

Delphi

EU Legislators Agree on a Regulation Targeting Foreign Subsidies

Time to Keep Record of Non-EU Financial Contributions ahead of Mergers and Tenders

Elisabeth Eklund / Partner / Advokat, **Helene Andersson** / Counsel / Advokat, **Karl Hammarlund** / Associate



On 30 June 2022, the European Parliament (EP) and the Council reached a provisional agreement on the EU Foreign Subsidies Regulation (FSR) which will allow the European Commission (the Commission) to screen non-EU government subsidies. Formal approval is anticipated later this year and the new rules to enter into force by mid-2023.

Targeting companies that receive financial contributions from governments outside the EU, the FSR introduces new notification regimes for both mergers and public tenders and equips the Commission with an arsenal of investigatory and remedial powers, including dawn raids, fines and prohibitions of mergers and awards of tender contracts. Given its broad scope, the FSR is expected to have far-reaching implications for companies operating in the EU, not only companies from third countries but also EU-based companies that have received financial contributions from any non-EU government. It is time already now to keep track of such financial contributions since the rules will require records for the last five years once they enter into force.

In short:

- The FSR introduces an ex-ante control (i.e. a notification is required) ahead of mergers and public tenders involving companies that receive foreign subsidies from non-EU governments (subject to certain thresholds). Similar to the EU merger control rules, the FSR introduces a standstill obligation, requiring the transaction/awarding of the contract to be cleared by the Commission before the concentration can be completed or the bidder can be awarded the contract.
- The Commission will be empowered to investigate (*ex-officio*) any other market situations, such as mergers not meeting the thresholds, if it suspects that a foreign subsidy could lead to a distortion in the EU internal market.
- The Commission is granted an arsenal of remedial and sanctioning powers. For example, companies that fail to notify a transaction/bid in a public tender or complete the transaction absent Commission approval may have to pay fines of up to 10% of their annual turnover.
- The FSR grants the Commission far-reaching investigatory powers, allowing it, inter alia, to carry out dawn raids, send out requests for information and interview those who may have information relating to the investigation. Failure to comply with the Commission's investigation may lead to substantial fines.

1. BACKGROUND

1.1 *The legislative process*

In May 2021, the Commission published its proposal for a foreign subsidies regulation.¹ The proposal aimed to introduce a new control regime for subsidies granted by non-EU governments to companies operating in the EU. The proposal followed a White Paper issued in June 2020 which expressed concerns about a perceived “regulatory gap” and a desire to create a level playing field within the EU between European and foreign-backed companies.² Today, subsidies granted by third countries are

¹ Proposal for a Regulation on foreign subsidies distorting the internal market, 2021/0114 https://competition-policy.ec.europa.eu/system/files/2021-06/foreign_subsidies_proposal_for_regulation.pdf

² White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, https://competition-policy.ec.europa.eu/system/files/2021-06/foreign_subsidies_white_paper_en.pdf

not controlled under the existing EU rules as the State aid control regime only applies to subsidies granted by EU Member States. The proposal aimed to address these concerns.

The Council and the EP entered negotiations on the regulation in May this year, and on 30 June, they reached a political agreement on the final text of the FSR.³ The agreement, which largely follows the text of the Commission's proposal, is subject to formal approval by the two co-legislators which is expected later this year. The FSR would then enter into force mid-2023.

1.2 Exclusive new powers to the Commission

The FSR confers substantial new and exclusive powers on the Commission to investigate foreign subsidies that might distort the internal market and to remedy any possible distortion created. It introduces three tools:

- i. a notification-based tool to investigate M&A transactions;
- ii. a notification-based tool to investigate public tenders; and
- iii. an ex-officio investigation regime covering all other market situations.

1.3 The FSR covers all non-EU subsidies

The FSR will be applicable to any company active in the EU (both EU-based companies and foreign companies) that have received subsidies from third countries. While the legislative history of the regulation implicitly acknowledges that the new instrument primarily targets subsidies from China, subsidies to companies from all third countries, including the United States and the United Kingdom, will be covered by the FSR. Thus, although not all subsidies will be considered distortive it is key that companies keep track of any kind of subsidies regardless whether they originate from Asia, South- or North America, Africa etc. See below regarding the wide scope of foreign subsidies.

2. WHAT IS A FOREIGN SUBSIDY?

2.1 The definition of foreign subsidy – a complex assessment

The FSR defines a foreign subsidy as a financial contribution by a third country which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.⁴ This definition is similar, but not identical, to the State aid concept under EU State aid rules. The key elements of the definition are discussed below.

