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Foreign Subsidies Regulation enters into force on 12 January 2023 - Notification requirements apply from October 2023

The **EU Regulation on foreign subsidies distorting the internal market** (“FSR”) enters into force on 12 January 2023.^[1] It marks an important legislative evolution for companies from third countries engaged in an economic activity within the EU and aims to ensure a level playing field in the EU internal market.

Broad scope of application

The FSR targets any undertaking engaged in an economic activity in the internal market that has received a foreign subsidy distorting the internal market.

A **foreign subsidy** is any financial contribution provided by a third country (non-EU Member State) which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited to one or more undertakings or industries.^[2]

A **distortion in the internal market** is deemed to exist when “a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition in the internal market”.^[3]

The FSR indicates that a distortion is considered “unlikely” if the total amount of the subsidy is below EUR 4 million over any consecutive period of three fiscal years. However, distortion is deemed “most likely” in situations involving an ailing undertaking or when the foreign subsidy (i) takes the form of an unlimited guarantee for debts or liabilities, (ii) directly facilitates a concentration or (iii) enables the submission of an unduly advantageous tender. The Commission’s assessment will balance the negative effects against the positive effects on the development of the relevant economic activity.

The EU Commission’s powers

The Commission has exclusive competence to enforce the FSR and has been entrusted with far-reaching powers to do so. These include conducting market investigations, adopting interim measures, imposing fines and binding commitments, prohibiting concentrations and the award of a public procurement contract.

The Commission is equipped with three intervention tools: two notification-based tools (notification of concentrations and notification of foreign financial contributions in the context of public procurement procedures (“PPP”)), and an **ex officio review tool**.

Notifiable M&A

Concentrations – i.e. transactions resulting in a change of control on a lasting basis – that involve an acquirer or a target that has received foreign financial contributions must be notified to the Commission prior to their implementation (“stand-still obligation”) where:

- At least one party to the concentration is established in the EU and has generated an **EU-wide aggregate turnover of at least EUR 500 million**; and
- The undertakings concerned received a **combined foreign subsidy in excess of EUR 50 million in the three years** prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.^[4]

To calculate the aggregate turnover and the combined foreign subsidy, the Commission will not only look at the amounts generated/received by the notifying parties but those generated/received by the entire corporate group to which the parties belong to.

In addition, for transactions falling below the thresholds, the Commission can request the notification of any concentration on its own initiative if it suspects that the undertakings concerned may have benefited from foreign subsidies in the three years prior to the concentration.

The Commission will assess whether the foreign financial contributions received by a party to a concentration constitute foreign subsidies and whether they distort the EU internal market. This assessment is limited to the concentration concerned.

Notifications in the context of public procurement procedures

Undertakings participating in a PPP must notify the contracting authority or entity (which must transfer such notification to the Commission) of foreign financial contributions they have received if:

- The estimated value of **the procurement at issue is at least EUR 250 million**; and
- The **aggregate contributions granted to the bidder in the three years prior to notification amount to at least EUR 4 million per third country**.^[5]

Where the procurement is divided into lots, foreign financial contributions must be notified if the thresholds above are reached and if the value of the lot or the aggregate value of all the lots to which the tenderer applies is of at least EUR 125 million.

Where these thresholds are not reached:

- The undertakings must list in a declaration (to be passed to the Commission by the contracting authority or entity) all foreign financial contributions they have received and confirm that those contributions are not notifiable under the FSR;
- Before the award of the contract, the Commission may request notification of foreign financial contributions if it suspects that the bidder may have benefitted from foreign subsidies in the three years prior to the bid submission or request to participate in the PPP.

The Commission will assess whether foreign subsidies cause or risk causing a distortion in a PPP, i.e. whether the foreign subsidies enable the bidder to submit an unduly advantageous bid. Similarly to M&A transactions, this review is limited to the PPP in question. During the Commission's review, all procedural steps can continue, except for the award of the contract.

Ex officio investigations

The Commission may examine information from any source regarding alleged foreign subsidies distorting the internal market, even after the closing of M&A transactions. ^[6] Such investigations are not limited to foreign financial contributions in a concentration or those in the context of PPP.

However, with regards to PPP, the *ex officio* review is limited to awarded contracts. Therefore, the only provisions of the FSR applicable to as yet unawarded public procurement contracts are those related to the *ex ante* notification of certain foreign financial contributions, as mentioned above.

Next steps - How to prepare

The FSR will apply from **12 July 2023** and the notification obligations will apply from **12 October 2023**.

The FSR will not apply to:

- Concentrations for which the agreement was concluded, the public bid announced, or a controlling interest acquired before 12 July 2023; or
- Public procurement contracts awarded or initiated before 12 July 2023.

In principle, in all other situations, the FSR applies to foreign subsidies granted in the **five years prior to 12 July 2023** or, by way of derogation for undertakings notifying a concentration or foreign financial contributions in the context of a PPP, **three years prior to 12 July 2023**.

Given the FSR's broad scope, it is strongly recommended that companies from third countries with a business in the EU start preparing now for the application of the FSR. This is especially important for companies planning to participate in M&A transactions and PPPs as the timelines for receiving the Commission's decision may be affected if notification is required.

Companies are advised to (i) identify and review financial contributions from third countries since at least July 2020 and possibly July 2018, and (ii) ensure internal monitoring of foreign financial contributions granted.

Our expertise

Contact our experts [Ursula Bassoukou](#), [Philippe-Emmanuel Partsch](#) and [Achet-Billa Saleh](#) in the **EU Financial & Competition Law** practice for assistance in understanding this new legal framework and how it could potentially impact your activities.

[1] Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market

[2] Article 3 FSR

[3] Article 4 FSR

[4] Article 20(3) FSR

[5] Article 28(1) FSR

[6] Article 9 FSR

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