

# Kluwer Competition Law Blog

## Foreign Subsidies Regulation – EU Publication of Notification Forms Launches Compliance Efforts

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The European Union's (EU's) new [Foreign Subsidies Regulation](#) (FSR), entered into force on January 12, 2023. The FSR creates a unique new quasi-antitrust regime to combat distortions of competition in the EU internal market caused by subsidies multinationals receive outside the EU. It imposes new mandatory notification and approval requirements for acquisitions of significant EU businesses and large EU public tenders, and it gives the Commission new powers to launch ex officio investigations into potential distortions as from July 12, 2023. The notification requirements will only apply as from October 12, 2023, but notifications will require extensive financial information not currently captured by corporate reporting systems, and collecting this information will likely require months of preparation. (For a detailed discussion of the FSR, please see Wolter Kluwer's [white paper](#) on the regulation.)

On February 6, 2023, the Commission published draft [implementing measures](#), including an implementing regulation (the Implementing Regulation) and draft concentration and procurement notification forms (the Concentration Form and the Procurement Form). These drafts are open for comment for one month (until March 6, 2023) and should be finalized in the second quarter of 2023.

The Implementing Regulation concisely addresses a wide range of procedural questions but contains few surprises, since it draws heavily on other EU competition measures. The draft notification forms are more innovative, since the FSR requires new type of information and addresses radically different theories of harm compared to the EU Merger Regulation (EUMR).

### **Implementing Regulation**

The Implementing Regulation sets out detailed arrangements for the Commission's conduct of proceedings under the FSR, including notifications (Chapter II), Commission investigations (Chapter III), commitments and redressive measures (Chapter IV), parties' submission of observations (Chapter V), the Commission's use of information and confidentiality (Chapter VI), parties' access to the Commission's file (Chapter VII) and time limits (Chapter VIII).

Chapter II deals with such issues as the parties responsible for filing notifications in respect of covered concentrations and public tenders (or declarations to the effect that notifying parties in a

public tender have not received any relevant foreign financial contributions), how to submit notifications and declarations and the calculation of time limits.

Chapter III addresses issues such as time limits for third party comments when the Commission opens an in-depth investigation (no more than one month), procedures for interviews and oral statements taken during inspections, and, in the case of investigations relating to public procurement procedures, information from EU contracting authorities and information on unduly advantageous tenders.

Chapter IV deals with procedures for parties to submit proposed commitments in the case of notified concentrations (no later than 65 working days after an in-depth investigation is opened) or public tenders (50 working days) and the appointment of trustees to supervise implementation of commitments or redressive measures. Chapter IV also expands on the Commission's powers under the FSR to impose transparency and reporting obligations with regard to foreign financial contributions that the addressee receives, or concentrations or public procurement procedures that the addressee participates in, after the decision. The types of commitments and redressive measures the Commission can consider are detailed in the FSR.

Before the Commission adopts a decision, the addressee has the right to make submissions (Chapter V) and to access the Commission's files (Chapter VII). The Commission is required to protect the confidentiality of business secrets and other confidential information (Chapter VI). The Commission can suspend time limits for its review of concentration notifications (Chapter VIII), as under the EUMR, but has no such ability in the procurement notification context.

The Implementing Regulation, though it addresses many important procedural issues, closely resembles similar measures in other procedures (notably EUMR review) and is unlikely to be controversial.

### **Notification Annexes**

Annexes I (on concentrations) and II (on public procurement procedures) will – for most multinationals – have more practical significance than the Implementing Regulation, since they set out the procedure for submitting notifications and the information required. These annexes contain a number of common provisions on procedures, a common core of required information on parties' "financial contributions", and additional information specific to notified concentrations or procurement procedures.

*Common procedural provisions.* Both annexes include general provisions on the purpose of the notification form, the types of information required, information that is not reasonably available or necessary for the Commission's examination, pre-notification contacts and waiver requests, the requirement for complete documents, notification mechanics and treatment of confidential and personal information. Again, these provisions closely follow comparable measures under the EUMR.

Of these introductory provisions, the possibility to engage with the Commission case team prior to notification and request waivers from the obligation to provide information that is not reasonably available or not necessary for the Commission's investigation reflect a welcome accessibility and openness on the Commission's part. However, experience with EUMR notifications suggests that

pre-notification discussions can be time-consuming, and the Commission is as (or more) likely to require additional information as to waive information requirements in pre-notification discussions. In any event, multinationals won't be able to count on receiving waivers when designing their financial contribution reporting systems.

