

New regulatory authorization for M&A and public procurement

Under the new EU Foreign Subsidies Regulation (“FSR”), certain transactions will require authorization of the European Commission

Spain - Legal flash

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Key aspects

- As of July 12, 2023, the European Commission will monitor third-country subsidies granted since July 12, 2018.
- In addition, from October 12, 2023, concentrations and bids made in public procurement procedures must be notified in certain cases if foreign subsidies that distort the internal market have been granted, with failure to do so resulting in serious consequences.
- In practice, this means that, along with the analysis required under merger control rules and foreign direct investments (“FDI”), it will be necessary to carry out an analysis as to whether the transaction will be subject to the European Commission’s authorization under the new foreign subsidies rules, which will have an impact on the terms and costs of the transaction.
- Undertakings wishing to participate in future public procurement procedures should ascertain whether they have been granted any subsidies subject to the new regulation.



Key provisions of the regulation

On December 23, 2022, [Regulation \(EU\) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market](#), known as the Foreign Subsidies Regulation (the “**FSR**”), was published in the Official Journal of the European Union (“**OJEU**”). The content and key concepts of the FSR clearly draw inspiration from EU rules on state aid and merger control.

Generally speaking, the FSR affects all undertakings receiving any kind of foreign subsidy that distort the internal market after July 12, 2023. In this context, undertakings are required to consider current and future subsidies, as well as past subsidies granted in the five years prior to July 12, 2023, which may be subject to investigation by the European Commission (the “**Commission**”).

In addition, and as explained in detail in this legal flash, **the FSR has a direct impact on M&A transactions and public procurement procedures if the undertakings involved are the recipients of foreign subsidies granted in the three years prior to July 12, 2023, and after that date**. In practice, this means that:

- **M&A transactions will require an analysis**, along with the analysis required under merger control rules and FDI, **as to whether they will also be subject to the condition precedent of the Commission’s authorization** under foreign subsidies rules, which will affect the terms and costs of these transactions; and
- **undertakings wishing to participate in future public procurement procedures should ascertain whether they have been granted any subsidies subject to the new regulation.**

These analyses will require expert advice, as it will be necessary to keep track of how the Commission applies the FSR to interpret, among others, central aspects that have been provided a very broad definition (e.g., foreign subsidy, financial contribution, control, concentration and public undertaking). Previous experience in EU rules on state aid and merger control will prove useful to conduct both types of analyses.

Entry into force and date of application

- The FSR entered into force on January 12, 2023, and will apply from July 12, 2023.
- However, **prior notification requirements to obtain authorization for concentrations or public procurement procedures will not apply until October 12, 2023.**
- Likewise, at the beginning of this year, the Commission is expected to publish for public consultation the draft guidelines for the FSR and to present implementing regulations that, among others, will introduce **a simplified procedure**.
- The FSR **will not affect transactions that have already been carried out or most of those that have entered an interim period** as the regulation does not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before July 12, 2023. Similarly, it will not apply to public procurement contracts that have been awarded or procedures initiated before July 12, 2023.



Purpose of the FSR

The EU considers that subsidies granted by countries not members of the EU to undertakings operating in the EU may **distort the internal market and undermine the level playing field**, especially when:

- they are then used to fully or partially finance concentrations entailing a change of control over EU undertakings; or
- contracts are awarded in the EU to economic operators benefiting from those subsidies.

While subsidies granted by Member States are subject to strict control under EU state aid rules, until now, no mechanism has been in place to control subsidies granted by third countries to undertakings operating in the internal market. The purpose of the FSR is to **contribute to the proper functioning of the internal market by establishing a harmonized framework** with a view to redressing potential distortions arising from third-country subsidies.

In line with Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, the EU introduces a protectionist measure against certain foreign and multinational investors, in this case to prevent them from benefiting from any advantages resulting from third-country financial contributions that allow them to compete under better conditions in the internal market, or to be awarded public procurement contracts.

The new Regulation confers broad and exclusive powers on the Commission to collect any market information it considers necessary for this purpose (including the possibility of issuing requests for information, and conducting inspections and market investigations into the particular sectors), and it imposes two notification obligations.

