

Has my company received foreign subsidies that must be notified in the EU?

EU Foreign Subsidies Regulation

7 December 2023

According to the Foreign Subsidies Regulation¹ (**FSR**), as of 12 October 2023 all companies operating in the EU must notify concentrations and participations in public procurement procedures which meet certain thresholds where such companies have received foreign subsidies (**FS**) (i.e., subsidies from a third country (e.g., the UK or USA) not from a Member State of the EU).

Under the new rules, companies, regardless of whether they are EU-based or not, may be made subject to interim measures, redressive measures, requests for information and inspections as well as be fined up to 10% of their turnover in case of infringement. Absent notification, complaints by rivals are a likely possibility.

In the following sections, we explain (1) when a company must notify FS, (2) what triggers the obligation to notify, (3) how to identify a subsidy, (4) when a subsidy is granted by a third country, (5) the procedure for notification, and (6) the powers of the European Commission.

The objective of this document is to identify all risks to avoid pitfalls and to recommend best practices in relation with the new EU system of control of foreign subsidies.

Each section of this document addresses some of the main points that you and your organisation should know about the FSR. To receive further information or guidance on these or any other questions related to the FSR, do not hesitate to contact us.

Is my company obliged to notify?

The so-called “notifying party” varies according to whether the underlying situation relates to a concentration or to participation in public procurement procedures (see 2, below). Besides, as the term “company” relates to the group to which a company belongs, a remote subsidiary in the corporate chart may trigger the notification obligation for its holding company.

The notifying party in a concentration varies depending on whether it is a merger, an acquisition, or a JV. The notifying party in public procurement procedures includes the bidders to the contract and, under certain conditions, the main subcontractors, and main suppliers.

¹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

What triggers the obligation to notify?

Companies that enter into concentrations and companies that bid in public procurement contracts in the EU are obliged to submit a notification to the Commission (concentration) or to the contracting authority/entity (public procurement) provided the following thresholds are met.

A **concentration** is deemed to occur where a change in control results from either a merger, the acquisition of control of another company or the creation of a full-function JV.

Concentrations must be notified to the European Commission when the following thresholds are met:

- a One of the merging companies, the acquired company or the JV is established in the EU (i.e., has a subsidiary or a permanent establishment in the EU) and has an EU turnover above €500M, and
- b Any of the following: the merging companies, the acquirer(s), the acquired, the JV parents and the JV, received from third countries foreign financial contributions (**FFC**) > €50M in the last three years.

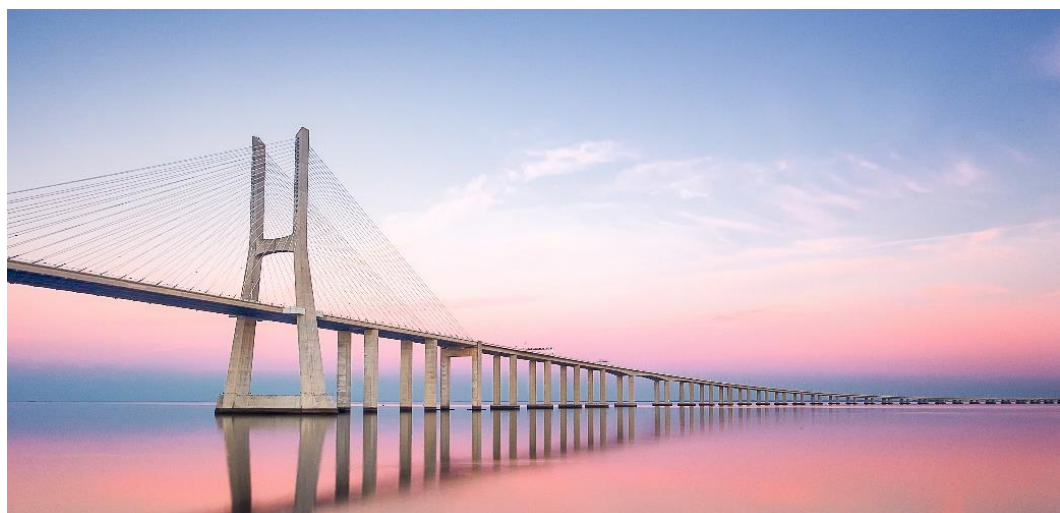
A notifiable concentration shall not be implemented before its notification and is subject to an initial **stand-still** obligation of 25 working days after a complete notification. If an in-depth investigation is opened, an additional stand-still obligation of 90 working days applies with a possibility of 15 working days extension if commitments are offered.

Notification in a **public procurement procedure** is compulsory if the following thresholds are met:

- a The value of the public procurement is at least €250M, and
- b The bidder, including its subsidiaries, its holding companies and, under certain conditions, its main contractors and suppliers were granted FFC > €4M per third country in the last three years.

In a public procurement procedure, a notification may be required or, if the FFC threshold is not met, a declaration listing all FFC received and confirming that FS are not notifiable. In addition, two types of notification are possible, a detailed notification or a lighter notification consisting of an overview of FFC of at least €1M.

Do contact us to understand the conditions for the above notification(s)/declaration.



What is an FS?

A pre-requisite for an FS is that an FFC exists, but not all FFCs are necessarily an FS. The identification of an FS requires a complex assessment but in essence, an FS is an FFC by a third country that confers an advantage and is limited to one or more companies/sectors of the economy.

