Houthoff Q&A

Foreign Subsidies Regulation

19 December 2023

DISCLAIMER

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Material aspects

1. Scope

1.1. Which companies fall within the scope of the Foreign Subsidies Regulation?

1.1.1. All companies engaging in economic activity on the EU internal market, regardless of whether the company is private or publicly owned, fall within the scope of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, i.e. the Foreign Subsidies Regulation (hereafter: '**FSR**'). Therefore, the FSR in principle applies to both foreign companies operating in the EU and EU-based companies. The actual applicability of the FSR depends on whether all material conditions are met. In principle, a company only has to take account of the FSR when it receives a foreign subsidy as defined by the regulation (see further § 2).

1.2. Which markets and/or economic sectors does the FSR apply to?

1.2.1. The FSR applies to all economic sectors and markets in the EU, including sectors that are of strategic interest and certain critical infrastructures.

1.3. Which activities are covered by the FSR?

1.3.1. The FSR targets all economic activities on the EU internal market. An economic activity is defined rather broadly as any activity consisting in offering goods and services on a given market.

1.3.2. The FSR could also apply if your company is not yet active within the EU but intends to enter the EU internal market. If your company benefits from foreign subsidies, the FSR may require your company to notify the European Commission ('**Commission**') of its entry into the EU internal market via:

1. the acquisition of control of an undertaking which is involved in an economic activity on the EU internal market (see further § 3); or
2. its participation in a public procurement procedure to provide goods or services on the EU internal market (see further § 4).

1.4. Does the FSR apply if my company is not active on the EU internal market?

1.4.1. The geographical scope of the FSR is limited to undertakings engaged in an economic activity on the EU internal market. Therefore, if your company (and corporate group) is not involved in any economic activity within the territory of the EU and does not intend to enter the EU internal market either, the FSR does not apply.

2. The concept of 'foreign subsidies'

2.1. What is a foreign subsidy?

2.1.1. A support measure qualifies as a foreign subsidy if the following four cumulative criteria are met:

1. the measure qualifies as a financial contribution within the meaning of the FSR;
2. the financial contribution is provided by a third country;
3. the financial contribution confers a benefit on one or more undertakings active on the EU internal market;
4. the financial contribution is limited to one undertaking or industry or to a limited group of undertakings or industries (i.e. is selective in nature).

2.1.2. A foreign subsidy can take various forms and the term does not necessarily refer only to actual subsidies. Whether an act entails a 'foreign subsidy' is determined on a case-by-case basis, taking into account all relevant circumstances, including in particular the legal and economic environment of the third country involved.

2.1.3. The aforementioned four criteria are addressed in more detail in the questions below.

2.2. Which measures may qualify as a financial contribution within the meaning of the FSR?

2.2.1. The determination of whether a support measure constitutes a financial contribution is not dependent upon its form. Besides the direct transfer of funds, a financial contribution may comprise the transfer of financial liabilities or assets, the provision or purchase of goods or services without compliance with normal market conditions, and the provision of other financial advantages in an indirect manner. Examples of indirect financial contributions include the forgiveness of debt and compensation for financial burdens imposed. The concept of financial contribution also covers the foregoing of State revenue in other ways, such as by the granting of special or exclusive rights. Tax exemptions from ordinary tax regimes of third countries should also be taken into account.

2.3. When is a financial contribution considered to be granted by a third country?

2.3.1. A financial contribution can only qualify as a foreign subsidy if it is provided by a third country, which includes all countries that are not EU Member States. A financial contribution can be provided by a third country either in a direct or indirect manner. The character of the granting entity itself is not the decisive factor for the question of whether a financial contribution is provided.

2.3.2. On this basis, any contribution which can be attributed to the third country qualifies as a financial contribution. First and foremost, this includes contributions by the government (be it national, regional or local) and public authorities of third countries. Second, contributions by private entities which are attributable to any third country government are also caught by the regulation.

2.3.3. The test for determining whether a financial contribution is attributable to a third country is whether the entity granting the financial contribution is under the direct or indirect control of a third country government. All relevant elements must be taken into account in this assessment. These include, in particular, the characteristics of the entity and the legal and economic environment in the third country, including the government's role in the economy. Companies should thus be wary of the fact that it is not always necessary for a financial contribution to have originated directly from the resources of a third country; other measures may qualify as a financial contribution as well.

2.4. When can a financial contribution entail a benefit?

2.4.1. In principle, financial contributions provided exclusively for non-economic activities do not entail a benefit and therefore will not constitute a foreign subsidy. Non-economic activities are generally activities which do not entail the offering of goods or services on the market. In particular, the exercise of public powers is not considered to be an economic activity. The application of the foreign subsidy rules is likely to follow the case law of the Court of Justice of the European Union ('**CJEU**') on the application of the concepts of 'economic activity' and 'undertaking'. According to this case law, any activity consisting in the offering of goods or services on a given market qualifies as an economic activity and any entity engaged in such activity qualifies as an undertaking.

