

October 2023

Foreign Subsidies Regulation

WHAT IS IT AND HOW IT AFFECTS OUR EU BUSINESS OPERATIONS?

On 12 July 2023, the EU's Foreign Subsidies Regulation¹ ("FSR" or "Regulation") issued on December 2022 has entered into effect introducing a novel monitoring scheme to prevent foreign subsidies from distorting competition within the single market.

What is it?

In a nutshell, the new Regulation aims to level the playing field by bridging a perceived regulatory gap left by EU State aid rules applying to subsidies granted by EU countries but not by foreign -non-EU- states. Procedural details related to how the FSR is going to operate -in particular the ex ante notification and approval process- are laid down in the Implementing Regulation published by the European Commission ("EC" or "Commission") on 10 July 2023. Hence, the Commission expects that from 12 October 2023 onwards -when the notification obligation for concentrations and public procurement starts to apply- distortive events within the internal market triggered by foreign subsidies will be significantly attenuated.

1. Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/2

2. Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to the Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market [2023] OJ L177/1

Contact

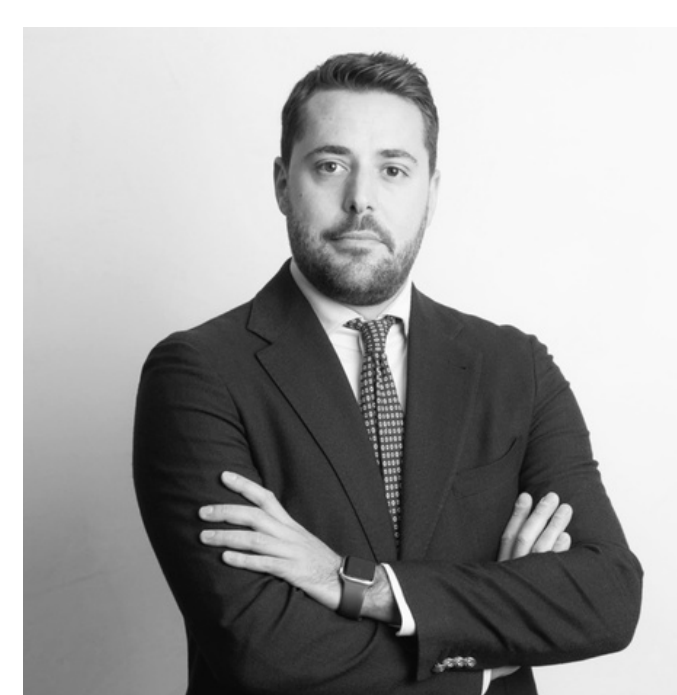


Pigi Konstantinou

Partner

T: +30 210 36 26 888

E: pkonstantinou@souriadakistsibris.gr



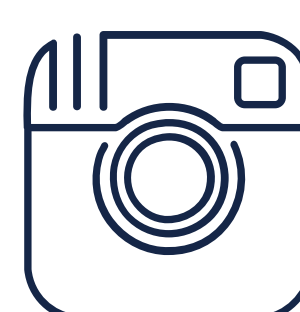
Iason Tatsis

Associate

T: +30 210 36 26 888

E: itatsis@souriadakistsibris.gr

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How it works?

To put it briefly, the FSR introduces two distinctive -ex ante- notification obligations for businesses, which relate either to M&A transactions or to public procurement processes. That being said, the FSR does not target undertakings but transactions and in particular the substantial ones, namely the ones that exceed certain thresholds. More specifically, every time an undertaking -most often companies or private equity funds- acquires -either itself or through a JV- control of an EU company or participates in a public procurement process within the EU, the former is obliged to notify the Commission of any foreign subsidy granted from non-EU states, in the three years prior to the conclusion of the agreement, the announcement of the public bid, and/or the acquisition of a controlling interest. Apart from the aforementioned notifiable transactions, the FSR also grants the Commission the additional power to launch investigations on its own initiative -ex-officio- every time it suspects a foreign subsidy may be involved in an economic activity.

