

# Foreign Subsidies Regulation: Have your say

08 February 2023

On 6 February, the European Commission (*Commission*) published a [draft Implementing Regulation](#) on detailed arrangements for the conduct of proceedings pursuant to the [Foreign Subsidies Regulation](#) (*FSR*) including relevant notification forms. Interested parties have the possibility to provide the Commission with feedback on the draft regulation until 6 March 2023 via an [online portal](#).

## The Foreign Subsidies Regulation

The FSR, which entered into force on 12 January 2023, is a new instrument which seeks to prevent that the level-playing field in the EU single market is undermined by market-distorting subsidies granted by third countries. With the FSR, three new tools were introduced to enable the Commission to effectively investigate foreign subsidies and remedy any distorting effects: two notification-based tools provide the Commission with the power to examine concentrations and bids in public procurement procedures in view of foreign subsidies if certain thresholds are met. Additionally, an ex-officio tool allows the Commission to investigate all other market situations. For further information on the FSR, please see our [Briefing on the FSR](#).

## Main content of the draft Implementing Regulation

The notification and declaration obligations under the FSR for parties of a concentration as well as bidders in public procurement procedures will start to apply on 12 October 2023. With the draft Implementing Regulation now submitted, the Commission provides more detailed information on how relevant notifications and declarations are to be made. The requirements are detailed in two annexes, one for concentrations and one for public procurement procedures. The annexes also include standardised forms that should be used.

Furthermore, the draft regulation provides rules for the investigation by the Commission, in particular the timelines, the conduct of interviews and oral statements as well as the submission of commitments. The draft also includes the details of disclosure and rights of defence of the company under investigation.

## Acceleration of procedures by means of pre-notification and waivers

Companies subject to notification obligations are invited to engage in pre-notification discussions with the Commission. The pre-notification phase serves to discuss, among

other things, the precise amount of information required in the notification. According to the draft, pre-notification may result in a significant reduction of the amount of information to be submitted to the Commission as companies can ask for waivers to submit certain information required by the notification form. The Commission intends to consider such waiver requests if the relevant information is not reasonably available or not necessary for the examination of the case. The concept of pre-notification, which is also an established step in EU merger control and State aid procedures, can thus be used to significantly limit the administrative burden and ideally shorten the overall duration of the investigation procedure before the Commission.

## **Forms for notifications and declarations**

The forms for notifications and declarations are of particular importance, as they detail what is required from companies for a complete notification/declaration. While the form for concentrations on the one hand and for public procurement procedures on the other hand have a similar structure, they differ in the details. According to the draft forms, the following information is to be provided:

- Description of the public procurement procedure/concentration;
- Information about the party(ies);
- Detailed list on foreign financial contributions (including, *inter alia*, detailed elaborations on the main elements and characteristics of the financial contributions);
- Explanations on any possible positive effects of the subsidy (in particular on the development of the relevant subsidised economic activity on the internal market, but also on broader positive effects in relation to relevant policy objectives of the EU);
- Supporting documentation in view of the other statements (e.g. on the subsidies);
- Attestation of correctness and completeness.

With regard to concentrations, the following additional information is required:

- Details of the concentration, ownership and control (including, *inter alia*, sources of finance to fund the transaction, description of economic rationale of the transaction);
- Jurisdictional thresholds (in particular turnover data);

- Impact on the internal market of the foreign financial contribution in the concentration (e.g. whether the concentration occurs in the context of a structured bidding process; information on different business lines or activities of each of the parties in the EU).

In notifications concerning public procurement procedures, companies must additionally explain whether there are any elements to justify that the tender is not unduly advantageous due to the financial contributions received. Such explanation may in particular refer to the economics of the manufacturing process, the originality of the work, supplies or services, or compliance with applicable obligations in the fields of environmental, social and labour law.

The notification form is also to be used for the mandatory declaration in public procurement procedures in case the notification obligation does not apply (e.g. because the minimum threshold of financial contributions received of EUR 4m per third country is not met). In this case, (only) the description of the public procurement procedure and information about the party(ies) as well as the attestation of correctness and completeness must be provided. In addition, the company must list all foreign financial contributions and declare that no notifiable foreign financial contributions have been received.

## **What's next?**

By setting out the procedural details and information requirements the draft Implementing Regulation confirms that the FSR results in a considerable additional administrative burden for companies participating in procurement procedures or M&A transactions in the EU. This applies not only if the company itself has received subsidies from third countries, but also, for example, if only subcontractors in procurement procedures or one of the parties in a concentration have received such subsidies. Companies that regularly participate in procurement procedures in the EU or where transactions are foreseeable should therefore familiarise themselves with the new regulations in the FSR and the draft Implementing Regulation at an early stage and ensure that the necessary information and documents are available in good time.

While the draft Implementing Regulation and the forms further clarify what will be required from companies, there are still some unanswered questions regarding the scope of application of the notification and declaration obligation. With regard to public procurement procedures, for example, it is not entirely clear from the wording of the FSR whether the declaration obligation only applies to cases where the estimated total value of the contract is at least EUR 250m (or also to procurements below that threshold). In addition, the instructions in the declaration form for public procurement procedures suggest that only financial contributions that (i) fall under the categories of foreign subsidies most likely to distort the internal market or (ii) relate to operating costs are to be notified. It is to be hoped that the remaining uncertainties will be clarified in the final version of the Implementing Regulation or otherwise in due course.

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Interested parties have the opportunity to submit comments to the Commission on the draft Implementing Regulation until 6 March 2023. The adoption of the regulation is planned for the second quarter of 2023.

BLOMSTEIN is monitoring further developments with regard to the FSR closely and will keep you informed. For questions regarding the impact of the FSR on public procurement procedures, please contact [Pascal Friton](#) and [Ramona Ader](#). With regard to concentrations, [Max Klasse](#) and [Jasmin Mayerl](#) are happy to answer any questions that may arise.