

How to deal with foreign subsidies in the EU: a guide to the new implementing regulation

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On 10 July 2023, the European Commission ("EC") published the final rules for implementing the [Foreign Subsidies Regulation EU 2022/256](#) ("FSR"). The FSR empowers the EC to investigate and, if necessary, remedy the distortive effects of financial contributions granted by third countries to companies operating in the European Union ("EU") single market. It entered into force on 12 January 2023 and took effect on 12 July 2023. For further information please see our previous [client alert](#), "Foreign subsidies notification procedure clarified and eased under Commission's draft new rules?"

The final [Implementing Regulation](#) ("IR") to the FSR details its procedural aspects, such as the investigation process, the rights of the parties and the process for notification and submission of documents. The relevant notification forms for concentrations and public procurement procedures can be found in the annexes ([Annexes 1 and 2](#)).

The implementing regulation follows a public consultation and a stakeholder dialogue that took place after the publication of the [draft Implementing Regulation](#) ("draft IR") in February 2023. Although the final IR addresses much of the criticism that the draft IR received, by reducing the expected administrative burden at notification, the FSR will still require considerable effort from firms, first and foremost in data collection on financial contributions received and in fulfilling the reduced but still onerous reporting obligations.

What is new in the final version of the IR and what are the key updates?

The key updates to the IR concern the reporting thresholds, the definition of reportable information for financial contributions, and the depth of information required, as well as reporting exemptions.

Notification thresholds

The FSR enables the EC to address distortions caused by foreign subsidies in the EU internal market through two newly introduced notification procedures and an ex officio investigation tool.

As the IR cannot amend the underlying FSR despite the vehement criticism, the thresholds triggering a notification obligation for concentrations and public tenders (applicable as of 12 October 2023) remain unchanged. They are as follows:

	Concentrations	Public Procurement Procedures
Turnover/contract value threshold	At least one of the merging parties, the target company, or the joint venture, is established in the EU and has an annual EU turnover of more than € 1 million.	The estimated contract value is € 1 million or more and the value of the lot or the aggregate value of all the lots to which a tenderer applies is € 1 million (in case the procurement is divided into several lots).
Financial contribution threshold	The acquirer and/or the target, the merging parties, or the joint venture and/or its parents have received aggregate financial contributions of more than € 50 million in the last three years from third countries.	The “economic operator” (main subcontractors and main suppliers) has received aggregate financial contributions of € 4 million in the last three years.
Declaration	---	In public tenders, if the contract value is at least € 250 million and the financial contribution threshold is not met, economic operators are still required to submit a declaration, stating that they did not receive any notifiable financial contribution and a list of non-notifiable financial contributions granted in the last three years.

However, the IR makes some effort to reduce workload for companies by using playroom in designing the modalities of reporting:

Companies still need to take all financial contributions into account when determining whether the respective notification threshold is met, including the provision/purchase of goods/services at market terms. However, not all financial contributions need to be reported in the notification forms (see below).

Which financial contributions are reportable?

In response to the feedback received during the public consultation, the EC has introduced significant changes to the IR by limiting the reporting of “financial contributions” which must be reported in the notification forms. A distinction between the potentially more harmful contributions listed in Art. 5 (1) FSR and all “non-reportable contributions”:

ART. 5 CONTRIBUTIONS

Under the IR, financial contributions are now reportable and detailed information needs to be submitted (see below) only if they meet two conditions:

- they exceed € 1 million, and
- they are considered to be “likely distortive” according to Art. 5 (1) FSR.

This category includes contributions that (a) support a failing business, (b) provide unlimited guarantees, (c) are export financing measures inconsistent with the Organisation for Economic Co-operation and Development (OECD) (Arrangement on outward supported export credit), (d) directly facilitate a concentration, or (e) enable a company to submit an unduly advantageous tender.

OTHERS

All other types of contributions must only be reported if they

- individually exceed € 1 million
- total more than € 45 million (for concentrations) or € 4 million (for non-concentrations) per non-EU country over the three years prior to the notification, making

What is the level of information requirement in the forms?

The required level and detail of reporting is determined by the type of contribution:

ART. 5 CONTRIBUTIONS

For “likely distortive” contributions, detailed disclosure obligations are imposed.

assessments to determine whether the financial contributions received may be pushing the company past notification thresholds or could be considered distortive in nature to prompt an ex officio investigation.

4. MAKE THE FSR AN INTEGRAL PART OF M&A PLANNING

In M&A deals it will be crucial for the parties to consider the notification timing. FSR planning should be included alongside the planning already in place for more well-known regulatory regimes, such as merger control and foreign direct investment (FDI) review, companies will need a coordinated strategy to navigate the requirements of each regime effectively. FSR now needs to be an integral part of any step of the M&A process needing to be considered from the outset (incl. in the due diligence process, transactional documents and the overall strategy).

5. ENGAGE WITH THE COMMISSION

Companies should consider contacting the EC, which is willing to engage in pre-notification talks on the interpretation of the new rules and to possibly reduce the administrative burden (e.g. through obtaining waivers).



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