The notification obligation under the new EU system of control of foreign subsidies relates to FFC and not to FS.

An FFC is any (i) transfer of funds (ii) foregoing of liabilities, and (iii) provision or purchase of goods or services to/by a foreign country to an undertaking.

If you get in touch with us, we would be happy to explain, by way of example, what are transfer of funds (e.g., capital injections, grants, loans, guarantees, fiscal incentives, setting off of operating losses, debt forgiveness and debt to equity swaps and rescheduling) and the foregoing of revenues.

The provision/purchase of goods or services is most controversial because interpreted extensively, any company that supplied/procured goods/services to/from a third country in the last three years' worth €50M (concentrations) or €4M (public procurement procedures) is obliged to notify. There are exceptions to the obligation of notification in cases where the goods/services were supplied/procured in open, transparent and non-discriminatory procedures (i.e., at market prices).

When is a subsidy “foreign”?

Only foreign contributions from a third country (i.e., not a Member State of the EU) are caught by the new system of the EU of control of foreign subsidies.

A third country includes the central government and public authorities of all levels (region, local...). In addition, actions by “public entities” and “private entities” can also be attributed to the third country.

The notion of public undertaking refers not only to companies whose capital is owned by the public sector (publicly controlled companies) but also to companies over which the state exerts a direct or indirect dominant influence. However, not every decision taken by a publicly owned/controlled company can be attributed to the third country. The State must be involved in the decision to adopt the measure and certain conditions be satisfied.

The action of a private entity can also be attributed to the State:

- **When acting as an intermediary (indirect aid).** A transfer of funds from the State to a private company, who then transfers the funds to the ultimate beneficiary. An example of this situation may exist when public funds are provided to airports, but the indirect recipients are the airlines using that airport.
- **When a stringent regulatory framework regulates certain transfers between private companies.** An example of this situation may exist when the State mandates certain compulsory financial contributions to be made to the beneficiary. The resources are not managed or administered by the State at any point, but the transfer was ordered by it.

The reference in the FSR to “elements such as the (...) economic environment prevailing in the State in which the entity operates, including the government’s role in the economy” coupled with the fact that no impact on the public budget is required by the FSR, will likely result in actions by private companies constituting an FFC under the FSR more easily than their equivalent under EU State aid law.

The notification

Bird & Bird can support companies with the entire notification process, including:

- how to fill in the relevant Form (Form FS-CO and Form FS-PP),
- the conditions for notification or declaration in public procurement procedures,
- the type of information required,
- how to negotiate pre-notification discussions and waiver requests,
- how to deal with confidential and personal data,
- the submission of supporting documentation, and
- the possibility of exceptions to the obligation to notify.

Powers of the Commission

The European Commission is the competent authority to apply the FSR and can act in three situations: (i) *ex officio* review of foreign subsidies, (ii) notification of concentrations and (iii) notification/ declarations of foreign financial contributions in the context of public procurement procedures.

According to public statements by high-ranking Commission officials, *ex officio* cases will not be a priority in the early stages of application of the FSR but rather the treatment of notifications².

The Commission is competent to balance the negative distortive effects of an FS in the internal market against its positive effects on the development of the subsidised economic activity (**balancing test**).

The Commission is entitled to order **redressive measures**, such as reducing capacity, publication of results of R&D, divestment of assets, dissolve the concentration, repayment of the foreign subsidy and adaptation of the governance structure of the company.

The Commission is entitled to accept **commitments** offered by the undertakings under investigation where such commitments fully and effectively remedy the distortion in the internal market of the EU and make the commitments binding on the companies.

The Commission is equally competent to adopt **interim measures**, such as offering access to infrastructure, production facilities, refraining from certain investments and licensing of IP or assets.

Companies can be made subject to **requests for information** and **interviews** with their staff as well as **inspections** within the EU and, under certain conditions, outside the EU. During inspections the Commission may request explanations in the form of **oral statements** from officials and external representatives of companies.

The Commission is competent to impose **finances** up to 1% of a company's turnover and **periodic penalty payments** up to 5% of the daily average turnover for infringements of a procedural nature such as the provision of incorrect or misleading information, refusal to provide complete answers on facts, refusal to submit to inspections, etc. Fines for substantive infringements such as not compliance with commitments, interim measures or redressive measures can be up to 10% of a company's annual turnover.



² Mlex 13 September 2023, *Football complaints over foreign subsidies aren't top priority, EU official Pesaresi says*.

Contacts



Morten Nissen

Partner

+4539141661
morten.nissen@twobirds.com



Janneke Kohlen

Partner

+31703538846
janneke.kohlen@twobirds.com



Marc Martens

Partner

+3222826090
marc.martens@twobirds.com



Dániel Arányi

Partner

+3613018920
daniel.aranyi@twobirds.com



Dr. Joerg Witting

Partner

+4921120056000
joerg.witting@twobirds.com



John Shi

Partner

+861059335678
john.shi@twobirds.com



Sandra Seah

Partner

+6564289429
sandra.seah@twobirds.com



*Federico Marini
Balestra*

Partner

+390669667006
federico.marinibalestra@twobirds.com



Thomas Oster

Partner

+33142686741
thomas.oster@twobirds.com