

# What Does the New EU Foreign Subsidies Regulation (FSR) Mean for Companies Doing Business in the EU?

**COVINGTON**

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON  
LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

[www.cov.com](http://www.cov.com)

# EU Foreign Subsidies Regulation (FSR)

## What does the new EU Foreign Subsidies Regulation (FSR) mean for companies doing business in the EU?

The [EU Foreign Subsidies Regulation](#) (FSR) adopted in December 2022 creates a new instrument to prevent foreign subsidies from distorting the European Union (EU) internal market. It aims to fill a perceived regulatory gap left by EU State aid rules applying to subsidies granted by EU countries but not by foreign states. It started to apply on 12 July 2023 and its notification obligations kick in on 12 October 2023. Procedural details are laid down in the [Implementing Regulation](#) (IR) which entered into force on 13 July 2023.

Key things you need to know about the FSR and the IR:

- The FSR creates an additional layer of deal conditionality for sizeable transactions besides potential foreign direct investment (FDI) and merger control clearance.
- From 12 October 2023, when acquiring (including jointly) control of a company in the EU or participating in a public tender in the EU, companies - including EU ones - will have to notify the European Commission (Commission) of foreign financial contributions (FFCs) received from non-EU states if the relevant thresholds are met or if the Commission so requests. Notification is compulsory and suspensory. Failure to notify or to suspend closing pending clearance may lead to severe sanctions. Information requirements are far-reaching as they comprise FFCs irrespective of whether they have a link with the notified transaction or public procurement procedure.
- Beyond notified transactions and public procurement procedures, the Commission may launch *ex officio* investigations where it suspects that a foreign subsidy may distort the internal market. The FSR can relate to any type of activity unless already governed by other legislation.
- Where following an investigation (initiated either in relation to a notification or on an *ex officio* basis) the Commission determines that a foreign subsidy risks distorting the EU internal market, remedies could apply, and the Commission could even prohibit the transaction or the award of a public contract.

## Covington Contacts

Our extensive merger experience enables us to assist clients on compliance with the FSR and the IR, assist with filing obligations and advise on the best strategy for potential multiple parallel filings under merger control and FDI screening mechanisms. Drawing on our long-standing State aid experience, we are able to present arguments that would resonate with the Commission, both under notifications or potential complaints submitted to level the playing field.



[Christian Ahlborn](#)  
Brussels



[Laurie-Anne Grelier](#)  
Seoul



[Carole Maczkovics](#)  
Brussels



[James Marshall](#)  
London



[Melissa Van Schoorisse](#)  
Brussels



[Sibel Yilmaz](#)  
Brussels



[Johan Ysewyn](#)  
Brussels

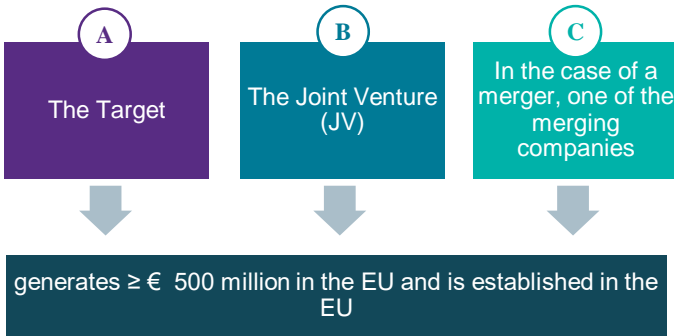
# EU Foreign Subsidies Regulation (FSR)

