



In this issue:

A new screening mechanism for certain M&A transactions involving companies that have received financial support from non-EU countries.

It also includes a new reporting obligation for participants to certain public procurement procedures that are foreign-subsidized entities.

Based on the European Regulation 2022/2560 on distortion of the Internal Market through Foreign Subsidies (“**FSR**”) the European Commission may investigate, and remedy subsidies received from non-EU countries that distort the EU internal market.

A new screening mechanism for certain M&A transactions involving companies that have received financial support from non-EU countries.

It also includes a new reporting obligation for participants to certain public procurement procedures that are foreign-subsidized entities.

1. Entry into force:

On July 10, 2023, the Implementing Rules of Regulation 2022/2560 were adopted through Regulation 2023/1441 (“**Implementing Regulation of FSR**”). Even though the FSR came into effect on July 12, 2023, businesses engaged in economic concentrations and participating in public procurement procedures that meet the criteria have been granted an adaptation period. As a result, the obligation to notify will begin from October 12, 2023. Nevertheless, If the financial thresholds are met, the filing obligation will apply to transactions signed on or after 12 July 2023 that have not closed before 12 October 2023.

2. Applicability

i. **Mandatory notification in the case of M&A transactions** if the following conditions are met:

- a. the target (in case of an acquisition), one of the merging parties (in case of a merger) or a joint venture, established within European Union, has derived an EU turnover of at least €500 million,
- b. within the last three years, foreign financial contributions from non-EU countries of at least €50 million were granted cumulatively: (i) in the case of an acquisition to the acquirer or acquirers and the acquired undertaking, (ii) in the case of a merger, to the merging undertakings, (iii) in the case of a joint venture, to the undertakings creating a joint venture and the joint venture.

ii. **Mandatory notification in the case of public procurement** if the following conditions are met:

- a. the estimated contract value is at least €250 million,
- b. the foreign financial contribution aggregately granted to 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 public procurement procedure, three years prior to notification, is equal to or greater than EUR 4 million per non-EU country.

3. What is considered a foreign financial contribution?

The FSR introduces a very broad notion of foreign financial contribution that may include:

- ✓ the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt-to-equity swaps or debt rescheduling,
- ✓ the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; but also
- ✓ the supply and purchase of goods and services, including ordinary-course arm’s length transactions.

4. Sanctions

Acquisitions of control, mergers, and the creation of joint ventures (JVs) that meet the thresholds are subject to the FSR suspensory pre-closing notification and approval.

As regards public procurement procedures, economic operators participating in a public procurement procedure, shall notify the contracting authority or contracting entity of all foreign financial contributions received. Once the notification or declaration is submitted, the contracting authority or contracting entity shall transfer the notification or declaration to the European Commission.

Non-compliance with the Regulation may result in various sanctions, including but not limited to:

- administrative fines, which may reach up to 10% of the company's annual aggregated turnover,
- imposing behavioral or structural remedies,
- recovery of the foreign subsidy,
- prohibition from participating in certain economic activities.

5. Next steps

- (a) Companies in ongoing transactions should assess the need for an FSR filing and evaluate its impact on the deal's risk and timing,
- (b) Deal documentation should include provisions for a potential FSR filing as part of the closing conditions, similar to merger control requirements,
- (c) Parties should engage in pre-notification discussions with European Commission to progress on draft filings and enhance the chances of a swift review after formal filing after 12 October,
- (d) Bidders in high-value public procurement procedures (i.e. large infrastructure, procurement of highly complex hardware/software solutions) should analyze the operational situation at a group level and at the level of association structures or consortia to which they are part, from the perspective of the obligations imposed by the FSR.

For further questions regarding the aspects mentioned in this alert, please contact us.



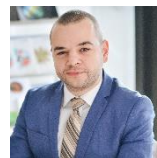
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