2.4.2. Exceptionally, even financial contributions provided exclusively for non-economic activities may qualify as foreign subsidies if such contributions are indirectly used to subsidise the undertaking's

economic activities (so-called 'cross-subsidisation'). Therefore, companies must remain vigilant of the risk that compensation or other financial benefits resulting from the allocation of special or exclusive rights for non-economic activities may qualify as foreign subsidies if the compensation or rights also confer competitive advantages in relation to their economic activities.

2.5. How will the European Commission assess whether a financial contribution confers a benefit?

2.5.1. As a general rule, a financial contribution confers a benefit to a company if that benefit could not have been obtained under normal market conditions in the relevant third country.

2.5.2. The wording and the indicators for the existence of a benefit echo the Commission's approach to the existence of an economic advantage in the context of State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union ('**TFEU**'). Therefore, it seems likely that the Commission's approach to the existence of a benefit will be similar.

2.5.3. The existence of a benefit must be assessed by comparing the financial contribution to normal market conditions by applying comparative benchmarks such as the investment practice of private investors, financing rates obtainable on the market, the normal tax treatment and the remuneration for a given good or service at market terms. This assessment can be compared to the determination of the existence of an economic advantage within the meaning of Article 107(1) TFEU.

2.5.4. In the absence of directly comparable benchmarks, generally accepted assessment methods could be applied to establish alternative benchmarks. In this regard, it seems likely that certain methods employed by the Commission and the CJEU to determine the existence of an economic advantage within the meaning of the EU State aid rules (Article 107(1) TFEU) will be used, such as the Market Economy Operator (MEO) test. This test entails assessing whether a private operator of a comparable size operating in normal conditions of a market economy in similar circumstances could have been prompted to provide the same financial contribution.

2.5.5. The FSR provides limited guidance on the assessment of benefits. A financial benefit is not likely to apply where government contracts are concluded following a competitive, transparent and non-discriminatory tender procedure. However, companies should be wary of tax advantages, e.g. in the form of tax exemptions, as these are likely to confer a benefit. In particular, transfer pricing (i.e. the pricing of intra-group transactions) involving entities which have received financial contributions can confer a benefit if it does not take place under normal market conditions. This could result in a group entity which is active on the EU internal market receiving a benefit from an entity established in a third country. While the FSR does not make clear how the Commission will assess whether such intra-group transactions lead to a benefit, an approach similar to the one applied under EU State aid rules can be expected. That approach entails that the Commission generally applies the arm's length principle to assess whether the pricing of intra-group transactions corresponds to transfer pricing under normal market conditions. According to CJEU case law, such assessment must be made based on the applicable national law in the Member State of establishment.

2.6. From which moment can a benefit be deemed to have been granted?

2.6.1. The moment the beneficiary or group of beneficiaries obtains the entitlement to the foreign subsidy is decisive for the application of the FSR. Importantly, the actual disbursement of the foreign subsidy is not a necessary condition for the FSR to apply.

2.7. Are all benefits covered by the term 'foreign subsidy'?

2.7.1. No, only selective benefits are covered. This means that the benefit is granted to one or more undertakings or industries. This condition is akin to the requirement of selectivity under EU State aid rules.

2.7.2. The selective nature of the benefit can be determined either *by law* or *in fact*. A selective nature may be present by law if a specific group of one or more undertakings or industries receive a benefit in comparison to others because of a specific regulation or government decree. A selective nature may be present in fact if a benefit follows from the factual involvement of the third country, e.g. through the direct provision or purchase of goods or services at a higher price than the actual market price.

2.8. Does the FSR prohibit all foreign benefits?

2.8.1. No, the FSR does not prohibit companies from receiving foreign subsidies. The FSR only sets out a framework to prevent foreign subsidies from distorting the EU internal market. To that end, the Commission may impose redressive measures, require commitments from companies to remedy a distortion of the EU internal market caused by the foreign subsidy, or in extreme cases prohibit a concentration or the award of a contract (see further § 6 for an overview of the measures and commitments that the Commission may impose or require).

2.9. When does the Commission consider a foreign subsidy to cause a distortion of the EU internal market?

2.9.1. A foreign subsidy is considered to distort the EU internal market when the foreign subsidy can improve the competitive position of a company, which in turn will potentially or actually negatively affect competition in the internal market.

2.9.2. The Commission takes various elements into account in its assessment. These include the amount and nature of the foreign subsidy, the characteristics and dynamics of competition on the market concerned, the activities of the beneficiary and the purpose of the foreign subsidy. Foreign subsidies granted to small and medium-sized enterprises (SMEs) are less likely to cause a distortion than foreign subsidies to large companies.