## Is my business concerned by the FSR?

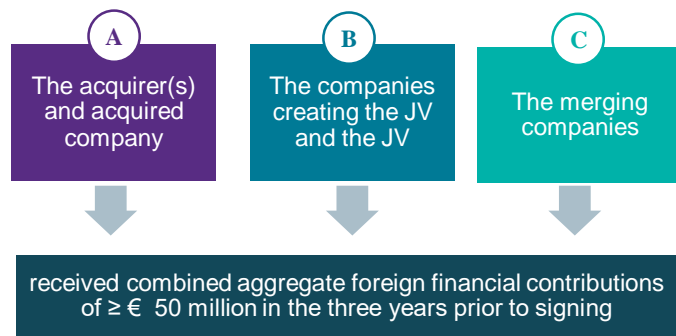
Your business may fall within the scope of the FSR in the following situations:

- From 12 October 2023, a notification must be filed when engaging in a concentration within the meaning of the EU merger control (i.e., where there is a change of control on a lasting basis), meeting the following conditions or where the Commission so requests:

### Size of the concentration threshold



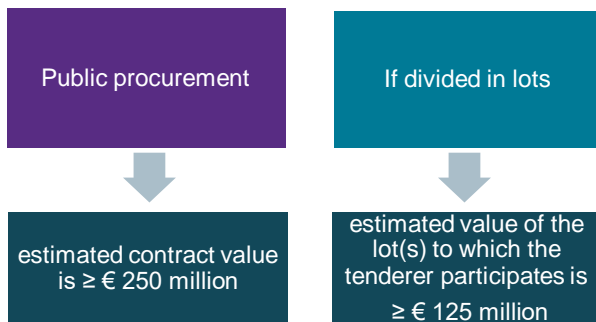
### Amount of FFCs received threshold



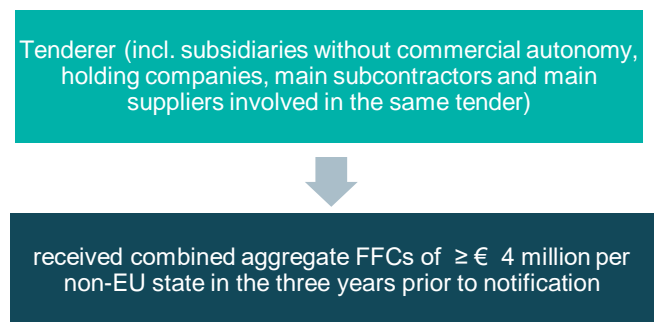
Transactions signed before 12 July 2023 are not subject to notification and will not be investigated.

- From 12 October 2023, a notification must be filed when engaging in a public procurement procedure (or a concession) meeting the following conditions or where the Commission so requests:

### Size of the PP threshold



### Amount of FFCs received threshold



Public procurement procedures launched before 12 July 2023 will not be investigated.

- Your business may be subject to an investigation when participating in a concentration or public procurement procedure in the EU, even if the conditions above are not met, but also in other cases, when simply engaging in an economic activity in the EU. The Commission may launch ex officio investigations when it has concerns that foreign subsidies may have been granted in the last ten years but no longer than five years prior to the application date of the FSR of 12 July 2023. However, the FSR does not apply where other legislation already applies, for instance when exporting goods into the EU for which the EU Anti-Subsidy Regulation would address any potential distortive foreign subsidy your business may have received.

# EU Foreign Subsidies Regulation (FSR)

## How will the Commission assess foreign subsidies?

### **Procedure**

The Commission will firstly conduct a preliminary review of the notification, after which it may decide to initiate an in-depth investigation should the transaction give rise to concerns of distortion in the internal market.

In the case of concentrations, the Commission may initiate an in-depth investigation no later than 25 working days after the receipt of the complete notification. The in-depth investigation may not last more than 90 working days from the date the decision to initiate the in-depth investigation was issued. If no decision has been reached after 90 days, the concentration can be implemented.

For public procurement procedures, the Commission has 20 working days from receipt of a complete notification to close its preliminary review or, where it suspects distortions, to initiate an in-depth investigation. It must issue a final decision within 110 working days from the receipt of the complete notification, thereby including the preliminary review phase.

In both proceedings, the Commission may stop the clock where information is missing or incomplete. In public procurement, incomplete information or late submissions may even lead to the tenders being rejected.

