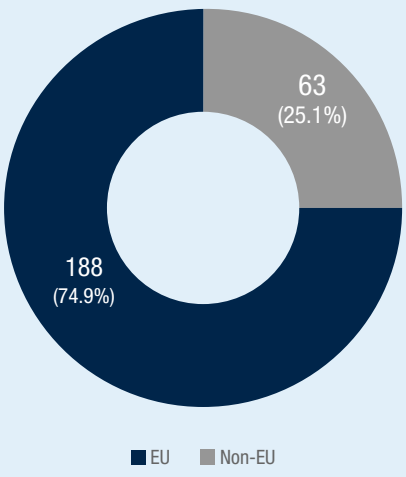
Sub-sectors (Top 3 sectors)



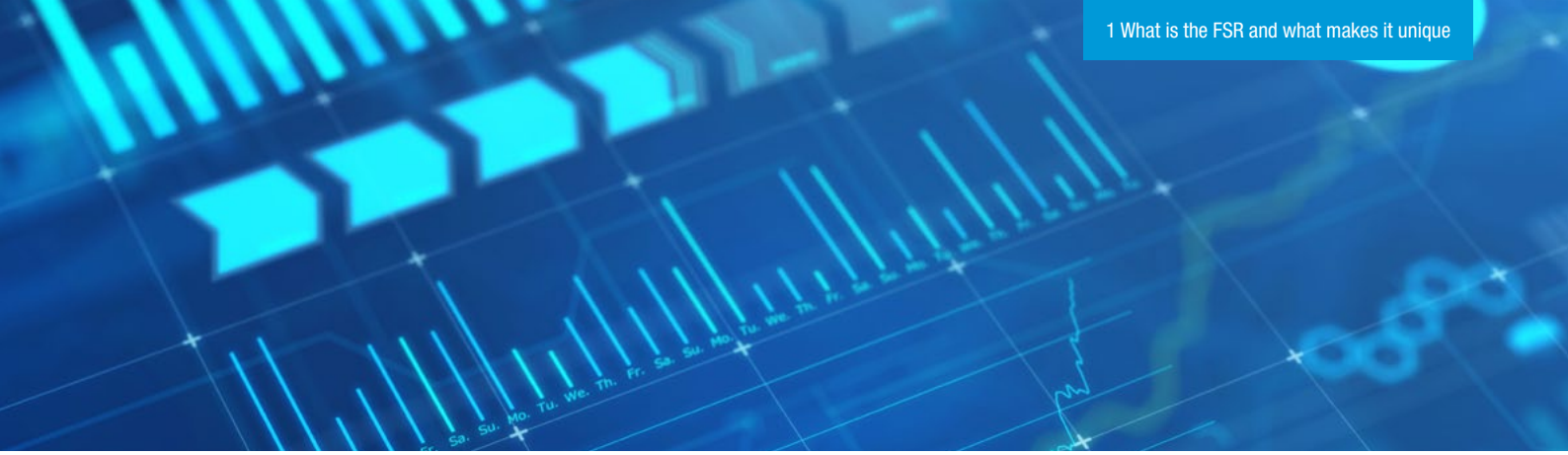
Buyer country



Seller HQ involvement: EU vs Non-EU



This is based on 249 cases and 251 identified sellers.



1.2.2 Overview of stages

Table 1 shows a break-down of the stages each case went through or is currently in. There were 249 FSR concentration notifications between July 2023 and 2 April 2026.

Of these, 232 (93%) were cleared without an in-depth investigation. There were four in-depth investigations (around 2%), of which two were cleared with commitments (the two case decisions are also discussed below), and two are currently undergoing in-depth investigations. Two have been withdrawn.

To put this in perspective, across all merger cases (from 1990 to March 2026), around 94% were cleared in Phase I (with or without commitments), in about 3% of cases the EC opened an in-depth investigation, and around 3% of cases have been withdrawn.[5]

This illustrates that the vast majority of FSR concentration cases is waved through, which is a natural consequence of the broad notification requirements set by the EC.

It is apparent that the majority of work for companies, at this stage, is identifying and collecting all foreign financial contributions to assess whether the notification thresholds are met, and if so, prepare the material required to notify the EC. Making such assessments early in decision making processes also provides an opportunity for strategic considerations such as target selection, if similar synergies could be achieved elsewhere.

This implies that FSR advisory is particularly well suited for advisory teams with technology, investigations, finance and valuation, and economic expertise. Such teams can assist clients end-to-end, from the pre-notification stage to potential in-depth investigations.

The remainder of this note focuses on the learnings from the two in-depth investigations.

5 When doing the comparison for 2023 (full year) to March 2026 (including), there are around 96% of Phase I clearance decisions, with around 1% going to an in-depth investigation and about 2% were withdrawn. We note that these % are relative of filings during that time, and not necessarily reflective of all case (e.g. a notification in 2022 may result in a clearance in 2023).

Table 1: FSR Concentration Cases

Decision	Number of cases	Percentage relative to notification
Notification	249	N/A (100%)
Withdrawal after notification	2	0.8%
Cleared without an in-depth investigation	232	93.2%
In-depth investigation opened	4	1.6%
Cleared with commitments after an in-depth investigation	2	0.8%

Note: This table reconstructs the procedural path of notified cases under the FSR on a cumulative basis. All cases are counted at the notification stage. “In-depth investigation” refers to cases that entered an in-depth investigation. “Cleared with commitments after an in-depth investigation” refers to cases in which the EC accepted commitments as a condition for clearance. “Cleared without an in-depth investigation” refers to cases where the provisional deadline and suspension period under the FSR expired, which is interpreted here as clearance and has therefore been renamed from the EC website label “Suspension expired.” “Withdrawal after notification” refers to cases withdrawn by the notifying parties before a decision.

