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## The EU Regulation on Foreign Subsidies is published - What does it target and what does it involve for companies?

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On 23 December 2022, the new EU Foreign Subsidies Regulation (“FSR”)<sup>1</sup> was published in the Official Journal of the EU.

The FSR aims at tackling the distortions to the EU internal market caused by subsidies granted by non-EU countries (the so-called “foreign subsidies”) to companies active in the Union. It introduces a new tool, whereby companies involved in EU acquisitions or public tenders over certain amounts will have to notify any foreign subsidies received from a non-EU country in the past three years. The FSR adds in the EU’s toolbox a new instrument allowing the European Commission to scrutinize foreign subsidies, in addition to subsidies granted by EU Member States.

The definition of a subsidy in the FSR is similar to the concept of subsidy found in the WTO Agreement on Subsidies and Countervailing Measures and the corresponding EU Basic Anti-Subsidy Regulation<sup>2</sup>. A foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on 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<sup>3</sup>.

The FSR will enter into force on 12 January 2023 and will apply from 12 July 2023<sup>4</sup>. By way of exception, the provisions of Article 21 FSR on prior notification of concentrations and Article 29 FSR on prior notification or declaration of foreign financial contributions in the context of public procurement procedures will apply nine months later, namely from 12 October 2023<sup>5</sup>. Companies thus have only a few months to get ready for the entry into force of the FSR and to identify the financial contributions that might be reportable under the FSR.

The FSR will apply to three types of situations, namely concentrations, public procurement, and other types of situations.



## CONCENTRATIONS

The FSR will apply to M&A transactions where the companies concerned have received subsidies from third countries which facilitated their operation<sup>6</sup>. The FSR provides that the European Commission will now be able to review the subsidies received in the last three years prior to the concentration on the basis of an *ex ante* notification<sup>7</sup>. Parties will not be able to implement the transaction until the European Commission has cleared the deal.

A mandatory notification under the FSR will be triggered if the following criteria are met: the acquired business, merging businesses, or joint venture created must have an EU turnover of at least €500 million<sup>8</sup>, and the parties to the concentration must have received combined aggregate financial contributions from third countries of more than €50 million in the last 3 years<sup>9</sup>.

The investigation procedure followed by the European Commission will mirror the procedure for EU merger control with a *phase 1* (25 working days from the date of notification) and a *phase 2* or in-depth review of 90 working days. Following the review, the European Commission may approve or prohibit the transaction, or accept commitments<sup>10</sup>.

## PUBLIC PROCUREMENT

The FSR will apply to situations where an undertaking tendering for a public procurement procedure benefit from a foreign subsidy which distorts the procedure. In this case, the European Commission may:

- Accept the undertaking's commitments if they fully and effectively remove the distortion on the internal market<sup>11</sup>;
- Or, if not, prohibit the award of the contract to the undertaking concerned<sup>12</sup>.

Notification as per the FSR will be required if two thresholds are met: the contract value of the tender must be at least €250 million<sup>13</sup> and the economic operator must have received in the last three years prior to the public procurement procedure financial contributions of at least €4 million per third country<sup>14</sup>. If the financial contributions received are below these notification thresholds, companies participating in a public procurement must nevertheless list the subsidies they have received<sup>15</sup>.

The FSR complements further the arsenal of EU rules adopted in relation to public procurement, and notably the recent International Procurement Instrument Regulation<sup>16</sup> which restricts third countries companies from accessing EU public procurement and concession markets under certain conditions when there is no reciprocity.

## OTHER TYPES OF SITUATIONS THROUGH EX-OFFICIO INVESTIGATIVE TOOLS

In addition to concentrations and public procurement procedures, the European Commission may investigate on its own initiative all other situations<sup>17</sup>. The European Commission is limited to investigating subsidies granted in the last 10 years preceding its investigation<sup>18</sup>. The FSR provides the example of defence and security contracts covered by Directive 2009/81/EC, which should not be subject to notification requirements under the FSR, but which could nonetheless be reviewed through *ex-officio* investigations<sup>19</sup>. Other situations may include, for instance, *ex post* reviews of M&A transactions.

## COMMITMENTS AND REDRESSIVE MEASURES

The commitments and redressive measures that the European Commission may impose are, *inter alia*, the following<sup>20</sup>:

- Offering access under fair and non-discriminatory conditions to an infrastructure that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union;



- Reducing capacity or market presence;
- Refraining from certain investments;
- Licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;
- Publication of results of research and development;
- Divestment of certain assets;
- Requiring the undertakings concerned to dissolve the concentration;
- Repayment of the foreign subsidy;
- Requiring the undertakings concerned to adapt their governance structure.

The European Commission has a wide scope of measures at its disposal and can be adapted to the situation at hand.

### RELATIONSHIP WITH TRADE IN GOODS AND THE EU ANTI-SUBSIDY REGULATION

The FSR lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions, which can arise with respect to any economic activity, and in particular in concentrations and public procurement procedures<sup>21</sup>. With respect to trade in goods, Article 44 FSR specifies that “[...] *no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 3.2.1 of the Agreement on Subsidies and Countervailing Measures [...]*”<sup>22</sup>.

### SHIPBUILDING SPECIFICITIES

The FSR provides specific rules with respect to the shipbuilding sector and indicates that it will take precedence over the EU Regulation on Protection Against Injurious Pricing of Vessels<sup>23</sup> until this regulation becomes applicable. Once this regulation becomes applicable, the provisions of the FSR applicable to public procurement and concentrations will still apply to the shipbuilding sector<sup>24</sup>.

### IMPLICATIONS FOR BUSINESSES AND NEXT STEPS

The European Commission may specify further the procedural details for notifications under the FSR by adopting implementing acts<sup>25</sup>. The European Commission will also issue guidelines to provide businesses with additional guidance<sup>26</sup>.

Businesses will have to prepare for this new regulatory framework. In particular, they will have to identify and analyze the subsidies they receive from third countries so that these may be properly notified during concentrations or public procurements.



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<sup>1</sup> Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 December 2022, p. 1.

<sup>2</sup> Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30 June 2016, p. 55, as amended.

<sup>3</sup> FSR, Article 3(1).

<sup>4</sup> FSR, Article 54.

<sup>5</sup> FSR, Article 54. For completeness, it should be noted that by way of exception, Article 47 on implementing acts and Article 48 on committee procedure shall apply from 11 January 2023 and Article 14(5), (6) and (7) on inspections within the Union shall apply from 12 January 2024.

<sup>6</sup> FSR, Articles 19 *et seq.*

<sup>7</sup> FSR, Article 19.

<sup>8</sup> FSR, Article 20(3)(a).

<sup>9</sup> FSR, Article 20(3)(b).

<sup>10</sup> FSR, Article 25.

<sup>11</sup> FSR, Article 31(1).

<sup>12</sup> FSR, Article 31(2).

<sup>13</sup> FSR, Article 28(1)(a).

<sup>14</sup> FSR, Article 28(1)(b).

<sup>15</sup> FSR, Article 29(1).

<sup>16</sup> Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), OJ L 173, 30 June 2022, p. 1.

<sup>17</sup> FSR, Articles 9 *et seq.*

<sup>18</sup> FSR, Article 38(1).

<sup>19</sup> FSR, recital 41.

<sup>20</sup> FSR, Article 7(4).

<sup>21</sup> FSR, Article 1.

<sup>22</sup> FSR, Article 44.

<sup>23</sup> Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels, OJ L 176, 30 June 2016, p. 1.

<sup>24</sup> FSR, Article 44(5).

<sup>25</sup> FSR, Article 47.

<sup>26</sup> FSR, Article 46.