2.9.3. There are five categories of foreign subsidies which the Commission considers are most likely to distort the internal market:

1. a foreign subsidy granted to a company at risk of insolvency, i.e. which is likely to go out of business in the short or medium term without any subsidy;
2. a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of a company;
3. an export financing measure contrary to the OECD Arrangement on officially supported export credits;
4. a foreign subsidy which directly facilitates a concentration; and
5. a foreign subsidy which enables a company to submit a valid but unduly advantageous bid in a tender.

2.9.4. If a foreign subsidy falls within one of these categories, the Commission is not required to carry out an in-depth assessment of the effects of the foreign subsidy to establish that it causes a distortion of the internal market. A company can rebut this legal presumption of distortion by putting forward sufficient evidence that, although the foreign subsidy falls within one of these categories, it does not distort the internal market in the specific circumstances at hand.

2.9.5. To provide guidance on assessing whether other types of foreign subsidies cause a distortion on the internal market, the Commission intends to publish guidelines by 26 January 2026 at the latest.

2.10. Which foreign subsidies are considered not to distort the internal market?

2.10.1. Foreign subsidies that do not amount to more than EUR 200,000 per third country over a consecutive period of three years (the 'de minimis' threshold) are exempted. The Commission will not assess foreign subsidies falling below the 'de minimis' threshold, nor consider them to be distortive.

2.10.2. The Commission considers foreign subsidies which fall within one of the following categories unlikely to distort the internal market:

a) foreign subsidies that do not exceed EUR 4 million over any consecutive period of three years;
b) foreign subsidies granted as compensation for damage caused by natural disasters or exceptional occurrences.

2.10.3. In principle, the Commission will not review a foreign subsidy if it falls within either one of these two categories. In contrast to foreign subsidies falling below the de minimis threshold, these categories merely present a presumption, which the Commission can set aside on the basis of evidence.

2.10.4. Finally, the Commission has indicated that in the long term it may introduce block exemptions for certain foreign subsidies similar to those that currently exist for certain categories of State aid.

2.11. Can a distortion of the internal market be justified by positive effects of the foreign subsidy?

2.11.1. Importantly, the actual assessment of a distortion of the EU internal market involves performing a 'balancing test' rather than merely focusing on the existence of the distortion itself. Having found that a foreign subsidy distorts the internal market, the Commission will carry out this balancing test to weigh the subsidy's positive effects against its negative effects on the internal market.

2.11.2. If as a result of the balancing test the Commission finds that the negative effects are not outweighed by the positive effects, it may impose redressive measures or require commitments from the companies involved.

2.12. What factors does the Commission take into account in the balancing test?

2.12.1. We consider the following factors to be of possible relevance in weighing the negative (i.e. distortive) effects of a foreign subsidy: the necessity of the foreign subsidy, its appropriateness, proportionality, transparency and the negative effects on competition and trade. The Commission does not easily accept that the positive effects will outweigh the negative effects if the foreign subsidy is presumed to distort the EU internal market.

2.12.2. The positive effects taken into account in the balancing test will be based on the evidence submitted by Member States, individuals and/or companies during the investigation period. In particular, the positive effects that a company can raise could include the incentive effect of the foreign subsidy on the development of an economic activity, the contribution to an objective of common interest (e.g. environmental or climate protection or energy objectives), the advancement of social standards and the promotion of research and development.

2.12.3. The Commission will publish guidelines on the application of the balancing test one year after the start of application at the latest. We therefore expect the guidelines to be published by 12 July 2024. The balancing test is likely to share similarities with the compatibility assessment of State aid measures under Article 107(3) TFEU. In that article, policy objectives, the subsidy's necessity and

appropriateness, proportionality, transparency and the effects on trade play an important role in 'balancing' the positive effects of a State aid measure against the negative effects on competition on the EU internal market. The Commission has set out in various guidelines how it assesses the compatibility of State aid with the internal market. These guidelines may serve as inspiration to the Commission in applying the balancing test with regard foreign subsidies. See e.g. the Guidelines on State aid for climate, environmental protection and energy 2022 and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.

Procedural aspects

3. Notification requirement for concentrations

3.1. What is understood to be a 'concentration' under the FSR?

3.1.1. The concept of concentration under the FSR is similar to the concept under EU merger control rules: a concentration is a change of control of an undertaking. A change of control is understood to occur in three main situations: (1) a merger of two previously independent undertakings or parts thereof, (2) the acquisition of control in an undertaking and (3) the creation of a joint venture ('**JV**') performing on a lasting basis all the functions of an autonomous economic entity.

