

Kluwer Competition Law Blog

The EU Foreign Subsidies Regulation: Start Your Engines

Jay Modrall (Norton Rose Fulbright, Belgium) · Friday, July 14th, 2023

The EU Foreign Subsidies Regulation (FSR) gives the European Commission (the Commission) broad powers to investigate and remedy distortions of the European Union (EU) internal market caused by non-EU subsidies and subjects significant acquisitions and public tenders to a new EU notification and approval regime. The Commission's publication of an [implementing regulation](#) (the Implementing Regulation) and a "[frequently asked questions](#)" document (the Commission Q&A) provide the guidance many companies have been waiting for to begin collecting the information they will need to prepare notifications as early as October 2023.

The months since the FSR entered into force in January 2023 have been marked by controversy and surprises. Although the FSR does not provide for an official complaint procedure, a Belgian football club angry about alleged Middle Eastern subsidies to its competitors filed a [complaint](#) in May 2023. The Commission's [consultation](#) on a draft implementing regulation provoked an intense lobbying campaign warning that the proposed information requirements would lead to a "*trainwreck*". In response, the notification forms attached to the Implementing Regulation – Form FS-CO for concentrations and Form FS-PP for public tenders – were heavily revised.

Multinationals, many of which have taken a wait-and-see approach, now have only a few months to prepare for FSR notifications, which will be required for qualifying transactions signed after July 12 and not closed by October 12. They will need to collect information on their "*foreign financial contributions*," a key concept in the FSR that does not correspond to any existing accounting or reporting metric. The first firms caught by the new notification requirements may include large private equity buyout firms, which engage in frequent M&A activity, and multinationals active in large-scale European public tenders, for instance in the energy, healthcare, infrastructure and telecommunications sectors.

Foreign "Financial Contributions" and "Subsidies"

The FSR distinguishes between three key concepts: "*financial contributions*," "*foreign subsidies*," and "*distortions on the internal market*".

The FSR defines financial contributions as the transfer of funds or liabilities, the foregoing of revenue that is otherwise due, and the provision of goods or services or the purchase of goods and services, whether provided by government authorities or public or private entities whose actions can be attributed to a non-EU country. Examples include 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 concept of foreign financial contributions is very broad, including a wide range of business practices whether or not they involve a subsidy element.

A foreign subsidy arises where a non-EU country provides a financial contribution conferring a benefit to an undertaking active in the EU that is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries. The FSR concept of foreign subsidy is more or less modelled on the EU law concept of State aid. In a State aid investigation, however, the Commission typically investigates a single State aid or aid scheme from a single EU country, not potentially hundreds of subsidies a multinational group may receive anywhere in the world (except the EU).

A distortion on the internal market arises “*where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market*”. The FSR provides that whether a foreign subsidy distorts the internal market depends on factors such as the amount and nature of the subsidy, the situation of the beneficiary and the markets concerned, the beneficiary’s economic activity in the EU, and the purpose and conditions attached to the subsidy. Foreign subsidies most likely to cause a distortion include subsidies granted to “*ailing undertakings*”; unlimited guarantees for debts or liabilities; export financing measures not in line with the [OECD arrangement](#) on officially supported export credits, subsidies directly facilitating a concentration, and subsidies enabling submission of an unduly advantageous tender.

The definitions of foreign financial contributions and subsidies are fixed in the FSR, but the Commission Q&A includes guidance to help multinationals identify and quantify their financial contributions, while Forms FS-CO and FS-PP include de minimis thresholds and exclusions to reduce the volume of information required for notifications. Nonetheless, in view of the wide variety of business transactions and practices potentially included as financial contributions, collecting this information will require a major effort, and multinationals will face many interpretive questions not addressed in the Commission Q&A or Implementing Regulation.

