

EU Commission publishes final Guidelines on the application of EU FSR

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In brief

What happened?

On 9 January 2026, the European Commission published its final guidelines ('Guidelines') on the application of certain provisions of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market ('EU FSR') and its accompanying Implementing Regulation. The updated Guidelines include several additions, amendments, and clarifications to the 2025 draft and should be taken into account when preparing any EU FSR-related case.

Why is it relevant?

The Guidelines are based on the EU legislative framework designed to address distortions caused by subsidies, including a wide range of direct and indirect tax credits and incentives from non-EU countries, in order to preserve the proper functioning of the internal market and ensure a level playing field.

Actions to consider

Undertakings potentially subject to the EU FSR, whether due to notification obligations or a Commission-initiated (ex officio) investigation, should proactively develop a thorough understanding of the EU FSR's distinctive, cross-disciplinary framework and begin implementing the necessary data-collection and review processes. Developing a means of identifying and monitoring tax and non-tax subsidies, and the advantages and potential distortions they confer on both the direct recipient and any intragroup beneficiaries is key to managing the risks associated with the EU FSR.

In Detail

Under the EU FSR, a foreign subsidy is deemed to exist “*where a third country provides, directly or indirectly, a financial contribution that 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*”.

The Guidelines clearly distinguish targeted subsidies, which may subsidize an undertaking’s EU-based operations from non-targeted subsidies, which lack a clear destination. The Guidelines further emphasize that foreign subsidies are not generally prohibited; issues arise only when they cause, directly or indirectly, a distortion in the internal market. Whether a distortion exists is determined by the Commission on a case-by-case basis, for which the Guidelines provide key assessment criteria.

The Guidelines cover the practical application of the EU FSR:

- criteria for determining the existence of a distortion in the internal market;
- the balancing test;
- prior notification of concentrations or foreign financial contributions received by an economic operator in public procurement; and
- the assessment of distortions of competition in public procurement.

Below are essential elements from three components of the assessment framework.

Criteria for establishing a market distortion

Under Article 4(1) of the Regulation, a market distortion may occur where a foreign subsidy “*is liable to improve the competitive position of an undertaking in the internal market*” and “*thereby actually or potentially negatively affects competition in the internal market*.”

The Guidelines detail the Commission’s criteria for assessing whether:

1. the beneficiary undertaking engages in economic activity in the EU;
2. the foreign subsidy is capable of improving the undertaking’s competitive position in the internal market, directly or indirectly, irrespective of whether the advantage has actually materialized; and
3. the foreign subsidy actually or potentially negatively affects competition in the internal market.

Compared to the earlier draft, the Commission Guidelines now set out more detailed criteria for evaluating cross-subsidization risks, especially non-targeted subsidies, with particular attention to shareholding structures. When evaluating whether an advantage obtained by the subsidized entity could be transferred to another group entity active in the EU internal market, the Commission assesses ownership links in depth. Ultimately, the closer and more aligned the shareholding structures, the greater the risk that the foreign subsidy could be used to support EU-based activities and distort competition.

Observation: As noted above, subsidies can include tax exemptions, incentives, and credits under the EU FSR. In some cases, the benefits of such tax offerings may be enjoyed both by the direct claimant and the wider tax ‘group’, for example where losses are generated and shared with other group

members. What constitutes a ‘group’ for tax purposes (which can already vary between different jurisdictions as well as differing on the type of tax benefit in question) may now need to be considered separately through an FSR lens to reflect the Guidelines representations around what constitutes a group (linear controlling shareholding link between entities).

Guidelines on the balancing test

As part of the balancing test, the Commission compares, on a case-by-case basis, the negative effects of a foreign subsidy that distorts the internal market with any positive effects it may generate. Such positive effects, which may be introduced by any Member State or any natural or legal person, must be considered by the Commission. If the balancing test is positive (i.e. positive effects outweigh negative effects), the Commission may eliminate the requirement for commitments or corrective measures. Conversely, a negative outcome may guide the Commission's scope of commitments or corrective measures, making this assessment crucial for the legal consequences of EU FSR proceedings.

The new Guidelines now allow contributions from other stakeholders (in addition to the undertakings concerned) that can now put forward arguments in favor of the subsidy. Moreover, the ‘cumulative assessment’ of the positive effects is now allowed when multiple subsidies are under scrutiny, and they are too closely related to carry out separate assessments.

The updated Guidelines explicitly reference economic security and defense policy among the ‘other policy goals’ that the Commission should consider when conducting the balancing test. Non-EU policy objectives should be considered only “to the extent that they are nevertheless relevant to the Union”, for example when they contribute to global welfare.

The Guidelines further refine the methodology of the balancing test, explicitly requiring a qualitative assessment of both positive and negative effects as well as EU policy objectives, such as environmental protection and innovation.

Distortion has a different meaning in public procurement

In procurement, the assessment focuses on whether a foreign subsidy enables the economic operator to submit an unduly advantageous tender for the works, supply, or service in question. The ability to submit an unduly advantageous tender must be considered even if the subsidy is not received by the tenderer itself but by its main subcontractor, main supplier, or another entity within its corporate group.

When assessing whether a tender is unduly advantageous, the Commission first examines whether the offer is advantageous; manifested through cost efficiencies, higher quality or more favorable conditions, including sustainability-related factors. Then it determines whether the advantage is legitimate, i.e., justified by factors other than foreign subsidies (such as efficiency gains, innovation, or favorable supply conditions), or undue (illegitimate), i.e. primarily resulting from foreign subsidies.

The Guidelines clearly divide responsibilities between the Commission and contracting authorities. If a contracting authority considers a tender to be abnormally low due to a foreign subsidy, it must notify the Commission and may not conduct its own assessment, thereby ensuring a uniform procedure.

The Guidelines also explain the Commission’s call-in powers, where the Commission may opt to impose the prior notification (rather than start an ordinary ex officio investigation) when a concentration or public tender may impact the EU market. The Guidelines illustrate the factors to consider when assessing whether the ex-ante review is warranted (including the significance of the economic activity concerned, which ultimately gives the Commission broad discretion), as well as the procedure the Commission will follow.

Takeaway

Ongoing FSR impact-assessment work will continue through July 2026, when the Commission is expected to issue its impact assessment report. It is important to keep following developments closely because further changes will almost certainly be forthcoming. Additionally, given the changes to the treatment of tax incentives in Pillar Two, further scrutiny may arise, and with 227 concentration cases already decided or in process (plus one registered ex-officio case), EU FSR is clearly having real impact.

Let's talk

For a deeper discussion of how the EU FSR might affect your business, please contact:

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