3.1.2. There are some very limited exceptions where a concentration is deemed not to arise, which include the acquisition of control by an agent of the public authorities pursuant to the law of a Member State relating to liquidation, bankruptcy, insolvency, cessation of payments, compositions or analogous proceedings.

3.2. What thresholds must be met for notification to be required?

3.2.1. A notifiable concentration must be notified to the Commission prior to its implementation.

3.2.2. Notification is necessary only if the concentration meets the following combined thresholds:

1. Turnover:
   a. In the case of a merger: at least one of the parties involved is established in the EU and has an aggregate turnover of at least EUR 500 million.
   b. In the case of an acquisition of control: the target undertaking is established in the EU and has an aggregate turnover of at least EUR 500 million.
   c. In the case of a creation of a JV: the JV is established in the EU and has a turnover of at least EUR 500 million in the EU. Only the turnover of the JV itself has to be considered; this is different from notification under the EU merger control regime, where the turnover of the initial parent company is relevant as well.
2. Foreign subsidies:
   The companies involved received financial contributions amounting in total to at least EUR 50 million in the three years preceding the concentration.

3.2.3. The Commission may request a company to notify a concentration which does not meet the above notification thresholds if it considers that a review is needed given the concentration's impact in the EU.

3.3. Are there any risks if the notification threshold is not met?

3.3.1. If the notification threshold is not met, then the concentration can in principle be implemented without prior notification of the concentration being required. The Commission can nonetheless

request the prior notification of a transaction falling below the notification threshold if the Commission believes that the concentration would have an especially large impact on the EU internal market. In such a case, the concentration is subject to the same scrutiny as a concentration that does meet the notification thresholds.

3.4. How should the turnover of a concentration be calculated under the FSR?

3.4.1. The turnover of the company concerned and that of its subsidiaries or parent companies should be added together. Like under EU merger control rules, only the turnover of the parts that are acquired as part of the concentration should be taken into account in this calculation and multiple transactions within two years must be regarded as being part of the same, single concentration.

3.4.2. When the concentration concerns the creation of or acquisition of control in a JV, only the turnover of the JV itself is relevant. The FSR differs from EU merger control rules on this point. Consequently, when a new JV is established, the turnover threshold will not be met because it does not yet have any turnover of its own. This can be different if the JV concerns the change from sole to joint control of a pre-existing undertaking.

3.4.3. For the calculation of the aggregate turnover, all sales of products and services of the preceding year within the EU – after deduction of sales rebates and VAT – should be taken into account. Other calculation standards apply for the calculation of turnover for banks and insurers.

3.4.4. All financial contributions count in the calculation of the turnover for the purposes of the notification threshold – even contributions which are exempted from disclosure in the Form FS-CO (see further § 3.8).

3.5. Which party must notify the concentration?

3.5.1. The notification obligation rests on both parties in the case of a merger. In the case of acquisition of control, the acquiring party is responsible for notification. For the creation of a JV, this obligation rests on the parent undertakings.

3.6. Can a party pre-notify a concentration?

3.6.1. It is possible to initiate pre-notification contact by submitting a case team allocation request with basic information on the concentration to the functional email address of the Foreign Subsidies Registry of the Directorate-General for Competition ('**DG COMP**'), i.e. comp-fsr-registry@ec.europa.eu. A template for such requests will be published on DG COMP's website. There are no specific time limits for engaging in pre-notification contact.

3.6.2. As part of the pre-notification contact, a party may submit a draft notification. The Commission will review the draft notification, leading to a preliminary overview of the information the Commission would require the party to submit as part of the actual notification.

3.7. How should a notification be submitted?

3.7.1. Notification takes place by completing and submitting the form FS-CO, which is attached as Annex I to the Implementing Regulation, together with any supporting documents.

3.8. What information must be provided to the Commission?

3.8.1. Information which the form FS-CO always requires includes a summary of the concentration, details on the ownership and control before and after completion of the concentration, and turnover and notification thresholds. A notification must include the stipulated information on the foreign financial contributions received, i.e. on all measures which qualify as a financial contribution provided by a third country.

3.8.2. The information requirements for foreign financial contributions depend on their qualification:

a. Detailed information must be provided for foreign financial contributions of at least EUR 1 million which fall within one of the categories likely to distort competition and were received by a notifying party or target in the three years prior to the concentration. Section 5 of the form FS-CO contains specific questions that must be answered to determine whether a foreign subsidy falls within one of these categories and sets out the information and documents which must be provided.

b. For other foreign financial contributions, which equal or exceed EUR 1 million, an overview of the various types of financial contributions suffices. Table 1 of the form FS-CO provides instructions on the provision of such information.

c. Information on foreign financial contributions of less than EUR 1 million and on several specific categories related to transactions at arm's length do not need to be included.

3.8.3. The notifying party should ensure that information and supporting documentation on the potential positive effects is provided for every notifiable foreign subsidy. The Commission can always request further information (at a later stage in the procedure) if necessary.