The Commission’s Powers and Procedures

The FSR empowers the Commission to conduct *ex officio* reviews of alleged distortive foreign subsidies reaching back five years, increasing year-by-year to a maximum of 10 years as of July 2028. As mentioned, the FSR contains no formal complaint procedure, but that did not deter a Belgian football club from launching a complaint even before the Commission gained its enforcement powers. The complaint may put the Commission in a difficult position. If the Commission opens an investigation in response to the complaint, the precedent may trigger many others, consuming resources and potentially interfering with the Commission’s investigative priorities.

When the Commission launches an investigation, its reviews will be divided into two phases: a preliminary review to assess whether financial contributions received by the target constitute foreign subsidies that appear likely to distort the EU internal market, followed by an in-depth review when needed. The Commission will have powers to impose interim measures, issue

requests for information, conduct inspections both inside and (with the relevant company's and government's consent) outside the EU, take action against non-cooperation and impose fines and periodic penalty payments. In the event of non-cooperation, the Commission will be entitled to take decisions "*on the basis of facts available*", a powerful incentive for companies and non-EU governments to cooperate.

Where the Commission finds that a foreign subsidy distorts the internal market, the Commission may impose redressive measures or, if the company concerned offers satisfactory commitments, adopt a decision making those commitments binding. The Commission can also impose transparency and reporting requirements in connection with the future receipt of financial contributions or participation in concentrations or public procurement procedures (e.g., in connection with transactions below the FSR reporting thresholds).

The Implementing Regulation fleshes out the FSR's procedural requirements, for instance, introducing timelines for submitting comments, procedures for interviews and oral statements during inspections, provision of information by contracting authorities in public procurement procedures, the submission of commitments and the appointment of trustees to oversee compliance by an undertaking concerned.

The Implementing Regulation also sets out detailed requirements in relation to confidential information and access to the Commission's files. Parties seeking confidential treatment must identify the relevant information, justify the claim of confidentiality and provide a redacted, non-confidential version. The Commission is required to protect confidential information and business secrets provided to it unless the Commission decides that there is an "*overriding interest*" in its disclosure.

Once the Commission informs a company under investigation of its intention to adopt a decision, the company can access non-confidential versions of documents in the Commission's files, excluding internal documents of the Commission and government authorities and correspondence among those authorities. In addition, the Implementing Regulation provides for access to unredacted documents in the Commission's files to a limited number of specified external legal and economic counsel and technical experts engaged by the company under investigation, provided they agree to be bound by "*terms of disclosure*" including an agreement not to disclose confidential information to their client.

Under Article 6 FSR, the Commission can take into account the positive effects of a foreign subsidy that may offset negative effects in terms of distortion of the internal market. This is the so-called "*balancing test*", which applies to both the Commission's ex officio investigations and notifications and may lead to investigations being closed, or transactions approved, on the basis of subsidies' positive effects even if they are found to distort the internal market. The Implementing Regulation does not include any specifics on how the balancing test may be conducted. Further clarification by the Commission is needed but will likely only follow the first application cases.

Notification Requirements

As mentioned, the FSR imposes new notification and approval requirements on multinationals participating in M&A activities and public procurement procedures meeting minimum thresholds. The Implementing Regulation includes notification forms to be used for this purpose –

Form FS-CO for concentrations and Form FS-PP for public procurement procedures – and details of the related procedures.

M&A Notifications and Form FS-CO

Transactions must be notified under the FSR if (i) the target, joint venture or a merging party is established in the EU and derived EUR 500M or more from the EU in the previous financial year and (ii) all the undertakings concerned received at least EUR 50M in aggregate foreign financial contributions in the previous three years. The Commission can require notification of sub-threshold transactions, as under the EUMR, but without the need for a referral request from a Member State. As under the EUMR, only so-called “*full function*” joint ventures are caught by the FSR, but unlike the EUMR the FSR does not require notification of joint ventures without significant EU revenues.

Given the broad definition of foreign financial contribution, the EUR 50M financial contribution threshold is not meaningful, since it will likely be met in substantially all transactions meeting the turnover threshold. The financial contribution threshold can even be met by the target alone, which is odd considering that the notification requirement was designed to prevent multinationals receiving foreign subsidies from using those subsidies to outbid European bidders without such subsidies.

