

# European Union: Foreign Subsidies Regulation (FSR) Update

EU Commission's FSR Guidelines fail to deliver on necessary legal certainty

## In brief

On 9 January 2026, the Commission published guidelines on the application of certain provisions of the FSR ("**FSR Guidelines**").

The FSR Guidelines provide guidance to companies engaged in M&A and public procurement in the EU on how the Commission will assess under the FSR (i) the criteria for distortion of competition; (ii) the balancing test for positive and negative effects on competition, and (iii) the Commission's powers to request prior notification of below-threshold transactions and public procurement procedures.

The FSR Guidelines provide a roadmap for companies to argue why their transaction or participation in public procurement procedures should not raise concerns under the FSR and should be carefully considered when preparing for future notifications to the Commission under the FSR.

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## Key takeaways

The FSR Guidelines serve as a reminder that companies have every interest in being prepared as best as possible to tackle potential FSR concerns. In that context, companies which regularly participate in public procurement procedures in the EU or contemplate acquiring companies with an EU presence, should consider:

- Preparing a **comprehensive database** covering the **foreign financial contributions** received over the past three years;
- Developing arguments on why legal, contractual, functional and economic barriers minimize or **rule out the risk of cross-subsidisation**;
- Identifying those foreign subsidies that might raise concerns and **documenting the positive effects** these have brought for the EU or EU policy objectives; **Assessing the risk for a call-in by the Commission** in case of acquisition of strategic assets in the EU and prepare arguments why you have not benefitted from distortive foreign subsidies.

## Introduction

The EU Foreign Subsidies Regulation,<sup>1</sup> which entered into force on 12 July 2023, aims to subject subsidies granted by non-EU countries to the same sort of scrutiny as applies to EU Member State subsidies under EU State aid rules. By doing so the FSR should, according to the European Commission ("**Commission**"), contribute to the proper functioning of the internal market and ensure a level playing field for all companies active in the EU.

Two and a half years after its entry into force and 21 months after the start of the obligation to notify qualifying transactions and participation in large public procurement procedures, the Commission published on 9 January 2026, guidelines on the application of

<sup>1</sup> Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, 2022 O.J. L 330/1.

certain provisions of the FSR.<sup>2</sup> The FSR Guidelines cover: (i) the criteria for distortion of competition under Article 4(1) FSR; (ii) the test to balance the positive and negative effects on competition caused by a foreign subsidy under Article 6 FSR and (iii) the Commission's call-in powers to request prior notification of transactions and foreign financial contributions in public procurement.

While the FSR Guidelines clearly set out the different steps that the Commission will take in assessing distortion of competition in the EU and performing the balancing test, they fail to provide much needed legal certainty on how the Commission will exercise its wide discretion when actually reviewing the notifications or conducting an *ex officio* investigation. In addition, there are no limitations on the Commission's call-in powers to request prior notification of below-threshold transactions. The FSR Guidelines are therefore a missed opportunity to deliver on the Commission's broader simplification and competitiveness agenda and the objective of "reducing drastically the regulatory and administrative burden" and making EU administrative processes "simpler, faster, and lighter".<sup>3</sup>

## Distortion of competition: Two step test with limited safe harbours

In line with Article 4(1) FSR, the FSR Guidelines confirm that in order for a foreign subsidy to be distortive of competition in the EU, two cumulative conditions must be met. First, the foreign subsidy must be liable to improve the competitive position of the undertaking in the EU, and second, the foreign subsidy must, actually or potentially, negatively affect competition in the internal market.

With regards to the first condition (improvement of competitive position), the FSR Guidelines distinguish between targeted and non-targeted foreign subsidies.

Targeted foreign subsidies are those that support, directly or indirectly, the undertaking's economic activities in the EU, either because the purpose, nature and scope of the foreign subsidy shows that they are targeted at the EU (e.g., subsidy conditional on making an investment in the EU) or because the Commission can show that the undertaking uses or intends to use the foreign subsidy for its economic activities in the EU. For these targeted foreign subsidies an improvement of the competitive position is presumed.

