

Starter Kit: How to Prepare for Mandatory Notifications under the EU Foreign Subsidies Regime

October 2023

The new EU foreign subsidies regime will impact all multinational companies regardless of their country of origin. As of October 12, companies engaging in large transactions and bidding for large public procurement contracts in the EU are obliged to seek prior clearance from the European Commission. Implementing rules provide some welcome reporting relief, but the notification process requires that companies put in place mechanisms to track in real time a wide range of foreign financial contributions granted directly or indirectly from non-EU state funding.

Being prepared will avoid negatively impacting your ability to bid for large tenders or having a transaction held up because the review deadlines do not start running unless the foreign subsidies' notification is complete. Upfront preparation will also allow you to engage early in prenotification contacts with the Commission to obtain waivers where appropriate to further reduce the notification reporting burden.

This Starter Kit provides a high-level summary of the new regime and some tips on how to approach setting up a system that will allow you to gather the information you will be required to report on should you trigger a notification. If you are interested in learning more, including having access to our FSR Reporting Tool and related Q&A, please reach out to your usual Baker McKenzie contact or one of our FSR experts.

1. INTRODUCTION

The EU Foreign Subsidies Regulation ("FSR")¹ means that:

- As of **12 July 2023**, the Commission is able to examine on its own initiative any economic activity in the EU benefitting from a third country subsidy that may have distortive effects, *including* in relation to concentrations and public tenders that do not meet the notification thresholds.
- as of **12 October 2023**, **concentrations**² and **large public tenders** above certain monetary thresholds have to be notified to the European Commission for prior approval where the companies involved have benefitted from financial contributions from non-EU third countries.³
- "In-between": Concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired on or after 12 July but that have not closed before 12 October 2023, are subject to FSR notification.

The Regulation and its implementing rules impose reporting obligations that are disproportionately burdensome. Not only because the notification thresholds are set at a low level, but also because the information to be reported is not readily available at any company. In essence, the FSR is based on a very far-reaching concept of "foreign financial contribution" and requires notifying companies to identify and report all foreign financial contributions (with some limited exceptions), *regardless* of whether such contributions constitute a foreign subsidy liable to distort competition within the EU internal market.

This Starter Kit does not address the heightened risk of *ex officio* investigations that might be expected in certain "strategic" industries or sectors (tech, energy, innovation are some obvious potential candidates) based on the perceived availability of significant foreign subsidies in a complex and rapidly evolving geopolitical environment. Nor does it focus on the specific challenges that the FSR poses for third-country State-owned enterprises. It is designed to assist the majority of multinationals that will trigger mandatory filings that are unlikely to raise any material substantive issues.

We aim to:

1

help you understand what is included in the concept of foreign financial contributions, and

2

guide you on how to prioritise identifying what are likely to be the most pertinent foreign financial contributions for any notification you may face in the short-term.

This guidance does not assure that you are in full FSR compliance. It is the minimum required for you to be able to demonstrate a good faith effort to gather the most relevant information. It will help you prepare when seeking reporting waivers during pre-notification discussions should you find yourself in a position of having to notify in the uncertain early months/years of the new regime.

Compared to draft rules published earlier this year, the final Implementing Regulation⁴ includes some significant carve outs from the foreign financial contribution reporting obligations that will make compliance more manageable by introducing different reporting levels.

Section 2 below is a reminder of the notification thresholds. **Section 3** explains the broad notion of "foreign financial contributions". **Section 4** sets out the different reporting levels.

Section 5 provides a suggested roadmap on how to start identifying and tracking those financial contributions that the Commission is most likely to be interested in substantively examining as foreign subsidies capable of distorting competition in the EU internal market.

For more details on the substantive FSR rules, please click [here](#).

¹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 23.12.2022, L 330/1.

² A concentration refers to any change of control on a lasting basis resulting from either: (i) the merger of two or more previously independent undertakings or parts of undertakings; (ii) 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; or (iii) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

³ A third country is any country that is not an EU Member State. The FSR covers any non-EU country government (central, regional or local), public authority, or public or private entity whose actions can be attributed to the state.

⁴ Commission Implementing Regulation (EU) 2023/1441 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, OJ 10.07.2023, L 177/1.

