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The EU Foreign Subsidies Regulation is now in force: what do companies need to know?

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Why an EU Foreign Subsidies Regulation?

On 12 July 2023, Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (the “**Foreign Subsidies Regulation**” or “**FSR**”) officially entered into force.

Through this new piece of legislation, the European Commission (“**EC**”) aims to “catch” under its radar, all financial contributions granted by non-EU countries that may result in distortive subsidies to the advantage of companies operating in the EU. Up to now, said financial measures fell outside the scope of application of EU Competition and State aid rules.

The EC thus decided to intervene, with a view to address this regulatory gap between EU and non-EU granted financial contributions.

The final goal of the EC is to ensure a level playing field among all companies operating within the EU perimeter, both those receiving EU subsidies (already subject to State aid control) and those receiving non-EU subsidies (now falling under the scope of the FSR).

New powers granted to the European Commission

Under the FSR, the EC has been entrusted with the following enforcement powers:

- 1 Two **notification**-based tools:
 - i One to investigate **concentrations**; and
 - ii One to investigate **bids in public procurement procedures**;
- 2 An **ex-officio** tool to investigate all other market situations.

As of 12 July 2023, the EC can officially launch *ex-officio* investigations; whilst the notification obligation of concentrations and bids that meet the FSR criteria will only apply as of 12 October 2023. From a temporal application point of view, according to the EC guidance, those deals signed after 12 July 2023 but not yet implemented by 12 October 2023 will be subject to the notification requirement.

Operations subject to the notification requirement

Pursuant to the FSR, the following operations are in the scope of application of this new EU regulatory tool:

- a **concentrations** involving financial contributions granted by non-EU governments, where the target company, one of the merging parties, or the joint venture, generates an EU turnover of at least **EUR 500 million**, and the transaction involves foreign financial contributions of more than **EUR 50 million**;
- b **bids in public procurement procedures** involving financial contributions by non-EU governments, where the estimated contract value is at least **EUR 250 million** and the bid involves a foreign financial contribution of at least **EUR 4 million** per third country. If the tender is divided into lots, the overall thresholds are the same, but a notification is required only if the participant bids for one or more lots

cumulatively having a value in excess of EUR 125 million. The contribution is relevant if granted not only to individual economic operators, but also to groupings and main subcontractors (with a subcontract quota equal to or greater than 20%), if known at the time of the bid submission.

Please note that, in relation to relevant public procurement procedures (a) any notification shall be submitted through the relevant contracting authorities/entities and, (b) regardless of the existence of subsidies triggering a notification requirement, a declaration concerning any foreign subsidies received by economic operators – or lack thereof – shall be submitted to contracting authorities/entities for each tender procedure.

For the purposes of the FSR, “**financial contribution**” has a wide-reaching meaning, as it includes any kind of measure ranging from tax credits, to public capital transfers and loans or guarantees provided by the non-EU State.

In analogy with the EU State aid provisions and case law, the financial contributions considered under the FSR shall be **selective** and shall confer a **benefit** to the companies active in the EU, as well as having a distortive effect in the internal market itself.

Without prejudice to the above-mentioned conditions, the EC may always carry out a “**balancing test**” with a view to consider eventual positive effects counterbalancing the negative effects of the notified operation. These are namely:

- positive effects on the development of the subsidized activity in the internal market; and
- positive effects related to relevant policy objectives (especially those of the EU, e.g. the sustainable transition).

FSR Implementing Regulation: notification procedure (almost) explained

On 10 July 2023, the EC adopted the FSR Implementing Regulation and related notification forms. This clarified the procedure that companies need to follow when notifying the operations meeting the relevant FSR requirements, as well as their procedural rights, the EC investigative powers and the procedural timeline.