Notified transactions cannot be closed while the review is pending. The notification process and timetable closely resemble the EUMR process, with an initial 25 working day review period, followed by an in-depth 90 working day review period, starting from the date of submission of a complete notification. For transactions notified under both regulations, however, the review timetables may diverge, especially during the pre-notification phase, when the EUMR and FSR case teams will have different questions for the parties.

Form FS-CO sets out the information to be provided by the notifying parties, which include all entities acquiring joint or sole control of a target as well as their respective group members. “*Targets*” include all entities controlled by the entity over which sole or joint control is acquired, but not entities that will no longer control the target post-transaction (i.e., the sellers).

This information falls into two categories, (i) transaction-specific information and explanations and (ii) groupwide foreign financial contribution information that will be largely the same for each notifiable transaction involving the same notifying party. Transaction-specific information includes a description of the concentration (Section 1), information about the parties (Section 2), the ownership and control structure of the parties and details of the concentration, including the amount and form of the consideration and information on relevant debt or equity financing (Section 3). To confirm that the notification thresholds are met, the notifying parties must provide their turnover data in the same format used for EU Merger Regulation filings and simple confirmation that the parties to the transaction have received more than EUR 50M of foreign financial contributions in the previous three years (without figures) (Section 4).

Information for the Commission’s substantive assessment is set out in Section 6. This includes information on any structured bidding process conducted for the target, an explanation of the target’s different business lines or activities and whether the acquirers are active in the same or related business lines or activities, together with the worldwide and EU turnover achieved from each and the percentage that EU turnover represents in relation to the relevant overall turnover.

For the foreign financial contributions considered most likely to be distortive, as discussed above, the notification must include explanations of whether and if so how foreign financial contributions are liable to improve the parties' competitive position in the internal market (taking account of the contribution's amount, use and purpose and how it would have been financed absent the contribution). The notification must also identify the merger and other regulatory filings triggered by the concentration and provide contact details of the target's five largest competitors in the EU and those provided in any EU merger filings.

The foreign financial contribution information to be provided is set out in Section 5. Detailed information is required for foreign financial contributions of EUR 1M or more received in the three prior years that may fall into any of the categories defined in the FSR as most likely to be distortive, as discussed above. For each such foreign financial contribution, the notifying parties must describe the form and amount of the contribution, identify the granting entity, describe the purpose and economic rationale and explain whether it confers a benefit and is limited in law or in fact to certain undertakings or industries; i.e., whether it constitutes a "*foreign subsidy*" within the meaning of the FSR (para 14.2).

Other foreign financial contributions of EUR 1M or more provided to the notifying parties in the three prior years must be summarized in a table. The table must include an overview of foreign financial contributions by type for each country where the total estimated value exceeds EUR 45M, along with a brief description of the purpose of the contribution and granting entities, whether there is a link with the transaction and an estimate of the value range ((EUR 45-100M, EUR 100M-500M, EUR 500M-1B or more than EUR 1B).

Form FS-CO includes a special provision for acquisitions of control by investment funds, which need not report foreign financial contributions granted to other investment funds (or their portfolio companies) managed by the same investment company but with a majority of different investors subject to two conditions. First, the acquiring fund must be subject to the EU's Alternative Investment Fund Managers Directive (the AIFMD) or an "*equivalent third country legislation*". Second, economic and commercial transactions between different funds and their portfolio companies over the prior three years are non-existent or limited. The possibility to notify on a fund-by-fund basis, as opposed to a groupwide basis, could be very beneficial to private equity investors, since a fund's investment activities are often concentrated in the first few years after launch, and any particular fund is likely to control relatively few portfolio companies in the first few years. On the other hand, the conditions may be difficult to fulfil; portfolio companies controlled by different funds in the same private equity group may not track their economic and commercial transactions, and collecting three years' worth of information on such transactions may be challenging.