2. TRIGGERING THRESHOLDS

Concentrations

Notification is required where:

- the target, the full-function JV or at least one of the merging parties is established in the EU and generated more than EUR 500 million revenue in the EU in the prior financial year, and
- the foreign financial contributions granted to all the undertakings concerned⁵ in aggregate are above EUR 50 million over the three years prior to the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

Public tenders

Bids in response to tenders organised by EU Member State contracting authorities must be notified where:

- the tender has a value of at least EUR 250 million (and, in case the tender is divided in multiple lots, the aggregate value of the lots applied for is at least EUR 125 million), and
- the bidder (and related undertakings including its main subcontractors and suppliers) have received financial contributions of EUR 4 million from a single third country in the three years prior to the notification.



In the unlikely event that the EUR 4 million threshold is not exceeded in any single third country, you will have to make a detailed declaration of all reportable foreign financial contributions granted by any third country and declare that they are below the threshold.



If your bid relies on subcontractors or suppliers which ensure key elements of the contract performance or have a contribution exceeding 20% of the total value of the bid submitted, you will be required to notify/report on the financial contributions received by those companies as well.

Reminder: The notifications are mandatory and have suspensive effect which means that a concentration cannot be implemented, or a large public tender cannot be awarded, before obtaining approval from the Commission. Failure to comply can attract fines of up to 10% of global revenues.

⁵ "Undertakings concerned" are (i) in the case of an acquisition: the target and the acquirer (considered at group level); (ii) in a JV: the JV and the parents (considered at group level); (iii) in a merger: the merging parties (considered at group level).

3. WHAT IS A FINANCIAL CONTRIBUTION?

The notion of financial contribution as defined in Article 3(2) FSR is extremely broad. In essence, it covers three main categories:



1. **The transfer of funds or liabilities:** this includes all types of direct transfers of funds (such as grants, fiscal incentives, loans, capital injections/increases, the set-off of operating losses, debt forgiveness), as well as potential direct transfers of funds (e.g., loan guarantees or credit lines).



2. **The foregoing of revenue that is otherwise due or the granting of special or exclusive rights:** this includes different tax or VAT incentives (investment tax credits, R&D credits, etc.), tax exemptions (e.g., exemption from local property tax, patent boxes), reductions in social security contributions, as well as the granting of exclusive concessions without appropriate remuneration (e.g., mining rights or land use rights).



3. **The provision or purchase of goods or services:** this includes any sale to or purchase from a public entity (including private entities which are ultimately controlled by a public authority) regardless of whether the sale/purchase was the subject of a tender procedure or concluded at arms' length/market conditions (e.g., public utility bills for gas, water and electricity, payments for postal services, waste collection and other public services).

Please refer to **Annex 1** for more granular detail on what is capable of falling within each of these three main categories.

4. REPORTING ON FOREIGN FINANCIAL CONTRIBUTIONS

The Implementing Regulation provides significant carve-outs from the foreign financial contribution reporting obligations that will make compliance more manageable, if still burdensome. However, these carve-outs do not apply to the determination of whether the notification threshold is met.

Three different reporting levels can be distinguished:

1

No reporting

Certain categories of foreign financial contributions are not reportable, namely:

- individual contributions below EUR 1 million;
- sales/purchases of goods/services (except financial services) to/from third countries' public bodies on market terms in ordinary course of business;
- certain identified tax benefits/measures (including social security deferrals, tax amnesties and holidays) of general application;
- tax reliefs to avoid double taxation in line with bilateral or multilateral agreements as well as unilateral tax reliefs for the avoidance of double taxation under national law following the same logic and conditions.

In case of acquisitions of control or creations of joint ventures by an investment fund or by a legal entity controlled by or via an investment fund, foreign financial contributions received by other funds (or their portfolio companies) that are controlled by the same investment company but are not involved in the concentration are not reportable, provided:

- i. the fund which controls the acquiring entity is regulated under EU⁶ or equivalent third country legislation; and
- ii. the majority of the investors in the fund controlling the acquiring entity and the other funds not involved in the concentration are different (majority is measured according to entitlement to receive profits); and
- iii. there are no (or limited) economic and commercial transactions between the fund controlling the acquiring entity and the other funds/portfolio companies not involved in the concentration (in the last three years).

