

New notification requirements for mergers and public procurement procedures enter into force

The Foreign Subsidies Regulation: Practical implications for reporting obligations

On 12 October 2023, the obligations under Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (the “**Regulation**” or “**FSR**”) to notify the European Commission of concentrations and public procurement procedures in which the thresholds set out in the Regulation are met, finally entered into force.

This means that all the provisions of the Regulation are now in force, except for three provisions concerning the duty of cooperation on the part of Member States, their officials and other public authorities in inspections that may be carried out by the European Commission under the Regulation (Article 14(5), (6) and (7) of the FSR), which will not apply until 12 January 2024.

The innovative nature of this Regulation has left some companies wondering about the scope of this new regime, so we will answer the most frequently asked questions:

1. Which companies are bound by the new reporting regime?

The undertakings affected by the FSR:

i) Include all companies, whether public (directly or indirectly State-controlled) or private, involved in any of the transactions concerned and which carry out their economic activity or part of it in the EU internal market, which have received financial support from third States; regardless of the economic sector concerned (including sovereign wealth funds, investments by public companies or companies that receive public funding).

ii) Include all public authorities covered by EU public procurement rules.

iii) Thresholds must be met by distinguishing between:

A) Concentration procedures. A double threshold must be cumulatively met:

- **Turnover threshold:** In the case of mergers, at least one of the merging companies; in case of acquisitions, the acquired undertaking; and in case of the creation of a joint venture, the joint venture; is established in the European Union and generates an aggregate EU turnover of at least EUR 500,000,000. Its analysis is carried out in a manner equivalent to the merger control procedure.
- **Threshold for financial contributions received:** The parties must have received combined financial contributions exceeding EUR 50,000,000 from third countries in the three years preceding the transaction.

B) Public procurement procedures. The double threshold must be cumulatively met:

• **Threshold relating to the value of the public contract:**

- a) In the case of single contracts, the estimated value of the public contract, framework agreement or specific contract under the dynamic purchasing system, excluding VAT, must be equal to or greater than EUR 250,000,000.

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b) In the case of contracts divided into lots: the estimated value of the contract, excluding VAT, must exceed the threshold of EUR 250,000,000; and the value of the lot or the cumulative value of all lots for which tenders are invited must be equal to or greater than EUR 125,000,000.

- **Threshold for financial contributions received:** In the three financial years preceding the notification, the economic operator must have received aggregate financial contributions of EUR 4,000,000 or more per third country.

2. What financial contributions do I have to report?

The concept of financial contribution is broader than that of a foreign subsidy distorting the internal market. An undertaking may be required to report a transaction due to the volume of foreign contributions, and yet not receive any domestic market-distorting subsidy.

The FSR does not include an exhaustive or *numerus clausus* list of financial contributions. It only includes generic categories (the transfer of funds or obligations; the forgoing of revenues that would otherwise be due; the provision and/or purchase of goods or services) that help to classify the specific measures on the basis of which financial contributions from third countries may be granted.

The following must be reported: (i) financial contributions that the FSR considers to have a higher likelihood of distorting the internal market (Article 5 FSR) and (ii) all contributions other than the above, but equal to or greater than EUR 1,000,000.

3. How should a concentration be reported?

The Implementing Regulation contains a form that contains all the reporting obligations of the entities concerned, specifying the manner in which the notification to the Commission is to be carried out. In particular, companies must provide the following information:

- i) For foreign financial contributions considered to be the most likely to distort the internal market: details of all individual financial contributions of at least EUR 1,000,000 that were granted during the last three years.
- ii) For all other foreign financial contributions: a summary of all the individual financial contributions of at least EUR 1,000,000 granted in the last three years, and only in relation to those countries that have granted the parties at least EUR 45,000,000 during the three years preceding the concentration, subject to a number of exceptions.

However, the FSR and its Implementing Regulation provide for certain mechanisms that aim to simplify the amount of information to be provided to the Commission. They also provide for the option to request the Commission to grant a waiver or to lift the obligation to provide certain information, although this option will always be exercised on a case-by-case basis. Pre-reporting is highly recommended if the thresholds are met.