Notifications on Form FS-CO must be accompanied by supporting documentation (Section 8), including documents relating to any foreign financial contributions considered most distortive, such as analyses and other documents describing their purpose and economic rationale and prepared by or for members of the parties' boards, as well as any such documents prepared by or for the entity(ies) that granted the foreign financial contribution, to the extent available. Supporting documents must also include analyses and other documents discussing the transaction's rationale, including in relation to alternative acquisitions, competitive conditions, competitors and potential sales growth and expansion, as well as similar external due diligence reports and other documents assessing or discussing the transaction value.

Under the Implementing Regulation, notifying parties can request waivers from the requirement to provide information that is not reasonably available or not necessary for the Commission's examination. The Commission encourages parties to raise such requests in the pre-notification process. The Implementing Regulation notes that pre-notification discussions are likely to be especially useful in relation to the most distortive foreign financial contributions. Such a waiver, however, does not preclude the Commission from requesting that information at a later stage.

Finally, in addition to the above-described information, which is required for a notification to be considered complete, the notifying parties may provide information on possible positive effects on the development of the relevant subsidized economic activity on the EU internal market, as well as other positive effects in relation to the relevant policy objectives (Section 7).

Should the Commission find in an in-depth investigation that the parties received foreign subsidies distorting the internal market that is not offset by any positive effects under the balancing test, the Commission has two options. The Commission can accept commitments to effectively remedy the distortion (unlike the EU Merger Regulation, the FSR does not allow remedies to be offered in Phase I), or the Commission can prohibit the transaction.⁷The Commission will also have remedial powers – including ordering a transaction to be unwound — if it finds that a notifiable transaction has already been implemented and distorts the EU internal market.

With the possible exception of a foreign subsidy directly facilitating a proposed acquisition (which the Commission could require a proposed acquirer to reject or reimburse), the appropriate remedy for a distortion will often be unclear. What would be the remedy, for instance, if the Commission concludes that long-standing subsidies under public-sector contracts raise a bidder's general profitability, enabling it to pay more for a target than EU bidders? What if the subsidized acquirer is the only bidder or all potential acquirers are subsidized?⁸The Implementing Regulation includes no specifics on what remedies may be suitable in what circumstances, nor the forms and requirements for remedies. In due course, hopefully, the Commission will adopt a further implementing regulation comparable to its notice on remedies under the EU Merger Regulation.

Public tender notifications and declarations and Form FS-PP

The FSR supplements existing EU public procurement rules by requiring bidders in significant tenders to notify the contracting authority of any foreign financial contributions they have received in the preceding three years.⁹The objective is to catch foreign subsidies “*that cause or risk causing a distortion in a public procurement procedure [by enabling] an undertaking to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned*”, thereby putting less subsidized bidders at an unfair disadvantage.

The public procurement notification requirements apply to a wide range of contracts subject to EU public procurement rules, but there are a number of exceptions. In particular, the FSR excludes public procurement in the defence and security sectors. In addition, where works, supplies or services can only be supplied by a particular economic operator, the economic operator will not be subject to the FSR's notification requirement, but must nonetheless inform the Commission of all foreign financial contributions it received. The Commission retains the power to launch an own-initiative investigation, but the relevant economic operator will not need to file a notification.

Notification is required in respect of covered public procurement procedures where the estimated

value of a public procurement or framework agreement is EUR 250M or more (or, where a procurement whose aggregate value is EUR 250M or more is divided into lots, individual lots (or combinations of lots) valued at EUR 125M or more), and the “*economic operator, including its subsidiary companies without commercial autonomy, its holding companies and, where applicable, its main subcontractors and suppliers*” received aggregate financial contributions of EUR 4M or more per third country in the three prior years (Article 28(1)(b)). The Commission can also require notification where it suspects that a participant in a public procurement process has benefitted from foreign subsidies in the previous three years.