3.9. How can I obtain a waiver of the obligation to submit information?

3.9.1. The Commission can be requested to waive the submission of certain information in the pre-notification phase. Such a request can also be submitted as part of the draft notification, which the Commission prefers as then it can review the waiver request along with the draft notification. The Commission will consider a waiver request if the request contains substantiation of the fact that (1) the information is not reasonably available, or (2) the information is not reasonably necessary for the Commission's assessment. Please note that a waiver of information does not bar the Commission from requesting that information at a later stage.

3.10. What happens after notification?

3.10.1. A notifiable concentration is considered invalid until the Commission has taken a decision on the effects of the foreign subsidies on the EU internal market. Following a complete notification, the Commission has 25 working days to take a decision to initiate an in-depth investigation, if considered necessary on the basis of its preliminary review. An in-depth investigation into the effects of the foreign subsidy on the EU internal market may take a period of up to 90 working days. This period can be extended by no more than 20 working days in total. The Commission may, exceptionally, halt the time limits if it finds that the notifying party refused to comply with a request for information or submit to a Commission inspection.

3.10.2. The concentration may not be implemented prior to the lapse of the time periods for the completion of the investigation or the adoption of a final Commission decision. An exception to this stand-still obligation applies for the implementation of a public bid or a series of securities transactions. The Commission may also grant a derogation from this standstill obligation upon request: a company can apply for such a derogation at any time pre- or post-transaction.

4. Notification requirement for public procurement procedures

4.1. What is the procedure for notification of participation in a public procurement procedure?

4.1.1. The notification requirement for public procurement procedures rests with the contracting authority or entity. Companies must submit a notification or declaration of foreign financial contributions received to the contracting authority or entity, which must submit a notification received to the Commission without delay.

4.1.2. Following a complete notification, the procedure is as follows. The Commission shall first carry out a preliminary review within 20 working days. In duly justified cases, the Commission may extend this time limit by 10 working days once. The Commission will assess whether the foreign subsidy enables the participation in a tender with an unduly advantageous bid in relation to the works, supplies or services concerned. The assessment is limited to the public procurement procedure in question and only foreign subsidies granted during the three years prior to the notification are taken into account. If the Commission considers the notification incomplete, it will contact the contracting authority and the notifying company directly with the request to complete the notification within 10 working days.

4.1.3. The Commission can decide to initiate an in-depth investigation if considered necessary within the time limit for completing the preliminary review. An in-depth investigation (into the effects of the foreign subsidy on the internal market) may take a maximum of 110 working days. This period can be extended once by 20 working days. The Commission may halt the time limits if it finds that a request for information or a Commission inspection has not been complied with.

4.1.4. The procedure differs when the tender takes the form of a multi-stage procedure. In that case, the Commission has 20 working days to examine the complete notification. In this first period, the Commission will not complete the preliminary review: once the deadline of 20 working days elapses, the preliminary review shall be suspended until the submission of a final tender or a tender in the case of a restricted procedure. After the tender or a final tender containing a complete updated notification is submitted, a new second 20 day period commences for the Commission to decide whether or not to initiate an in-depth investigation. The Commission has a total of 90 working days from the moment of the completed updated notification to close an ensuing in-depth investigation. This period can, in exceptional cases, be extended once by 20 working days.

4.1.5. The public procurement procedure may continue during the Commission investigation until the point of the award of the contract. If the Commission decides to prohibit the award of the contract to the company involved, the contracting authority will have to reject that company's bid. The Commission will decide that the contract may be awarded if it does not find that the company's bid involved benefits from a foreign subsidy distorting the internal market. If the Commission omits to take a decision at all, the contract can also be awarded, but only after the aforementioned time limits have passed.

4.2. When is notification to contracting authority required?

4.2.1. A company participating in a public procurement procedure must notify the contracting authority or entity of the financial contributions from non-EU countries if the following two thresholds are met:

(1) The estimated contract value of the public procurement procedure is equal to or more than EUR 250 million, and

(2) the company has received foreign financial contributions of, in total, at least EUR 4 million from a single non-EU country in the three years prior to the notification.

4.2.2. If the contract is divided into lots, the additional threshold applies that the aggregate value of the lots to which the company applies must also be at least EUR 125 million.

4.2.3. For the purposes of calculating whether the threshold of EUR 4 million is met, the turnover of subsidiary companies without commercial autonomy, holding companies and subcontractors and suppliers involved in the same procedure, are also relevant.

4.3. What if the notification thresholds are not met?

4.3.1. If the notification thresholds are not met then instead of a notification the company must submit a declaration to the contracting authority or entity of all foreign financial contributions received and confirm that these do meet the notification thresholds.

