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Insights

FOREIGN SUBSIDY CONTROL : SUMMARY OF RECENT DEVELOPMENTS

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SUMMARY

Over the past few months, a first draft of guidelines on the implementation of the regulation on foreign subsidies has been published. Perhaps more significantly, a review of the regulation itself has been launched — just two years after it came into force. Below is a summary of the main developments.

- Regulation 2022/2560 on foreign subsidies distorting the internal market (FSR), which came into force on July 12, 2023, aims to remedy the **distortions caused by subsidies paid by third countries** to companies in the European Union.
- Since **October 12, 2023**, the European Commission has been responsible for monitoring mergers and public procurement procedures involving companies that have received foreign financial support.
- It has several tools at its disposal to do this: **mandatory notification** of mergers and responses to public procurement contracts exceeding certain thresholds, the possibility of **conducting investigations on its own initiative**, and the imposition of **corrective measures** in the event of identified distortions of competition.

A HIGHLY ANTICIPATED DRAFT GUIDELINE

On **July 18**, **2025**, the European Commission published and submitted for public consultation its **draft guidelines** on the implementation of the FSR.

This document was eagerly awaited by businesses and practitioners, given the many questions raised by the FSR and the few decisions published by the Commission (to date: (i) in merger control, a single authorization decision subject to commitments and a decision to open an in-depth investigation, with Phase I decisions not being published, and **(ii)** in public procurement, three decisions to open in-depth investigations, leading to the withdrawal of bids).

In this regard, while the draft provides useful clarifications, it suggests that the Commission intends to retain **considerable leeway by adopting a very broad definition of many key concepts in the FSR.**

On the existence of a distortion of competition caused by a foreign subsidy, the Commission establishes the following analysis grid:

(i) The beneficiary of the aid carries out an economic activity in the Union. The Commission takes a broad approach in this regard, considering that this criterion will be met even when the link between the subsidized company's activity and the internal market is established, including indirectly: for example, when the company concerned purchases goods or services within the European Union (EU), or if it has investment projects in the EU.

(ii) The foreign subsidy is likely to improve the company's competitive position in the internal market. Here again, the Commission takes an extensive view of this criterion.

It therefore considers that this condition may be fulfilled if (**i**) the company uses or intends to use the foreign subsidy for its economic activities in the internal market, **(ii)** the foreign subsidy is granted to support the company's economic activities in the internal market (either directly, such as a production subsidy, or indirectly, such as a subsidy for R&D activities outside the EU but likely to be used subsequently in the internal market), but also (**iii)** where the subsidy is not specifically intended, directed or used for an activity in the internal market, but where it is possible that the company may use the resources concerned, in whole or in part, to cross-subsidize its economic activities in the internal market. The Commission states in this regard that its analysis will be based on a range of indicators: the nature of the subsidy and the conditions attached to it, the capital structure of the beneficiary, existing agreements with third parties, applicable laws, the economic situation of the beneficiary, etc., so that it retains a high degree of discretion in practice.

(iii) The foreign subsidy actually or potentially adversely affects competition in the domestic market.

The Commission considers that this condition may be met in many circumstances: when the subsidy (**i**) eases financial constraints and strengthens the financial soundness of the beneficiary company, (**ii**) reduces production and/or investment costs, **(iii)** alters the incentives for companies to take risks, (**iv)** modifies the outcome of negotiations for the acquisition of companies, or (**v)** influences public procurement procedures.

It specifies that, in order to establish the existence of distortion, it will analyze the effects of the subsidy on both:

- **The behavior of the recipient company**, whether in terms of prices, production, choice of customers or suppliers, diversification, investment, R&D, etc.; and

- **Competitive dynamics** and any potential distortion to the detriment of other economic operators. In this regard, the Commission will take into account a number of criteria, including **(i)** the scope, purpose, and conditions of the subsidy, **(ii)** its amount, (**iii)** the type of subsidy involved, **(iv)** the importance of the beneficiary, **(v)** the characteristics of the sector, and **(vi)** the applicable legal framework.

The Commission also draws up a typology of the main distortions of competition, covering a very wide range of situations: where the subsidy directly facilitates an acquisition, where it improves the beneficiary's position in the market, for example by enabling it to lower its prices, where it affects its investment decisions, or where it has an impact on the value chain.

(iv) In the context of public procurement, foreign subsidies enable economic operators to submit unduly advantageous bids.

