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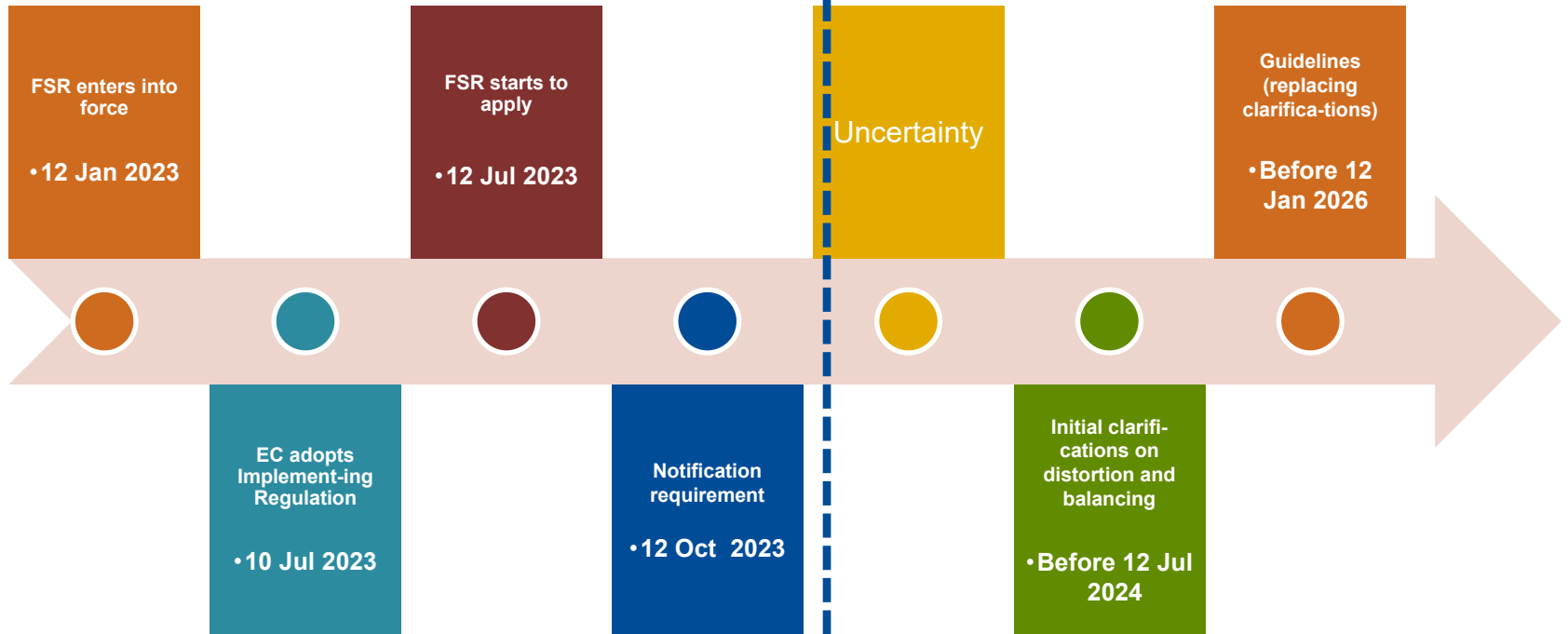
“DISTORTION IN THE INTERNAL MARKET” IN THE FOREIGN SUBSIDIES REGULATION

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TIMELINE



DISTORTION OF THE INTERNAL MARKET IS THE CENTRAL CONCEPT

Distortions in the internal market

- “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” (Article 4, para. 1, first sentence FSR)

“Most likely to distort” categories

- A foreign subsidy is **most likely to distort the internal market** where it falls under one of the following categories:” (Article 5, para. 1 FSR)

Balancing test

- “The Commission may, [...] balance the negative effects of a foreign subsidy **in terms of distortion in the internal market**, according to Articles 4 and 5 against the positive effects [...].” (Art. 6, para. 1 FSR)