In conclusion, the forms invite parties to identify and support any positive effects from a transaction that might counterbalance potential distortions, call for extensive supporting documentation (including documentation of any foreign subsidy identified as potentially distortive in Article 5(1) FSR) and require an attestation regarding the completeness and accuracy of the notification (subject to the typical sanctions).

*Common information requirements.* Both notification forms require a common base of information on notifying parties' non-EU "financial contributions," a new metric covering a wide range of government interactions. The definition of financial contribution includes investments, tax incentives and contracts with government entities and public and private entities "attributable to" governments, whether or not a subsidy is involved. Required financial contribution information must be provided on a global, groupwide basis for the parties' three prior financial years.

Each notification includes a table illustrating how financial information should be presented, including the names of the receiving and granting entities, the type and amount of the financial contribution and the date of granting, organized by country and chronologically.

However, the notification forms are inconsistent as to how complete listings of foreign financial contributions must be. The Concentration Notification requires notifying parties to list financial contributions of all types, but only "if: (i) the individual amount of the contribution is equal to or in excess of EUR 200,000; and (ii) the total amount of contributions *per third country and per year* is equal to or in excess of EUR 4 million" (emphasis added). The Procurement Notification requires disclosure of financial contributions whose aggregate amount "equals or exceeds EUR 4 million *per third country in the three years prior to notification*" (emphasis added), but only if they fall into any of the categories in Article 5(1), points (a) to (c) and (e) of Regulation (EU) 2022/2560 – which defines categories of foreign subsidies most likely to distort the internal market — or relate to operating costs (Recital 19). (The Concentration Form also requires the parties to identify financial subsidies potentially qualifying as distortive foreign subsidies but does not exempt parties from providing information on other financial contributions.)

The Concentration Form further requires information on any "non-economic activities" conducted by the parties and any financial contributions linked to such activities. Both forms require parties to identify financial contributions that confer a benefit and are limited to a particular company or sector, i.e. the criteria for identifying financial contributions as foreign subsidies under Article 3(1) FSR.

In other words, the Concentration and Procurement Forms both allow parties to exclude a significant amount of information on their financial contributions, but the forms take very different approaches. The Concentration Form's *de minimis* thresholds appear generous, but may not be as straightforward as they seem. For example, would 12 monthly payments to a State-owned utility company of EUR20 thousand each qualify as twelve financial contributions below the EUR200 thousand threshold or one financial contribution over the threshold?

The Procurement Form lacks the EUR200 thousand de minimis threshold, but it seems to exclude even more financial contribution information, because only financial contributions that the parties themselves identify as meeting the FSR criteria need to be disclosed at all. (Under this approach, the Commission apparently be unable to check the parties' determination as to whether undisclosed financial contributions constitute distortive foreign subsidies.) On the other hand, the Procurement Form's exclusion of financial contribution information for countries where financial contributions are less than EUR 4 million over three years is less generous than the Concentration Form. In any case, Section 7 confusingly states that "the notifying party(ies) must list all foreign financial contributions received."

*Concentration Form requirements.* The Concentration Form naturally calls for information on the parties and the proposed transaction. Besides the financial contribution information described above, the Concentration Form requires the parties to identify and explain any that may have a connection to the concentration, as well as information on any financial contributions falling into the categories of most distortive subsidies in Article 5(1) FSR.

Interestingly, the Concentration Form calls for information that the Commission expects to use for its substantive evaluation, including information on the seller's process and other potential buyers. Other potential buyers, in the case of auctions, can expect to receive requests for information to allow the Commission to compare the effect of any foreign subsidies they receive to the foreign subsidies received by the notifying party. Information on the sales process and other potential bidders will likely come from the seller, who may not want to share such information with the ultimate buyer.

The Concentration Form also calls for extensive information from the proposed buyer on the due diligence it conducted, including copies of due diligence reports, documents relating to the transaction valuation and whether and if so how any foreign subsidies it receives may enhance the value of the proposed Transaction. This information will likely be highly confidential to the buyer, who will not want to share it with the seller.

The Concentration Form alludes to possible overlaps between FSR review and parallel merger and foreign direct investment (FDI) reviews, asking what other filings are required and information on competitors of the parties included in such filings. Whether or not a transaction triggers antitrust filings, the Concentration Form calls for information on the parties' lines of business and main competitors in the EU, similar to a merger filing but without (at least so far) detailed market information.