The Commission will focus its analysis on this condition in the context of public procurement. It will first analyze whether a foreign subsidy allows an economic operator to submit an unduly advantageous bid for the work, supplies, or services concerned (for example, by reducing the price, improving quality, or offering better conditions in terms of delivery, guarantees, services, etc.). It will then analyze whether this advantage can be explained by factors other than the foreign subsidy, for example, through the profitability of the production process, innovation or innovative techniques, or exceptional conditions enjoyed by the economic operator.

The Commission also specifies that a foreign subsidy granted not to the economic operator participating in the tender but to a company within the group does not rule out the existence of an unduly advantageous offer. The Commission may then send requests for information to understand the link between the foreign subsidy granted to a company in the group and the economic operator participating in the tender. This clarification is important because, unlike merger control, sister companies are not, in principle, included in the scope of financial contribution reporting.

As regards how it intends to implement the **balancing test** (which consists of determining whether the positive effects of a subsidy outweigh its distorting effects), the Commission does not really provide any useful details, preferring to indicate that this issue is subject to **a "case-by-case" analysis** and that it is not possible to determine in advance whether certain types of subsidies will necessarily have positive effects that offset the distortions of competition they cause elsewhere.

The draft nevertheless indicates that the Commission may take into account, as positive effects, the strengthening of environmental protection, human rights, or the economic development of disadvantaged regions of the EU resulting from the subsidy.

Finally, **with regard to the implementation of the power of evocation** (the FSR giving the Commission the possibility to request prior notification of any concentration that does not exceed the thresholds "*at any time prior to its completion if it suspects that foreign subsidies may have* *been granted to the undertakings concerned during the three years preceding the concentration*"), the Commission states that it considers **that it has "broad discretion"** and that, in deciding whether to exercise this option, it will take into account, in particular **(i)** the fact that the target's turnover does not necessarily reflect the importance of its current or future economic activity, **(ii)** the strategic nature of its activity (particularly where it owns critical infrastructure or innovative technologies), **(iii)** any below-threshold acquisition strategies in the sector concerned, or **(iv)** the nature of the foreign subsidies concerned.

Contributions to the public consultation were due by September 12, 2025, and the final version of the guidelines is expected to be published by **January 12**, **2026**. It is therefore hoped that the final version will provide greater clarity for businesses.

LAUNCH OF THE FIRST EVALUATION OF THE FOREIGN SUBSIDIES REGULATION, JUST TWO YEARS AFTER ITS ENTRY INTO FORCE

On **August 12**, **2025**, the European Commission launched its first evaluation of the foreign subsidies regulation. This initiative aims to **review its practice in implementing and enforcing the regulation**.

To this end, the Commission is seeking feedback from stakeholders *through*:

- **A public consultation** to gather opinions on certain aspects of the implementation and enforcement of the FSR from all stakeholders, such as businesses, law firms, Member States, professional associations, individuals, and the scientific community.
- **A call for contributions** to gather more general feedback from all stakeholders on the main objectives of the FSR review report, as well as its scope and context.

The Commission indicates that it is particularly interested in feedback on **(i)** the assessment of foreign subsidies distorting the internal market, **(ii)** the application of the balancing test, **(iii)** the Commission's own initiative to examine foreign subsidies that may have a distorting effect on the internal market, **(iv)** notification thresholds, and **(v)** more generally, the level of complexity of the rules and the costs incurred by businesses.

The Commission is therefore likely aware that the FSR places a very heavy administrative burden on businesses and that the thresholds used, particularly those relating to *"financial contributions"* received, do not necessarily seem appropriate for the objective pursued. In this regard:

- With regard to merger control, it appears that (**i**) the number of notifications received by the Commission is much higher than anticipated and (**ii**) the vast majority of transactions reviewed to date are not problematic. Since the SRF came into force, the Commission has received around 200 notifications of mergers, whereas it had anticipated only around 30 per year in the impact assessment carried out in 2021. Furthermore, of all the transactions reviewed, only two have been subject to in-depth scrutiny.

- With regard to public procurement, the number of notifications is also much higher than anticipated. The Commission has received more than 2,500 declarations/notifications, only three of which have been subject to in-depth investigation.

Stakeholders can submit their comments until **November 18**, **2025**, and the Commission will have to present a report to the European Parliament and the Council in July 2026, accompanied, where appropriate, by relevant legislative proposals.

We can therefore hope for a revision in the short term that will ease the constraints while allowing the Commission to exercise its control when a real competitive issue arises.

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