If the thresholds are met, economic operators participating in a public procurement procedure must notify the contracting authority of all foreign financial contributions meeting the minimum threshold per third country and list all foreign financial contributions in a “*declaration*”. The contracting authority must transfer the notification or declaration to the Commission “*without delay*”. The Commission must review a notification without “*undue delay*”, and give the economic operator 10 working days to provide any missing information required to make the notification complete. If the notification continues to be incomplete, the Commission will adopt a decision declaring the tender irregular and request the contracting authority to reject the tender.

Once a notification is complete, the Commission must carry out a preliminary review no later than 20 working days after receipt (subject to extension by 10 working days) and decide whether to open an in-depth investigation. The Commission must complete any in-depth investigation no later than 110 working days after receiving the complete notification (subject to extension by 20 working days after consultation with the contracting authority). (Special rules apply to public procurement procedures in the form of multi-stage procedures.)

During the Commission’s investigation, the contracting authority can continue with all procedural steps except the award of the contract. If the contracting authority determines that the most advantageous tender was submitted by an entity that submitted a declaration that no notification was required, however, the contracting authority may award the contract to that bidder unless the Commission has previously opened an investigation.

Form FS-PP sets out the detailed information and process for FSR notifications of public tenders. While the Commission has made efforts to harmonize Forms FS-CO and FS-PP, there are significant differences both in process and substance.

Form FS-PP defines the notifying parties as “*all the economic operators, groups of economic operators, main subcontractors and main suppliers covered by the notification obligation*”. Form FS-PP goes on to specify that, “[u]nless otherwise specified, the term ‘notifying party(ies)’ includes all their subsidiary companies without commercial autonomy and all its holding companies”. This definition has been interpreted to mean that notifying parties need not include foreign financial contributions received by group members outside the direct chain of control, i.e., sister companies. (Form FS-PP lacks the provision allowing investment funds to report foreign financial contributions on a fund-by-fund basis included in Form FS-CO, but if the definition of notifying parties in Form FS-PP excludes sister companies, the outcome would be the same (without the burdensome conditions).) There is no similar statement with respect to main subcontractors and suppliers, arguably indicating that sub-contractor and supplier financial contribution information need be provided only for the specific legal entity involved, not on a groupwide basis.

As with Form FS-CO, Form FS-PP requires information specific to the relevant tender, including

information on the tender (Section 1) and the notifying parties (Section 2). However, such information can be provided by linking to the Tenders Electronic Daily or other public procurement platform and via the European Single Procurement Document, where applicable.

Foreign financial contribution information to be included is set out in Section 3. Section 3 closely parallels Section 5 of Form FS-CO in terms of foreign financial contributions for which detailed information is required and foreign financial contributions to be summarized in a table by country and type. However, the exclusion of sister companies from the definition of notifying parties will in many cases significantly reduce the volume of information to be included. This is especially the case where the bidder is a member of an EU-based group since any foreign financial contributions will often be received by non-EU sister companies of the notifying parties.

Also like Form FS-CO, Form FS-PP provides that notifying parties may request waivers from the obligation to provide information that is not reasonably available or not necessary for the Commission's examination of the case. Although notifications are submitted to contracting authorities, not directly to the Commission, the Commission is also available for pre-notification discussion of draft Forms FS-PP.

Section 4 calls for "any elements to justify that the tender is not unduly advantageous" due to the foreign financial contributions received. These elements may, in particular, refer to 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 tendered, the originality of the work supplied or services proposed, compliance with applicable obligations in the fields of environmental, social and labour law and obligations regarding subcontracting.

If desired, the notifying parties may also provide information on possible positive effects on the development of the relevant subsidized economic activity on the EU internal market, as well as other positive effects in relation to the relevant policy objectives (Section 5).

Like Form FS-CO, Form FS-PP requires the provision of supporting documents, especially in relation to the most distortive foreign subsidies, but Section 6 of Form FS-PP also calls for three years of tax declarations, as well as business plans and market research underlying the decision to participate in the public procurement procedure.