### **Substantive assessment**

The Commission will examine foreign subsidies. Foreign subsidies exist when the following conditions are satisfied:

- i. Financial contributions.* This concept includes contributions provided both directly or indirectly. The FSR provides a non-exhaustive list of types of financial contributions that fall within the definition: (i) the transfer of funds or liabilities (such as loans); (ii) the foregoing of revenue that is otherwise due (such as tax exemptions); and (iii) the provision of goods or services.
- ii. Financial contributions granted by a non-EU state.* A non-EU state includes any foreign public authority but also commercial entities (state-owned or private) whose actions can be attributed to the state, for instance because they act upon instructions of a state.

Financial contributions granted by a non-EU state are referred to as 'foreign financial contributions' (FFCs). They need to meet two further conditions to amount to a foreign subsidy:

- i. A benefit.* A FFC confers a benefit if it could not have been obtained under normal market conditions. The existence of a benefit should be determined on the basis of comparative benchmarks such as the investment practice of private investors, financing rates obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service. An example of a benefit that would not be obtained under normal market conditions is an interest-free loan granted by a non-EU state to the undertaking.
- ii. Specific to one or more companies or industries.* The FFC is specific if it is not available on a general basis. The FSR specifies that such specificity may occur in law or in fact. As an example, financial support during the COVID-19 pandemic granted to all businesses such as wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions, would not meet the criterion of specificity.

# EU Foreign Subsidies Regulation (FSR)

The Commission will then assess whether the foreign subsidies, if any, create a distortion on the internal market. A distortion shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of a company in a way that negatively affects competition in the EU's internal market. Relevant indicators to assess the distortive nature are the amount and nature of the foreign subsidy, the situation of the company (e.g., size, markets and sectors), the level and evolution of economic activity on the internal market, the purpose and conditions of the foreign subsidy, and the use of the foreign subsidy on the internal market. There are some presumptions of distortions (i.e., the most distortive categories of foreign subsidies are considered to be subsidies to ailing companies, unlimited guarantees, export financing measures not aligned with the OECD Arrangement, subsidies directly facilitating a concentration, and subsidies enabling a tenderer to submit an unduly advantageous bid) and also presumptions of no distortion (e.g., subsidies of less than EUR 4 million over three years).

If an investigation concludes that there is a distortion, the Commission may balance the negative effects against the positive effects of the scrutinized foreign subsidy. If the negative effects outweigh the positive ones, the company may be subject to remedies to restore the competitive landscape (e.g., requiring repayment of the foreign subsidy to the foreign country, refraining from certain investments in the EU, or providing a license on FRAND terms for those assets developed with foreign subsidies). Where a distortion is determined to be irremediable, the Commission may prohibit a concentration or the award of a public contract.

## What are the notification requirements?

Notifying parties will have to complete a "Form FS-CO" for concentrations to be submitted to the DG COMP (the Commission's Directorate-General in charge of competition). For public procurement procedures, a "Form FS-PP" will need to be completed and submitted to the contracting authority which, in turn, will forward the notification to DG GROW (the Commission's Directorate-General in charge of the internal market).

The notifying parties in the context of qualifying concentrations are all the merging parties or, in the case of an acquisition of control, all the parties acquiring control. The parties include not only the legal entities directly involved in the transaction but all group entities (including parents, subsidiaries and companies directly or indirectly controlled by the parent companies) of the companies concerned, except for investment funds which benefit from a specific limitation under certain conditions.

The notifying parties in public procurement tenders are the economic operators (including subsidiary companies without commercial autonomy and all holding companies), their consortia, as well as the main subcontractors and main suppliers that are expected to contribute to the performance of the resulting contract for more than 20% of the contract value.

