

## LEGAL ALERT

# THE FOREIGN SUBSIDIES REGULATION BECOMES APPLICABLE

Regulation (EU) 2022/2560 of the European Parliament and of the Council, of 14 December 2022, on foreign subsidies distorting the internal market (the Foreign Subsidies Regulation, FSR), becomes applicable as of today, 12 July 2023.

The FSR provides the European Commission with new and significant powers to investigate financial contributions granted by non-EU governments to companies active in the European Union, in order to address distortions potentially caused by foreign subsidies to the EU single market. The FSR introduces new notification and compliance obligations for EU companies planning M&A transactions and entering into public procurement procedures.

### New investigation tools

The FSR establishes three instruments, all enforced by the European Commission:

- **An ex-ante obligation to notify concentrations** (full mergers, acquisitions of sole or joint control, and full-function joint ventures) in which (i) the EU turnover of the acquired party, of at least one of the merging parties or of the joint venture is at least EUR 500 million in the preceding financial year and (ii) the parties to the transaction were granted combined aggregate financial contributions of more than EUR 50 million in the 3 years preceding the signing of the relevant transaction agreements.
- **An ex-ante obligation to notify foreign financial contributions in public procurement procedures** in which (i) the estimated value of the contract is of at least EUR 250 million and (ii) the bid involves a foreign financial contribution of at least EUR 4 million per non-EU country over the past 3 years. If the value of the contract is above EUR 250 million, but no reportable financial contribution was granted to the companies concerned in the past three years, a declaration to that effect must be submitted to the awarding authority.
- **The power for the Commission to start *ex officio* investigations** when it suspects the involvement of a foreign subsidy, including the possibility to request ad-hoc notifications concerning concentrations and public procurement procedures which do not meet the thresholds for mandatory filing. The FSR applies to all sectors and economic activities, but the

Commission may also carry out market investigations on specific sectors, types of economic activity or subsidy instrument types to identify specific distortions.

In the two *ex-ante* notification instruments, the companies concerned are subject to a standstill obligation, meaning the transaction cannot be implemented, or the public contract cannot be awarded, until the end of the Commission’s investigation or until the end of the applicable waiting period.

The FSR endows the Commission with extensive investigative and sanctioning powers for non-compliance, which are broadly comparable to those applicable in EU competition law cases. In particular, failing to notify a concentration or the participation in a public procurement procedure subject to mandatory filing, or implement the transaction or the contract without waiting for the Commission’s clearance (gun-jumping), may lead to a fine of up to 10% of annual aggregate turnover.

If the Commission finds that a foreign subsidy exists and is distortive, it should balance the negative effects of the subsidy, in terms of the distortion, with the positive effects of the subsidy to determine appropriate redressive measures, to accept commitments (which may include a range of structural or non-structural remedies), or ultimately to block the transaction or the contract. The Commission’s review procedure under the FSR is broadly similar to the procedure of the [EU Merger Regulation](#), with an initial review, which can be followed by an in-depth investigation, if there are sufficient indications that a company has been granted a foreign subsidy that distorts the internal market.

### **“Foreign subsidy”: a very broad notion**

The FSR applies to all “foreign subsidies”, which can be any *financial contribution provided directly or indirectly by a non-EU Member State, which confers a benefit on a company engaging in an economic activity in the EU and is limited to one or more companies or industries.*

This is a very broad notion, which is likely to raise many doubts to companies. Financial contributions include the transfer of fund or liabilities (such as capital injections, direct grants, loans, guarantees, debt forgiveness, or compensation for financial burdens imposed by authorities), the foregoing of revenue otherwise due to the State (such as tax exemptions), and the provision of goods or the purchase of goods and services. Financial contributions can be provided by a central government or other public authorities of the non-EU State, or by a private entity whose acts can be attributed to the same State. Financial contributions are only deemed to provide a “benefit” (and therefore constitute a foreign subsidy) if they would not have been obtained under normal market conditions.

However, when assessing the notification thresholds to determine whether a transaction or a public procurement procedure is subject to mandatory filing to the Commission, the parties should take into account all financial contributions provided by non-EU Member States in the previous 3 years, including those obtained under normal market conditions.

## **The FSR becomes fully enforceable**

The FSR formally entered into force on 12 January 2023, mainly to allow the drafting of the Implementing Regulation, published today in the Official Journal ([Commission Regulation \(EU\) 2023/1441](#)), which details procedural aspects and contains the forms for the notification of concentrations and public procurement procedures, as well as for the declaration to be submitted in the case of procurement procedures above EUR 250 million where no reportable financial contribution has been granted to the companies concerned.

The FSR becomes applicable as of today, 12 July 2023, and the notifications obligations will only apply as from 12 October 2023 (certain aspects of inspections conducted in Member States and their enforcement by authorities will be applicable from 12 January 2024 onwards).

The FSR does not apply to concentrations for which the agreement was signed before 12 July 2023. However, the Commission has clarified that concentrations where the agreement was executed after 12 July, but do not close by 12 October, are subject to filing if the relevant thresholds are met.

## **Practical implications**

The FSR places significant compliance burdens on companies which are active in the EU and in non-EU countries. When considering a potential M&A transaction or the participation in a public procurement procedure, companies should assess whether the notification thresholds are met, considering in particular all financial contributions granted by non-EU countries in the previous 3 years, since non-compliance exposes the parties to the risk of heavy fines and other negative consequences. If applicable, an FSR filing may run in parallel to other regulatory approvals that may be required in the same transaction, such as merger control filings, including to the European Commission under the EU Merger Regulation.

Companies taking part in public procurement procedures meeting the thresholds should also take care in submitting the applicable notification form to the awarding authority or, if no reportable financial contribution was granted in the past 3 years, to submit the corresponding declaration.

Collecting information on past financial contributions received by companies of the same corporate group in non-EU jurisdictions can be onerous and also raise a number of practical questions. It is therefore advisable companies keep track of all financial contributions, coming directly or indirectly from State sources in third countries, obtained by any company of the same corporate group.

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