Tracking the FSR distinction between "*notifications*" of public tenders meeting the mandatory thresholds and "*declarations*" where these thresholds are not met, Section 7 of Form FS-PP sets out the information to be included in a "*declaration*".

Section 7 is counterintuitive, and it is unclear how multinationals will comply with it. Where "*no foreign contributions notifiable in line with Article 28(1)(b).[i.e., above EUR 4M per third country]... have been granted to the notifying parties, Sections 1, 2 and 8 of this Form must be filled out*", along with a statement to that effect. However, under "*Article 29(1)... the notifying parties must list all foreign financial contributions received... in the last three years*". Foreign financial contributions below EUR 200K per third country over three years can be excluded, and individual foreign financial contributions below EUR 1M over three years can be listed in an aggregated form per type and country, together with a short description, but these exclusions are far narrower than the de minimis thresholds under Section 3. Thus, Section 7 seems to require more detailed disclosure of foreign financial contributions in countries where the mandatory notification thresholds are not met than in countries where they are met. Hopefully, Section 7 will

apply very rarely given that “*where at least one of the notifying parties has been granted notifiable foreign financial contributions the submission shall be considered a notification*” (Section 7(3)(c) of Annex 2 to the Implementing Regulation).

If the Commission finds that an economic operator benefits from a foreign subsidy distorting the internal market the Commission may adopt a decision accepting commitments that fully and effectively remedy the distortion or, failing that, a decision prohibiting the award of the contract to the economic operator concerned. Again, the Implementing Regulation provides no guidance on the process for submitting proposed commitments or which commitments would be suitable to remedy particular types of distortion.

Conclusion

The FSR gives the Commission broad powers to investigate a wide variety of commercial behaviour and to impose sweeping remedies. But the FSR’s most immediate impact will likely be felt by multinationals subject to new notification and approval requirements for major M&A transactions and public tenders. Multinationals that have been waiting for more clarity on the notification requirements now have only a few months to prepare for notifications that may be required as early as October 2023.

Thanks to the outpouring of criticism following the Commission’s February consultation, Forms FS-CO and FS-PP will be much more manageable. Although detailed information is still required for a few categories of foreign subsidies considered most distortive, many notifying parties will have no such subsidies. The tables summarizing foreign financial contributions by country and type will be relatively short, but preparing these tables will still be challenging, especially for multinationals active in many countries and business lines.

Multinationals will also have many questions regarding the identification and quantification of foreign financial contributions. Foreign financial contributions may be spread over multiple years and/or involve complex interrelationships (such as a joint venture with a government entity involving equity investments, debt financing and operating agreements). Notifying parties need not include “*ordinary course*” contracts on market terms, but what contracts qualify as “*ordinary course*” will vary significantly from company to company. Form FS-CO helpfully excludes certain tax benefits of general application, but tax benefits may still prove difficult to value since companies typically track taxes they pay, not taxes they don’t pay.

In short, the Commission has made significant efforts to reduce the burden of FSR notifications and to provide helpful guidance. But multinationals still face a major challenge, and, for many, time is short.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

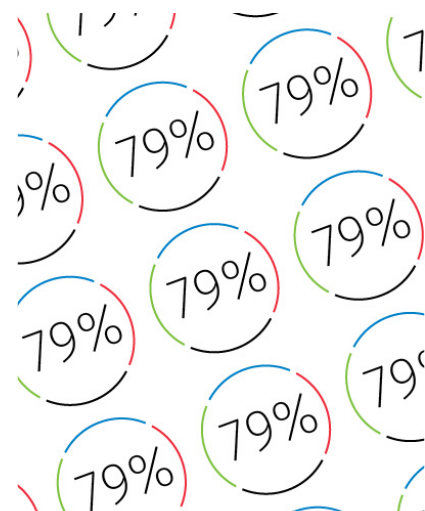
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Friday, July 14th, 2023 at 9:00 am and is filed under [European Commission](#), [Foreign subsidies](#), [Foreign Subsidy Regulation](#), Source: [OECD](#)

“>Mergers, Tender

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.