2 From regulation to application

While the recent FSR guidelines add structure, notably concerning the distortion test, the balancing exercise and call-in powers, significant uncertainty remains, particularly given the EC's emphasis on a case-by-case assessment. Arguably, the guidelines do not offer significant additional value when decisional practice is still sparse. The EC's publication of case studies is to be applauded, but ultimately the concrete application of approaches such as the balancing test will only unfold as practice develops.[6]

This section sets out what we consider to be the current lessons relevant for practitioners from an economics perspective.

Overall, the guidelines[7] and the two published cases so far – *ADNOC/Covestro* (2026)[8] and *e&/PPF* (2025)[9] – confirm that the evidentiary threshold for establishing competitive harm is low, while any benefit from a subsidy has a much higher evidentiary standard.

2.1 Unlimited guarantees

The decisions confirm that the EC will rely heavily on Article 5 presumptions regarding "unlimited guarantees" and "facilitating subsidies," while adopting a flexible, sector-specific approach to theories of harm and remedies. Critically, the cases establish that ownership integration, not merely state ownership, determines the scope of available commitments.[10]

The EC established in both cases that SOEs from jurisdictions lacking ordinary bankruptcy laws for public entities are presumed to benefit from an unlimited state guarantee under Article 5(1)(b). The mechanism is identical in both cases: UAE bankruptcy law excludes companies "wholly or partially owned by the federal or local government."

The EC dismissed formalistic legal arguments regarding the entity's statutory independence. Instead, it relied on market perception – specifically, credit rating agency reports – which uplifted the companies' credit ratings based on an "expectation of state support."

In *e&/PPF*, the EC noted that e&'s AA- credit rating was consistently above the target's rating, with rating agencies explicitly citing "high likelihood of extraordinary government support." This indicates that market sentiment trumps statutory text: if the market prices in a government bailout, the EC will treat it as an unlimited guarantee, reversing the burden of proof onto the notifying party.

6 The Commission has launched its first review of the FSR and will report by July 2026; this process may lead to targeted adjustments (including legislative proposals) that could improve clarity and reduce uncertainty over time. Source: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_25_1954/IP_25_1954_EN.pdf

7 European Commission (2026), "Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market." (Henceforth, "guidelines").

8 European Commission (2026), "Case FS.100156 – ADNOC/COVESTRO". Available at: https://competition-cases.ec.europa.eu/cases/FS.100156 (henceforth, *"ADNOC/Covestro"*)

9 European Commission (2025), "Case FS.100011 – e&/PPF Telecom Group". Available at: https://competition-cases.ec.europa.eu/cases/FS.100011 (henceforth, *"e&/PPF")*

10 In the case of ADNOC/Covestro, it is shown that the Board of Director of ADNOC overlaps almost perfectly with the Supreme Council for Financial and Economic Affairs, and the company is wholly owned and financially fully integrated in the group.

2.2 Direct facilitation of acquisitions

ADNOC/Covestro provides the first concrete application of Article 5(1)(d) i.e. subsidies "directly facilitating" a concentration. The EC finds that a EUR 1.17 billion capital increase, negotiated as part of the transaction structure and instrumental to secure the target board's support, constituted a "facilitating subsidy."

This interpretation signals that the EC will look beyond the mere purchase price to examine the broader deal perimeter. Any fresh equity injection, bridge financing, or favourable loan arrangement tied to the deal timeline can be flagged as an enabling factor for the transaction, triggering the presumption of distortion without requiring a complex effects analysis. The threshold is notably low: any subsidy "explicitly agreed in the context of a concentration," and instrumental to the closing of the transaction, qualifies.

In *e&/PPF*, the EC left open whether the "unlimited guarantee" constituted a "directly facilitating" subsidy under Article 5(1)(d). It found it unnecessary to reach a definitive view, on the basis that the guarantee did not distort the acquisition process given that the price was in line with market sentiment and the loans were received on competitive market terms.

This suggests that the EC will apply Article 5(1)(d) selectively where the subsidy played a causal role in deal formation; not merely where it improved the acquirer's overall financial position.

> The threshold is notably low: any subsidy "explicitly agreed in the context of a concentration," and instrumental to the closing of the transaction, qualifies.

2.3 Tax exemptions and fungible financial strength

Beyond "unlimited guarantees" and "capital injection," the *ADNOC/Covestro* decision (Section 7.3) introduces a critical precedent for corporate tax planning. The EC investigated what it termed "contested fiscal arrangements," i.e. corporate tax exemptions for ADNOC entities in UAE free zones (e.g., Abu Dhabi Global Market) and preferential tax rates under Singapore's Global Trader Programme.

The parties argued that these regimes pursued legitimate policy objectives and were standard for the region. The EC rejected this, finding them to be specific subsidies (limited to certain sectors/zones) that conferred a benefit through foregone state revenue. It further linked the resulting tax savings to the M&A distortion through a fungibility argument: the savings freed up resources that could be redeploy for aggressive acquisitions or capex, supporting the "unconstrained growth" theory of harm.

This has implications for acquirers active outside the EU (e.g. acquirers benefiting from Swiss cantonal tax holidays, patent boxes, or specific tax rulings in jurisdictions like Singapore, Ireland and China). Even if these measures are lawful and standard in the home jurisdiction, the FSR treats them as foreign financial contributions.

A key lesson from *ADNOC/Covestro* is aggregation. The EC did not need to show that the tax exemptions alone distorted the transaction or the post-transaction behaviour; it combined them with the "capital injection" and "unlimited guarantee" to build a cumulative picture of "vast financial resources." Tax incentives therefore must be assessed not in isolation but as additive elements that increase the overall foreign subsidy exposure.

2.4 Theories of harm

Public decisional practice under the regulation remains extremely limited. As noted, the EC has so far published only two reasoned decisions following an in-depth investigation. The EC does not publish reasoned decisions for concentrations cleared without the need for an in-depth investigation.

