

# EU Foreign Subsidies Regulation (FSR): new guidance on notification procedures offers some streamlining

12 July 2023

## In brief

An EU regulation ('The Implementing Regulation') setting out notification procedures regarding non-EU subsidies that might distort the internal market was adopted by the European Commission on 10 July. In particular, it establishes the form of notification, the degree of aggregation of information and some exclusions in applying the rules of the Foreign Subsidies Regulation ('FSR') which was adopted by the European Parliament and Council in November 2022 (see [our Tax Policy Alert](#)).

The FSR will apply from 12 July 2023. As of 12 October 2023, companies will have to notify either mergers and acquisitions ('concentrations') or participation in public procurement bids, where they involve foreign financial contributions, meet the relevant notification thresholds and do not fall within the new exceptions. Notifications under the Commission's ex-officio power of investigation in other cases are to be determined in each case.

## In detail

### Overview

The power for the Commission to adopt The Implementing Regulation (formally the *Regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council*) was provided in the FSR.

The FSR, adopted in November 2022, introduced three tools to assess distortion: two ex ante notification-based tools and an ex-officio power of investigation tool. Consultation in relation to procedural rules, to include specific details of what needs to be notified and how, generated significant feedback through written submissions but also a number of verbal exchanges about the practicalities of the level of notifications. The Implementing Regulations include two annexes, one on concentrations and one on public procurement bids.

The FSR set out an obligation for companies to notify foreign financial contributions in:

- Concentrations where at least one of the merging companies, the acquired company or the joint venture generates an EU turnover of at least €500 million, and the transaction involves parties that have received foreign financial contributions from any number of non-EU countries of at least €50 million in the previous three years.
- Bids in public procurement procedures where the estimated contract value is at least €250 million and the bidder (or various group members or bid subcontractors or suppliers) was granted foreign financial contributions of at least €4 million per non-EU country in the previous three years.

The Implementing Regulation removes some of the complexity around notifications in these cases, as set out below. It also provides procedures for the Commission's investigation process (following notification or ex-officio), submitting redressive commitments, protection of confidential information, time limits, and the transmission and signature of documents.

### **De minimis limit of €1m per contribution**

Notifying parties must apply the reporting procedures for the three years mentioned only for each financial contribution of €1m or more.

This applies in relation to the specific line-by-line notification requirements for the FSR Article 5 subsidies most likely to distort the market—e.g., granted to those in difficulties, unlimited guarantees, for export, to allow a concentration/ bid at a lower price—and to those which can be aggregated. These differences are further discussed below.

### **Aggregation per third country and per type**

Reportable contributions that are not in the most distortive categories (above), may be reported per third country and per type for the three years in ranges: €45-100 million, >€100-500 million, >€500-1,000 million, and “more than €1,000 million.”

A per country threshold also applies here: for concentrations €45m (less than the €50m total FSR threshold) and for public procurement bids €4m (the same as the total FSR threshold).

For this purpose, the different types are described as direct grant, loan/financing instrument/repayable advances, tax advantage, guarantee, risk capital instrument, equity intervention, debt writeoff, contributions provided for the non-economic activities of an undertaking, or other.

Insofar as a general description is required of the purpose of the financial contributions included in each type and of the granting entity(ies), listed examples include: ‘tax exemption for the production of product A and R&D activities’, ‘several loans with State-owned banks for purpose X’, ‘several financing measures with State investment agencies to cover operating expenses/for R&D activities’, ‘public capital injection in Company X’.

As well as excluding the de minimis contributions, parties do not need to include the following information in these aggregated figures (although it seems they would be required for the most distortive contributions, when they fall in those categories):

- Tax or social security contributions, tax amnesties and tax holidays, normal depreciation or loss-carry forward, if they apply generally and not only to specific sectors,
- Tax relief provided to avoid double taxation,
- Provision/purchase of goods/ services (except financial services) at market terms in the ordinary course of business.

## Notifications in concentrations

FORM FS-CO applies in relation to concentrations and Table 1 of Annex 1 contains the aggregation instructions.

A lot of specific information is required for the line-by-line reporting, including the impact on the EU single market and the contact details of the five largest competitors of the target that have activities in the EU. That supplements questions around:

- the different business lines or activities of the target, explaining categories of products and/or services offered in each of them and to what customers;
- whether the notifying party(ies) are active in the same or related activities or business lines.

There is a section which includes the opportunity to set out any EU benefits of the concentration, in order to address the balancing that the Commission must consider of positive and negative effects.

There is an exclusion for acquisitions of control or creations of joint ventures by an investment fund or by a legal entity controlled by or via an investment fund. In this case, you do not need to include foreign financial contributions granted to other investment funds managed by the same investment company but with a majority of different investors measured according to their entitlement to profit (or granted to portfolio companies controlled by these other funds) provided you can demonstrate that certain conditions are cumulatively met.

## Notifying public procurement bids

FORM FS-PP applies in relation to public procurement bids and Table 1 of Annex 2 contains the aggregation instructions.

There are a significant number of questions in relation to the line-by-line reporting relating to items such as the elements and characteristics of the financial contributions, their purpose and economic rationale and whether there are any conditions attached to their grant or use.

There is a section which includes the opportunity to set out any EU benefits of the bid, in order to address the balancing that the Commission must consider of positive and negative effects.

There is a specific opportunity to justify the absence of it being an unduly advantageous tender. In this regard it refers to, for example,

- the economics of the manufacturing process, of the services provided or of the construction method;
- the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- the originality of the work, supplies or services proposed by the tenderer;
- compliance with applicable obligations in the fields of environmental, social and labour law;
- compliance with obligations regarding subcontracting.

## The takeaway

The de minimis limit of €1m per financial contribution will somewhat help streamline the information gathering process. And some of the clarifications will simplify some of the initial reporting, although the Commission may still seek further information. But even with these improvements, the FSR will substantially increase the regulatory burden for businesses outside the EU that wish to invest in or otherwise enter the EU internal market.

It is important to assess whether the FSR impacts your situation and consider what further actions may be appropriate. The Implementing Regulation further advocates the use of pre-notification discussions, preferably using a draft version of the relevant form.

A webcast addressing aspects of the FSR is available from [our website](#).

## Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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