4.3.2. The contracting authority or entity may not rely solely on the submission of a declaration to the effect that no notification is necessary and must inform the Commission without delay if it suspects that notifiable foreign subsidies may be involved in a public procurement procedure. If no notification or declaration has been submitted, the company must, upon request of the contracting authority or entity, submit the required document(s) within 10 working days at the risk of having the request to participate in the tender rejected.

4.3.3. Moreover, even when the notification thresholds are not met, the Commission may require the notification of foreign financial contributions prior to the award of the contract when it suspects that a company has benefited from them. If the Commission requires such notification, the foreign financial contribution shall be subject to the same assessment as a notifiable foreign financial contribution.

4.3.4. Finally, the moment at which the declaration or notification must be submitted depends on the type of procedure. In an open public procurement procedure, the notification or declaration must be submitted only once, together with the tender. In a multi-stage procedure, the notification or declaration must be submitted twice, first together with the request to participate and second as an updated notification or declaration together with the submitted or final tender.

4.4. Which party must submit the notification or declaration to the contracting authority or entity?

4.4.1. The company or group of companies participating in the public procurement procedure is responsible for notification to the contracting authority or entity. The notification obligation also applies to subcontractors or suppliers whose participation ensures key elements of the contract performance or whose contribution exceeds 20% of the value of the submitted tender.

4.5. How should a notification be submitted?

4.5.1. Notification takes place by completing and submitting the form FS-PP which is attached as Annex II to the Implementing Regulation, together with the information which must be sent with this form.

4.6. What information must be provided to the Commission?

4.6.1. The information requirements of the form FS-PP differ between notification and declaration of foreign financial contributions. In any case, the form FS-PP always requires information on the notifying parties (Section 2) and on the public procurement procedure (Section 1). When the European Single Procurement Document (**'ESPD'**) is used, the tender information should be imported from the ESPD in accordance with Section 1 of the form FS-PP.

Notification

4.6.2. A notification must also include an explanation of the fact that the tender is not unduly advantageous (Section 4) and information on foreign financial contributions received (Section 3). Detailed information must be provided on foreign subsidies of at least EUR 1 million which fall within one of the categories likely to distort competition. Section 3 of the form FS-PP contains specific questions to this end. Other foreign subsidies which equal or exceed EUR 1 million must be included in an overview per country in accordance with Table 1 of the form FS-PP, save for the exceptions listed there (under B.6). It is advisable for the notifying party to ensure that information and supporting documentation on the potential positive effects of foreign subsidies (Section 5) are provided as well. Moreover, the Commission can always request further information at a later stage in the procedure if necessary.

Declaration

4.6.3. In the case of a declaration, Sections 3, 4 and 5 of the form FS-PP can be left blank and the specific Section 7 of the form FS-PP must be completed instead. Here, the notifying party or parties must declare that they have not received any foreign financial contributions which are notifiable under Chapter 4 of the Regulation on public procurement procedures and must list all foreign financial contributions of at least EUR 1 million received in the three years preceding the declaration. Contributions below this threshold but above the de minimis threshold (i.e. EUR 200,000 over a consecutive period of three years) can be declared per country as aggregate without the need to specify their value(s).

4.7. When and how can parties pre-notify?

4.7.1. There are no specific time limits for engaging in pre-notification contact. Pre-notification is voluntary but encouraged by the Commission, and preferably done on the basis of a draft form FS-PP. The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs ('**DG GROW**') can be contacted by email regarding questions on the pre-notification of public procurement procedures.

4.8. What happens if contracts are awarded in violation of the notification obligation?

4.8.1. First, if the notification and declaration obligations are not complied with, the contracting authority or contracting entity declares the tender irregular and informs the Commission accordingly.

4.8.2. Second, if the Commission finds that a notification is incomplete, it will also directly request the economic operator itself to complete the notification within 10 working days. If the notification remains incomplete despite this request, the Commission will adopt a decision declaring the tender irregular. In that decision, it will request the contracting authority or entity to adopt a decision rejecting the tender as irregular as well. Contracts awarded on the basis of irregular tenders can be declared void by the national court.

5. Ex officio market investigation

5.1. When may the Commission start an ex officio investigation?

5.1.1. The Commission may – on its own initiative – start a preliminary review if it has indications of the existence of a foreign subsidy which distorts the internal market. Any source of information may lead the Commission to start a preliminary review. Besides public media sources, Member States or private parties may also communicate the information in question. Member States are under an obligation to

inform the Commission when they suspect any involvement of foreign subsidies. In addition, any private party may send information on possible foreign subsidies to the Commission.

5.1.2. Where, based on the preliminary review, the Commission has sufficient indications of a foreign subsidy which distorts the internal market, it will adopt a formal decision to start an in-depth investigation into the company concerned. If not, the Commission will close the investigation.