In practice, this limits transparency and in turn the ability of practitioners and firms to draw reliable conclusions about how key tests and theories of harm will be implemented. Accordingly, insights remain necessarily tentative and non-exhaustive.

Nonetheless, these two in-depth cases illustrate how the EC adapts its theory of harm to sector-specific economics, consistent with the guidelines focus on market characteristics and competitive dynamics (see Guidelines para. 54):

- **Financing distortion (in e&/PPF):** in the capital-intensive telecoms sector, the harm was identified as access to artificially cheap financing for infrastructure and spectrum, enabling the acquirer to crowd out EU rivals. The EC emphasised that financing is of "paramount importance" in an industry demanding an estimated EUR 148 billion in investment to fund the "Digital Decade."
- **"Unconstrained growth" distortion (in ADNOC/Covestro):** in cyclical chemical markets, the theory of harm was that subsidies insulated the acquirer from downturn discipline, allowing sustained and aggressive capex and R&D through recessions. While non-subsidised EU competitors face capital constraints during downturns, the subsidised entity could expand and gain share through financial backing rather than competitive merit.

In both cases, the EC discussed competitors' financial constraints as a relevant market condition. The distortion analysis was thus inherently relative, assessed against competitors' actual funding limitations rather than in absolute terms.

2.5 Commitments

Different case-specific commitments resolved the EC's concerns. In *e&/PPF*, the Commission accepted a strict financial ring-fence: PPF's parent is barred from financing the EU target except in narrowly defined liquidity emergencies.[11] This is to eliminate the potential for distortion at source, by reducing the ability of the SOE to alter the competitive dynamics altogether.

By contrast, in *ADNOC/Covestro*, where cross-financing was found integral to the transaction, the EC accepted an output-based commitment: ADNOC may finance Covestro, but certain benefits of that financing, i.e. current and future "sustainability patents", must be licensed to smaller competitors on market-standard terms. Here, the commitment addresses the effects, in particular that the patents advance wider EU policy objectives, rather than eliminating the financial link at source.

The EC explicitly distinguished the two settings (*ADNOC/Covestro* para 147): partial state ownership with structural separation supports financial ring-fencing (in *e&/PPF*), whereas full financial integration (in *ADNOC/Covestro*) necessitates redistributive, output-based commitments. This establishes a spectrum that may be predictive for commitment design.

Both cases also illustrate the impact of the market test. In *ADNOC/Covestro*, the list of excluded competitors (from the commitments) was narrowed from 17 to eight competitors, and the geographic scope expanded to global sales. In *e&/PPF*, the emergency funding threshold was raised to reflect genuine financial distress. Commitment parameters are therefore negotiable and responsive to third-party feedback. Parties should anticipate market test adjustments and may benefit from engaging stakeholders early to shape the evidentiary record.

We note that the market test may also open scope for third parties that could be harmed by the subsidy to influence proceedings, particularly if concerns can be substantiated with economic analysis.

11 Defined as acute liquidity crises with debt/EBITDAaL of 4x or more and third-party financing unavailable.

2.6 Evidentiary standards and information risk

The decisions underscore the procedural tools available where information from sovereign shareholders is incomplete. In *e&/PPF*, the EC relied on Article 16 ("facts available") and inferred a subsidy benefit when the sovereign parent did not fully respond to information requests (RFIs). Conversely, in *ADNOC/Covestro*, the EC suspended the review ("stop-the-clock") pending the provision of information. This creates a risk for acquirers with non-cooperative shareholders, which can either suffer an adverse subsidy presumption (*e&/PPF*) or face indefinite deal delays (*ADNOC/Covestro*), which may ultimately undermine the transaction.

e&/PPF also illustrates how state-linked financing can be structured to avoid a subsidy finding. The EC concludes *no benefit* (and thus no foreign subsidy) in a state-dominated loan where: (i) private participation existed (approx. 5-10%); (ii) pricing was benchmarked against market rates, and (iii) the borrower held strong standalone credit ratings. This provides a framework for mitigating subsidy risk at source, distinct from broader concerns such as "unlimited guarantees" that tend to drive distortion findings and commitments.

3 Implications and economic methodologies

As case decisions are limited in number, no clear picture has emerged regarding how the EC assesses various economic methods and findings, and thus how economic arguments around benefits, distortion or balancing would play out. Particularly, given that the EC is not itself required to quantify potential harm, there is no quantitative benchmark available to weigh potential beneficial effects against. It would likely be up to the parties to first illustrate the magnitude of the potential negative effects (if any), prior to demonstrating potential beneficial effects, if so desired.

Traditional competition analysis focuses on product market effects and market power. The FSR does not require a market definition; its concern is financial advantage and distortion of competitive dynamics in the EU internal market. Assessments under FSR therefore appear to be more general, with a wider view on their effects on EU policy objectives and dynamic effects on the entirety of the EU internal market. Notably, a transaction can be problematic under FSR and not under EU merger control, and vice versa.

Nevertheless, the underlying economic toolkit – counterfactual analysis, benchmarking and other quantitative and qualitative evidence – remains largely applicable. But it is likely to be applied more widely and to focus on dynamic effects such as environmental and innovation, largely overlooking specific static effects on relevant parameters of competition.

The existing guidelines and cases also show that the EC engages in both quantitative (e.g. through various methodologies for benchmarking) and qualitative assessments, and that the EC is not looking at any individual analysis as a checklist or in isolation; the approach appears to be of more holistic nature.

Below, we illustrate, using examples, the main areas where and how established quantitative methodologies could have likely been applied, drawing on practical examples from the two decisions where applicable. Any assessment is inherently case specific, and in practice it will be necessary to engage with various pieces of analyses across the topics identified by the EC.

> A transaction can be problematic under FSR and not under EU merger control, and vice versa.

