

# 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 at least € 500 million.	The estimated contract value is € 250 million or more and the value of the lot or the aggregate value of all the lots to which a tenderer applies is at least € 125 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 previous three years from third countries.	The “economic operator” (i.e., bidder plus main subcontractors and main suppliers) has received aggregate financial contributions of € 4 million or more per third country in the last three years.
Declaration	---	In public tenders, if the contract value is at least € 250 million but 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 types of “financial contributions” which must be reported at filing, making a distinction between the potentially more harmful contributions listed in Art. 5 FSR and all “non-Art. 5 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” contributions 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 officially 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, and
- total more than € 45 million (for concentrations) or € 4 million (for public tenders in the EU) per non-EU country over the three years prior to the notification.

## 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 contributions that are “most likely distortive”, detailed disclosure obligations are imposed.

Companies must provide specific information for each individual contribution exceeding € 1 million. This includes details such as the amount and type of contribution, the granting authority, the purpose and economic rationale etc., along with supporting documentation.

## OTHERS

For all other types of contributions only [a high-level overview disclosure](#) is required. This includes reporting the types of contributions received for each third country meeting the aggregate reporting threshold and estimating the total amount of contributions within broad ranges (e.g. € 45 million–€ 100 million, € 100 million–€ 500 million, etc.).

Keep in mind that the EC can request further information even if the thresholds are not met.

## Special exemptions from reporting

The IR added reporting exemptions for specific types of financial contributions:

- Investment funds only need to report financial contributions which have been received by the fund involved in the transaction and its controlled portfolio companies, if (cumulatively):
  - i. The fund is subject to the Alternative Investment Fund Managers Directive or equivalent legislation; and
  - ii. There are either no or limited economic and commercial transactions (such as the sale of assets, including ownership in companies, loans, credit lines or guarantees) between the fund controlling the acquiring entity and other investment funds and their portfolios managed by the investment company.
- Contracts concluded on market terms (excluding financial services).
- In concentrations, financial contributions to the target company, where they are not Art. 5 FSR contributions.
- General tax measures are exempt from disclosure as well.
- No notification is required in defense procurement.

## Ex officio investigations

The *ex officio* tool empowers the EC to investigate allegedly distortive foreign subsidies regarding any kind of economic activity in the EU. The question is whether the EC has the manpower for this.

The FSR will not be applicable to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023, and public procurement contracts that have been awarded or procedures initiated before 12 July 2023.

## Key take aways / Outlook for companies

The changes in the final IR are a welcome improvement on the heavily criticized draft IR. Still, though reporting burdens are reduced in the new regulation, firms should start constant and extensive monitoring for FSR compliance, if they have not done so already. Our key advice to executives is:

### 1. GET READY NOW

The FSR filing obligations will not apply to concentrations that either (i) were signed on or after 12 July 2023 and will have been implemented before 12 October 2023 or (ii) were signed before 12 July 2023, regardless of whether they were closed by 12 October 2023. For current deals or tenders that do not fall within these exceptions and all new concentrations and tenders, start assessing whether the notification thresholds could be met as soon as possible – this process can be very time-consuming.

### 2. KNOW YOUR FOREIGN FINANCIAL CONTRIBUTIONS

The notification process can be significantly streamlined if you have a working knowledge of at least your own foreign financial contributions, a dataset which companies previously had no need to be aware of. Start preparing for the new regime now by collecting data about foreign financial contributions which have been received in the last three years. This will pay off when the time comes to file.

### 3. SET UP A MONITORING SYSTEM

It is also essential for companies to establish a solid internal compliance system and conduct regular self-

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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