

## Newsletter

# Application of the new Foreign Subsidies Regulation: first practical guidance for business

## Introduction

With the adoption of the **Implementing Regulation** on 10 July 2023, the European Commission has completed the definition of the procedural provisions of Regulation (EU) 2022/2560 on foreign subsidies distorting the Internal Market (so-called Foreign Subsidies Regulation - FSR), in view of its application as of 12 July 2023.

This Newsletter outlines the essential elements of the new regime on foreign subsidies which, as is well known ([see previous Newsletter of 29 November 2022](#)), is aimed at regulating the means by which the Commission may review subsidies granted by public authorities of non-EU countries to companies operating within the Union, in order to ensure an adequate level playing field, in particular with regard to mergers, acquisitions and participation in public procurement.

## Overview of the regulation

### *Foreign subsidies control regime*

FSR lays down rules and procedures for investigating **foreign subsidies that distort the Internal Market** and for redressing those distortions. Such distortions can arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.

A **foreign subsidy** shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the Internal Market and which is limited, in law or in fact, to one or more undertakings or industries.

In order to detect distortions, the Commission may **balance** the negative effects of a foreign subsidy against the positive effects on the development of the relevant subsidised economic activity on the Internal Market, while also considering the relevant policy objectives of the European Union.

The Regulation defines specific cases of non-distorting subsidies:

- if the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over any consecutive period of three years, that foreign subsidy shall be considered **unlikely** to distort the Internal Market.
- if the total amount of a foreign subsidy does not exceed the amount of **de minimis** aid (i.e. EUR 200.000) per third country over any consecutive period of three years, that foreign subsidy shall **not be considered to distort** the Internal Market.

Nevertheless, the FSR identifies certain categories of foreign subsidies that are most likely to cause distortions (**blacklist**). In particular:

- (i) a foreign subsidy granted to an **ailing undertaking**;
- (ii) a foreign subsidy in the form of an **unlimited guarantee** for the debts or liabilities of the undertaking;
- (iii) an **export financing measure** that is not in line with the OECD Arrangement on officially supported export credits;
- (iv) a foreign subsidy **directly facilitating a concentration**;
- (v) a foreign subsidy enabling an undertaking to submit an **unduly advantageous tender** on the basis of which the undertaking could be awarded the relevant contract.

### ***Definition of financial contributions***

The identification of the foreign financial contribution is a key element to define a foreign subsidy.

FSR provides a **broad definition of financial contribution**, covering any financial contribution made by a third country (i.e. central government and public authorities, public or private entities whose actions can be attributed to a third country). Financial contributions include, for example: the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or the provision of goods or services or the purchase of goods or services.

### ***European Commission's investigative tools: ex-ante notifications obligation and ex-officio review***

FSR provides for the following **investigative tools**:

- **ex-ante notification** obligation in case of concentrations and public procurement **above certain thresholds**;
- **ex officio review** in case of concentrations and public procurement procedures below the thresholds (with a possible request for prior notification by the Commission) and for all other market situations where a distortion may occur.

The following charts set out the relevant thresholds for the application of the prior notification regime and the related review procedures.