3.1 Assessing the benefits ("unfair" benefits to the firm)

As discussed in Section 1.1, for a FFC to qualify as a foreign subsidy, two conditions must be met: (i) the contribution must be specific to one or more undertakings or industries, and (ii) the EC must establish that the contribution confers a benefit to the firm not obtainable on market terms. Demonstrating the absence, or limited magnitude, of such a benefit therefore represents the first line of argument for investigated parties.

In some circumstances the EC may presume that certain forms of support – such as unlimited guarantees or capital injections from SOEs – confer a benefit and are liable to distort competition. In such cases, the burden shifts to the parties to demonstrate that the financial contribution does not provide an advantage compared to normal market conditions. In other (future) situations, the EC may need to conduct a more detailed economic assessment to establish the existence and magnitude of any benefit, which in turn will provide a more detailed methodological blueprint than what is currently available.

Regardless of where the burden of proof lies, parties can strengthen their position by credibly quantifying the (alleged) unfair benefit, and its incremental economic effects, relative to a counterfactual scenario in which the financial contribution had not been received.

A first approach could consist in demonstrating that equivalent financing conditions would have been available on market terms. This analysis closely resembles the Market Economy Operator Principle (MEOP) used in state-aid control.

This may involve reconstructing the firm's counterfactual cost of capital (WACC) and assessing whether the relevant investment or expansion project remains economically viable under market financing conditions. For example, a firm may show that a project's internal rate of return exceeds a market-based WACC derived from peer benchmarks, credit spreads, or rating-agency estimates. If the project remains profitable in the counterfactual, the investment decision may be interpreted as commercially rational and the subsidy as not instrumental.

Where a potential benefit arises through preferential financing conditions, the magnitude of the advantage can be estimated through established corporate finance principles. A common approach is Discounted Cash Flow (DCF) analysis, or analogous valuation frameworks used to estimate the valuation uplift attributable specifically to the financial contribution.

Within such a methodology, the parties would compare the valuation (or bid capacity) under two scenarios: (i) financing conditions incorporating the alleged subsidy; and (ii) a counterfactual scenario based on market financing costs, typically proxied by the WACC of comparable unsubsidised peers.[12]

The evidence from the DCF analysis could also be expanded with event studies or comparable transactions analysis, where the acquisition premium is compared to similar unsubsidised transactions. With a sufficiently large sample of comparable transactions, firms may also attempt a regression analysis of premia on deal characteristics. The absence of a statistically significant positive residual would then indicate that the subsidy is not associated with a level of overbidding. Such analysis allows parties to quantify whether the alleged subsidy materially increases the firm's ability to fund acquisitions or investments relative to market financing conditions.

When the alleged benefit arises from state guarantees or credit support, the value of the advantage may need to be estimated through credit uplift analysis. In these cases, the benefit can be approximated as the difference between the firm's borrowing costs on a standalone basis, and the borrowing costs reflecting the presence of the guarantee. The standalone basis can be benchmarked using peer credit spreads, CDS premia, or rating-based borrowing curves. The resulting spread differential between the two scenarios provides an estimate of the value provided by the guarantee when applied to the relevant debt exposure.

Such methods allow parties to demonstrate either that the financial contribution does not confer a measurable advantage, or that any benefit is limited in magnitude relative to the scale of the transaction. Deploying such analyses could establish the absence of a demonstrable benefit, implying no "foreign subsidy" is present. Based on the guidelines and cases, we consider that no single methodology is likely to convince the EC, but rather that some combination of methods is needed in practice.

12 DCF analysis featured in the Commission's review of ADNOC/Covestro (Case FS.100156), where the Commission examined the Parties' DCF valuations alongside other benchmarks — including analyst target prices, comparable transaction premia, and market multiples — to assess whether the offer price of EUR 62 per share was consistent with conditions available to a non-subsidised investor. The Commission used the DCF in the traditional sense, as one of several comparators to evaluate the reasonableness of the offer price, rather than constructing an explicit two-scenario counterfactual comparing subsidised and unsubsidised financing conditions. Notably, the DCF was the only methodology among those considered that supported a valuation at EUR 62 per share, which the Commission treated as an indicator that the underlying assumptions may have been optimistic.

3.2 Assessing the potential distortion post transaction

Once a foreign financial contribution is identified to be a foreign subsidy, the EC must establish that the subsidy is liable to improve the competitive position of the undertaking, and that this improvement actually or potentially harms competition.[13]

The two distortion cases so far are based on a presumption of distortion as the foreign subsidies related to unlimited guarantees; the EC was therefore not required to put forward a well-defined theory of harm, and it did not attempt to quantify the magnitude of the potential distortive effects. In presumption cases, the burden of proof would be on the parties to show that the foreign subsidy causes no potential distortion on the internal market. In the available cases, the parties did not advance substantiated economic evidence to attempt to counter the presumption of harm. Little guidance is therefore available to date.

The EC does advance two case- and sector-specific high-level theories of harm: (i) a financing distortion in telecoms (in *e&/PPF*), and (ii) an "unconstrained growth" distortion in chemicals (in *ADNOC/Covestro*). But until a case becomes public where the EC is required to put forward or address a well-defined theory of harm, there will remain inevitable uncertainty relating to the mechanisms and specificities of the theories of harm, as well as the methods to quantify magnitudes.

Overall, we would expect theories of harm under FSR to be more dynamic and general in terms of effects analysis relative to theories of harm advanced in traditional competition analysis, which may relate, for example, specifically to upward pricing pressure.

While the EC did look at credit rating agencies' views for the transaction process itself, one could, for example, analyse this formally using more rigorous methods such as event studies to examine capital market reactions, and specifically how the stock market responds to the announcement of the subsidy or the acquisition. A muted or neutral reaction, while controlling for other confounding factors that would move the stock price, may undermine claims of substantial competitive impact (i.e. the market did not price it in). Given the EC placed much weight on credit rating agencies' views, such analysis may be particularly useful.