2.2 The wide concept of a financial contribution

The term “financial contribution” is defined broadly and covers, inter alia:

See also Delphi's newsletter on the White Paper: <https://www.delphi.se/uploads/2020/07/the-commission-adopts-white-paper-on-the-distortive-effects-of-foreign-subsidies-on-the-internal-market.pdf>

³ Political agreement is available here https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf

⁴ Article 2 of the provisional text.

- i. the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
- ii. the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
- iii. the provision of goods or services or the purchase of goods or services.⁵

Thus, a financial contribution covers not only transfer of funds but also favourable conditions or lack of costs.

2.3 Attributable to a third country – an extensive approach

A financial contribution is considered to have been provided by a third country if it was provided by:

- i. the third country's central government and public authorities at all levels; or
- ii. any foreign public entity whose actions can be attributed to the third country; or
- iii. any private entity whose actions can be attributed to the third country.⁶

A financial contribution is considered attributable to a third country if that country was involved in the decision to grant the contribution, regardless of whether the contribution was provided by a public or private entity. Again, a very broad definition that will no doubt catch many financial contributions.

2.4 Benefit – is the financial contribution provided under normal market conditions?

The financial contribution is considered to confer a benefit to an undertaking if it could not have been obtained under normal market conditions. This assessment is based on comparative benchmarks, such as the investment practice of private investors, the rates of financing obtainable on the market, the tax treatments for similarly situated companies and normal remuneration for the goods or services transferred.⁷

2.5 Selective

The benefit must be selective, i.e. it must either benefit an individual company or industry or several companies or industries. Financial contributions generally available to all companies in the market are not selective.

3. FOREIGN SUBSIDIES THAT ARE CONSIDERED DISTORTIVE

3.1 Examples of distortive foreign subsidies

Not all foreign subsidies will be subject to prohibitions or remedies under the FSR. For that they must also distort the internal market. A foreign subsidy is considered distortive if it can improve the beneficiary's competitive position in the internal market and if this has actual or potential effects on competition in the internal market.⁸ The distortive effects have to be assessed on a case-by-case basis by reference to a non-exhaustive list of indicators relating to the subsidy at stake such as the amount and nature of the foreign subsidy, the level of economic activity of the company receiving the foreign

⁵ Ibid. Article 2.2 a).

⁶ Ibid. Article 2 b).

⁷ Ibid. Recital 10.

⁸ Ibid. Article 3.

subsidy in the EU and the purpose and conditions attached to the foreign subsidy.⁹ The FSR thus gives the Commission broad discretion in its assessment of the distortive effects.

The FSR sets out a list of categories of subsidies that are considered “most likely” to distort the internal market:

- i. support to firms in difficulty without a viable restructuring plan;
- ii. unlimited guarantee for debts or liabilities;
- iii. export financing measures;
- iv. foreign subsidies that directly facilitates a merger, acquisition or creation of a joint venture; and
- v. foreign subsidies that enables an undertaking to submit an unduly advantageous tender.¹⁰

3.2 De minimis rules

However, the FSR also sets out two de-minimis rules:

- i. a foreign subsidy will not be considered to distort the internal market if its total amount does not exceed EUR 200,000 in any three-year period.¹¹
- ii. a foreign subsidy is “unlikely” to distort the internal market if its total amount does not exceed EUR 4 million in any three-year period.¹²

4. THREE NEW CONTROL TOOLS

4.1 The three new control tools in short

As stated above, the FSR introduces three new mechanisms to control foreign subsidies in the EU:

- i. a notification obligation (subject to certain thresholds) for M&A transactions involving companies that have received financial contributions from third countries, prior to completion;
- ii. a notification obligation (subject to certain thresholds) for bids in public procurements by companies that have received financial contributions from third countries, ahead of the award of the tender; and
- iii. a general market investigation (ex-post) tool allowing ex-officio investigations in relation to all other market situations involving foreign subsidies.

These three mechanisms are further developed below.

4.2 Notification obligation for M&A transactions

4.2.1 Aim of the notification requirement

The notification requirement is intended to address distortions caused by foreign subsidies facilitating the acquisition of companies established in the EU. The objective is to ensure that no unfair benefit is given to the beneficiary of the subsidy, either directly by linking a subsidy to a given acquisition, or indirectly by *de facto* increasing the financial strength of the acquirer.

⁹ Ibid. Article 3.1.

¹⁰ Ibid. Article 4.

¹¹ Ibid. Article 3.2 a).

¹² Ibid. Article 3.2 (this threshold was set at EUR 5 million in the Commission’s proposal).

