



THE EU'S FOREIGN SUBSIDIES REGULATION

The Foreign Subsidies Regulation¹ (“FSR” or the “Regulation”), which will apply from the second half of 2023, will allow the EU to address subsidies granted by non-EU countries (“foreign subsidies”) which distort the internal market and fair competition. Although subsidies granted by EU Member States are strictly regulated by the EU’s state aid regime and imports of subsidised goods can be restricted by anti-dumping measures, the EU currently has no mechanism to regulate foreign subsidies.

¹ Regulation (EC) 2022/2560, 2022 O.J. (L 330) 1

The FSR will, in effect, extend the EU's state aid regime beyond its borders in certain circumstances and allow the EU to address subsidies granted by non-EU countries which distort the internal market and fair competition. It will have a particular focus on companies engaged in investment, procurement, and mergers and acquisitions on the internal market. While it has been suggested that the FSR is intended primarily to counteract the effect of Chinese government subsidies, given the current make up of investment inflows to the EU, the FSR may affect in particular companies receiving US government subsidies, especially following the Inflation Reduction Act passed by the US Congress last year. Despite this, the European Commission ("Commission") has said that the FSR will keep the EU "open to trade and investment, while ensuring a level playing field for all companies operating in the Single Market."²

How will the FSR operate?

The FSR will apply to all undertakings "engaging in an economic activity in the internal market",³ regardless of ownership. It creates three new tools to allow the Commission to address the potentially distortive effect of foreign subsidies on the internal market. These are: 1) a mandatory prior notification regime for concentrations; 2) a mandatory prior notification regime for public procurements; and 3) the right for the Commission to launch an investigation on its own initiative. We will look at each of these three tools in turn.

Concentrations

The mandatory notification regime for concentrations will cover mergers, acquisitions and the creation of full function joint ventures. Notification of the concentration to the Commission will be required where: 1) any one of the undertakings involved in the concentration is established in the EU and has an EU turnover of €500 million or more; and 2) the undertakings involved have received combined aggregate foreign subsidies of €50 million or more in the three preceding years.

Once notified, a standstill period will commence during which the

Commission can investigate the concentration. In the first instance, this period will be 25 working days to allow for a preliminary review. The Commission can then conduct an in-depth review if it chooses, which extends the standstill period for a further 90 working days, extendable by a further 15 working days if commitments are offered to the Commission by the undertakings. During the standstill period, the concentration cannot be implemented. These timescales are broadly similar to the Phase I and II review periods under the EU Merger Regulation ("EUMR").⁴ In theory, where notifications under both the FSR and the EUMR are required, the two reviews could be run together. However, given that each review has a different focus (the EUMR focuses on the effect on the market of a proposed transaction, as opposed to the effect of foreign subsidies on the market), the Commission will be examining different issues in each procedure. It is therefore anticipated that the review processes will be run separately in parallel.

Public Procurement

The mandatory notification regime for public procurements will work similarly to that for concentrations. Notification to the Commission will be required where: 1) the value of the contract to be awarded is €250 million or more; and 2) the bidder (including any dependent subsidiaries and holding companies) as well as any subcontractors or suppliers involved in the tender have received aggregate foreign subsidies of €4 million or more from any single third country in the three preceding years.

As with concentrations, there will then be a standstill period while the Commission carries out a review, which will be 20 working days for a preliminary review, then a further 90 working days if an in-depth review is conducted, extendable by a further 20 working days in exceptional circumstances.

Own initiative investigations

Finally, this residual investigation power will allow the Commission to launch an investigation on its own initiative into foreign subsidies which

could distort the EU internal market. This could relate to a concentration or public procurement which does not meet the requirements for mandatory notification, as well as any other economic activity affecting the internal market.

The Commission's powers

The FSR grants the Commission the power to request information from third countries and to conduct interviews in third countries with permission, as well as expansive investigation powers within the EU.

The Commission's tools with relatively high thresholds for notifications were designed to allow the Commission's resources to be focused "on the largest and potentially most distortive cases".⁵ The residual investigation power is designed to allow targeted intervention where appropriate, while minimising the administrative burden for both companies and the Commission. The need to consider the volume of notifications received by the Commission is particularly pressing given that in 2017, there were 100,000 foreign-owned companies active in the EU, along with a further 22 million EU-owned companies which could potentially receive foreign subsidies and be subject to the FSR. The Commission has indicated that it expects to receive notification of approximately 30 concentrations and 36 procurements, and that it will carry out around 30-45 own initiative investigations per year.⁶

What foreign subsidies are caught by the FSR?

The FSR defines a subsidy as a direct or indirect financial contribution conferring a benefit. This can include transfers of funds or liabilities, such as grants, loans, guarantees, debt forgiveness, or debt to equity swaps; the foregoing of revenue such as tax exemptions or the granting of exclusive rights without adequate remuneration; or the provision or purchase of goods and services. Financial contributions can be provided by central government, public authorities, or public or private entities whose actions can be attributed to the state. For public entities, the Regulation specifically

² [Foreign Subsidies Regulation \(europa.eu\)](#)

³ FSR, Art 1(2)

⁴ Regulation (EC) 139/2004, 2004 O.J. (L 24) 1

⁵ [Questions and Answers \(europa.eu\)](#)

⁶ [Impact Assessment Report \(europa.eu\)](#)



mentions that factors including the government's role in the economy should be considered when determining whether a public entity's actions can be attributed to the state.