2

Detailed reporting

Detailed reporting⁷ will be required for the foreign financial contributions that are not subject to the specific carve-outs (see 1 above), and that:

- Individually **exceed EUR 1 million, and**
- May qualify as one of the **"most likely distortive"** categories of subsidies (Article 5(1) FSR):
 - Subsidies granted to ailing firms with no viable restructuring plan that are otherwise likely to go out of business in the short or medium term
 - Unlimited guarantees for debts or liabilities

⁶ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers

⁷ The reporting requirements entail the provision of details on the form, amount, purpose and economic rationale of the financial contribution, as well as any conditions attached to the foreign financial contribution, the main elements and characteristics (e.g., interest rates and duration in the case of a loan), and any supporting documentation. The requirements also entail an explanation of whether the contribution confers a benefit and is limited in law or in fact. In public procurement cases there must be an explanation of whether the contribution has been granted only for operating costs exclusively limited to the tender at stake, and finally a justification for absence of unduly advantageous tender.

4. REPORTING ON FOREIGN FINANCIAL CONTRIBUTIONS

- Export credits that are not compliant with the OECD Arrangement on officially supported export credits
- Subsidies directly facilitating a specific merger / enabling submission of unduly advantageous tender

3

Simplified reporting

Finally, the last reporting category requires simplified reporting of other⁸ foreign financial contributions that in aggregate, per country amount to:

- EUR 45 million or more in the context of a concentration
- EUR 4 million or more in the context of a large public tender

These financial contributions need to be reported using a table form overview:

Third-country	Type of financial contribution ⁹	Brief description of the purpose of the financial contribution and the granting entity ¹⁰
Country A	Type 1	
	Type 2	
	Type 3	
	Type 4	
Total estimated financial contributions granted by A: EUR [...] ¹¹		

⁸ Other refers to foreign financial contributions not subject to specific reporting exemptions or detailed reporting requirements (see 1 and 2 above).

⁹ Example: direct grant, loan/financing instrument/repayable advances, tax advantage, guarantee, risk capital instrument, equity intervention, debt write-off, contributions provided for the non-economic activities of an undertaking (see recital 16 FSR), or other.

¹⁰ General description of the purpose of the financial contributions included in each type and of the granting entity(ies). For instance, 'tax exemption for the production of product A and R&D activities'; 'several loans with State-owned banks for purpose X'; 'several financing measures with State investment agencies to cover operating expenses/for R&D activities'; 'public capital injection in Company X'.

¹¹ Use the following ranges: less than EUR 45 million (only applicable in case of public tenders), EUR 45-100 million, EUR >100-500 million, EUR >500-1,000 million, more than EUR 1,000 million.

5. HOW TO PREPARE FOR NOTIFICATION

The FSR Implementing Regulation strongly encourages notifying parties to engage in pre-notification discussions to ensure that notification is complete and where useful to agree with the Commission on waivers from the reporting obligations in relation to information that is either (1) irrelevant for the assessment of the concentration or public procurement procedure in question, or (2) not reasonably available to them.

Unless and until the Commission provides for broad upfront waivers of general application, it will not be feasible to rely solely on pre-notification discussions to manage a timely FSR approval process. Given the many uncertainties as to how the FSR will apply in practice, we propose the following stepped approach to initial preparations, with a view to facilitating meaningful pre-notification discussions in the event a notification is required in the early days of the new regime.

Step 1: Prepare for future reporting based on FSR risk profile

We recommend engaging with your business to consider:

- whether your corporate strategic planning allows you to predict with any certainty which business line / group company is most likely to be involved in the next potentially notifiable concentration, and
- which large public tenders in your sector may trip the notification thresholds (we can provide some guidance based on publicly available information about prior tenders that would qualify).

This will allow you to prioritise information gathering on those group entities of most relevance. On this basis, you can prepare to:

- (1) explain in writing the process and filters used to produce the list of group companies for which you will report as well as the relevant foreign financial contributions (reporting is narrower in the procurement context, see Step 2 below);
- (2) provide reasons why the chosen filters are justified in light of the concentration/public procurement in question, and formulate waiver requests for types of financial contributions and/or group companies/business lines which have been filtered out by virtue of this process;
- (3) collect additional information such as analyses, reports, studies, surveys, presentations or comparable documents from the grantor/recipient illustrating the purpose and economic rationale of those foreign financial contributions listed as "most likely to be distortive" and in relation to which the Commission has indicated it will likely not grant waivers (see Step 3 below); and
- (4) if necessary, explain by reference to the group structure and (likely) transaction financing structure why the foreign financial contributions received cannot have facilitated the concentration or contributed to the submission of an "unduly advantageous" tender or in any other way have distorted competition in the EU.

Step 2: Collect information for simplified reporting

As a next step, you should prepare for the simplified reporting by collecting relevant information on all other foreign financial contributions granted to the notifying parties which are not excluded from the reporting obligations.