The Commission considers that foreign subsidies may enable subsidised investors to pay a higher price for the assets than they would otherwise have paid, thus preventing non-subsidised investors to access innovative technologies or critical infrastructure.¹³

4.2.2 Notification thresholds – based on non-EU financial contributions

The notification obligation captures any concentration involving an acquisition of control on a lasting basis (the same type of transactions that are reportable under the EU merger control rules) and which meets the following two thresholds:¹⁴

- i. the turnover of the target, the joint venture¹⁵ or at least one of the merging undertakings generates an EU turnover of at least **EUR 500 million**;
- ii. the parties to the transaction received financial contributions from non-EU countries exceeding **EUR 50 million** in the last three years.

The second threshold is based upon the receipt of a foreign financial contribution (not a foreign subsidy). Therefore, the threshold does not require that the financial contribution confers a selective benefit to the beneficiary. Any measure that qualifies as a financial contribution, however small it may be, must be included in the calculation.

4.2.3 Stand-still requirement and sanctions for failure to notify

Similar to EU merger control, the FSR introduces a standstill obligation, requiring the transaction to be cleared before it may be completed. The Commission may impose fines of up to 10% of the buyer's global turnover if a transaction is not notified or is closed before a clearance decision.¹⁶

4.2.4 Prohibition of transactions and remedies

Following the review, the Commission may approve or prohibit the transaction, impose remedies or accept commitments offered by the parties. The review process is similar to the Commission's EU merger control process.

4.2.5 Timeline for the Commission's review

Once a notification is declared complete by the Commission, a phase I review period of 25 working days kicks in. If there is no concern at the end of phase I, the Commission will close its investigation and the merger can then proceed. The Commission may initiate an in-depth phase II investigation of 90 working days if it suspects that the foreign subsidy is distortive. If the parties offer commitments, the phase II-review is extended by an additional 15 working days.¹⁷ The review process would run in parallel with an EU merger control review if a transaction qualifies for review under both regimes, as well as any Foreign Direct Investment screening rules in case those rules are applicable.¹⁸

¹³ Ibid. Recital 2.

¹⁴ Ibid. Article 18.3.

¹⁵ In case of joint ventures, the JV company itself must be established in the EU and meet the financial contribution threshold of EUR 50 million. It is not sufficient that only the parent companies meet this condition. This is different under the EU merger control rules which can be triggered solely upon the basis of the turnover of the JV parents.

¹⁶ Article 25.3 of the provisional text.

¹⁷ Ibid. Article 23.1.

¹⁸ Ibid. Article 40.1.

4.3 Notification obligation for certain bids in public procurements

4.3.1 Aim of the notification requirement

This tool aims to ensure a level playing field between EU and non-EU companies when competing for large public contracts in the EU. The Commission considers that subsidised companies may be able to make more advantageous offers, thus either discouraging non-subsidised companies from participating in the first place or winning contracts to the detriment of non-subsidised, but more efficient companies.¹⁹

4.3.2 Thresholds for notification

The FSR sets out the following thresholds for the notification obligation:

- i. the estimated contract value of the public tender is at least **EUR 250 million** (in case the tender is divided into lots, the aggregate value of the lots applied must be at least **EUR 125 million** for the threshold to be met);
- ii. the bidding party (including its subcontractors or suppliers) received a financial contribution of at least **EUR 4 million** from a third country during the last three years.²⁰

When a company submits a bid or requests to participate in a public tender, it must submit information to the contracting authority about all foreign financial contributions received in the last three years or confirm in a declaration that it has not received any such contributions.²¹ The notification or declaration will be transferred to the Commission for review.

4.3.3 Suspensory assessment and sanctions for lack of information or notification

If a company fails to provide information or a declaration, it may be disqualified from the public tender.²²

The Commission's review is suspensory, i.e. contracts may not be awarded to the bidder prior to a clearance decision by the Commission. However, the Commission's review will not suspend the public procurement procedure entirely – other preliminary steps in the public procurement may proceed. The Commission has the power to impose fines of up to 10% of the bidder's global turnover on a company that fails to notify.²³

4.3.4 Prohibition of awards of tenders and remedies

Following the review, the Commission may approve or prohibit the award of the tender to the bidder, impose remedies or accept commitments offered by the bidder.

4.3.5 Timeline for the Commission's review

In terms of procedure, the Commission will have 20 working days for its preliminary review (extendable by up to 10 working days). If there is no concern at the end of the preliminary review, the Commission will close its investigation and the public tender can then proceed. An in-depth investigation period of

¹⁹ Ibid. Article 26.

²⁰ Ibid. Article 27.2.

²¹ Ibid. Article 28.1.

²² Ibid. Article 28.1c.

²³ Ibid. Article 32.3.

