

# The FSR Playbook

## What the new Guidelines mean for M&A and Public Procurement

14 January 2026

On 9 January 2026, the European Commission (*EC*) published Guidelines on the Foreign Subsidies Regulation. The Guidelines provide additional clarity surrounding the application of the Foreign Subsidies Regulation (*FSR*), particularly with regard to (i) the assessment of distortion, (ii) the balancing test, and (iii) the EC's powers to "call in" (i.e., request prior notification of) below-threshold M&A transactions or bids in public procurement procedures. This briefing aims to illuminate the new standards introduced by the Guidelines in order to help navigate the still nebulous regulatory landscape under the *FSR*.

### Assessment of Distortion

The *FSR* requires a distortion in the internal market for the EC to take action against foreign subsidies. Under the *FSR*, the concept of "distortion" was left quite open-ended. According to the regulation, a foreign subsidy is deemed to be distortive if two conditions are met:

1. The foreign subsidy must be liable to improve the competitive position of a company in the internal market; and
2. in doing so, the foreign subsidy must (actually or potentially) negatively affect competition in the internal market.

The Guidelines refine the assessment of these conditions, in particular by distinguishing between **two categories of competitive improvement**:

- **Targeted Foreign Subsidies:** Foreign subsidies that support a company's economic activities in the internal market are generally considered to improve its competitive position. This includes, *inter alia*, **direct support** for manufacturing, distribution, or the provision of services within the Union, as well as **support** tied specifically to **investments or acquisitions** in the internal market. Additionally, it covers **indirect support**, e.g. where foreign funding such as for Research & Development (*R&D*) outside the EU benefits internal market operations and guarantees that reduce financing costs or encourage risk-taking for activities within the EU.
- **Non-Targeted Foreign Subsidies:** In cases where the foreign subsidy has a general scope or supports non-EU activities (e.g., building a foreign manufacturing plant), the EC will assess the likelihood of cross-subsidisation. In doing so, it will

take into account several factors such as links between the recipient of the foreign subsidy and group companies active in the internal market, design and condition of the foreign subsidy and agreements with third-parties.

Furthermore, the Guidelines specify the requirements for a subsidy to **negatively affect competition**. A negative effect occurs when the subsidy changes the way companies normally compete in the EU market, effectively tipping the scales and undermining the level playing field. The subsidy must have contributed to this market shift but it need not be the sole reason for it.

The assessment involves a two-sided analysis: the **effect on the company's behaviour** (e.g., whether the subsidy encourages aggressive pricing or capacity expansion) and the resulting **alteration of competitive dynamics** (e.g., when subsidised companies cause rivals to lose sales and profits, discourage competitors from investments), both in view of the internal market.

## How can distortions play out in practice?

The Guidelines also illustrate some of the main categories of distortions. These include **distortions in acquisitions** (e.g., subsidies allowing the beneficiary to outbid rivals in acquisitions), **distortions via operating decisions** (e.g., subsidies enabling lower prices) or **distortions via investment decisions** (e.g., subsidies that guarantee risk-free R&D projects thereby deterring others).

## Distortion in Public Procurement

In public procurement procedures, the assessment of distortion is narrower and more specific than in general market activities. It is relevant whether a foreign subsidy enables a company to submit an **unduly advantageous tender** within a specific procurement procedure. The Guidelines provide for several clarifications:

- An advantage is not just about **lower prices**; it can also manifest as higher quality or more innovation, better delivery timelines or after-sales support as well as more favourable payment terms.
- It is undue if the company **cannot plausibly explain** it through other factors, such as superior technical solutions, unique cost-efficiencies, or exceptionally favourable (but non-subsidized) supply conditions. The assessment is similar to whether an abnormally low tender can be justified.
- An unduly advantageous tender may also result from subsidies granted to group companies of the bidder, main subcontractor or supplier which are not subject to the notification obligation (e.g., sister companies).

A distortion is confirmed if the unduly advantageous tender is awarded the contract, influences on the results of the procedure, or deters competitors from participating.

## Balancing Test

If the EC finds a distortion, it may balance the negative effects of a foreign subsidy against any positive effects on a case-by-case basis. The Guidelines specify potential positive effects to be considered in the balancing test, such as remedying a market failure or contributing to broader Union policy objectives (e.g., environmental protection and R&D). For public procurement, the availability of alternative sources of supply is also a key consideration.

The Guidelines emphasize that positive effects must be caused by the subsidy to be relevant in the assessment. For the Article 5 “most likely to distort” subsidies defined by the FSR, the Guidelines note that positive effects are less likely to outweigh the negative ones.

## EC’s Call-In Powers

The Guidelines also shed further light on the EC’s discretion to call in (i.e., request prior notification of) otherwise non-notifiable M&A transactions or bids in public procurement procedures.

- **M&A:** The EC may request prior notification of any below-threshold concentration at any time prior to its full implementation.
- **Public Procurement:** The EC may request notification of foreign financial contributions in below-threshold procedures before the award of the contract, while endeavouring to limit interference with the procurement process.

This power is triggered if the EC suspects a foreign subsidy was granted in the last three years and if the transaction or bid is so important that it merits prior review given its impact in the Union. In essence, the EC is looking for cases that, while small enough to slip past mandatory reporting thresholds, are strategically sensitive enough to warrant investigation.

Elements the EC will consider include: the strategic or important character of the activity/sector; the possession of strategic assets such as critical infrastructure; the significance of the contract value/length (in procurement); and whether the suspected foreign subsidies fall under the Art. 5 “most likely to distort” categories.

## What does this mean going forward?

The Guidelines provide much needed clarity on the EC's methodology, particularly concerning the concepts of distortion and cross-subsidisation, allowing for a better assessment of compliance risks and pitfalls. However, the Guidelines still leave significant room for case-by-case assessments by the EC. The FSR remains a relatively new instrument and practical enforcement experience is limited. The final interpretation of the FSR will continue to evolve through future EC decisions and is ultimately up to the Courts in Luxembourg, as the Guidelines do not have force of law themselves. Compliance with the EU foreign subsidies regime requires both an understanding of the rules and also a strategic approach that anticipates the EC's enforcement priorities. Therefore, sound legal advice can be essential and BLOMSTEIN has the experience to navigate this complex regulatory environment.

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BLOMSTEIN will closely monitor further developments and keep you informed. If you have any questions on the impact of the FSR on public procurement procedures, Pascal Friton and the entire team is ready to assist you. With regard to concentrations, Max Klasse is happy to answer any questions that may arise.

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