As a reminder, no information should be collected on those foreign financial contributions that fall within the following categories:

- individual contributions below EUR 1 million;
- sales/purchases of goods/services (except financial services) to/from third countries' public bodies on market terms in ordinary course of business;
- certain identified tax benefits/measures (including social security deferrals, tax amnesties and holidays) of general application;
- tax reliefs to avoid double taxation in line with bilateral or multilateral agreements as well as unilateral tax reliefs for the avoidance of double taxation under national law following the same logic and conditions.

5. HOW TO PREPARE FOR NOTIFICATION

Information need only be reported for the notifying parties, which are:

- in case of a concentration: either all the parties to the merger or, in the case of an acquisition of control, to all the undertakings or persons acquiring sole or joint control of the whole or parts of one or more undertakings.¹²
- In case of a public procurement procedure: the economic operators and its main subcontractors and suppliers.

The information to be collected should include country of origin and the issuer of the financial contribution, the granting date, the amount of the contribution, and a summary description (as per our **FSR Reporting Tool**).

Step 3: Identify those foreign financial contributions "most likely to be distortive"

The Commission has identified a limited subset of subsidies that are most likely to be viewed as distortive (Article 5(1) FSR). The notification forms require the parties to provide detailed information on foreign financial contributions that may relate to these categories of subsidies granted during the last three years before the transaction or tender, provided they exceed EUR 1 million individually. Since it is highly unlikely that the Commission will grant a waiver in relation to these foreign financial contributions, companies should proactively identify and track them. They are:

- foreign financial contributions granted to an ailing undertaking** (i.e., an undertaking that would likely go out of business in the short or medium term but for the foreign financial contribution received);
- foreign financial contributions in the form of an unlimited guarantee** for the debts or liabilities of the undertaking without any limitation as to the amount or the duration of such guarantee;
- export financing measures** that are not in line with the OECD Arrangement on officially supported export credits;
- foreign financial contributions directly facilitating a concentration**; and
- foreign financial contributions enabling an undertaking to submit an unduly advantageous tender**.

For most private or publicly quoted multinationals, the focus will be on categories d) and e). Category a) will ordinarily not be relevant for large multinationals. Category b) is mostly likely only relevant for Chinese and other third-country State-owned enterprises.

Export financing measures under category c) should be readily identifiable. Normally, the relevant measure – where obtained from OECD member countries and others subscribing to these OECD rules – will refer to its compliance with the OECD Agreement.¹³ Where such a reference is not included, and confirmation of compliance with the OECD Agreement cannot be obtained from the issuing agency, export financing measures should be reported.

With regard to support directly facilitating a concentration (category d), the Commission will likely be most interested in those third-country measures that have a direct impact on the ability of the acquiring undertaking to finance the transaction (e.g., the provision of low interest rate loans, government guarantees, or the injection of fresh capital into the acquiring undertaking). Companies should not only seek to identify and quantify these contributions but also to compile relevant internal data, and documentation from the grantor/recipient, that shed light on their purpose and economic rationale. This will be necessary to justify why any support is not a subsidy or is not capable of negatively impacting competition in the EU internal market.

In relation to contributions that facilitate "an unduly advantageous tender" (category e), the Implementing Regulation and notification form stipulate that the focus will be mainly on those **financial contributions covering operating expenses** linked exclusively to the public procurement procedure at stake. Operating expenses are

¹² In case of concentrations, the term 'notifying party(ies)' includes, (i) all the undertakings that are solely or jointly, directly or indirectly, controlled by the 'notifying party(ies)' in accordance with Article 20(5) and 20(6) of Regulation (EU) 2022/2560, (ii) all the undertakings or persons that solely or jointly, directly or indirectly, control the 'notifying party(ies)', and (iii) the undertakings controlled by the undertakings referred in point (ii).

¹³ The OECD Arrangement on officially supported export credits applies to all official support provided by or on behalf of a government for export of goods and/or services. It lays down detailed rules on down payments, repayment terms, maximum official support, interest/premium rates, credit risk rates which need to be satisfied by those export credits, as well as the categories of goods and/or services which are excluded from this Arrangement (e.g., export of parts for coal-fired electricity generation plants). Participants are composed of Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland, Turkey, the United Kingdom and the United States.

5. HOW TO PREPARE FOR NOTIFICATION

those which the bidder would incur in its day-to-day management, and may include full or partial exemption from paying social security contributions, the purchase of utilities at preferential rates from state-owned entities, subsidies received for training staff, etc..