Commitments/Redressive Measures

- “The Commission may impose redressive measures in order to **remedy the distortion in the internal market actually or potentially caused** by a foreign subsidy, unless it has accepted commitments [...]” (Article 7, para. 1 FSR)

SCOPE FOR INTERPRETATION

Wording

Systematics

Purpose

“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” (Article 4, para. 1, first sentence FSR)

WORDING

Wording indicates a three-stage test

- Improvement of the competitive situation of an undertaking on the internal market through an appropriate foreign subsidy;
- Actual or potential restriction of competition in the internal market;
- Causality

Liable to improve competitive situation / actual or potential restriction of competition

- The foreign subsidy only has to be “liable” to improve improve the competitive position of a company
- A **potential restriction** of competition is sufficient
- No distinction between restrictions of competition by object or effect

SYSTEMATICS AND PURPOSE

Systematics

- **External**
 - FSR is part of wider EU competition and State aid law – consistency requires that existing concepts should be applied as far as possible but may require adaptations
- **Internal**
 - Distortion in internal market separate from notion of foreign subsidy and not assumed in presence of selective advantage (unlike State aid)
 - Distortion in internal market” standard must explain the Article 5 FSR categories and the Article 7 FSR redressive measures / commitment categories
 - Same “distortion in the internal market” standard for merger, public procurement, *ex officio* investigations

Purpose and objective

- Creating a **level playing field** within the meaning of and complement the EU state aid rules
Protect the internal market from third country measures that State aid law would prohibit if such measures were taken by Member States.

PROPOSED THREE STEP TEST

Improve competitive situation in the internal market

- Financial-economic assessment
- A selective benefit not automatically improvement of competitive situation in the internal market
- Counterfactual analysis of situation in the internal market without the foreign subsidy
 - Subsidies for business lines and/or subsidiaries - Cross-subsidization criteria in state aid law and 102 TFEU
- Liable to improve situation – standard / threshold?

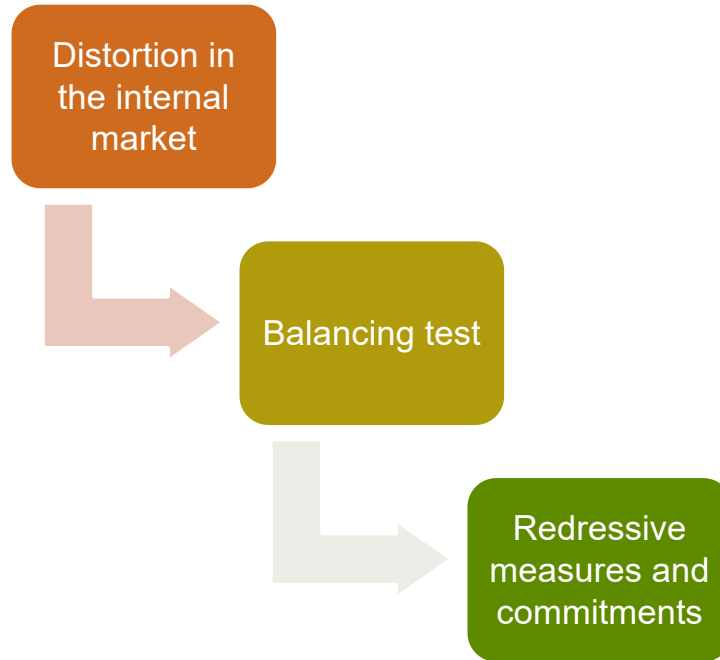
Actual or potential restriction of competition in the internal market

- Competition / competition economics assessment
- Actual and potential distortion of competition - what is the standard / threshold
- Which market - “market of acquisitions” and/or product and services markets?
- Relevance of antitrust and State aid distortion scenarios?
- De minimis market share thresholds?

Causality

- Counterfactual analysis of competition in the internal market without the improvement of the competition situation
- Taking into account foreign subsidies for other market participants?

THE WIDER SUBSTANTIVE TEST



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