

Commission Consults on Notification Requirements and Process for EU Foreign Subsidies Regulation

February 9, 2023

On February 6, 2023, the European Commission (“Commission”) launched a public consultation on its proposed rules and procedures for merger and public procurement notifications under the EU Foreign Subsidies Regulation (“FSR”).

The FSR aims to tackle distortive subsidies given by non-EU countries to companies active in the EU and entered into force on January 12, 2023. The FSR establishes a mandatory notification regime for certain large mergers or public tenders for companies that have received substantial financial contributions from non-EU governments (the specific thresholds are described in our [previous coverage](#) of the FSR). These notification obligations come into effect on October 12, 2023.

The proposed notification rules are likely to attract significant comments as they impose burdensome requirements for mergers (requesting detailed information about all non-EU financial contributions exceeding de minimis thresholds) and to a lesser extent for public procurement tenders.

This alert memo summarizes the Commission’s proposed rules and procedures, which are published in the form of a Draft Implementing Regulation. Interested parties may [provide feedback](#) on this proposal by March 6, 2023.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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Scope of the Draft Implementing Regulation

The Draft Implementing Regulation covers several aspects of the merger and public tender notification procedure.

Notification form requirements. The Draft Implementing Regulation contains template forms that detail the information and supporting documents required for reportable mergers and public tenders (these requirements are discussed in detail below).

Phase 2 review timelines and commitment offers. Under Article 10 of the FSR, the Commission must open an in-depth review if it identifies “*sufficient indications*” that one of the undertakings concerned has received a foreign subsidy that distorts the internal market during its preliminary investigation. This Phase 2 period lasts 90 working days for mergers and 110 working days for public procurement procedures. The Draft Implementing Regulation provides that parties will have a month to submit their views during Phase 2. If notifying parties wish to offer commitments during Phase 2, these must be submitted no later than Working Day 65 and Working Day 50 for mergers and public procurement tenders, respectively. The Draft Implementing Regulation provides for the possibility for the parties or the Commission to appoint trustees to monitor the remedies.

Conduct of interviews and oral statements. The Commission may gather evidence through interviews and inspections as part of its review. The Draft Implementing Regulation clarifies the measures the Commission will adopt to document and allow corrections to any statements taken.

Access to evidence and confidential treatment. The Draft Implementing Regulation details how the Commission will handle confidential information, the circumstances under which it may disclose such information to specific legal and economic counsel of the parties, and the rights of the party under investigation to access evidence from the investigation (“access to file”). The Draft Implementing Regulation clarifies that internal documents of and correspondence between EU and non-EU public authorities are not covered by access to file.

Notification Form Requirements for Mergers

Similar to the EU Merger Regulation, the Draft Implementing Regulation requires merger notifications to be submitted on a template form. The form and any supporting documents (or translations) must be provided in one of the EU’s official languages.

There will be a pre-notification process during which the parties submit and iterate a draft form and engage with the Commission on the precise information required. The statutory review period begins once the Commission deems the notification complete, although the Commission could still request additional information during its investigation.

The Draft Implementing Regulation does not provide for a simplified notification process although the Commission may agree to waive information requirements during pre-notification discussions if these are (a) “*not reasonably available*” (e.g., information about a target in a hostile bid) – provided the parties provide “*best estimates for the missing data*” and if possible, indicate where the Commission could obtain this information; or (b) “*not necessary*” for the Commission’s examination of the case.

Information on the transaction (Section 1 to 4)

These sections require basic details about the concentration which are largely in line with information provided under the EU Merger Regulation. In addition, parties must provide (a) the enterprise value of the target and how this was calculated and (b) details on the sources of finance (whether debt or equity) used to fund the transaction, such as the identity of the lenders or subscribers for shares and the conditions attached to any equity financing.

Information on non-EU financial contributions (Section 5)

The notification form requests a detailed list of all the non-EU financial contributions that the parties have received in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. This list should cover all non-EU financial contributions, unless (a) the individual amount of the contribution is less than EUR 200,000 or (b) the total amount of contributions per third country and per year is less than EUR 4 million.

For each financial contribution, the parties must provide the following information, presented using Commission's template table (with financial contributions ordered by country):

- the receiving entity;
- the granting entity;
- the third-country to which the financial contribution is attributable;
- the type of financial contribution;
- whether it was the result of a tender process;
- the amount of the contribution;
- the date of granting;
- whether it has a possible link with the transaction and if so, to explain its connection.

For financial contributions which fall into one of the four categories of financial contribution the FSR deemed "*most likely to be distortive*" (assuming they give rise to a subsidy),¹ parties must provide additional information:

- the form of the contribution (e.g., loan, tax exemption, etc.);
- the granting entity;
- the purpose and economic rationale;
- the conditions attached to the contribution or its use;
- the "*most likely to be distortive*" category it falls into;
- whether the contribution confers a benefit;
- whether the contribution is selective *i.e.*, limited to certain undertakings or industries;
- other specified information depending on its type.

¹ These are (a) aid to ailing firms outside a viable restructuring plan; (b) unlimited guarantees; (c) support for

a specific merger or public tender; and (d) certain export financing.

Distortive effects (Section 6)

For purposes of assessing the distortive effect of the non-EU financial contributions, the parties must provide:

1. details on how the transaction was agreed *e.g.*, whether there was a bidding process, the candidates that participated, and the due diligence carried out (including a copy of all due diligence reports);
2. information on their business lines or activities in the EU and relevant turnover;
3. for any “*most likely to be distortive*” financial contributions, an explanation if these are liable to improve the parties’ competitive position in the EU, by reference to the nature, amount, and use or purpose of the financial contribution, and how this purpose would have been financed absent the transaction; and
4. contact details for the target’s five largest competitors in the EU and any competitor contact details provided for EU merger control or national filings.

Positive effects (Section 7)

The parties have the option to provide information on any positive effects generated by the financial contributions disclosed, whether on the development of the related economic activity in the EU or “*broader positive effects*” linked to policy objectives. The parties should specify if these effects have or are expected to take place.

Supporting documentation (Section 8)

The form requests three categories of supporting documentation: (a) documentation for financial contributions that fall within the “*most likely to be distortive*” categories; (b) analysis, studies or other documents from the grantor or recipient discussing the purpose and economic rationale of any financial contribution; and (c) the parties’ annual accounts.

Notification Requirements for Public Procurement Procedures

The notification requirements for public procurements broadly mirror the requirements for concentrations, in requiring general information about the public procurement procedure and details of non-EU financial contributions received by the participating economic operators and their main subcontractors in the last three years. However, the scope of non-EU financial contributions covered is more limited: the notifying parties only need to report non-EU financial contributions that fall into the categories that are “*most likely to be distortive*” or that relate to operating costs. