

FSR key take aways

10 THINGS TO KNOW

12 July 2023



The New EU Foreign Subsidies Regulation (FSR): 10 Things to know

1. The EU's Foreign Subsidies Regulation (FSR)¹ has entered into force on 12 January 2023 and applies as from 12 July 2023. It is accompanied by an Implementing Regulation (adopted on 10 July 2023) and various guidance documents (incl. a Q&A that will be updated from time to time) on the European Commission's (EC) website. It enables the EC to review subsidies granted by non-EU countries that may distort competition within the EU. The concept of subsidies targeted by the FSR is equivalent to the notion of State aid in EU law. For more information on the FSR, please refer to our [website](#).
2. The FSR is relevant for any company doing business in the EU. It will typically apply to companies or funds owned by non-EU countries (e.g. sovereign wealth funds) and companies operating in State-run economies but it equally applies to companies and funds operating in market economies and to EU businesses that have received financial contributions from non-EU countries, e.g. in case of substantial operations outside the EU. The FSR applies across sectors and irrespective of the third country concerned.
3. The FSR creates two new **ex ante** notification obligations. The first relates to M&A operations. The second mandatory notification will apply in the context of public procurement procedures.

These two new mandatory notification obligations will only apply as from 12 October 2023 (for M&A, this includes transactions signed after 12 July 2023 but not yet implemented on 12 October 2023). The new notification obligations come on top of other existing prior notification obligations, for instance in the area of merger control or foreign direct investment.

 1. M&A transactions (including the establishment of a joint-venture) must be notified if the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and the parties concerned received together foreign financial contributions of in total at least €50 million in the last three years. Such transactions cannot be completed until cleared by the EC.
 2. In case of public procurement procedure, a prior notification will need to be made where the estimated contract value is at least €250 million and the bidder has received in the last three years foreign financial contributions of in total at least €4 million per third country. An bidder under investigation cannot be awarded the contract until cleared by the EC.
 3. The FSR further empowers the EC to start an investigation, on its own initiative, if it suspects that a foreign subsidy may be involved that may distort competition in the EU. Such investigations are not limited to M&A or tender situations where the thresholds mentioned above are not met, and could, for instance, include situations where greenfield investments are made or minority interests are taken in companies.

¹ Regulation 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market, 2022 OJ L330/1.

7. A key concept in the FSR is the notion of foreign financial contributions. The concept basically covers any income derived from non-EU countries and is therefore much broader than the notion of 'subsidies' granted by a third country. In addition, in the context of the mandatory notification obligations, the thresholds expressed in terms of foreign financial contributions are set at a low level (€50 million in case of M&A operations, €4 million in the context of public procurement). It will be key for companies to get a proper inventory of the financial contributions received from third countries as from 2020 and to have that information readily available. The FSR Implementing Regulation adopted on 10 July 2023 however limits what needs disclosing to some extent, alleviating some of the information collection burden.
8. The EC will have exclusive powers to enforce the FSR. Where the EC establishes a distortive foreign subsidy, it may issue a prohibition decision or impose redressive measures on companies to remedy the distortion or accept such measures as commitments. Remedies and commitments may involve for instance the divestment of certain assets or the prohibition of a certain market behaviour.
9. The FSR grants the EC broad powers to gather the information necessary for its investigation including fact-finding missions and inspections. These powers are similar to those it has in the context of competition law enforcement. The EC may impose fines, including of up to 10% of a company's global turnover in case of failure to make the mandatory notifications, gun-jumping and non-compliance with EC decisions/commitments.
10. In the run-up to 12 July 2023, the EC has issued implementing rules and guidance on how it intends to assess foreign subsidies. The EC also issued two notification forms for respectively concentrations and public procurement cases. The implementing rules are a critical piece of legislation as it informs companies on the notification processes, the foreign financial contributions to be reported, other data to be notified to the EC (and their level of detail), etc.

Our EU/competition team is monitoring developments closely and can help you with preparing for the FSR regime by assisting you in assessing what qualifies as financial contributions, whether they qualify as foreign subsidies and assess their impact in the EU.

Please do not hesitate to contact your usual contact at Simmons & Simmons.

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