Concentrations	
Thresholds	<ul style="list-style-type: none"> <li>a. at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an <b>aggregate turnover in the Union of at least EUR 500 million</b>; and</li> <li>b. the undertakings were granted combined aggregate <b>financial contributions of more than EUR 50 million from third countries in the three years preceding the transaction</b>.</li> </ul>
How are financial contributions identified?	<ul style="list-style-type: none"> <li>• In the case of an acquisition, financial contributions granted to the acquirer or acquirers and the acquired undertaking;</li> <li>• In case of a merger, financial contributions granted to the merging undertakings;</li> <li>• In the case of a joint venture, financial contributions granted to the undertakings creating a joint venture and the joint venture.</li> </ul>
Which turnovers are considered?	<ul style="list-style-type: none"> <li>• In the case of a merger: the turnovers of each of the merging undertakings;</li> <li>• In the case of an acquisition: the turnover of the target (considering the group)</li> <li>• In the case of the creation of a joint venture: the turnover of the joint venture (but only in the case of a change from sole to joint control; in the case of greenfield joint ventures the threshold will not be met).</li> </ul>
Notifying parties	<ul style="list-style-type: none"> <li>• A concentration which consists in a merger or in the acquisition of joint control shall be notified jointly by the parties to the merger or by those acquiring joint control.</li> <li>• In all other cases, the notification shall be made by the person or undertaking acquiring control of the whole or parts of one or more undertakings.</li> </ul>
Procedure	<p><b><u>Phase I – Preliminary review</u></b></p> <p>25 working days after receipt of the complete notification.</p> <p><b><u>Phase II – In-depth investigation</u></b></p> <p>90 working days after the opening of the in-depth investigation. That period can be extended by 15 working days (<b>commitments</b> shall be submitted at the latest 65 working days from the date on which the in-depth investigation was initiated).</p>
Standstill obligation	The concentration shall not be implemented before the clearance by the European Commission.

Public procurement	
Thresholds	<p>a. The estimated value of the public procurement is <b>equal to or greater than EUR 250 million</b> (if the contracting authority decides to divide the procurement into lots, <b>the value of the lot or the aggregate value of all the lots is equal to or greater than EUR 125 million</b>); and</p> <p>b. the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions <b>in the three years prior to notification equal to or greater than EUR 4 million per third country</b>.</p> <p>➤ If the relevant thresholds <b>are not met</b>, economic operators shall list in a <b>declaration</b> all foreign financial contributions received.</p>
Notifying parties	<ul style="list-style-type: none"> <li>Economic operators participating in a public procurement procedure, shall notify to the contracting authority or contracting entity.</li> </ul>
Procedure	<p><b><u>Phase I – Preliminary review</u></b></p> <p>20 working days after receipt of the complete notification.</p> <p><b><u>Phase II – In-depth investigation</u></b></p> <p>110 working days after receipt of the complete notification. That period can be extended by 20 working days (<b>commitments</b> shall be submitted at the latest 50 working days from the date on which the in-depth investigation was initiated).</p>
Standstill obligation	The award is subject to the clearance by the European Commission.

In the case of **sub-threshold** concentrations or public procurements, if the EU Commission suspects that an economic operator may have benefited from foreign subsidies, it may request **prior notification** of the transaction, or initiate an *ex-officio* review. Also in such cases, the procedure has two phases: a **preliminary review**, conducted autonomously by the Commission, and an **in-depth investigation**, in which information may be requested and further inquiries conducted.

***The consequences of a distorting foreign subsidy: commitments, redressive measures and sanctions***

In order to remedy the distortion in the Internal Market actually or potentially caused by a foreign subsidy, the Commission may impose **redressive measures** or accept **commitments** offered by the undertaking under investigation.

Such commitments and redressive measures may be:

- **structural**, such as
  - (i) divesting certain assets; and
  - (ii) requiring the undertakings concerned to adapt their governance structure.
- **behavioural**, such as
  - (i) repaying the foreign subsidy; and
  - (ii) offering access to infrastructure, including research facilities, acquired or supported by foreign subsidies distorting the Internal Market.

The Commission shall, where appropriate, impose **reporting and transparency requirements**, including periodic reporting regarding the implementation of the commitments and redressive measures.

A **severe sanctioning system** is established where an undertaking:

- intentionally or negligently, **supplies incorrect or misleading information** in a notification; in such cases, the Commission may, by decision, impose **finances not exceeding 1% of their aggregate turnover of the undertaking concerned** in the preceding financial year, and a **periodic penalty payment of up to 5%**;
- intentionally or negligently, **does not comply to the notification obligation**; in such cases, the Commission may (i) require the companies concerned to **dissolve the concentration or take any measures necessary to restore the previous situation**, and (ii) fine the undertakings up to **10% of their aggregate turnover** in the preceding financial year;
- **does not comply with a decision** with commitments or redressive measures; the Commission may, by decision, impose fines not exceeding **10% of the aggregate turnover of the undertaking concerned** in the preceding financial year, or **periodic penalty payments not exceeding 5%**.