Another piece of relevant economic evidence may be to show a genuine capacity constraint in the relevant industry. This could be done by showing utilisation rates, supply-demand balance analyses, and capacity gap analysis including forecasts. The aim would be to show that the additional capacity would be required, and that the subsidy corrects an imbalance.

Some complementary empirical techniques can be deployed to assess whether a subsidy or guarantee creates a credible risk of rival foreclosure.

First, critical margin analysis identifies the minimum margin a competitor requires to remain viable and tests whether the beneficiary's subsidy-enabled expansion could plausibly push rivals below that threshold. Where it can be shown that a substantial buffer exists between rivals' observed margins and the critical level, the foreclosure mechanism lacks substance.

Second, financial distress modelling can be used to quantify the probability of a firm being near or approaching insolvency, and can stress-test how sensitive that probability is to competitive shock induced by the beneficiary's growth under different scenarios. This analysis could also be conducted through survival analysis, where in an ex-ante setting where post-subsidy data are unavailable, the baseline hazard can be estimated on historical market data and used to simulate rivals' predicted survival under counterfactual scenarios calibrated to the expected effects of the guarantee.

Despite being costly, data intense and assumption-driven, in the absence of post-transaction data, structural models of competition (e.g. merger simulation models calibrated to observed data) can simulate the competitive equilibrium with and without the alleged subsidy-induced advantage. This allows quantification of predicted changes in output, prices, margins, capacity utilisation, and concentration. For example, one could model downturn scenarios to assess whether subsidised expansion materially displaces EU competitors or merely alters investment timing without significant competitive harm.

In practice, no single technique should be relied upon in isolation; rather, a combination of these methods – progressing from the relatively straightforward critical margin screen through to the more data-intensive simulation – constitutes a holistic, effects-based assessment capable of demonstrating that the measure at issue advances EU policy objectives and strengthens the internal market without producing distortive foreclosure effects.

13 Guidelines, paragraph 34.

3.3 Balancing and positive effects

The balancing test set out on Article 6 requires the parties to demonstrate that the foreign subsidy's positive effects outweigh the distortion. The burden lies entirely with the parties (see Guidelines paragraph 135). Based on the available decisions, parties have so far not achieved the very high standard of proof required by the EC to establish positive effects.

The EC expects submissions to be grounded in counterfactual economic analysis. While potential negative effects may be assessed in aggregate and do not need to be linked to a specific subsidy, the bar is much higher for positive effects. In particular, the EC expects evidence of: (i) a causal link between the subsidy and the claimed positive effects, (ii) indispensability: that effects would not arise absent the subsidy, and (iii) the timing and magnitude of those effects.

In practice, this results in an exceptionally demanding evidentiary standard. Unless parties can show that the benefits generated by the subsidy are concrete, measurable, and directly caused by the subsidy, the balancing test is unlikely to succeed. Moreover, where firms have already argued that the foreign subsidy does not confer an unfair advantage or distort any market, it becomes inherently difficult to claim that the same subsidy nonetheless produces significant positive effects. Such arguments can be logically inconsistent, and without a clear causal mechanism showing how a non-distortive subsidy could still create substantial public interest benefits, the balancing test becomes even harder to substantiate. Firms may therefore prefer to move directly to proposing commitments rather than relying on the balancing test as their primary defence.

The *ADNOC/Covestro* illustrates this standard. General references to EU Green Deal and industrial sustainability were rejected as unsubstantiated because no economic analysis demonstrated that the subsidies were necessary to achieve those outcomes, or that the same outcomes could not be achieved without them.

To meet this standard, parties would need to move beyond qualitative narratives and ground their submissions in rigorous counterfactual modelling. The most practical starting point is a project-level financial simulation – typically a discounted-cash-flow model built from the firm's own capex and opex projections – comparing expected returns with and without the subsidy.

Because firms routinely prepare such models as part of their internal investment appraisal, the data requirements are modest and the output is intuitive: the analysis shows whether the subsidy is what tips the project past the firm's hurdle rate, or merely enhances returns on an investment that would proceed regardless.

Where the Commission requires a more granular counterfactual, for instance, to address concerns about scale or timing rather than a binary go/no-go decision, this baseline model can be extended into a structural investment framework that incorporates estimated cost functions, demand trajectories, and capacity constraints, generating predictions about how the investment's size, phasing, or location would differ absent the subsidy. The progression from financial appraisal to structural modelling would remain grounded in observable firm-level data, while it would scale in sophistication to match the complexity of the Commission's requirement.

Although not strictly required, quantifying the positive effects strengthens the submission considerably. This evidence helps the Commission weigh benefits against distortions.

Methods widely used in competition economics, such as consumer surplus analysis, cost–benefit analysis, valuation of externalities through shadow pricing can be adapted to the FSR context. Positive effects like avoided CO_2 emissions, improved energy efficiency, supply chain resilience, or innovation spillovers may be quantified using ETS price benchmarks, social cost of carbon, projected consumer cost savings, or innovation-output metrics. These techniques mirror the approach to efficiency claims in merger control, where parties must demonstrate verifiable, merger-specific, and timely benefits.

3.4 Cross-subsidisation for non-targeted subsidies

Where a foreign subsidy is granted to a non-EU entity, the EC must establish a link to EU operations. However, the EC applies a holistic and highly flexible assessment, examining whether the subsidy can in any way strengthen the financial position of the undertaking and thereby facilitates activities in the EU.

As set out in paragraphs 20 to 32 of the Guidelines, the Commission may rely on a wide, non-exhaustive set of indicators, including group ownership and control structures, intra-group financial flows, functional and economic links between the subsidised entity and its EU affiliates, the design of the subsidy, and any relevant legal or contractual constraints. This open-ended list gives the Commission broad discretion to infer a connection between the subsidy and EU operations.

