

Insights

THE EU'S FOREIGN SUBSIDIES REGULATION GOES LIVE AS THE EUROPEAN COMMISSION FINALISES THE NOTIFICATION REQUIREMENTS FOR BUSINESSES

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SUMMARY

The EU's Foreign Subsidies Regulation (FSR) entered into force on 12 July 2023. Its M&A and public procurement notification regimes will go live on 12 October 2023.

On 10 July 2023, the European Commission (Commission) adopted its final version of the FSR's Implementing Regulation alongside the template notification forms. This gives further information on how the FSR regime works in practice, and specifies the information that must be included for mandatory M&A and public procurement notifications.

We have written previously about the [FSR regime](#) at the beginning of 2023.

This article looks at the new FSR regime, and what this means in practice for those doing business within the EU.

WHAT IS THE FSR REGIME?

The FSR empowers the Commission to scrutinise the impact of foreign subsidies granted by non-EU countries to businesses that are active in the EU. It is intended to prevent such contributions from distorting competition within the EU.

There are three pillars to the regime:

1. Certain contributions granted in the context of M&A transactions must be notified to the Commission. This represents another layer of M&A notification assessments and potential filings for businesses with activities in the EU - alongside merger control and foreign direct investment;
2. Certain contributions granted in the context of public procurement must be notified to the Commission; and

3. The Commission may scrutinise foreign financial contributions on its own initiative.

Under the FSR, the Commission has similar enforcement powers to its remedial toolkit for merger control - namely the ability to prohibit transactions and public contract awards, require structural and behavioural remedies from parties and impose fines of up to 10% of global turnover for non-compliance.

WHAT IS A FOREIGN FINANCIAL CONTRIBUTION AND A FOREIGN SUBSIDY?

The range of financial contributions from non-EU countries caught by the FSR regime is notably broad. Relevant financial contributions include, among other things:

1. Transfers of funds or liabilities, such as grants, loans, loan guarantees, setting off of operating losses and debt forgiveness;
2. Foregoing revenue that is otherwise due, such as tax exemptions; and
3. The provision of goods or services to the non-EU state, or the purchase of goods or services from the non-EU state.

While all such financial contributions from non-EU countries (whether direct or indirect) will be relevant for assessing the notification thresholds discussed below, they will only be deemed to be foreign subsidies where they confer a benefit on a business that is active in the EU, and that benefit is limited to one or more businesses or industries.

M&A NOTIFICATION REGIME

THRESHOLDS FOR NOTIFICATIONS

The FSR provides that certain transactions involving companies that are active within the EU must be notified to the Commission in order to test the potential impact of foreign financial contributions. A notification obligation is triggered in case of a merger when both of the following thresholds are met:

1. One of the merging parties (in the case of a merger), the target (in the case of an acquisition of control) or the joint venture (in the case of a creation of a joint venture) must achieve €500m turnover in the EU in the last year; and
2. €50m of foreign financial contributions aggregated across all parties to the transaction over the previous three years.

The FSR also allows the Commission to request the prior notification of any concentration which does not meet the thresholds where the Commission suspects that foreign subsidies may have

been granted to the undertakings concerned in the three years prior to the concentration.

PRACTICALITIES

The FSR's M&A regime includes a standstill obligation, meaning that the transaction cannot close before the notification process is cleared.

The Implementing Regulation, and the template M&A notification form appended to it, set out the information requirements for those making a mandatory notification.

Some of the information required for the notification is similar to that compiled for merger control filings. Unsurprisingly, though, other information not included in merger control filings will need to be provided. Some of the key further information required is outlined below.