5.2. What investigational powers does the Commission have in the course of an investigation?

5.2.1. The Commission may send out requests for information and conduct inspections within the EU. The Commission also has the power to carry out inspections in countries outside the EU, but only if the third country's government authorises such inspection. During an inspection, the Commission has far-reaching powers which are very similar to the powers it has pursuant to Article 20 of Regulation (EU) 1/2003 for the carrying out of a 'dawn raid' in the context of a breach of competition law. For instance, the Commission may, if need be, with the help of the police or other enforcement authority:

a. enter premises, land and vehicles owned by the company or association of companies;

b. review all business records, regardless of format, access any accessible information, and make or request copies or extracts of the information;

c. interview representatives and staff members for explanations of information regarding the inspection's subject matter and purpose, and record their responses;

d. seal the business premises and records as needed during the inspection.

Refusal to cooperate, the breaking of a seal placed during an investigation or the giving of false information can lead to serious fines (see § 8).

5.2.2. Besides to the Commission's inspection powers, it may also request all information that it considers necessary to its investigation. The information that can be requested is limited by the principle of proportionality. As a part of a request for information, the Commission may also conduct interviews on a voluntary basis. If the interview takes place outside the EU's borders, the government of the third country needs to consent to the interview taking place. Finally, the Commission may also request a third country to provide information.

5.2.3. The powers to perform inspections or to request information apply both during in-depth investigations and during the initial period of preliminary review.

6. Decision types

6.1. What decisions can the Commission take and do these differ between the notification procedures and the ex officio investigation?

6.1.1. The Commission can take a no-objection decision if it finds that there is no foreign subsidy involved that actually or potentially distorts the internal market. It can do so in the course of a 'standard' notification procedure as well as following an ex officio investigation. If the Commission takes a no-objection decision, no specific action by the company concerned is required.

6.1.2. If the Commission considers the foreign subsidy to result in an actual or potential distortion of the internal market, the company in question can offer commitments to the Commission. Commitments can be offered in the course of both an ex officio and a notification procedure. Alternatively, the Commission may impose redressive measures. Commitments and redressive measures must be proportionate to the actual or potential distortion and can be structural or behavioural.

6.1.3. The FSR provides for a non-exhaustive list of potential redressive measures:

- Potential structural measures include requiring the companies to divest certain assets or to dissolve the concentration investigated by the Commission;
- Potential behavioural measures aim to mitigate the effects of the foreign subsidy and include the company reducing its market presence, e.g. by temporarily restricting commercial activity, offering access under fair, reasonable and non-discriminatory terms to infrastructure acquired or supported by the subsidy, refraining from making certain investments, repaying the foreign subsidy with interest, or adapting its governance structure.

6.2. How will the Commission respond to commitments offered?

6.2.1. The Commission can accept commitments by taking an official decision, which will have a binding effect on the companies concerned. If the Commission does not accept the commitments, it may impose redressive measures. Moreover, in a notification procedure, the Commission can take the decision to prohibit a concentration or tender bid if it finds that the proposed commitments are insufficient or ineffective to remedy the distortion of the EU internal market.

6.3. What kind of reporting and transparency obligations can be imposed on a company?

6.3.1. The Commission may impose reporting and transparency requirements as it considers appropriate, following an in-depth ex officio investigation. In particular, these requirements may include the obligation to inform the Commission of financial contributions or the participation in concentrations or public procurement procedures during a specified time period.

6.4. Can the Commission also impose interim measures?

6.4.1. The Commission has the power to adopt interim measures only in the ex officio investigation procedure. The Commission may choose to impose interim measures following an in-depth investigation if commitments were not submitted or if these were insufficient. The Commission may not take interim measures with regard to the outcome of past public procurement procedures.

7. Rights and obligations of companies

7.1. To what extend can the information disclosed in procedures under the FSR be used in other investigations?

7.1.1. The information acquired by the Commission cannot be disclosed or transferred to other procedures without consent of the information provider. However, the Commission may publish statistics and reports, e.g. on its enforcement activity, provided the information does not allow the identification of specific parties.

7.2. Will a company under investigation be able to submit its observations before the Commission takes and publishes a decision?

7.2.1. Companies do not have the opportunity to submit observations before the Commission has adopted a decision to formally initiate an in-depth investigation. The Commission adopts this decision on the basis of its findings in the preliminary procedure. The Commission publishes a summary of a decision to formally initiate an in-depth investigation in order to allow interested parties to express their views.

7.2.2. In the in-depth investigation, the Commission must grant the company under investigation the opportunity to submit observations before it takes any decision to prohibit the concentration or the award of the contract, impose redressive measures or accept commitments. Moreover, the decision may not be based on grounds other than those on which the company has been able to exercise its rights of defence by submitting its observations.