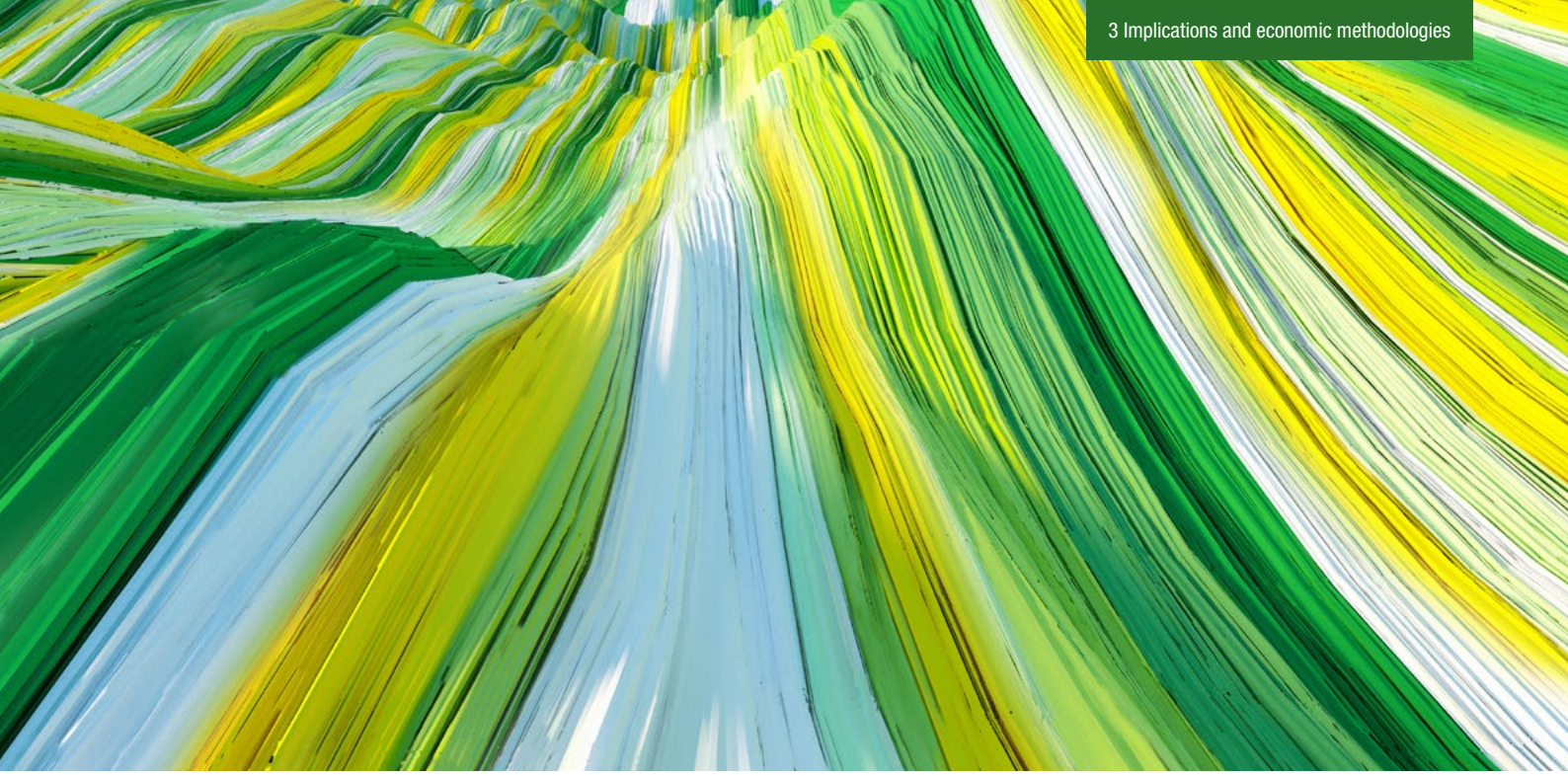
The recent decisions confirm the breadth of this approach. In *ADNOC/Covestro*, the EC relied on the "fungibility" argument: tax savings outside the EU freed up additional resources for EU acquisitions. By contrast, in *e&/PPF*, the EC found no benefit where a state-dominated loan included private participation and market-rate pricing. These cases illustrate that the EC looks at foreign subsidies in aggregate and in context, focusing on the overall economic position of the group rather than on formal legal or accounting distinctions.

Responding to this type of assessment requires a combination of economic and forensic financial analysis. Where observable intra-group transactions exist — loans, dividends, management fees, or cost-sharing arrangements — the most direct approach is to trace those flows from the subsidy recipient to the EU entity and assess whether their terms are consistent with what unrelated parties would agree, thereby determining whether the subsidy benefit was actually transmitted.

Where no such direct transfer exists, as with the ADNOC fiscal arrangements, where the EC relied on a fungibility argument, the analysis shifts to a group-wide funds-flow model that reconstructs the full sources and uses of capital across the corporate structure, testing whether the EU operation was in fact financed by resources traceable to the subsidy or by independent funding streams entirely unconnected to it.

This type of analysis sits at the intersection of transfer pricing, corporate finance, and competition economics, and is particularly well suited to advisory teams with restructuring and forensic accounting capabilities alongside economic expertise.

> Economic analysis can inform commitments design, ensuring that the proposed commitments balance the identified distortion in a proportionate manner.



3.5 Commitments

The *ADNOC/Covestro* IP licensing commitment alters the competitive landscape. Covestro retains access to ADNOC capital, while eight major competitors are excluded from the licensing pool and others gain access under defined terms. The EC recognises that compulsory licensing may reduce Covestro's incentive to innovate (paragraph 593), but considers that the overall effect supports a level playing field, without articulating a quantitative framework for weighing this dynamic efficiency trade-off.