Affected subsidies

The FSR applies to **foreign subsidies granted to undertakings engaging in an economic activity in the internal market**. It includes private and public undertakings (directly or indirectly controlled by a state, including sovereign funds), foreign undertakings operating in the EU, and European multinationals that have received foreign subsidies.

- A **foreign subsidy** is considered to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.
- The FSR provides a **broad definition of financial contribution**, which includes: (i) the transfer of funds or liabilities, (e.g., capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses and debt rescheduling); (ii) the foregoing of revenue that is otherwise due; or (iii) the provision of services or purchase of goods.
- Undertakings that engage in an economic activity in the internal market include those that: (i) acquire control of or merge with an undertaking established in the EU; or (ii) participate in a public procurement procedure in the EU.



- A financial contribution may be provided by the central government, public authorities at all other levels, and also by a foreign private or public entities whose actions can be attributed to the third country.

What is a distortion in the internal market?

A distortion is considered to exist when a foreign subsidy **improves the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in that market.**

This assessment could take into account the amount, nature and purpose of the foreign subsidy; the specific situation of the undertaking and the markets or sectors concerned; as well as the level and evolution of the undertaking's economic activity on the internal market.

The FSR makes a series of assumptions, summarized in the table below:

Most likely to distort the internal market	Unlikely to distort the internal market	No distortion caused to the internal market
<ul style="list-style-type: none">➤ Foreign subsidies granted to an ailing undertaking➤ Unlimited guarantees➤ Export financing measures that are not in line with the OECD Arrangement on officially supported export credits➤ Foreign subsidies directly facilitating a concentration➤ Foreign subsidies enabling an undertaking to submit an unduly advantageous tender	<ul style="list-style-type: none">➤ The total amount of a foreign subsidy does not exceed €4 million over any consecutive period of 3 years➤ The aim of the foreign subsidy is to repair the damage caused by natural disasters or exceptional occurrences	<ul style="list-style-type: none">➤ The total amount of a foreign subsidy does not exceed €200,000 per third country over any consecutive period of three years

Notification of concentrations

Notifiable concentrations

Under the FSR, a concentration must be notified when it meets the following cumulative requirements:

- At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and **generates an aggregate turnover in the EU of at least €500 million.**



- The following undertakings **were granted combined aggregate financial contributions of more than €50 million** from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest: (i) in the case of an acquisition, the acquirer or acquirers and the acquired undertaking; (ii) in the case of a merger, the merging undertakings; and (iii) in the case of a joint venture, the undertakings creating a joint venture and the joint venture.

Definitions of concentration and control

In line with the EU rules on merger control, the FSR is based on a **very broad definition of concentration and control**.

- A concentration arises where a change of control on a lasting basis results from:
 - the merger of two or more previously independent undertakings or parts of undertakings; or
 - the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
- The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity also constitutes a concentration.
- With regard to control, as in the case of merger control and FDI, the key factor is the acquisition of the **possibility of exercising decisive influence on an undertaking**. Control may be acquired of fact or law, and it can be acquired, among others, through the acquisition of the ownership of the assets of an undertaking or by having the power to adopt decisions.

Notification procedure

Competent authority	Unlike FDI, where the state members have competence to authorize the transaction, the Commission is the sole authority competent to apply the FSR .
<p>This is a prior authorization to the execution of the transaction (unless the Commission acts <i>ex officio</i> at a later moment). Therefore, in practice, purchase agreements of undertakings affected by the FSR must be subject to the condition precedent of obtaining authorization.</p>	
Time of notification	Concentrations must be notified to the Commission: <ul style="list-style-type: none">➤ before their implementation and after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; or➤ when they demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, when they have publicly announced their intention to make one.
Parties subject to notification	In principle, the parties involved must make the notification:



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- When the concentration consists of a merger or the acquisition of joint control, it must be notified jointly by the parties to the merger or by those acquiring joint control.
 - In all other cases, the notification must be made by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

However, the Commission may:

- review the concentration *ex officio* if the undertakings concerned fail to meet their obligation to notify (this is not subject to time limits); and
 - request the prior notification of any concentration that is not a notifiable concentration if it suspects that foreign subsidies may have been granted to the undertakings concerned in the three previous years.
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The time limits provided for in the FSR may overlap with the time limits set if an authorization under merger control rules is required. The regulation establishes a two-step procedure:

- **Preliminary review:** the Commission has 25 working days after receipt of the complete notification to decide whether to carry out an in-depth investigation if it suspects the existence of a foreign subsidy distorting the internal market.
- **In-depth investigation:** the Commission has 90 working days after opening the in-depth investigation to adopt a decision. Once the Commission has adopted a decision with commitments or a no objection decision, the concentration may be implemented.