4. What are the specific reporting requirements in public procurement procedures?

The public authority must adapt the tender documents and calls for tender. In the case of foreign financial contributions in public procurement procedures, companies must submit the following:

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- i) In the case of foreign financial contributions considered to be the most likely to distort the internal market, the information required is the same as in the case of concentrations: detailed information on all individual financial contributions of at least EUR 1,000,000 each, granted to the parties to the transaction during the last three years.
- ii) For all other foreign financial contributions: the summary of financial contributions must include all financial contributions in relation to those countries that have granted at least EUR 4,000,000 during the three years preceding the concentration, instead of the minimum of EUR 45,000,000 required for concentrations.

In addition, where the thresholds relating to the value of the contract are met, but there are no foreign subsidies equal to or greater than EUR 4,000,000, the undertaking is required to declare all foreign financial contributions received, confirming that such contributions are not subject to reporting obligations. In such cases, the contracting authority/entity shall transmit the notification or declaration to the European Commission without delay.

5. What analysis can the European Commission carry out?

Concerning the substantive analysis, i.e., the Commission's specific analysis of subsidies and their potential to distort the internal market, the Commission has a broad degree of discretion. The Regulation provides guidance on the type of subsidies that it considers to have the greatest and least potential to distort, going so far as to establish a sort of presumption of distortion for certain types of subsidies.

In any case, as in other areas, the theories of harm specific to this regime will be specified as the Regulation is applied in different cases and decisions and, of course, in view of what the CJEU may eventually decide in appeals against the Commission's decisions. While the practice evolves, the Commission's communications and the CJEU's case law will be a relevant guide for the internal market.

6. What happens if I do not report or if I do not provide an adequate response to requests for information?

The European Commission may impose financial penalties in the case of non-compliance with reporting obligations; implementation of the concentration before the Commission authorises it; and non-compliance with the Commission's decisions, with fines of up to 10% of the aggregate turnover of the undertaking in the preceding financial year.

In addition, if, as a result of the reporting, the subsidies are deemed to distort the internal market, the concentration may be prohibited, the obligation to provide commitments may be included, or the award of the contract may be prohibited.

7. Can the European Commission decide to monitor my financial contributions even if I do not have a reporting obligation?

The Commission may carry out *ex officio* investigations regarding any information concerning foreign subsidies that are suspected of distorting the internal market in any sector and regardless of the thresholds.

Moreover, even where the thresholds for reporting a concentration or a procurement procedure are not met, the Commission may require pre-reporting where it suspects that foreign subsidies may have been

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granted to the undertakings concerned in the three years preceding the concentration or the submission of the offer or the request to participate in the procurement procedure.

8. What can companies do to avoid “surprises” in concentration transactions and public procurement procedures?

Companies that operate in third countries must keep internal controls and records of all foreign financial contributions that they have received in the five years prior to 12 July 2023 and retain these records for at least ten years.

Another recommendation is for companies to include the FSR analysis in their due diligence during the processing of concentration transactions. By doing so, it will be possible to monitor in detail the risks that a given transaction may pose under the Foreign Subsidies Regulation, and in the event that compliance with the thresholds referred to above is verified, to carry out a pre-notification procedure, duly cooperating with the European Commission in order to avoid the imposition of fines.

FURTHER INFORMATION

- [🔗](#) Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (“Foreign Subsidies Regulation”).
- [🔗](#) Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 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 (“Implementing Regulation of Foreign Subsidies Regulation”).
- [🔗](#) Commission Q&A on the Foreign Subsidies Regulation.
- [🔗](#) Pérez-Llorca – Legal Briefing on Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

LEGISLATIVE DEVELOPMENTS

New legislation and new legislative Proposals from the European Commission in the month of October

Legislative and regulatory developments in October

In addition to the publication of the [European Commission's Work Programme 2024](#), the following legislative developments in October should be noted:

I. New regulations:

- Commission Regulation (EU) 2023/2391 of 4 October 2023 amending Regulations (EU) No 717/2014, (EU) No 1407/2013, (EU) No 1408/2013 and (EU) No 360/2012 as regards de minimis aid for the processing and marketing of fishery and aquaculture products, and Regulation (EU) No 717/2014 as regards the total amount of de minimis aid granted to a single undertaking, its period of application and other matters ("The *de minimis* Regulation for fisheries") [[C \(2023\) 6585](#)], OJ L 2023/2391 of 05.10.2023. It is scheduled to enter into force on 25 October 2023.
- Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 ("Renewable Energy Directive"), [[COM \(2021\) 557](#)], 14.07.2021.

According to information available on the official website of the [European Parliament's legislative observatory](#), the act has been completed and is awaiting publication in the OJEU.