For non-targeted foreign subsidies (e.g., foreign subsidies of general scope and objectives which can be used for any economic activity), the Commission will assess the risk of them being used to cross-subsidise economic activities in the EU. With regard to cross-subsidisation, the FSR Guidelines essentially introduce a reversal of the burden of proof, as the Commission states that absent credible legal or economic factors which prevent or render unlikely a transfer, the Commission may assume that the foreign subsidy is liable to improve the undertaking's competitive position. Factors that may be put forward as showing the legal or economic hurdles for cross-subsidisation include significant differences in shareholding between different group entities; absence of close functional, economic or organic links; binding agreements with third parties preventing cross-subsidisation; or applicable law and regulations preventing cross-subsidisation. Transfer pricing rules and internal group policies are generally not considered to be sufficient to rule out the existence or possibility of cross-subsidisation.

Finally, the FSR Guidelines introduce limited safe harbours for types of foreign subsidies which the Commission considers not to be liable to improve the competitive position in the EU and therefore do not require further investigation under the FSR.

The most helpful safe harbours cover subsidies:

- a) To address market failures outside the EU and which relate to activities taking place exclusively outside of the EU (e.g., subsidies which had they been granted by EU Member States would have complied with the General Block Exemption Regulation (which allows EU Member States to grant certain types of State aid without prior Commission approval);
- b) Under *de minimis* amounts (i.e., EUR 4 million collectively or EUR 200,000 from a single non-EU country over any consecutive period of three years); and
- c) Of an amount that is insignificant in relation to the undertaking's economic activity in the EU.

With regard to the second condition (actual or potential negative effect on competition), the FSR Guidelines provide that, above the *de minimis* thresholds (i.e., EUR 4 million collectively or EUR 200,000 from a single non-EU country over any consecutive period of

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<sup>2</sup> Communication from the Commission - Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, 9 January 2026, C(2026) 42 final, available [here](#).

<sup>3</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_339](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339). See also [https://commission.europa.eu/news-and-media/news/commission-proposes-cut-red-tape-and-simplify-business-environment-2025-02-26\\_en](https://commission.europa.eu/news-and-media/news/commission-proposes-cut-red-tape-and-simplify-business-environment-2025-02-26_en)

three years), any negative impact on competition is considered to be appreciable. Combined with the fact that there is no need to prove actual harm to competition, the harm does not need to be in the same market as where the undertaking is active (i.e., it can take place upstream, downstream, or in an otherwise related market) and the subsidy does not need to be the sole or main cause of the negative effect on competition, there is effectively a presumption that if the foreign subsidy improves the competitive position of the undertaking this will lead to an actual or potential negative impact on competition. This is similar to the position under EU State aid law.

Specifically in relation to the assessment of distortion in the public procurement context, the FSR Guidelines provide for three key steps: (i) determining the advantageous nature of the tender; (ii) assessing whether the advantage is undue (i.e., stemming from the foreign subsidy rather than market efficiencies or innovation); and (iii) evaluating the actual or potential negative effect on competition in the procurement process. In particular, the Commission examines if the foreign subsidy allows the operator to offer more favorable terms (e.g., lower prices, better quality, or improved delivery conditions) that would not have been possible absent the foreign subsidy. The FSR Guidelines further provide that the Commission might in this context not only look at foreign subsidies granted to the economic operator (and the companies in the vertical control chain) and the main suppliers or subcontractors, but also to foreign subsidies granted to other companies in the corporate group of the economic operator, main supplier or subcontractor. This is a clear widening of the scope compared to the Implementing Regulation.

## Balancing test: Strict test to show positive effects

The FSR Guidelines set out how the Commission intends to apply the balancing test during which the Commission will determine whether the positive effects of the foreign subsidy outweigh the negative effects on competition.

The FSR Guidelines helpfully acknowledge that positive effects can be generated outside of the market where the undertaking is active (as with possible negative effects) and even outside the EU. In addition, the FSR Guidelines clarify that positive effects can be looked at in aggregate across several foreign subsidies and can potentially outweigh any negative effect, although it is unlikely to do so if the undertaking has benefitted from the most likely distortive subsidies listed in Article 5(1) FSR.<sup>4</sup> Positive effects can be linked to address market failures (e.g., non-competitive pricing, absence of R&D/innovation), contributing to EU policy objectives in the EU (e.g., decarbonisation) or outside the EU (e.g., contribution to social standards outside EU). Specifically with regard to public procurement, the absence of alternative sources of supply can be taken into account and the fact that without the participation of the subsidised tender the public policy objective of the contracting Member State cannot be attained may be considered as a positive effect outweighing the potential negative effects on competition caused by the foreign subsidy.