The notifying parties must provide general information regarding the notified transaction and public procurement tender as well as turnover data. They also need to provide information on FFCs above EUR 1 million. The level of detail to be provided depends on the nature of the FFCs according to the categorization outlined in the IR. The different types of FFCs are categorized into the most distortive category of FFCs (as set out above) which require the most detail, and other types of FFCs for which it is sufficient to provide an overview.

# EU Foreign Subsidies Regulation (FSR)

## *Most distortive FFCs*

For FFCs that are considered most distortive, the notification needs to include information on their form, the granting entity, the amount, the reason for which they were granted, the conditions attached, their main characteristics, whether they confer a benefit and whether they are specifically or generally applied. In public procurement procedures, further information is needed as to whether the contribution has been granted with the intention to cover more than just the operating costs exclusively linked with the public procurement tender under consideration.

## *Other FFCs*

FFCs in the other category include direct grants, loans, and tax advantages. Such contributions only require a short description and specification of their aggregate amount in defined ranges (EUR 45-100 million, EUR 100-500 million, etc.).

## *Excluded FFCs*

Certain FFCs are excluded from the notification obligation. In particular, the second type of FFCs listed in the FSR as examples (i.e., foregoing revenue that is otherwise due) are excluded if they are applied generally. The third type of financial contributions (i.e., supply/purchase contracts) are also excluded if concluded on market terms. FFCs are also not required to be reported where they do not collectively exceed EUR 45 million per country for concentrations, or EUR 4 million per country for public procurement procedures, as well as individual contributions not exceeding EUR 1 million.

Where information is not reasonably available or is not necessary for the Commission's investigation, the notifying parties may request in pre-notification discussions that the Commission waive the obligation on the parties to provide such information in the particular case. It is expected that the Commission will be cautious in granting such waivers in the early days of the FSR as it will want to test the application of the FSR and avoid creating restrictive precedents regarding information requirements. This will no doubt evolve with time as the Commission gains experience in applying the FSR.

# EU Foreign Subsidies Regulation (FSR)

## What does the FSR change for my business in the EU?

**When engaging in M&A activities in the EU, the FSR adds a third layer of transaction conditionality (in addition to merger control and FDI filings) and brings further complexity to the regulatory approval process for your transactions.**

All transactions which meet the above thresholds, and that have been signed (or in the case of a public bid, announced) after 12 July 2023 but not closed by 12 October 2023, will need to be notified and cleared prior to closing.

When participating in EU public procurement, the participating tenderers have to submit their FFCs to the contracting authority. As outlined above, FFCs received in the past three years of an aggregate amount exceeding EUR 4 million need to be included in the notification. Where this threshold is not met, the tenderer must nevertheless declare all FFCs received in the past three years that individually exceeded EUR 200.000.

The notification requirements are combined with a standstill obligation: your transaction may not close or the public contract may not be awarded to your company until the Commission has given its approval, possibly subject to commitments.

The Commission can impose fines of up to 10% of the worldwide group turnover for non-compliance with the notification or standstill obligations. It can also order the dissolution of a concentration implemented in breach of these obligations.

The notification obligations are far-reaching and the regulatory burden on notifying parties will be onerous. Companies would be well advised to start preparing sufficiently in advance of a planned transaction or public procurement process of a certain size. Preparation requires the collection of information on FFCs across group entities and a robust analysis of FFCs for the Commission assessment.

Beyond notifiable transactions and public procurement procedures, the *ex officio* investigative powers are broad and the potential remedies could be onerous and highly disruptive for the investigated company.

Although the FSR does not provide for any complaint procedure, competitors of recipients of potentially distortive foreign subsidies may submit market information for the Commission to prompt an *ex officio* investigation. It is expected that the Commission will prioritize notifications (and pre-notification discussions), at least in the early stages of application of the FSR, for several reasons. The FSR is a new instrument that needs to be stress-tested, the teams in charge of the FSR are reportedly understaffed and the Commission is bound by statutory time limits to review notifications - which combined with the important amount of information to be reported, likely entails a sizeable amount of work.