- Proposal for a Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport ("ReFuelEU Aviation Initiative"), [[COM \(2021\) 561](#)], 14.07.2021.

According to information available on the official website of the [European Parliament's Legislative Observatory](#), the act has been completed and is awaiting publication in the OJEU.

- Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC, [[PE/22/2023/REV/1](#)], OJ L, 2023/2225, 30.10.2023.

II. New Commission proposals:

- European Commission proposals to [reform the system of alternative dispute resolution \("ADR"\)](#) and strengthen consumer rights. In particular, the Commission's reform proposal includes:
 - i) The Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, [[COM\(2023\) 649 final](#)], 17.10.2023.
 - ii) The Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform ("Online Dispute Resolution Platform"), [[COM \(2023\) 647 final](#)], 17.10.2023.

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- iii) Commission Recommendation (EU) 2023/2211 of 17 October 2023 on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations (notified under document number [C(2023) 7019], OJ L 2023/2211, 19.10.2023.
- Proposal for a Regulation of the European Parliament and of the Council on preventing plastic pellet losses to reduce microplastic pollution, [COM (2023) 645 final] of 16.10.2023. This proposal follows on from previous proposals such as:
 - i) Commission Regulation (EU) / ... amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles, [C(2023) 6419 final] of 25.09.2023.
 - ii) Proposal for a Regulation of the European Parliament and of the Council on type-approval of motor vehicles and engines and of systems, components and separate technical units intended for such vehicles, with respect to their emissions and battery durability (Euro 7) and repealing Regulations (EC) No 715/2007 and (EC) No 595/2009, [COM(2022) 586 final], 10.11.2022.
- Proposal for a Council Implementing Decision amending Implementing Decision (EU) (ST 10150/2021; ST 10150/2021 ADD 1 REV 1) of 13 July 2021 on the approval of the assessment of the recovery and resilience plan for Spain, [COM(2023) 576 final], 2.10.2023.





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JUDICIAL DEVELOPMENTS

October's most relevant judgments on Competition law and State aid

Judicial developments in October

- Judgment of the CJEU of 12 October 2023, [Case C-11/22](#), *Est Wind Power*: The CJEU provided clarification on the concepts of “start of works” and “necessary state authorisation for constructing the project” in the 2014-2020 Guidelines on State aid for environmental protection and energy.
- Judgment of the CJEU of 12 October 2023, [Case C-445/22 P](#), *Larko v Commission*: The CJEU dismissed the appeal brought by the parties against the judgment of the General Court of 4 May 2022 in [Case T-423/14 RENV](#), which dismissed an action for annulment challenging a Decision of the European Commission that declared a Greek State aid scheme which benefited Larko (a Greek mining company) to be incompatible with the internal market. It is worth analysing the Commission's Communication on the application of Articles 107 TFEU and 108 TFEU to State aid granted in the form of guarantees and whether the criteria contained therein cannot modify the rules governing the sharing of the burden of proof between the Commission and the Member States for the purposes of proving the existence of an advantage when analysing a State aid scheme.
- Judgment of the CJEU of 19 October 2023, [Case C-325/22](#), *Ministar na zemedelieto, hranite i gorite*: The CJEU answered three questions referred for a preliminary ruling by the Administrative Court of Varna (Bulgaria), noting the concept of an undertaking and the obligation of the courts not to apply the national rule if it does not allow a market price to be calculated in the area of State aid.
- Judgment of the General Court of 25 October 2023, [Case T-136/19](#), *Bulgarian Energy Holding and Others v Commission*: The General Court annulled a decision of the European Commission that found that the Bulgarian Energy Holding (“BEH”) group had abused its dominant position due to its refusal to grant access to strategic gas infrastructure in Bulgaria to other competing companies. According to the General Court, the Commission did not establish sufficiently that it was Bulgargaz (a subsidiary of the BEH group) which prevented its suppliers from gaining access to the pipeline.
- Judgment of the CJEU of 26 October 2023, [Case C-331/21](#), *EDP–Energias de Portugal and Others*: The CJEU held that, in a trading partnership agreement between companies operating in different markets that was intended to promote sales by those companies, a non-compete clause that prevented one of the parties from entering the market for the supply of electricity was anti-competitive by object.

FURTHER INFORMATION

- ➔ [Full list of judgments issued by the Court of Justice of the European Union - October 2023.](#)