



## **INTRODUCTION TO THE EU FOREIGN SUBSIDIES REGULATION**

*12 October 2023*

### **Preliminary Remarks**

As of 12 October 2023, a new mandatory notification and stand-still requirement will affect certain M&A transactions and public tender participation requests and bids in the EU.

The new notification requirement results from the EU Foreign Subsidies Regulation (“FSR”). It does not replace, but merely complements similar notification and clearance obligations that may result from any applicable merger control or FDI regime.

The FSR applies to all economic activities conducted by an “undertaking” in the EU. However, specific rules, which can have significant implications, apply to M&A transactions (“concentrations”) and participation in public procurement procedures in the EU (the internal market).

The purpose of the FSR is to address “distortions” caused, directly or indirectly, by foreign subsidies, with a view to ensuring a level playing field in the EU.

In this newsletter, we will provide an introduction to the FSR, including the key concepts, key obligations, and procedures proscribed by the FSR.

## **Key Concepts under the FSR**

### Foreign Financial Contribution

The FSR provides that any form of direct or indirect financial contribution from any non-EU government or any public or private entity attributable to a third country (non-EU country) constitutes a foreign financial contribution (“FFC”) for the purposes of the FSR.

This is an extremely wide-reaching concept, and it may take many forms, including in the form of direct grants, interest-free or low-interest loans off-market terms, tax incentives (e.g., exemptions/reductions), state-funded R&D, government contracts (regardless of size, whether they qualify as “subsidies” or whether they have any nexus to the EU), and grants of exclusive rights without adequate remuneration.

### Foreign Subsidy

The notion of a “Foreign Subsidy” embraces a “foreign financial contribution” meeting the additional conditions of conferring a “benefit” not normally available on the market to an “undertaking” (a company or group of company) engaged in an economic activity in the EU, while that benefit being “specific” to one or more companies or industries, either in law or in fact, as opposed to being available to all companies or all companies active in a particular industry under the national legal order of the third country concerned.

### Distortive Foreign Subsidy

This concept applies to a “foreign subsidy” which is liable to improve the competitive position of the beneficiary undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market. This requires a complex case-by-case “balancing test” assessment.

Any distortion in the internal market must be determined on the basis of indicators, which can include, in particular, the following: (a) the amount of the foreign subsidy; (b) the nature of the foreign subsidy; (c) the situation of the undertaking, including its size and the markets or sectors concerned; (d) the level and evolution of economic activity of the undertaking on the internal market; and (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

The FSR provides some legal presumption rules applicable to determining the existence of a distortion in the internal market or – on the other hand – the absence of such distortion:

- i. Subsidies likely to be distortive: (a) supporting a failing business (without a long-term plan to restructure); (b) unlimited guarantees; (c) facilitating a concentration; (d) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; and (e) enabling a company to submit an unduly advantageous tender.

- ii. Subsidies unlikely to be distortive: if lower than EUR 4 million in the past three (3) years; or if aimed at repairing damage caused by natural disasters or exceptional circumstances; and
- iii. Non-distortive subsidies (de minimis): below EUR 200,000 per third country in the previous three (3) years.

### Undertaking

The notion of “undertaking” under the FSR will likely correspond to the same notion applied in the existing EU Competition and State Aid case law of the Court of Justice.

This implies again a quite broad reach as it will embrace all legal entities considered to form part of a “single economic unit”. This may cover the parent company of the group and all legal entities below.

### **Notifiable M&A Transactions**

An M&A transaction – meaning a merger between two or more undertakings, the acquisition of an undertaking by one or more undertakings (regardless of whether it being a share or asset deal), or the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity – must be notified to the EU Commission before its implementation (closing) if:

- i. The acquired undertaking, one of the merging parties, or the joint venture generated a combined **EU-wide turnover** of at least **EUR 500 million** in the preceding financial year, and
- ii. The undertakings involved in the transaction (e.g., the buyer and target undertaking) received a total of at least **EUR 50 million in Foreign Subsidies** from third countries during the three (3) calendar years prior to the notification.

Save from mergers and joint ventures where both parties will have to notify, the notification obligation lies with the Buyer.

During the Commission's review of the notification, the parties are subject to a standstill obligation prohibiting the parties from implementing (closing) the transaction concerned.