### *Date of application*

FSR shall apply from **12 July 2023**, but notification obligations shall apply from **12 October 2023**. FSR shall apply to foreign subsidies granted in the five years prior to 12 July 2023 where such foreign subsidies distort the Internal Market after 12 July 2023.

This means that concentrations for which the agreement was concluded on or after 12 July 2023 but not yet implemented as of 12 October 2023 will have to be notified and are subject to standstill obligation.

This Regulation shall not apply to:

- concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023;
- public procurement contracts that have been awarded or procedures initiated before 12 July 2023.

## The Implementing Regulation

The Implementing Regulation and the notification forms adopted on 10 July 2023 have clarified some of the practical aspects that are essential to guide companies within the regulation and have simplified some of the administrative burdens initially foreseen by the draft implementing regulation published for a consultation on 6 February 2023.

Below you can find some of the most relevant indications.

### *Procedural aspects*

- The time limits to control transactions under the Regulation run from the **effective date of notification**, i.e. when the Commission receives a **complete notification**.
  - With regard to **concentrations**, if the Commission considers the information submitted to be incomplete, it may request supplementary information. In such cases, the submission of the requested information constitutes the effective date of notification.
  - With regard to public **procurement** procedures, a distinction must be made between open and multi-stage procedures. In an open procedure, the notification or declaration shall be submitted only once, together with the tender. In a multi-stage procedure, the notification

or declaration shall be submitted twice, first with the request to participate and then as an updated notification or updated declaration with the submitted tender or final tender.

- When the Commission opens an in-depth investigation, the time limit within which the undertaking under investigation, any other natural or legal person, Member States and the third country that granted the foreign subsidy may submit their **comments in writing** shall be fixed by the Commission and shall normally not exceed one month from the date on which the undertaking under investigation has been informed about the decision, or from the date of publication of the summary notice of the decision in the Official Journal of the European Union in all other cases. In duly justified cases, the Commission may extend the said time limit.
- The **right of access** to the file of the Commission shall not extend to: (i) internal documents of the Commission; (ii) internal documents of the authorities of Member States or third countries, including competition authorities and contracting authorities or contracting entities; (iii) correspondence between the Commission and the authorities of Member States or third countries, including competition authorities and contracting authorities or contracting entities; (iv) correspondence between the authorities of Member States and between Member States and third countries.
- During the pre-notification phase, the notifying parties may present a motivated **waiver** request on the provision of information that is not reasonably available or information that is not necessary for the assessment of the transaction. It is however possible for the Commission to request such information pending the investigation.

## *Information requirements on financial contributions*

- The **notification forms** – in addition to the information about the transaction, the parties, the impact and possible positive effects of the contributions on the internal Market – the parties shall disclose information on foreign financial contribution according to the following criteria:
  - For **concentrations**, companies must report:
    - detailed information on any **foreign financial contributions equal to or in excess of EUR 1 million** that may fall into any of the categories of the **blacklist** foreseen in the regulation, individually granted to the notifying parties or to the target over the **past three years**;
    - an **overview** (by means of specific table) of **financial contributions that do not fall into any of the categories of the blacklist**:
      - of an individual amount of **at least EUR 1 million**;
      - granted to the notifying parties over the **past three years**;
      - and only for those countries where the estimated **aggregate amount** of all financial contributions granted over the past three years is **EUR 45 million or more** should be included.
  - For **public procurement** procedures, companies must report:
    - detailed information on any **foreign financial contributions equal to or in excess of EUR 1 million that may fall into any of the categories of the blacklist**, individually granted to the notifying parties or to the target **over the past three years**;
    - an **overview** (by means of specific table) of **financial contributions that do not fall into any of the categories of the blacklist**:
      - of an individual amount of **at least EUR 1 million**;
      - granted to the notifying parties **in the three years prior to the notification**;