The burden of proving the positive effects of the foreign subsidies rests on the undertaking claiming them. In that respect, the FSR Guidelines have put in place a strict test. The undertaking must, to successfully argue positive effects, substantiate three points:

- **Specific:** The positive effects must be causally attributable to the foreign subsidy itself and not to the general activity of the undertaking, this can be shown through a counterfactual analysis setting out the conduct without the presence of the subsidy.
- **Material:** The effects must be significant and based on evidenced, not marginal or theoretical.
- **No Less-Distortive Alternative:** The undertaking must show that the same benefits could not have been achieved without the distortion, or via less distortive mechanisms.

In order to allow the Commission to take the positive effects properly into account, the undertaking should be mindful of presenting these positive effects as soon as possible in the notification process.

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<sup>4</sup> Article 5(1) FSR provides that the following subsidies are considered most likely distortive: (i) subsidies to companies likely to go insolvent without support and which lack a viable restructuring plan; (ii) guarantees provided by a non-EU country for debts or liabilities without limit on amount or duration, (iii) non-OECD compliant export financing that does not follow the Arrangement on Officially Supported Export Credits; and (iv) subsidies that directly facilitate a merger, acquisition, or joint venture/ subsidies enabling a company to submit an unduly advantageous tender in a public procurement procedure.

## Call-in powers: Commission left with wide discretion

The FSR Guidelines provide limited restrictions on the Commission's power to require notification of below-threshold transactions or foreign subsidies in public procurement procedures.

The FSR Guidelines introduce two safe harbours where the Commission will not require prior notification. First, the Commission will not require prior notification where it can establish with sufficient certainty that the aggregate amount of foreign subsidies in the past three years does not exceed EUR 4 million or where the foreign subsidies were granted to make good damages from natural disasters/exceptional occurrences. Second, no notification will be required for public procurement procedures with an estimate contract value below the thresholds of the EU Public Procurement Directive.

Beyond those safe harbours, the FSR Guidelines clarify that the Commission will consider the following factors to determine whether a notification might be required:

- Whether the turnover of the target actually reflects the economic activity in the EU;
- Strategic importance of the activity, sector, supply chain of undertaking concerned, notably in relation to strategic assets or innovative technologies;
- Patterns in investments, acquisitions or participation in public procurements which create an economic presence or influence;
- Previous decisions finding distortive subsidies in the sector or for the undertaking;
- Contextual elements indicating a likelihood of distortion.

The list of criteria that the Commission will take into account is welcome, but it is concerning that this list is very broad and open-ended, leaving significant discretion to the Commission to exercise its call-in powers.

This, coupled with the fact that the Commission is not willing to commit to any cut-off date after which they will no longer exercise their call-in power, leaves businesses with considerable legal uncertainty.

## Next steps

Following the publication of the FSR Guidelines the Commission will now continue the preparation of the first evaluation report on the implementation of the FSR which needs to be published by 12 July 2026. Amongst calls from businesses and certain Member States for a drastic reform of the FSR regime, including the removal of the mandatory notification regimes, it will be interesting to see what changes to the FSR, if any, the Commission will propose.

In the meantime, the FSR Guidelines serve as a reminder that companies have every interest in being prepared as best as possible to tackle potential FSR concerns. In that context, companies which regularly participate in public procurement procedures in the EU or contemplate acquiring companies with an EU presence, should consider:

- Preparing a **comprehensive database** covering the **foreign financial contributions** received over the past three years;
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Pavlo Prokhorov, Associate, has contributed to this legal update.

## Contact us



**Bram Hoorelbeke**

Counsel

[bram.hoorelbeke](mailto:bram.hoorelbeke)

[@bakermckenzie.com](https://twitter.com/bakermckenzie)



**Alexandra Gracia de Torres**

Associate

[alexandra.graciadetorres](mailto:alexandra.graciadetorres)

[@bakermckenzie.com](https://twitter.com/bakermckenzie)

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