90 working days is opened if the Commission suspects a distortive effect. The in-depth investigation may be extended by up to 20 working days.²⁴

4.4 General investigation tool

4.4.1 Aim of this mechanism

In addition to the two ex-ante control mechanisms described above, the FSR grants the Commission a general investigation tool to tackle other distortive foreign subsidies. The Commission may launch ex-officio investigations against any company that it suspects is receiving distortive foreign subsidies.

4.4.2 Lack of thresholds

The Commission is thus empowered to investigate transactions or public bids that fall below the thresholds set out above,²⁵ creating legal uncertainty for such transactions or public bids. According to the Commission's press release accompanying the proposal, the general investigation tool would cover other types of market situations, such as greenfield investments or concentrations and public procurements below the thresholds.²⁶

4.4.3 Sanctions and remedies

This tool would be broadly similar to the manner the Commission may assess State aid granted by EU Member States to companies in the EU. The Commission would be able to order the repayment of the foreign subsidy or impose other remedies.

4.4.4 No statutory time limits

In terms of procedure, there are no statutory timelines for the Commission's review process. The FSR only sets out that the process should consist of the stages:

- i. preliminary review in order to make a preliminary assessment on the existence of a foreign subsidy distorting the internal market;
- ii. in-depth investigation if the preliminary assessment revealed sufficient indications that distortive foreign subsidies have been received. The in-depth investigation may be terminated with remedies.

The Commission will not be able to initiate ex-officio investigations until six months after the entry into force of the FSR.²⁷ Importantly, the FSR provides that the Commission can review foreign subsidies that have been granted up to five years prior to the entry into force of the FSR (and not 10 years as initially envisaged in the Commission's proposal).

4.4.5 Complaints may be filed by third parties

The FSR provides that the Commission may initiate ex-officio investigations based on information received from Member States, but also from other third parties such as natural or legal persons or

²⁴ Ibid. Article 29.

²⁵ Foreign subsidies below the *de minimis* threshold of EUR 4 million are unlikely to be distortive and foreign subsidies below EUR 200 000 over a three-year period will not be considered distortive.

²⁶ https://single-market-economy.ec.europa.eu/news/commission-proposes-new-regulation-address-distortions-caused-foreign-subsidies-single-market-2021-05-05_en.

²⁷ Article 48 of the provisional text.

associations.²⁸ Consequently, a company that is negatively impacted by a foreign subsidy granted to a competitor may submit a strategic complaint to the Commission (similarly to State aid complaints under the EU State aid rules).

5. THE COMMISSION'S POWERS

5.1 *Investigatory toolkit*

For all three tools, the Commission will have far-reaching investigatory powers. The Commission will notably be able to require targeted companies to submit to requests for information and may also request information from other market participants such as Member States or competitors.²⁹ In addition, the FSR provides that the Commission may request information from the non-EU government granting the contribution.³⁰ The FSR also provides that the Commission may interview any natural or legal person who consents to being interviewed for the purpose of collecting information relating to the subject matter of an investigation.³¹

The Commission will be able to carry out inspections (dawn raids) within the EU.³² The FSR provides that inspections may also be carried out in non-EU countries if the relevant government approves the inspection, whether such permissions will be granted remains to be seen.

The Commission will be able to impose fines or periodic penalties on companies that fail to cooperate during investigations. Fines of up to 1% of the undertaking's worldwide turnover may be imposed if the undertaking.³³

- i. fails to provide any requested information in a timely way;
- ii. provides incorrect, incomplete or misleading information in response to a request for information;
- iii. does not cooperate during the investigation.

Importantly, the Commission may adopt a decision (in the preliminary phase or in the in-depth phase) based upon "facts available" if the companies do not cooperate, by for example failing to provide the requested information.³⁴ This approach is used by the Commission in anti-dumping investigations. When basing the decision on the facts available, the result may be less favourable to the undertaking than if it had cooperated.

The FSR also empowers the Commission to conduct market investigations into a particular sector, for a particular type of economic activity or a particular subsidy instrument. The market investigation may result in a published report and interested parties may be invited to provide comments. The Commission may also use information obtained in the sector investigation for its investigations against specific companies.³⁵

²⁸ Ibid. Article 7.1.

²⁹ Ibid. Article 11.

³⁰ Ibid. Article 11.5.

³¹ Ibid. Article 11.6.

³² Ibid. Article 12.

³³ Ibid. Article 15.2.

³⁴ Ibid. Recital 22 and Article 14.1.

³⁵ Ibid. Article 34.