Notably, the EC concludes that commitments "fully and effectively" address the distortion without demonstrating proportionality between the potential distortion of the alleged benefit resulting from the foreign subsidy and the licensing obligation imposed as a commitment. Economic analysis can inform commitments design, ensuring that the proposed commitments balance the identified distortion in a proportionate manner.

The starting point is the EC's theory of harm. In *ADNOC/* Covestro, this is "unconstrained growth," i.e. the ability to sustain higher capex or R&D through industry downturns. Economic quantification would require: (i) identifying the specific competitive parameters affected (additional capacity, incremental R&D spend, or pricing below the level sustainable at market financing rates), (ii) modelling a counterfactual in which the firm faces market-based financing constraints, and (iii) estimating the difference in prices, output, market shares, or investment between the two scenarios.

The estimated distortion can then be compared to the economic cost of the proposed commitment. For the ADNOC IP licensing obligation, the economic analysis could estimate: (i) foregone licensing revenue, calculated as the difference between voluntary market royalty rates and the mandatory terms proposed by the commitments, (ii) innovation effects, i.e. the expected reduction in R&D due to lower appropriability of returns[14], and (iii) any projected market share effects from enabling competitors to replicate Covestro's technology at below-market licensing rates. These components can be annualised and discounted to derive a net present value (NPV) over the commitment period.

If a proposed commitment imposes costs that materially exceed the competitive harm it is designed to neutralise, it is disproportionate. Conducting this analysis proactively enables the parties to frame commitments that are demonstrably proportionate.

A structured comparison also anchors the discussion in magnitudes, rather than relying on a general assertion that commitments "fully and effectively" address the (potential) distortion.

In practice, proportionality could be expressed as a ratio of the NPV of the commitment to the NPV of the quantified distortion. A ratio close to one would indicate alignment. A ratio materially above or below one would indicate over- or under-correction, respectively.[15]

As the annual distortion and annual remedy costs are independently estimated, the duration of the commitment becomes a key adjustment variable. Solving for the commitment length at which discounted remedy costs equal discounted harm would provide an economically grounded benchmark for scope and duration.

14 For example, Aghion et al., *QJE* 2005, establish that the relationship between competition and innovation follows an inverted-U; using patent filing data and R&D intensity for Covestro and its peers, one can estimate whether the compulsory licensing pushes the sector past the innovation-maximising level of rivalry, and translate the predicted R&D reduction into a EUR figure via Covestro's R&D budget.

15 While the ratio materially above one would indicate that the commitments violate the proportionality, a ratio below one is informative for the suitability and effectiveness principles of the commitments.

3.6 Conclusion

A defining feature of the FSR's substantive assessment, reaffirmed in the guidelines, is its case and fact specific, non-mechanical assessment. The guidelines state that cases should be assessed "*in light of [their] own facts and circumstances*" rather than as a checklist (paragraph 7). Unlike traditional competition analysis, which typically centres on clearly defined market structures and counterfactuals, the FSR requires judgments about behavioural change, competitive dynamics and EU policy objectives that are difficult to parametrise.

Therefore, the FSR's open-ended assessment framework places economic and financial evidence at the core of the substantive assessment. Established tools such as DCF valuation, credit uplift quantification, difference-in-differences, synthetic control methods, funds flow tracing, cost function estimation, structural bid modelling, and market simulation are directly transferable. Table 3 in the Annex maps such techniques to the relevant guideline provisions and outlines their practical implementation.

> The FSR's open-ended assessment framework places economic and financial evidence at the core of the substantive assessment.

The application of such methods under the FSR remains largely untested; this creates both uncertainty and scope for well-supported submissions to influence evolving practice.

Appendix A

Table 2: Notification thresholds

Dimension	Concentrations	Public Tenders
Trigger	EU-established party with EU turnover ≥ €500m AND	Contract value ≥ €250m (or lots ≥ €125m where framework ≥ €250m)
	Combined FFCs > €50m (3 years)	FFCs ≥ €4m per third country (3 years)
Who notifies	Acquiring party / merging parties	Prime contractor + subcontractors/suppliers with ≥ 20% share
Below FFC threshold	No notification required	Declaration required (confirm below threshold)
Standstill	Suspensory — no closing before clearance	Suspensory — no award during review

Appendix B

Table 3: Potential economic methods

Technique	Guidelines Application	Illustrative Practical Implementation
Difference-in-Differences (DiD)	Behavioural change assessment (paras. 48-54); specificity of positive effects (para. 119)	(1) Define the treatment event: Identify the precise timing when the subsidy was granted or became available to the undertaking, establishing a clear "before" and "after" period. The absence of an after period can be overcome by exploiting the database of cleared transactions by the EC (presented in Section 1.2). One could select a comparable subsidised firm as the treated unit. (2) Select outcome variables: Based on the alleged distortion, identify measurable behavioural outcomes—such as pricing (unit prices, margins), output (production volumes, capacity utilisation), or investment (capital expenditure, R&D spending). (3) Construct a control group: Identify a set of comparable non-subsidised competitors matched on observable characteristics (sector, size, geography, product mix, cost structure) that would plausibly have followed a similar trajectory absent the subsidy. Matching can be performed using propensity score methods or exact matching on key variables. (4) Verify parallel trends: Using pre-subsidy data, test whether the subsidised firm and control group exhibited similar trends in the outcome variable before the subsidy. This is the critical identifying assumption—if trends diverged pre-subsidy, the method is unreliable. (5) Estimate the causal effect: Calculate the change in the outcome variable for the subsidised firm (post minus pre), subtract the change for the control group over the same period. This "difference-in-differences" isolates the subsidy's causal impact from market-wide trends affecting all firms. (6) Robustness checks: Test sensitivity to control group composition, alternative time windows, and placebo tests (applying the method at dates when no subsidy occurred to verify no spurious effects).
Synthetic Control Method	Counterfactual tender construction (para. 85(c)); M&A counterfactual (para. 60)	(1) Define the counterfactual question: Determine what outcome needs to be estimated absent the subsidy—for example, what would the subsidised firm's unit costs, tender price, or profit margins have been without the foreign subsidy? The absence of post-data about the subsidy could be overcome in a similar way of the Diff-in-Diff approach in row one of this table. (2) Assemble a comparator pool: Identify a set of non-subsidised peer firms operating in the same sector and market conditions. These firms should not have received comparable subsidies and should have data available for the same time periods. (3) Select matching variables: Identify pre-subsidy characteristics that predict the outcome of interest—such as firm size, cost structure, capacity, input prices, labour costs, and historical outcome trends. (4) Construct the synthetic control: Using pre-subsidy data, estimate weights for each donor firm such that the weighted combination of donors best replicates the subsidised firm's pre-subsidy characteristics and outcome trajectory. The result is a "synthetic" version of the subsidised firm representing what it would have looked like without the subsidy. (5) Estimate the subsidy effect: Compare the actual post-subsidy outcomes of the subsidised firm against the synthetic control's outcomes over the same period. The gap represents the estimated effect of the subsidy on the firm's costs, pricing, or other outcomes. (6) Validate the counterfactual: Assess the quality of the pre-subsidy fit—if the synthetic control does not closely track the actual firm before the subsidy, the post-subsidy comparison is unreliable. Conduct placebo tests by applying the method to donor firms to verify that large gaps do not appear for non-subsidised firms.