This definition of foreign subsidy is extremely broad and covers many contributions which may not appear on the face of it to be subsidies in the usual meaning of the word. It conceivably includes money received as part of Covid-support measures, private banks acting under state direction to provide financing, or even government supply contracts. Additionally, the foreign subsidy does not even need to be received to be regarded as a foreign subsidy under the FSR, rather it *"should be considered granted from the moment the beneficiary obtains an entitlement to receive the foreign subsidy"*.⁷

The broadness of the contributions captured by the FSR is deliberate – it seeks to include subsidies disguised by private actors, indirect contributions such as loan guarantees or the foregoing of revenue, and contributions from all levels of government. However, in expanding the range of bodies and entities which can be deemed to provide a foreign subsidy, the definition appears to be so broad as to include contracts with state-owned utility companies for the

provision of electricity or water, or legitimate business activities such as fulfilling government cleaning, defence or catering contracts, amongst others. While the Commission will of course consider the nature of the contribution and assess its distortive effect, if any, the very broad definition of foreign subsidies could nevertheless cause such contributions to count towards the thresholds for notification. Given that it is the responsibility of the undertakings involved to collate this information to determine whether a mandatory notification is required, the breadth of what may be regarded as a foreign subsidy represents a significant additional administrative burden for those seeking to engage in procurement or investment activities in the EU.

How will the Commission determine a foreign subsidy's distortive effect?

Under the FSR, a foreign subsidy is deemed to distort the internal market where it is liable to improve the recipient's competitive position on the market and actually or potentially negatively affects competition in the internal market. The Regulation sets out factors which will be considered, such as the amount and nature of the subsidy, the size of the undertaking, the nature of the market or sectors,

and the purpose of and conditions attached to the foreign subsidy. Foreign subsidies which do not exceed €4 million over a period of three consecutive years are deemed unlikely to distort the internal market. There is also a *de minimis* threshold of €200,000 granted per third country over a period of three consecutive years, below which the foreign subsidy shall not be considered to distort the internal market.

Meanwhile, the foreign subsidies most likely to distort the internal market are: 1) those designed to save ailing businesses which are not also accompanied by a viable restructuring plan; 2) unlimited guarantees for debts or liabilities, in terms of amount and/or duration; 3) an export financing measure which does not conform with the OECD Arrangement on officially supported export credits; 4) those directly facilitating a concentration; or 5) those which enable an unduly advantageous bid in a public procurement.

The undertaking under investigation can provide evidence to show that a particular subsidy, in the specific circumstances of the case, does not distort the internal market. The Commission can also balance the distortive effects of a foreign subsidy against any positive effects it creates,

such as the development of economic activity or the furthering of policy objectives, for example, environmental protection or social standards.

It is worth noting that there is no explicit mention in the FSR that the identity of the state granting the foreign subsidy will form part of the Commission's determination. However, there are hints in the Regulation that for certain third countries, what constitutes a subsidy will be interpreted more widely. For example, where a financial contribution is provided by a foreign public entity, the Commission will consider whether the entity's actions can be attributed to the state, taking into account "*the legal and economic environment prevailing in the State ... including the government's role in the economy*". This could be read as an attempt to scrutinise subsidies from third countries with non-market economies, such as China, more closely.

If the Commission considers that a foreign subsidy distorts the internal market, it can impose measures to redress this, or accept commitments offered by the undertaking under investigation. These must be proportionate, and must fully and effectively remedy the distortion created by the subsidy. Redressive measures or commitments can include offering access to the infrastructure or facilities supported by the foreign subsidies, restrictions on investments or market activity, divestment of assets, the dissolution of the concentration (if already completed potentially contrary to the FSR's requirement for prior clearance), or the repayment of the foreign subsidy.

Next Steps

The FSR has now passed through the EU's legislative process and its application is split into two phases. From 12 July 2023, the bulk of the FSR will apply, including the ability for the Commission to launch investigations on its own initiative. Meanwhile, the notification requirements will apply from 12 October 2023.

The Commission has also published a draft implementing Regulation, which adds further details around the notification procedure, standard forms, and time limits. A consultation is currently open for stakeholders to provide feedback on the draft implementing Regulation.

Given the breadth of the Regulation, it is however disappointing that the Commission has only committed to provide clarification on the concept of distortion and the balancing test "*at the latest one year after the start of application*" (i.e. by mid-2024). Furthermore, the Commission will only publish guidelines on key concepts under the FSR "*within three years after the entry into force of the FSR*" (i.e. by 12 January 2026).⁸ In the absence of further guidance, those subject to the Regulation will have to exercise extra caution when navigating its notification procedures.

The consultation on the draft implementing Regulation is open until Monday 6th March 2023, and can be accessed here: **[Distortive foreign subsidies – procedural rules for assessing them.](#)**

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8 [Questions and Answers \(europa.eu\)](#)

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