With reference to the **notification reporting obligations**, the following details shall be submitted:

- a in case of concentrations:
 - i for all foreign financial contributions most likely to be distortive (pursuant to Article 5 FSR) detailed information on all financial contributions of an individual amount of at least EUR 1 million, granted to the parties to the transaction over the three years prior to the concentration;
 - ii for all other kinds of foreign financial contributions, an overview of financial contributions granted to the notifying party over the past three years, of an individual amount of at least EUR 1 million, and in relation only to those countries that have granted to the parties to the transaction at least EUR 45 million over the three years prior to the concentration (without prejudice to a number of exceptions provided in the FSR);
- b in case of public procurement procedures:
 - i detailed information on all financial contributions most likely to be distortive (pursuant to Article 5 FSR) of at least EUR 1 million individually granted to the notifying party over the three years prior to the notification;
 - ii for all other kinds of foreign financial contributions, an overview of financial contributions granted to the notifying party of an individual amount of at least EUR 1 million, and in relation only to those countries that have granted to each of the notifying parties at least EUR 4 million per country over the three years prior to the notification.

Final decisions that can be adopted by the EC

Similar to the EU merger procedure, the EC assessment of the notified operation may have different outcomes. In particular, the EC may:

- clear the notified operation by adopting a non-objection decision;
- conditionally clear the notified operation (e.g., following the acceptance of commitments offered by the undertakings concerned that are deemed to be suitable to address any risk of distortion);
- prohibit the notified operation (if the foreign subsidy is deemed to distort the internal market by giving competitive advantages to its beneficiaries).

The EC assessment on notified bids in public procurement procedures, aims at determining whether the bid is abnormally low as a result of a foreign subsidy which distorts competition in the internal market. The bidder may provide alternative justifications for its bid, and the most extreme measure – prohibition of an award – shall apply only where such justifications were insufficient and where any commitments offered by the bidder were deemed not sufficient to neutralize the distortion. This assessment concerns only the relevant tender procedure and may not be used as a ground for exclusion from other tenders. However, information acquired in relation to foreign subsidies in the context of public tenders can be used to assess other economic activities.

Fines and penalties

Severe fines calculated on the last aggregate turnover of the affected parties apply to:

- the intentional or negligent failure to provide accurate information to the EC;
- refusal to accept inspections (1%);
- refusal to submit a notification or a declaration where required (up to 10%); or,
- refusal to comply with an EC decision (up to 10%).

In addition, the EC may also impose periodic payments (up to 5% of the aggregated daily turnover) for each day of non-compliance from the date of the decision imposing the periodic payment, to the date of compliance.

Closing remarks

Although the Implementing Regulation and related notification forms shed some light on the procedural implications of the FSR, some open questions remain.

Firstly, the notion of “**public companies**” – to which the new regulatory set explicitly applies - is still subject to uncertain interpretation. If, according to the FSR, “*whether a public entity provided a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment prevailing in the third country in which the entity operates including the government’s role in the economy of that country*”, it remains unclear how foreign public companies shall conduct any self-assessment in this regard, lacking any further EC guidance. This is even more unclear when public companies involved in concentrations or bids in public tenders within the EU do not meet any other relevant threshold and/or conditions established under the FSR.

Secondly, some procedural timeline hurdles may arise both with reference to concentrations and public procurement bids.

With respect to concentrations, a coordination between the merger and the FSR notification procedures may be desirable. In light of the fact that the concentrations notified under the FSR may not be implemented until cleared by the EC, there may be procedural tensions in the event that an operation already received the go-ahead from the EC on the merger aspects, whilst the FSR procedure is still under review.

With respect to public procurement bids, as the public authority cannot award the bid until the EC adopts its decision, the risk is to unnecessarily lengthen tender procedures that the notifying company might not ultimately win. Even if the Implementing Regulation lists a set of deadlines for the adoption of EC decisions, even longer delays may occur whenever a contracting authority/entity, even if no notification has been submitted, has nonetheless reason to believe that a bid is abnormally low due to a suspected foreign subsidy. This is because it cannot carry out its usual assessment on abnormally low tenders pursuant to public procurement directives, and instead has to report the matter to the EC and then wait for its decision.

Hopefully, the practical implementation of the FSR will provide answers to these open questions.

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