1. The notifying party (the merging parties in the case of a merger, or the parties acquiring sole or joint control in the case of an acquisition of control) will need to list the sources of finance used to fund the transaction, and identify the lender and any guarantees/collateral for each debt instrument. For equity-financed acquisitions, the undertakings subscribing/purchasing the shares and the conditions attached to the equity financing must be disclosed.
2. The M&A notification form also requires the provision of information on any foreign financial contributions of €1m or more that fall within certain specified categories, and details of the bidding process where the transaction occurred by way of a competitive tender (including information on other bidders). Although this could be burdensome in some acquisitions, following feedback provided to the Commission by BCLP and others, the extent of that burden has reduced significantly from what was included in the initial drafts of the Implementing Regulation. Furthermore, the parties can ask the Commission to dispense with an obligation to provide certain information requested in the notification form where that information is not reasonably available. Where transactions are subject to parallel merger review, the Commission has also indicated that it may share materials within DG Comp with a view to further reducing the information and administrative burden on merging parties.

PUBLIC PROCUREMENT NOTIFICATION REGIME

THRESHOLDS FOR NOTIFICATIONS AND DECLARATIONS

The FSR requires that public procurement tenders and framework agreements must be notified to the contracting authority and then onward to the Commission **before the contract is awarded** where:

1. The estimated value of the public procurement or framework agreement is equal to or greater than €250m; and

2. The bidding party (including its holding companies and any subsidiary companies without commercial autonomy, where applicable) and/or its main subcontractors (where applicable), have received financial contributions from non-EU countries of at least €4m per non-EU country in the last three years prior to notification.

This notification obligation may also be triggered where the value of the tenderer's bid is significantly lower than €250m where a tender meeting the threshold at (1) above is divided into lots and the value of the lot/lots for which the tenderer applies amount to at least €125m.

The FSR also requires that where the financial thresholds in (1) above are met but any financial contributions granted by a non-EU country in the last 3 years do not exceed the threshold in (2), the notifying parties must submit a "declaration". This declaration must contain details of all financial contributions from a single non-EU country over a period of three years which in aggregate exceed €200,000. This onerous requirement is somewhat simplified for any financial contributions with individual amounts of below €1m but above €200,000 in the preceding three years which may be declared in aggregate without indicating their individual values.

PRACTICALITIES

The Implementing Regulation and template notification form that accompanies it set down the procedural framework and formalities for notifications and declarations applicable to public procurement processes under the FSR.

Notifying parties are required to include considerable detail in the notification, including "*detailed information*" on financial contributions and in particular on any financial contributions which are equal to or exceed €1m and may qualify as "*foreign subsidies most likely to distort the internal market*". The FSR lists those most likely to be distortive, namely: (i) a foreign subsidy to ailing entities; (ii) a foreign subsidy in the form of an unlimited guarantee; (iii) an export financing measure not in line with the OECD rules; and (iv) a foreign subsidy enabling an entity to submit an unduly advantageous tender.

As tenders cannot be awarded prior to Commission clearance, it is advisable to begin considering the information required for notification early in the tender process. The Commission also strongly encourages notifying parties to engage in pre-notification discussions with it in good time prior to notification. The Commission indicates that it may be possible to agree waivers in respect of certain of the information generally required to be included in notifications as a part of such pre-notification discussions, suggesting that the Commission may adopt a pragmatic and flexible approach to the notification process. However, it remains to be seen quite what this approach will look like in practice.

COMMISSION'S OWN INITIATIVE INVESTIGATIONS

Aside from the mandatory notification regimes, the FSR provides the Commission with the power to investigate alleged foreign subsidies received by businesses active within the EU up to ten years after they were granted. The Commission has no statutory time limit within which it must complete such investigations, besides a requirement to endeavour to complete them within eighteen months, aligning to a certain extent with a Commission merger review timeline. This will add a degree of uncertainty for businesses that are subject to such investigations. Where the Commission finds that there is a foreign subsidy that distorts the internal market, it can impose both structural and non-structural measures to remedy this harm.

WANT TO KNOW MORE?

Businesses that might be affected by the new FSR regime, in particular the notification regimes, might wish to consider putting in place procedures for gathering data on the foreign financial contributions they have received. In addition, deals and bids subject to the FSR will need to include provisions (e.g. conditions precedent in M&A) to account for the mandatory notification regimes.

If you would like to know more about how the FSR regime might affect your business, please reach out to any of the authors listed or your usual BCLP contact.

RELATED PRACTICE AREAS

- Antitrust
- International Trade

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