### **Notifiable Public Procurement Participation Requests or Bids**

A “notifiable” foreign financial contribution in a public procurement procedure covered by the FSR must be notified to the contracting entity or authority together with the submission of a tender and/or the submission of a request to participate, as the case may be.

Following this, the contracting entity shall pass on that notification to the Commission without delay.

In cases where, upon further inquiry with the undertakings, the required notifications or declarations have not been provided, the contracting authority is obliged to declare a request to participate or a submitted bid as “irregular”.

Similarly, the European Commission retains the authority to declare a tender as “irregular” if the undertaking fails to complete the required notification, even after receiving a request to do so.

A “notifiable” FFC in a public procurement procedure covered by the FSR will be deemed to arise where:

- (i) the estimated value of the public procurement procedure is EUR 250,000,000 or greater (ex. VAT),
- (ii) the economic operator (including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure) has on aggregate received Foreign Subsidy greater than EUR 4,000,000 per any third country, in the three (3) calendar years prior to the notification.

### **Ad Hoc Notification**

Even if the M&A transaction or public procurement procedure does not meet the EU turnover and/or FFC thresholds for notifiable M&A transactions and public procurement procedures, the EU Commission may request “ad hoc” notification at any time before the transaction's implementation or the award of the contract under the public procurement procedure concerned if it suspects that Foreign Subsidies have been granted to the involved undertakings during the three (3) years leading up to the conclusion of the M&A transaction or to the tender submission request.

### **Legal Implications in the Event of any Breach of the Notification and stand-still Obligation**

The Commission is the sole competent regulator for the purposes of enforcing the FSR.

Any transaction carried out in breach of the FSR notification and stand-still obligation will be considered valid only after a positive decision (either a “no-objection” or a “commitments” decision) has been adopted by the Commission following the opening and conclusion of the in-depth investigation procedure (Phase 2).

The party responsible of notification (typically the buyer) may be fined by the Commission with an amount up to 10% of the responsible undertaking's (typically the group) world-wide aggregate turnover in the preceding financial year.

Finally, the Commission also has powers to subject the relevant undertakings to fines of up to 1% of their global group turnover and periodic penalty payments of up to 5% of the average daily aggregate group turnover for each working day of delay, where companies supply incorrect, incomplete, or misleading information either in the notification form or in response to additional information requests served by the Commission.

### **The Implementing Regulation**

July 10 2023, the Commission approved Implementing Regulation (EU) 2023/1441, which establishes the procedures for notifying Concentrations and public procurement bids with regards to the FSR, outlines rules for calculating timeframes, and provides procedural guidelines for preliminary reviews and in-depth investigations in cases involving suspected distortive foreign subsidies.

The implementing regulation specifies the disclosure requirements for foreign financial contributions in the context of notifiable M&A transactions. It is essential to note that these requirements pertain solely to the disclosure obligation and do not alter the fact that all foreign financial contributions are relevant when evaluating whether the notification criteria are met. When the notification criteria are met, the following information should be disclosed:

- i. Companies are required to furnish detailed information about foreign financial contributions that may fall within any of the categories of foreign subsidies most likely to disrupt the internal market, as defined in Article 5(1) of the FSR, as previously outlined.
- ii. High-level information concerning certain other foreign financial contributions must be provided in an aggregated format.

Information related to these foreign financial contributions should encompass the three (3) years preceding the signing of the M&A deal. Notably, the reporting obligation applies exclusively to individual foreign financial contributions valued at EUR 1,000,000 or more.

Furthermore, the implementing regulation includes the formal notification form, annexes for reporting foreign financial contributions, and other associated documentation.

### **Moalem Weitemeyer provides Advice in Relation to the FSR**

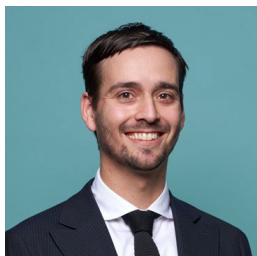
At Moalem Weitemeyer, we have followed the FSR closely since its adoption and we hold significant experience with respect to dealing with complex transactions, public procurement procedures and regulatory filings and clearances as well as compliant handling and litigation, including before the EU courts in Luxembourg.

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us.**



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