- and only for those countries where the estimated **aggregate amount** of all financial contributions granted in the three years prior to the notification is **EUR 4 million or more** should be included;
- non-notifiable foreign financial contributions, which are of a **value below EUR 1 million but above the *de minimis* threshold** in the last three years preceding the declaration can be declared as aggregate without indicating their values.
- It is possible not to disclose information concerning the following non-blacklisted contributions:
  - (a) if not selective, **deferrals of payment of taxes and/or of social security contributions**, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application;
  - (b) **tax reliefs for avoidance of double taxation**;
  - (c) provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business;
  - (d) foreign financial contributions below the **individual amount of EUR 1 million**;
  - (e) in the case of acquisitions of control or creations of joint ventures by an **investment fund** or by a legal entity controlled by or via an investment fund, there is no need to include foreign financial contributions granted to other investment funds managed by the same investment company but with a majority of different investors if the following conditions are cumulatively met:
    - The fund which controls the acquiring entity must be subject to Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers or to an equivalent third country legislation in terms of prudential, organisational and conduct rules, including requirements aimed to protect investors; and
    - The economic and commercial transactions between the fund which controls the acquiring entity and other investment funds (and the companies controlled by these funds) managed by the same investment company are non-existent or limited.

As clarified by the Commission in the Implementing Regulation and the Q&A, the obligations and exemptions to disclose information on financial contributions (reporting thresholds) do not affect the calculation of the notification thresholds of FSR (notification thresholds).

## Practical issues

The application of the new regulations raises further challenges in relation to several practice areas, such as M&A, tax and national public procurement discipline. In particular:

### M&A

- New burden in an M&A process to establish, during the due diligence phase, whether the concentration transaction is subject to notification and standstill.
- Issue regarding the audit of the applicable thresholds, particularly when the target group has not developed a specific reporting regarding subsidies and/or where foreign jurisdictions are involved in which qualified advisory services are not readily available.
- Need to negotiate which party, between the seller and the purchaser, should bear the sanction risk with respect to the failed notification or with respect to an erroneous calculation of the thresholds.
- Unlikely insurability through W&I considering the very high potential values of the applicable sanctions.
- Post-M&A exposure risk with respect to disturbing initiatives by commercial competitors (or competing investors in the event of a competitive sale process) which could report to the competent authorities potential breaches of the subsidies regulations in order to hamper the implementation of the transaction.

### Tax

- Issues due to the broad definition of financial contribution.
- Definition of the relevant regime for the purposes of identifying a selective advantage, in line with European case law on State Aid.
- Need to map the tax benefits obtained and set up internal compliance and data management processes in synergy with other departments such as legal and IT.
- Problems related to the tracking of data on tax benefits obtained by other companies in the same group.
- Effects of the joint application of other tax regulations, such as Global Minimum Tax and Controlled Foreign Companies (CFCs), in which the tax benefit obtained is offset.

### Public procurement

- Potential disincentives on participation in the procedure and on its competitiveness: elements that the D.Lgs. 36/2023 (new Italian public procurement code) sets as objectives to be pursued.
- The contracting authority should inform the participants of the notification obligation foreseen in the Regulation but economic operators are in any case required to apply the FSR even if the contracting authority does not provide such communication.
- The effect of the prohibition of the award and the other grounds for exclusion provided for in the FSR seems similar to that of the automatic grounds for exclusion provided for in the D.Lgs. 36/2023, although a technical-discretionary assessment by the administration is required.
- The consequences in the event that the administration proceeds to award (or sign) a contract in breach of the standstill obligation provided for in the FSR are unclear.

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