Time limits and steps

The Commission may extend the time limits for up to a maximum of 20 working days in certain circumstances, and it can suspend them if an undertaking provides incomplete information or refuses to submit to an inspection.

It regulates a positive silence mechanism, whereby if the Commission does not adopt a decision within the given time limit, the undertakings concerned will be allowed to implement the concentration.

Decision of the Commission

The Commission can adopt the following decisions:

- A decision **with commitments**. Under the FSR, commitments may consist of reducing the market presence, refraining from certain investments, publishing R&D results, divesting certain assets or repaying the foreign subsidy, among others.
- A **no objection** decision.
- A decision **prohibiting a concentration**.

It can also revoke a decision where an undertaking acts contrary to its commitments, the decision was based on incomplete, incorrect or misleading information, or the commitments were not effective.



Any **transactions carried out in breach of the FSR will not be valid** until the Commission adopts a decision, with some exceptions.

Also, the Commission is empowered to:

Non-compliance

- **require the undertakings concerned to dissolve the concentration or take other restorative measures;**
 - **order interim measures;** and
 - **impose fines** of up to 10% of the total aggregate turnover of the undertaking in the preceding financial year, and impose periodic penalties in some cases.
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Notification in public procurement procedures

A foreign subsidy will be considered to cause or risk causing a distortion in the internal market when it enables an economic operator to submit an **unduly advantageous tender** in public procurement procedures.

- **Thresholds:** In general, a notifiable foreign subsidy is considered to arise where (i) the estimated value of the public procurement or framework agreement net of VAT is equal to or greater than €250 million; and (ii) the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender were granted aggregate financial contributions equal to or greater than €4 million per third country in the previous three years.
- **Prior notification or declaration:** If the conditions for the notification of financial contributions are met, economic operators participating in a public procurement procedure must notify the contracting authority of all foreign financial contributions. In all other cases, economic operators must list in a declaration all foreign financial contributions received and confirm that they are not notifiable.
- **Non-compliance:** If a notification or declaration is missing from the bid, the contracting authority may request the economic operators concerned to submit the relevant document within 10 working days. In the case of non-compliance, the contracting authority will declare the bid to be irregular and inform the Commission. If the bid is still incomplete after the request for the relevant document, the Commission can declare the bid irregular and ask the contracting authority to reject it.
- **Preliminary review:** The Commission has 20 working days after it receives a complete notification (that can be extended by 10 working days once) to decide whether to carry out an in-depth investigation if it suspects that there is a foreign subsidy distorting the internal market.
- **In-depth investigation:** The Commission has 110 working days after opening the in-depth investigation (that can be extended by 20 working days once) to adopt a decision.
- **Decisions of the Commission:** Following an in-depth investigation, the Commission can adopt the following decisions: (i) a **decision with commitments**, if the economic operator offers



commitments that remedy the distortion in the internal market; (ii) a **no objection decision**, if the Commission does not find that an economic operator benefits from a foreign subsidy distorting the internal market; or (iii) a **decision prohibiting the award of the contract**, if the economic operator does not offer commitments or the Commission considers them insufficient.

However, the Commission can **revoke a decision** if an undertaking acts in breach of the commitments, the decision was based on incomplete, incorrect or misleading information, or the commitments were not effective.

- **Suspension of award:** During the preliminary review and the in-depth investigation, all procedural steps in the public procurement procedure may continue, except for the award of the contract. If the Commission has not adopted a decision within the applicable time limit, the contract may be awarded to any economic operator, including the economic operator submitting the notification.
- **Fines:** The Commission may impose fines of up to 10% of the total aggregate turnover of the economic operators in the preceding financial year if they intentionally or negligently fail to notify foreign financial contributions during the public procurement procedure, or they circumvent or attempt to circumvent the notification requirements.

For additional information, please contact our [Knowledge and Innovation Group](#) lawyers or your regular contact person at Cuatrecasas.

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