

Foreign Subsidies Regulation: Anything to declare?

12 October 2023

On 12 October 2023, the notification and declaration obligations of the Foreign Subsidies Regulation (*FSR*) will finally start to apply. The new review procedures for M&A transactions and bids in public procurement procedures are aimed to address distortions caused by foreign subsidies and thus ensure a level playing field for all companies operating in the EU Single Market. While the European Commission has recently provided further clarity on some of the procedural aspects of the *FSR* (see our latest [briefing](#)), there is still significant uncertainty about the actual compliance requirements for companies. This briefing aims to alert businesses to the pitfalls to watch out for and to provide practical guidance on how to successfully navigate these new regulatory waters.

When do the notification and declaration obligations apply?

The obligation to notify or declare foreign subsidies is triggered when certain thresholds are reached by companies which operate in the EU and are involved in mergers or bids for public contracts:

Notification obligation for concentrations

Concentrations trigger a **notification** obligation if two cumulative thresholds are met:

- The combined turnover of at least one of the merging undertakings, the acquired undertaking or the joint venture established in the EU, exceeds EUR 500 m in the EU, and
- all undertakings involved in the concentration were granted combined foreign financial contributions of more than EUR 50 m in the three financial years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification and declaration obligation for bids in public procurement procedures

Regarding bids in public procurement procedures, the **notification** requirement applies where

- the estimated contract value is equal to or exceeds EUR 250 m, and

- the bidder, including its subsidiary companies without commercial autonomy and its holding companies, as well as main subcontractors/suppliers were granted foreign financial contributions of at least EUR 4 m per third country.

In case of **procurement by lots**, in addition to the above, the value of the lot or the combined value of all the lots to which the tenderer applies must be equal to or greater than EUR 125 m.

But that's not all: The FSR obliges companies to provide a **declaration**, i.e. an overview of the foreign financial contributions received in "all other cases". The European Commission recently clarified in the Implementing Regulation that this refers to cases where the value of the procurement exceeds EUR 250 m but the threshold of EUR 4 m in foreign financial contributions from a single country is not reached.

How to prepare?

While the new filing obligation requires a great deal of preparation, the stakes are high as failure to comply with FSR filing requirements can lead to a standstill obligation or exclusion from a procurement procedure as well as significant fines (see below). This makes it all the more important to ensure that compliance mechanisms are in place in good time. We recommend to

- **establish internal compliance mechanisms with clear lines of responsibility** to ensure that all relevant information is readily available to the appropriate bodies within the company and set up **monitoring systems to keep track of all financial contributions from non-EU countries** (including from public or private entities whose actions can be attributed to a third country). This does not only include grants, but also (non-obvious) contributions such as capital injections, loans, loan guarantees, tax exemptions, and in certain cases even the provision/purchase of goods and services.
- **set up information-gathering protocols and suitable software tools** as collecting the data to assess and prepare the notification or declaration can be challenging and may require extensive group-wide financial information on a global basis as well as going back three years (also see the steps list in our latest [briefing](#)).
- **consider a pre-notification consultation** with the European Commission to minimize the information burden: The pre-notification phase can potentially lead to a significant reduction in the amount of information to be submitted to the European Commission, as companies can request to be exempted from providing certain information required in the notification form.

There is no (further) transition period

While the additional filing requirements have been talked about for a long time, companies need to be aware that they are now a reality. There is still a common perception that the FSR only affects Chinese companies, but the notification and declaration requirements generally apply to all companies operating in the EU that meet the thresholds. Accordingly, Margrethe Vestager recently [stated](#): “It is conceivable that subsidies that are given in the **United States** will be relevant to notify in the EU”. Therefore, the following should be kept in mind:

- **Some sectors will be particularly affected:** Traditionally heavily subsidised sectors such as basic industries (steel, aluminium, critical raw materials), infrastructure, transport and energy, but also the technology sector, e.g. subsidised acquisitions of promising European start-ups, will need to be especially prepared (and on the lookout, as they are likely to be the first to be targeted by the European Commission).
- **Sanctions are possible**, in particular in case of non-compliance with the notification obligations, which include fines up to 1% of the aggregate turnover in the preceding financial year in case of (intentional or negligent) supply of incorrect or misleading information in a notification and declaration, and fines up to 10% of the aggregate turnover in the preceding financial year in case of failure to notify (i) a concentration subject to a filing obligation under the FSR or (ii) foreign financial contributions in a public procurement procedure.
- **Don't forget about the ex-officio tool:** Apart from the filing requirements, the European Commission has the power to investigate, on its own initiative, any market situation, including mergers and procurement procedures below the thresholds, if it suspects that a distorting foreign subsidy may be involved. Deals signed on or after 12 July 2023 and concluded before 12 October 2023 will continue to be exempt from the notification requirement but could still be investigated by the European Commission on its own initiative (ex officio). The same is true for any other foreign subsidies granted after 12 July 2018, if they still distort the EU Single Market.

The FSR adds significant red tape for companies operating in the EU and compliance with the new rules requires careful preparation. But bear in mind that the FSR can also be used as a sword against competitors benefitting from subsidies. Either way, legal advice is key and BLOMSTEIN has the expertise. For questions regarding the impact of the FSR on public procurement procedures, please contact [Pascal Friton](#) and [Ramona Ader](#). With regard to concentrations, [Max Klasse](#) and [Jasmin Sujung Mayerl](#) are happy to answer any questions that may arise.