



# VAN BAEEL & BELLIS

## EU Foreign Subsidies Regulation now applies: Complemented by FSR Implementing Regulation – New Compliance Burden in the EU

The EU's Foreign Subsidies Regulation ("FSR") applies as of 12 July 2023. The European Commission ("Commission") may now use its broad ex-officio powers to investigate the distortive effects of foreign subsidies on the EU internal market. The FSR will require notifications of certain transactions and public procurement projects only as of 12 October 2023. However, transactions agreed as of 12 July that meet the notification thresholds will have to be notified if they are not closed before 12 October. Notification obligations will also apply to procurement projects that meet the notification thresholds and have been initiated as of 12 July 2023.

On 10 July, the Commission published the FSR Implementing Regulation ("IR"), which lays down the specific measures governing the Commission's investigatory powers as well as the procedures that apply to M&A and public procurement notifications. The IR's annexes contain the notification forms (Form FS-CO and Form FS-PP) that specify what information must be reported in each type of notification. While the IR's reporting requirements are somewhat targeted, notification still presents a substantial compliance burden.

**Ex-Officio Powers:** It remains unclear when the Commission will unleash its ex-officio investigatory powers. Complaints might well be submitted, complementing the (reportedly) already pending complaint about Gulf State subsidies to European soccer clubs. But it remains to be seen whether the Commission has sufficient resources – and will receive a sufficiently relevant and "promising" case – to open a first ex-officio investigation soon.

**Mandatory Notifications:** The FSR establishes the following mandatory notification and standstill thresholds:

*For transactions:*

- at least one of the merging firms, target, or joint venture is established in the EU and has EU aggregate turnover of at least €500 million; and
- the acquirer and target, merging parties, or joint venture and its parents have received aggregate financial contributions of more than €50 million in the previous three years.

*For EU public tenders:*

- the estimated contract value is at least €250 million; and

- the "economic operator" (the bidder plus its main subcontractors and suppliers) received aggregate financial contributions of €4 million or more per third country in the previous three years;

**Note:** For procurement projects that meet the contract value threshold, a bidder that does not meet the second threshold must nevertheless submit a "declaration," certifying that it has received financial contributions of less than €4 million per third country in the previous three years.

Transaction parties and tender participants must therefore take stock of all foreign contributions received worldwide during the three previous years to determine whether applicable foreign contribution notification thresholds are met. For M&A notifications, aggregated financial contributions must be calculated on a group level (with an exception for PE firms under certain conditions). For procurement notifications, only contributions to the bidder, its non-autonomous subsidiaries, and parent companies must be calculated.

The Commission may nevertheless require notification of transactions and procurement projects that do not meet the above thresholds.

**IR reporting requirements:** The IR adopts a pragmatic approach by limiting the level of information about individual foreign contributions that must be reported in notifications. This is a significant step away from the February 2023 draft IR that required parties to produce extensive, detailed information on all worldwide contributions and that was uniformly criticized for imposing an almost insurmountable compliance burden.

The IR distinguishes among three types of contributions, requiring parties to provide different levels of detail and supplementary information for each. These categories are:

1. *Contributions that are presumptively distortive subsidies (Art. 5(3) FSR) – extensive information and background documentation required.* Presumptively distortive subsidies include: (i) subsidies to ailing undertakings (with certain exceptions); (ii) unlimited guarantees for debts or liabilities; (iii) export financing measures not in line with the OECD rules; (iv) subsidies directly facilitating a concentration; and (v) subsidies enabling a firm to submit an “unduly advantageous” tender.
2. *Other types of subsidies – declaration in aggregated form required.* All contributions considered subsidies (such as grants, selective tax benefits, or concessions granted without proper compensation) must be declared in aggregated form by type and by third country source, following a table format outlined in the FS-CO and FS-PP. However, such contributions do not need to be reported if, per third country and over three years, they fall below: (i) €45 million (FS-CO); or (ii) €4 million (FS-PP).
3. *Contributions that are presumptively unproblematic – no declaration required.* Examples are listed in FS-CO and FS-PP and include:
  - i. general (i.e., non-selective) tax measures and relief such as deferrals of tax payments or social security contributions, tax amnesties, or certain measures to avoid double taxation;
  - ii. the supply or purchase of goods or services (except financial services) at market terms (e.g., contracts awarded in a competitive, transparent, non-discriminatory tender); and

- iii. in the Form FS-CO, for investment funds, contributions granted to other funds managed by the same investment firm (or by portfolio companies controlled by those funds) but with a majority of different investors, under certain conditions.

Contributions below €1 million do not need to be reported, regardless of their nature. The Commission, on the other hand, may require more detailed information about all three types of contributions.

**Take-aways:** The FSR heralds a substantial new compliance burden for transactions with an EU dimension and for participants in large EU public procurement projects. The revised IR significantly mitigates the volume of information that parties must declare in FSR notifications. But the magnitude of the task of ensuring accurate declarations should not be underestimated. Difficult questions may arise to properly distinguish among the three types of contributions identified in the IR.

Companies are advised to begin collecting data on foreign contributions received well in advance of any planned M&A or tender activities, as most of this data is not gathered in the ordinary course of business. Given the breadth of data covered by the concept of “contributions,” this task may also involve engaging with and coordinating between various subsidiary entities and reporting lines within the organization.

Companies should take potential FSR obligations into account when negotiating agreement terms (e.g., conditions precedent, risk allocation, best efforts and HOHW clauses) and when planning project timelines.

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