For these foreign financial contributions you should collect the data needed to explain why any relevant contributions under this category does not permit the submission of a tender that is "unduly advantageous", primarily with respect to pricing (rather than innovation or quality). To this end, the financial contributions received by the group companies involved in producing the tendered goods or services should be identified and related documentary evidence for each identified financial contribution be collected on:

- **the availability** (e.g., is the funding generally available to all businesses or specific to a particular industry or type of undertakings),
- **the purpose** (emissions reductions, etc.), and
- **the amount** (absolute amount and amount relative to costs incurred, etc.).

These factors will permit you to engage with the Commission on the substance in arguing that any relevant contributions do not amount to a foreign subsidy, or to establish that the subsidy is not capable of distorting competition in the EU internal market.

Annex 1: "foreign financial contributions" explained

The FSR is targeted at potential distortions arising in the EU internal market from foreign subsidies. But the notification mechanisms for concentrations and public tender bids are triggered not by the receipt of foreign subsidies, but by the receipt of third country "financial contributions". This is a much broader concept that extends significantly beyond the grant of subsidies that are defined by the presence of a selective advantage or specific benefit under EU State aid and WTO anti-subsidy rules respectively.

Financial contributions capture a broad range of public measures including many day-to-day commercial and economic relationships with public bodies and companies (including state-owned enterprises and certain private companies) whose actions are attributable to a third country, even where those relationships are based on market terms or are completely unrelated to a specific concentration or public tender. Accordingly, many benign transactions and public tender bids will inevitably come within the scope of the FSR's compulsory notification regime.

To help you understand the broad concept of financial contributions, we have identified below what we consider to be the most likely categories. The illustrative list reflects EU and WTO case law and is not exhaustive.



I. Transfer of funds/liabilities by third countries

- capital injections whether or not at market conditions (e.g., made at the same time, terms and conditions of significant capital provided by private co-investors)
- grants related to R&D and industrialisation, technological upgrades and innovation (including for example, special funds for promoting technological progress and technological transformation projects)
- debt-to-equity swap intended to address the deteriorating financial condition of the recipient company
- guarantees, whether or not provided at market conditions
- loans granted by national promotional banks, whether or not priced at market conditions
- debt forgiveness, whether or not available at the same time from private creditors
- grants for training of employees, whether or not provided at market conditions
- compensation for making good damage caused by natural disasters, whether or not generally available to all businesses
- export credits, export guarantees or insurance, whether or not provided at market conditions
- reductions or refunds of energy costs in the form of grants, whether or not generally available to all businesses.



II. Fiscal incentives

The notion of financial contribution encompasses tax exemptions regardless of whether they are justified by objective, non-selective criteria which are often automatically and generally available from government bodies or public authorities (at any level) based on statutory provisions of law, including for example:

- property transfer relief, by which governments and/or public authorities provide tax exemptions to private companies seeking to transfer property in the context of internal group restructurings (where a "transfer tax" or "stamp duty" would otherwise apply)
- offsetting losses, by which companies are permitted to offset tax losses from prior years under the rules of most tax systems, as a matter of ordinary course, provided certain conditions are met
- import duty credits for input materials or equipment
- local/municipal government preferential income tax rates for enterprises based on geographic location, or temporary exemptions of tax on immovable goods granted by a local authority to attract investments
- exemption from property tax for a small sales office or other entity

Annex 1: "foreign financial contributions" explained

- investment or R&D tax credits



III. The supply of any goods or services to third countries even if at arm's length or following a procurement procedure

- the supply of enterprise software products to public sector bodies under subscription
- the direct sale of products to public healthcare systems and direct sales to public hospitals (indirect sales through non-controlled distributors are not FSR relevant, nor are sales to private hospitals if reimbursement by public healthcare system is not made to the seller)
- the supply of any other product or service to governments, public authorities, public entities or private entities which actions are attributable to a third country



IV. The receipt/purchase of goods or services from any third country even if market price is paid

- the supply of land use rights, including usufruct, or the rental of buildings from state-controlled enterprises
- the granting of mining rights to companies
- the sale of land or the lease of facilities at industrial sites
- the government-mandated purchase of domestic products
- the purchase of electricity, gas, water (and other utilities or services) from state-controlled utilities companies
- paying rates on water usage in a manufacturing or office facility to a state-controlled company or government entity.