

Foreign Subsidies Regulation Underway – New Red Tape also for EU Companies

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On 1 July 2022, the European Parliament and the Council have reached a political agreement on the proposed Regulation on foreign subsidies distorting the internal market (*FSR*). This marks a decisive step towards the formal adoption of the FSR later this year. The FSR will provide the Commission with a new tool to investigate subsidies granted by non-EU governments out of its own motion but will also subject recipients of foreign subsidies to a parallel merger clearance procedure and to special review in public procurement procedures.

It will introduce another layer of regulatory scrutiny, which companies operating in the EU internal market should have on their radar from now on. The Regulation follows the Commission's proposal from last May (see BLOMSTEIN [briefing](#)).

EU Companies in Scope

The FSR will apply to any company that is already active or is going to be active on the EU internal market and that has benefited from subsidies granted by third countries. The act of acquiring control of or merging with an undertaking established in the EU is deemed to meet the first criterion as would participating in a public procurement procedure within the EU.

While it is to be expected that particular focus will be on foreign state-owned companies enjoying special treatment by their home government, the scope of the FSR is not limited to non-EU investors from state-controlled economies. Rather, the FSR will also apply to EU-based companies subsidised by foreign governments.

Implications for M&A and Public Procurement

Concentrations will trigger a notification obligation if two cumulative thresholds are met:

1. The turnover of the EU target exceeds EUR 500 million; and
2. The foreign financial contribution exceeded EUR 50 million in the three years preceding the deal.

Regarding bids in public tenders, the *ex ante* notification-based investigative tool applies where

1. the contract value exceeds €250 million; and

2. the bid involves a foreign financial contribution of at least €4 million per third country.

The parties to the concentration or participating at the tender will have to notify the Commission or the contracting authority *ex ante* any financial contribution received in the previous three years from a non-EU government. The notification requirement will start to apply nine months after entry into force and thus also to contributions pre-dating the entry into force of the FSR. Where a notification is required, the concentration cannot be completed, and the bidder cannot be awarded the contract until cleared by the Commission.

Identifying Subsidies and Financial Contributions

The definition of subsidies under the new FSR is broadly comparable to the notion of State aid under Article 107 (1) TFEU. According to the current text, it shall be deemed to exist where a third country provides

- a) a financial contribution which confers
- b) a benefit to an undertaking in an economic activity in the internal market and which
- c) is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries.

The notification obligation, however, is triggered by any “financial contribution” that meets the thresholds and neither requires the existence of a benefit/advantage for the recipient (see lit. b above) nor selectivity (see lit. c above). As a consequence, public measures which were tied to a quid pro quo or are non-selective, i.e. measures that are generally applicable across all undertakings and sectors in a country, might need to be notified. Even the general lowering of corporate taxation rates, for example, could in those circumstances qualify as a “financial contribution”. The FSR lists examples of what can be covered by financial contributions. It includes the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; the foregoing of revenue that is otherwise due; or the provision of goods or services or the purchase of goods and services.

The scope of the notification obligation for concentrations is broadened even further as the threshold level is not determined for each country individually but on the basis of the aggregate financial contributions received from all third countries.

While companies may struggle with determining what is relevant to report or not within the EU, it is crucial to submit correct and complete information with the notification.

Non-Cooperation - Penalties

The Commission may impose fines and periodic penalty payments where an undertaking (or association of undertakings) intentionally or negligently supplies incorrect, incomplete, or misleading information, does not supply information within the prescribed time limit, or refuses to submit to an inspection.

Failure by the undertaking to provide the relevant information may even lead the Commission to decide that the undertaking is deemed to have received a subsidy.

Companies breaching their obligation to notify altogether risk a fine, which may reach up to 10 % of their aggregated turnover.

Next Steps and Recommendations

The FSR will enter into force once it is formally adopted by the Council and the European Parliament and published in the Official Journal. This will likely still occur in 2022. It will become directly applicable across the EU six months after entry into force.

The precise application of the new regime still remains to be clarified. It can be expected that the Commission will also codify its approach to the interpretation of certain terms as well as further procedural practices in soft law or indeed in implementing regulations.

To increase deal certainty, significant experience in dealing with parallel reviews and familiarity with State aid rules already now is key. Foreign and EU-investors will need to allocate more time and attention to identify any applicable regulatory pre-closing requirements. From the seller perspective, pre-evaluating the risk related to non-EU investors gets even more important. Companies are therefore advised to

- start keeping track of their dealings with foreign authorities;
- consider whether any financial contributions from such foreign authorities might involve elements of “subsidies” within the meaning of the FSR;
- consider the impact of any finding of financial contributions and foreign subsidies especially when planning to engage in a (large) merger, acquisition, joint venture or public tenders above the thresholds.

BLOMSTEIN is monitoring further developments and will keep you informed. If you have any questions about the potential impact of the FSR on your company or your industry in relation to pending or future transactions, [Max Klasse](#), [Pia Hesse](#) and the entire BLOMSTEIN team will be happy to answer them at any time.