*Procurement Form requirements.* Like the Concentration Form, the Procurement Form calls for information specific to the relevant tender, but the form leverages existing procurement procedures and mechanics. For example, parties may rely on information provided on Tenders Electronic Daily (TED) or the European Single Procurement Document (ESPD), where applicable.

In addition to the financial contribution information described above, the Procurement Form calls for information as to why the tender is not unduly advantageous, including elements referred to in the EU procurement directives, such as the economics of the manufacturing process, the services provided or the construction method; the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or the execution of the work; the originality of the work, supplies or services proposed by the tenderer; compliance with applicable obligations in the fields of environmental, social and labour law; and

compliance with obligations regarding subcontracting.

During the legislative process, the FSR requirement that notifications include information on the notifying party's main sub-contractors and suppliers generated considerable concern. The Procurement Form appears to allow sub-contractors and suppliers to supply such information directly, rather than to the consortium leader, which will be helpful in situations where consortium members may be competitors.

While the Concentration Form requires detailed information on the seller's process and other bidders, as well as on the buyer's due diligence, the Procurement Form requires no such information. This is presumably because every bidder in a procurement meeting the thresholds will also file a notification or declaration under the FSR, enabling the Commission (at least in principle) to compare foreign subsidies received by each bidder and potential distortions linked to such subsidies.

## **Conclusion**

The FSR is a rare new thing under the antitrust sun. While the Implementing Regulation is generally familiar from existing EU antitrust tools, the Concentration and Procurement Forms call for information that is not readily available in multinationals' existing reporting systems. Multinationals who may be caught by the new notification obligations will need to begin preparations months in advance.

Multinationals who may need to notify under the FSR have so far been reluctant to begin serious preparations, without clear guidance on the information required. Now that the draft notification forms have been published, multinationals can begin to analyze the gaps between the information they currently collect and information they will need, and adapt their monitoring and reporting systems to be ready to notify by October 2023.

The forms include a number of surprises, including apparently generous – but inconsistent — de minimis thresholds to reduce the amount of material the Commission will need to review, while requiring notifying parties to make legal judgments regarding which financial contributions constitute potentially distortive foreign subsidies. The Concentration Form also sheds light on how the Commission will gather information on other potential bidders to compare potential distortions due to the notifying party's foreign subsidies (although this process would work best only if the seller conducted an auction process).

Unfortunately, the implementing measures offer little or no assistance to multinationals regarding how best to prepare for compliance with the FSR. Notifying parties likely cannot rely on the de minimis thresholds or ability to request waivers to simplify their internal data collection efforts. The fact that the two forms' de minimis thresholds are inconsistent is also unhelpful. Importantly, neither form sheds light on many practical issues that multinationals will face in translating FSR concepts into monitoring and reporting systems they can apply in real time. Examples include how to identify contract counterparties who are “attributable” to governments and tax practices qualifying as “tax exemptions” or “fiscal incentives” or how to quantify financial contributions potentially lasting many years.

The Implementing Regulation is less revealing than the notification forms about how the

Commission plans to conduct ex officio investigations, but the information requirements in the Concentration and Procurement Forms may serve as the basis for the Commission's requests for information to companies under investigation. The Commission's ex officio powers will kick in three months before the notification obligations, but the Commission may wish to hold off launching such investigations until it has gained some experience with the type of information it will receive in connection with notified concentrations and procurement procedures.

The Commission has given interested parties only one month to comment on the drafts, likely because the Commission itself is under intense time pressure. Comments can be expected to focus on clarifying ambiguities and harmonizing unnecessary differences between the notification forms, streamlining the notification process and providing guidance on practical issues facing multinationals.

On this final, crucial issue, unfortunately, the Commission may prove unwilling or unable to provide such guidance, lacking familiarity with companies' internal processes and experience applying the regulation. The Commission and multinationals will need to work, and learn, together.

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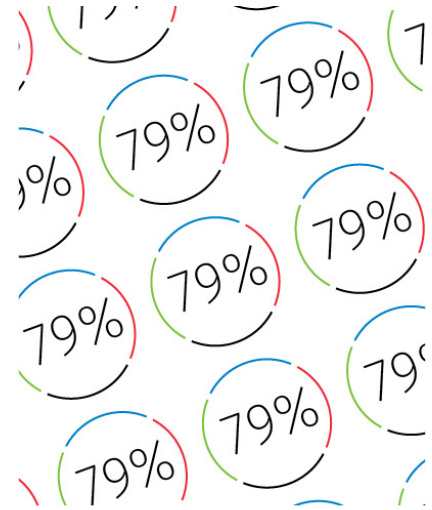
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