

# FOREIGN SUBSIDIES REGULATION IN THE EU: WHAT YOU NEED TO KNOW

Crib Sheet Guide



The European Union's new Foreign Subsidies Regulation ("FSR") was passed in late 2022 and is due to take effect in two stages in July and October 2023. This crib sheet is intended to give a high-level summary of what the new regime covers, and the key things you need to know before it takes effect.

## WHAT IS THE REGIME?

- The FSR gives the European Commission powers to scrutinise the impact of subsidies granted by foreign countries to businesses that trade in the EU. The regime is intended to ensure foreign subsidies do not distort competition on EU markets.
- There are three "pillars" to the regime, allowing the Commission to scrutinise 1) subsidies in the context of M&A transactions, 2) subsidies in the context of public procurement and 3) subsidies more generally.

## FOREIGN SUBSIDIES

*What is a foreign subsidy?*

- Direct or indirect financial contributions (that are limited to one or more businesses/industries) from non-EU countries that confer a benefit on a company operating in the EU.
- Include any transfer of funds or liabilities (including grants, loans, debt forgiveness etc), foregoing of revenues otherwise due (e.g. tax exemption) and provision/purchase of goods and services.
- May be paid by central governments, public authorities, public entities or private entities in limited circumstances.

*When are foreign subsidies most likely to distort the internal market?*

- When the business would fail absent the subsidy.
- Unlimited guarantees of debts/liabilities.
- Export financing measures not in line with OECD Arrangements.
- A subsidy directly facilitating a concentration (i.e. a corporate acquisition/merger).
- A subsidy enabling the submission of an unduly advantageous tender.

*When are foreign subsidies less likely to distort the internal market?*

- Unlikely to distort the internal market if total subsidies do not exceed EUR4 million in any consecutive three years.
- Will not distort the internal market if total subsidies do not exceed EUR200,000 in any consecutive three years.
- May not distort the internal market when the subsidy is aimed at making good the damage caused by natural disasters or other exception circumstances.

## Merger Notification Regime

### Notification Thresholds

- The target, one of the merging parties or the joint venture has EUR500 million EU turnover; and
- The parties received aggregate foreign subsidies exceeding EUR50 million in the last three years
- *Must notify and receive clearance before completing if these thresholds are met*
- *Commission can request notification of transactions below the thresholds*

### Timing

- Phase One: 25 working days
- Phase Two: 90 working days

### Possible Outcomes

- Transaction may be prohibited
- Commitments can be offered to remove concerns
- Fines for gun jumping (i.e. completion without clearance) and unwinding of transactions

## Public Procurement Regime

### Notification Thresholds

- Contract value is at least EUR250 million or aggregate value of lots is at least EUR125 million; and
- Bidding party and its main subcontractors have received foreign subsidies of at least EUR4 million in the last three years
- *Tender may not be awarded until review process is complete*

### Timing

- Phase One: 20 working days
- In-depth: 110 working days following notification

### Possible Outcomes

- Prohibition of the award
- Commitments can be offered to remove concerns
- Fines for failing to notify

### Own initiative investigations

- The Commission can also launch investigations into alleged foreign subsidies outside the M&A/procurement sphere up to 10 years after they were granted.
- There is no set time limit for in-depth investigations (although the Commission should “endeavour” to complete them within 18 months).
- The Commission can impose structural and non-structural measures where a distortion of the internal market is found.

## NEXT STEPS

- An “implementing regulation” will be put in place before the regime comes into force, setting out the notification and other procedures.
- The FSR’s provisions will come into force on 12 July 2023.
- The M&A and public procurement notification regimes will come into force on 12 October 2023.
- However, the Commission can investigate on its own initiative:
  - transactions where the agreement is signed, a public bid is announced or a controlling interest is acquired, and
  - public procurement contracts that are awarded or for which procedures are initiatedon or after 12 July 2023.

If you would like further information on the FSR, or would like to discuss how it might affect your business, please contact us:



**Dave Anderson**  
Office Managing Partner -  
Brussels  
Antitrust and Competition  
T: +32 2 792 2421  
david.anderson@bcplaw.com



**Paul Culliford**  
Senior Associate  
Antitrust and Competition  
T: +32 2 792 2424  
paul.culliford@bcplaw.com



**Tom Wright**  
Associate  
Antitrust and Competition  
T: +32 2 792 2437  
thomas.wright@bcplaw.com