Foreign Subsidies Regulation: rules to ensure fair and open EU markets enter into force

Brussels, 12 January 2023

Today, the Foreign Subsidies Regulation (‘FSR’) enters into force. This new set of rules for addressing distortions caused by foreign subsidies will allow the EU to remain open to trade and investment, while ensuring a level playing field for all companies operating in the Single Market. The Regulation was proposed by the Commission in May 2021 and agreed by the European Parliament and the Council in record-time, in June 2022.

The new rules on distortive foreign subsidies

The FSR applies to all economic activities in the EU: it covers concentrations (mergers and acquisitions), public procurement procedures and all other market situations. The new rules give the Commission the power to investigate financial contributions granted by non-EU countries to companies engaging in an economic activity in the EU and redress, if needed, their distortive effects.

The FSR consists of three tools, which will be enforced by the Commission:

- An obligation for companies to notify to the Commission concentrations involving a financial contribution by a non-EU government where (i) the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and (ii) the foreign financial contribution involved is more than €50 million*;
- An obligation for companies to notify to the Commission participation in public procurement procedures, where (i) the estimated contract value is at least €250 million and (ii) the foreign financial contribution involved is at least €4 million per non-EU country; the Commission may prohibit award of contracts in such procedures to companies benefiting from distortive subsidies.
- For all other market situations, the Commission can start investigations on its own initiative (ex-officio) if it suspects that distortive foreign subsidies may be involved. This includes the possibility to request ad-hoc notifications for public procurement procedures and smaller concentrations.

Investigative powers and procedures

A notified concentration cannot be completed and an investigated bidder cannot be awarded the public procurement contract while under investigation by the Commission. In case of breach of this obligation, the Commission can impose fines, which may reach up to 10% of the company’s annual aggregated turnover. The Commission can also prohibit the completion of a subsidised concentration or the award of a public procurement contract to a subsidised bidder.

The FSR grants the Commission a wide range of investigative powers to gather the necessary information, including: (i) sending information requests to companies; (ii) conducting fact-finding missions within and outside the Union; and (iii) launching market investigations into specific sectors or types of subsidies. The Commission may also rely on market information submitted by companies, by Member States, or by any natural or legal person or association.

If the Commission finds that a foreign subsidy exists and distorts the Single Market, it may balance the negative effects in terms of the distortion with the positive effects of the subsidy on the development of the subsidised economic activity. If the negative effects outweigh the positive ones, the Commission may impose structural or non-structural redressive measures on companies, or accept them as commitments, to remedy the distortion (e.g. divestment of certain assets or prohibition of a certain market conduct).

As a general rule, subsidies below €4 million over three years are considered ‘unlikely’ to be distortive while subsidies below the EU State aid ‘de minimis’ thresholds are considered non-distortive.

In the context of notifiable concentrations and public procurement procedures, the Commission can
look at foreign subsidies granted up to three years before the transaction. However, the Regulation does not apply to concentrations concluded and public procurements initiated before 12 July 2023. In all other situations, the Commission can look at subsidies granted 10 years in the past. However, the Regulation only applies to subsidies granted in the five years prior to 12 July 2023 where such subsidies distort the Single Market after the start of application.

Next Steps

With its entry into force, the FSR will move into its crucial implementation phase and start to apply in six months, as of 12 July 2023. As of this date, the Commission will be able to launch ex-officio investigations. The notification obligation for companies will be effective as of 12 October 2023.

In the coming weeks, the Commission will present a draft Implementing Regulation which will clarify the applicable rules and procedures, including the notification forms for concentrations and public procurement procedures, the calculation of time limits, access to file procedures and confidentiality of information. Stakeholders will then have 4-weeks to provide feedback on these draft documents before the implementing rules are finalised and adopted by mid-2023.

For More Information

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*Updated on 6 March, at 9:40

Quotes:

Our economy is open, which is why we must ensure fair terms for all market players. And as of today, we also have new tool to ensure that all companies doing business in the EU are treated equally. This new regulation will enable us to tackle distortive support from third countries, to the benefit of competition and for a level playing field in the Single Market.
Margrethe Vestager, Executive Vice-President in charge of competition policy - 12/01/2023
This is a truly significant milestone for our ambitious EU trade and economic agenda. We are operating in an increasingly volatile global economy, where we have to contend with more actors engaging in unfair activity or distorting the level playing field. We need to be able to better fend off these practices. The Foreign Subsidies Regulation will help us to protect the integrity of the Single Market, our most precious economic asset. For EU companies, this is a game changer as it will create fairer rules of engagement so they can compete on an equal footing with foreign competitors.

Valdis Dombrovskis, Executive Vice-President for an Economy that Works for People - 12/01/2023

Ensuring a true level playing-field both within our EU Single Market and with regards to third countries is more important than ever. The EU procurement market, accounting for over 14% of our GDP, is a strong economic tool. It is also an important geopolitical lever. It is not acceptable that it is distorted by foreign subsidies to the detriment of the competitive firms that play by the rules. The Foreign Subsidies Regulation will allow us to investigate financial contributions granted by non-EU governments to companies active in the EU, and prohibit the award of public contracts to a company that has unduly profited from foreign subsidies.

Thierry Breton, Commissioner for Internal Market - 12/01/2023

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