Event Study Analysis	Benchmarking with comparable past acquisitions (see Guidelines para. 64); assessing whether price offered exceeds normal market context (see Guidelines para. 61)	(1) Calculate transaction metrics: For the M&A transaction under investigation, compute the acquisition premium (the percentage by which the offer price exceeds the target's standalone value or undisturbed share price) and relevant transaction multiples (enterprise value relative to EBITDA, revenue, or EBIT). (2) Construct a comparable transactions sample: Identify a set of M&A transactions in the same or related sectors within a relevant time window. Comparables should share key characteristics with the investigated deal—similar target size, sector, geographic scope, deal structure (cash vs. stock, friendly vs. contested), and market conditions at the time of announcement. (3) Control for deal characteristics: Estimate a regression model in which the acquisition premium or transaction multiple is explained by observable deal features—including target profitability, growth prospects, synergy potential (horizontal vs. vertical acquisition), deal size, competitive tension (number of bidders), and prevailing market conditions (credit spreads, M&A cycle). (4) Generate predicted values: Use the estimated model to predict the "normal" premium or multiple for the transaction under investigation, given its specific characteristics. This represents what an unsubsidised acquirer would typically pay in a comparable transaction. (5) Identify abnormal pricing: Calculate the residual—the difference between the actual premium or multiple paid and the model's prediction. A statistically significant positive residual indicates that the subsidised acquirer paid more than market norms would suggest, consistent with subsidy-driven overbidding. (6) Cross-validate: Test robustness using alternative comparable samples, different transaction multiples, and subsamples. Where available, compare findings against the acquirer's internal valuation models to verify whether the bid exceeded their own assessment of standalone value plus synergies under market financing conditions.
DCF Valuation & Premium Analysis	Assessing whether price offered exceeds normal market context (para. 61); benchmarking with comparable past acquisitions (para. 64)	(1) Counterfactual valuation: Estimate the target's standalone value using DCF (Discounted Cash Flow) under market financing conditions—i.e., applying a WACC derived from comparable unsubsidised firms' cost of debt (benchmarked to corporate bond yields or CDS spreads) and cost of equity (CAPM with sector betas). Compare this to the acquirer's internal valuation models using subsidised financing terms to quantify the bid capacity expansion attributable to the subsidy. (2) Premium benchmarking: Calculate the acquisition premium (offer price relative to standalone value) and compare against a control sample of comparable transactions, controlling for deal characteristics (target size, sector, deal structure, market conditions). Abnormal premia—statistically significant positive residuals from a regression of premia on deal characteristics—may indicate subsidy-driven overbidding. (3) Multiple cross-check: Validate findings by comparing implied transaction multiples (EV/EBITDA, EV/Revenue) against sector comparables; outlier valuations support the inference that subsidised financing enabled above-market pricing.
Cost Function Estimation	Procurement: assessing below-cost pricing (para. 65-66); abnormally low tenders (para. 89)	Estimate industry/firm translog cost function using panel data on non-subsidised producers. Predict expected costs for subsidised firm given its scale/technology. Gap between predicted costs and bid price (if any) indicates subsidy pass-through. The absence of a gap is necessary but not sufficient to exclude distortion — the Commission could still argue that the subsidy manifests elsewhere, for instance in the firm's ability to sustain investment or absorb losses during downturns rather than in current pricing. The method is therefore most powerful in procurement cases where the allegation is specifically about abnormally low tenders, because there the question is directly about pricing relative to costs.
Structural Bid Function Estimation	Procurement benchmarking against other tenders (para. 85(a)); deterrence of participation (para. 94)	Model bidding behaviour in procurement auctions to predict equilibrium bids conditional on costs. Isolate subsidy effect on bid markups. Can identify participation deterrence from reduced bidder counts in procedures with known subsidised participant.

Transfer Pricing / Funds Flow Analysis	Cross-subsidisation assessment (paras. 20-32); intra-group financing (paras. 80-82)	Trace inter-company funds flows, transfer pricing arrangements, and intercompany loan terms. Compare to arm's length benchmarks. Identify mechanisms through which subsidies granted outside EU can benefit EU operations.
Market Structure & Capacity Analysis	Overcapacity distortions (para. 57(e)); investment deterrence (paras. 70-73)	Calculate capacity utilisation rates, HHI, and simulate competitive equilibrium with/without subsidised capacity. Guidelines note subsidies "sustaining uneconomic assets" or "encouraging investment in capacity expansions that would otherwise not have been built" are distortive.

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