Foreign subsidy refers to any financial contribution provided directly or indirectly by a non-EU country (“Foreign Financial Contribution” or “FFC”), which is limited to one or more companies or industries, and which confers a benefit on a company engaging in an economic activity in the EU. Such FFCs may take the form, for example, of zero-interest loans and other below-cost financing, unlimited guarantees, compensations, export financing not in line with the OECD Arrangement on officially supported export credits, preferential tax treatment, tax credits, or direct grants.

In this respect, we refer to the recent Spain’s La Liga complaint filed against Qatari-owned French club Paris St-Germain (PSG). There, the Spanish league alleged that PSG has received foreign subsidies from the government of Qatar and thus PSG was granted an unfair competitive advantage.

The notification obligations are compulsory for businesses -with a failure to comply to lead to potential sanctions- as from 12 October 2023 onwards. Furthermore, these obligations are imposed on top and irrespective of any existing notification obligations, such as foreign direct investment (FDI) or merger control clearance provisions.

The thresholds

With regards to M&A transactions, a prior notification shall be made in case at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate EU turnover of at least EUR 500 million. On top of that, the Parties in question should have been granted combined aggregate FFCs of more than EUR 50 million in the last three (3) years. If the abovementioned preconditions are cumulatively met, the respective transaction shall be cleared by the Commission.

With regards to public procurement tender processes, a prior notification shall be made in the event that the estimated value of that public procurement is equal to or greater than EUR 250 million and the bidder was granted with aggregate FFCs equal to or greater than EUR 4 million per third non-EU country within the last three (3) years. Similarly as above, the contract cannot be awarded to bidder until cleared by the Commission.

What is not covered by the FSR

Transactions concluded before 12 July 2023 are excluded from the scope of the abovementioned obligations and thus, there is no need to be notified. Also, deals signed after 12 July 2023 but completed before 12 October 2023 do not need to be notified, however it's up to the Commission's discretion to order a review -i.e. under its ex officio investigation capacity.

The Commission's role

The Commission is solely responsible for enforcing the FSR. In the event that the EC identifies an FFC as a distortive subsidy, the former has the power to prohibit the transaction or the award of the contract before it takes place. It may also impose redressive measures on the undertaking in question to remedy the distortion caused by the foreign subsidy. These redressive measures should include structural or non-structural remedies and the repayment of the foreign subsidy. The Commission may also accept commitments on behalf of the undertaking under investigation as a way to remedy the distortion caused.

To accomplish its mission and collect all the necessary information, the FCR has granted EC extensive investigative powers -similar to those granted under competition enforcement provisions- including RFIs and fact-finding inspections at premises. Noncompliance with these obligations³, may trigger the imposition of penalties to the undertakings under investigation of up to 10% of their aggregate turnover in the preceding financial year.

The procedural aspects

The demanding task of assessing foreign subsidies undertaken by the EC is thoroughly described in the Implementing Regulation, where two (2) distinctive notification forms are included, one for M&A transactions (Form FS-CO) and one for public procurement tender processes (Form FS-PP). Both notification forms require detailed information about the undertakings under investigation, the transaction, the FFCs, along with any other information that could be considered helpful for the Commission to assess whether the contribution is distortive or not. Nonetheless, the level of detail that needs to be provided in these notification forms depends on the categorization of the FFCs outlined in the Implementation Regulation. In particular, extensive details shall only be provided in case of likely distortive contributions, namely FFCs exceeding EUR 1 million, with summary information to be requested in all other instances.

On 12 July 2023, the Commission also updated the FAQs concerning the procedural aspects of these notification obligations including -amongst others- how the change of control is being assessed by the EC, tax exemptions treatment or the circumstances under which financial contributions from private equity entities could be potentially attributed to a third -non-EU- country.

3. And in particular fail to notify a concentration, gun-jumping behavior or non-compliance with Commission's decision