5.2 Transparency

The FSR requires the Commission, when opening an in-depth investigation, to publish a notice in the Official Journal of the European Union (OJEU) inviting comments from third parties.³⁶

In contrast, no publication will be made for the preliminary investigation. Moreover, the Commission will not publish any decisions if it, after a preliminary assessment, concludes that there are no sufficient indications to initiate an in-depth investigation and closes the case.

5.3 Balancing

If the Commission, following an in-depth investigation, finds that a foreign subsidy distorts the internal market, it will assess the positive and negative effects of the subsidy. The Commission shall carry out such a balancing exercise before deciding whether to impose redressive measures or to accept commitments. The positive effects must relate to the development of the subsidised economic activity on the internal market, but they may also relate to relevant EU policy objectives (such as environmental protection, R&D, social standards etc.).³⁷ The FSR requires the Commission to issue guidelines on how to carry out such balancing exercise.³⁸ Given the potential uncertainties as regards the application of the balancing exercise, the EU legislators urge the Commission not to wait, but to publish such guidelines before the FSR comes into force.

5.4 Remedies

If the negative effects on competition outweigh the positive ones, the Commission may impose measures to remedy the distortion, or accept them as commitments. The following types of remedies can be relevant:³⁹

- i. repayment of the foreign subsidy (plus interest);
- ii. structural remedies such as divestment of assets;
- iii. access remedies on fair and non-discriminatory terms to an infrastructure (such as research facility, production capability or essential facility);
- iv. licensing on fair and non-discriminatory terms to assets;
- v. behavioural remedies such as refraining from making certain investments or reducing market presence;
- vi. require the undertakings concerned to adapt their governance structure;
- vii. dissolution of the transaction if it has been completed;
- viii. prohibition of the transaction;
- ix. prohibition of the public contract award.

5.5 Interim measures

The Commission will be empowered to adopt interim measures if there are indications that a foreign subsidy distorts the internal market and if there is a risk of serious and irreparable damage to competition on the internal market.⁴⁰

³⁶ Ibid. Article 8.2 c.

³⁷ Ibid. Article 5 and Recital 16.

³⁸ Ibid. Article 40 b 1.

³⁹ Ibid. Article 6.3.

⁴⁰ Ibid. Article 10.

6. THE FSR'S IMPACT ON BUSINESSES

The FSR will increase the administrative burden for companies that receive financial contributions from non-EU countries. Rather than replacing any existing instruments, it complements the rules in place thereby adding weight to an already heavy burden.⁴¹ In relation to M&A transactions, this means that companies may have to file three entirely separate sets of notifications for a single transaction (merger control notification under EU or national merger control rules, foreign direct investment notification under national laws and a notification under the FSR). The FSR would thus introduce further complexity, uncertainty and potential delays for M&A transactions as well as for large public procurements in the EU.

In order to assess whether a transaction or a public bid is notifiable under the FSR, companies must collect information on all financial contributions received during the last three years. In addition, the Commission will under its ex-officio investigation tool be able to review any financial contributions received during the last five years. In light of this, companies should already now begin to design and implement systems to identify and quantify any financial contributions received from third countries. This will often be a complicated and time-consuming exercise which will necessitate State aid expertise. As noted above, the definition of the term financial contribution is very broad and will likely cover a lot of different types of measures involving third countries. In addition, there is no de-minimis rule for the calculation of financial contributions received, meaning that all small financial contributions also need to be counted and included in the calculation of the threshold. In order to comply with the notification obligations, it will thus be important that companies monitor and record all their future dealings with non-EU governments and others that may be considered to be relevant when assessing financial contributions.

Moreover, the notification threshold for M&A transactions relates to the financial contributions for all parties to the transaction which means that the contributions received from the target company also need to be included in the calculation. Buyers and sellers will therefore need to exchange information on their respective foreign financial contributions early in the transaction process in order to identify any filing obligations.

Finally, legal uncertainty still surrounds several central aspects of the FSR such as the application of the concepts of “distortion in the internal market” and “balancing”. While companies and their advisors may be able to use existing State aid principles for these assessments, they will need to look out for the Commission’s forthcoming guidelines and decisional practice.

Delphi’s team of experts is available to assist in addressing any questions that you may have regarding the FSR. We have vast experience in State aid, antitrust, merger control and public procurement issues, both substantive and procedural.

⁴¹ See Article 40 of the provisional text.



Elisabeth Eklund / Partner / Advokat
elisabeth.eklund@delphi.se +46 709 25 26 08



Helene Andersson / Counsel / Advokat
helene.andersson@delphi.se +46 767 72 00 33



Karl Hammarlund / Associate
karl.hammarlund@delphi.se +46 70 925 25 80

Delphi

delphi.se