7.2.3. One exception to the right to submit observations before the Commission adopts a final decision is where the Commission intends to adopt interim measures. In that case, the Commission can confine itself to granting the opportunity to the company under investigation to submit observations as soon as possible following the decision. The company is entitled to receive access to the Commission's file, to prepare its observations.

7.3. To what extent does the company under investigation have access to the Commission's file?

7.3.1. The company under investigation must request access to file itself, upon which the Commission will provide it with non-confidential versions of the documents in the file.

7.3.2. The company's right of access to the Commission file does not extend to internal documents of the Commission, Member States and third countries, including competition authorities and contracting authorities, or to correspondence between these parties.

7.3.3. The right of access does include documents submitted by information providers, without any redactions for confidentiality. However, the Commission will disclose these documents only under terms of disclosure that aim to safeguard the protection of business secrets and other confidential information. These terms include setting up a clean team which may view the information only for defence purposes under the FSR.

8. Compliance & Risks

8.1. What actions should I take to ensure compliance with the requirements and obligations that the FSR introduces?

8.1.1. Companies are advised to collect data on foreign financial contributions received and carry out a risk assessment of the involvement of foreign financial contributions in concentrations and participation in public procurement procedures since 12 July 2020. This is because the Commission power to start an ex officio investigation extends back to the three years prior to 12 July 2023, the date on which the FSR entered into force.

8.1.2. The assessment of notifications is likely to be the Commission's priority in enforcing the regulation. The FSR's notification obligation for concentrations and public procurement applies since 12 October 2023. As of that date, notifying foreign financial contributions which meet the notification threshold and were received in the previous three years is mandatory. Therefore, companies should start collecting information on foreign financial contributions received in relation to any current or foreseeable notifiable concentrations or participation in public procurement procedures in preparation for complying with the notification obligations.

8.1.3. In general, companies should consider implementing a system to keep track of information on financial foreign contributions received on an ongoing basis, so that this information will be readily available in the event of a future notifiable concentration or public procurement procedure. As set out in § 2, the concept of foreign financial contribution should be interpreted broadly.

8.2. Which sanctions can the Commission impose and when?

8.2.1. The Commission has the power to impose substantive fines in the case of non-compliance with a final Commission decision (i.e. a commitments decision, decision imposing redressive measures, decision ordering interim measures or prohibition decision) or the notification obligation. The Commission also has the power to impose fines in the case of non-compliance, whether intentional or negligent, with the use of a Commission investigational power, such as an information request or inspection. Finally, circumventing the notification requirement can be fined as well. If the Commission suspects such circumvention, it is entitled to demand additional information from the undertaking concerned.

Type of non-compliance	Possible sanctions
Non-compliance with a final Commission decision	- A periodic penalty payment of a maximum of 5% of the average daily aggregate turnover of the undertaking in the preceding financial year.
Non-compliance with Commission inspection or information request	- A fine of a maximum of 1% of the aggregate turnover of the undertaking in the preceding financial year. - A periodic penalty payment of a maximum of 5% of the average daily aggregate turnover of the undertaking in the preceding financial year.
Circumvention of a notification requirement	- A fine of a maximum of 10% of the aggregate turnover of the undertaking concerned in the preceding financial year.

8.3. What are the limitation periods of the Commission's power to impose sanctions?

8.3.1. The limitation period to impose fines and penalty payments is three years, starting from the day of the infringement or, in case of a repeated infringement, the day the infringement ceases to exist. Moreover, decisions imposing fines or periodic penalty payments can only be taken within five years following the decision to impose a penalty.

8.3.2. This limitation period is interrupted by actions to enforce the aforementioned sanction decisions, which interruption will prompt a recommencement of the limitation period. Proceedings before the CJEU, on the other hand, only suspend the limitation period.

9. Other

9.1. Are other areas of law relevant to application of the FSR?

9.1.1. The FSR will be applied in the light of EU legislation in the areas of EU State aid, merger control and public procurement rules., The concept of foreign subsidy and the FSR bear resemblance to World Trade Organisation ('**WTO**') trade rules as well. The possibility that a more WTO-oriented approach will be taken cannot be excluded, in particular as EU commercial policy and the establishment of the internal market, rather than EU Competition rules, served as the legal basis for the adoption of the FSR.

9.2. Which Commission DG is responsible for enforcement of the FSR?

9.2.1. Which Directorate-General is tasked with the enforcement of the regulation depends on the subject matter. In general, questions, information on possible distortions and notifications of concentrations pursuant to the FSR should be directed towards the DG COMP's Foreign Subsidy Registry. An exception applies in as far as foreign subsidies in the area of public procurement are concerned, which

fall under the responsibility of DG GROW. Questions, information on possible distortions and notifications relating to public procurement should be directed towards that DG.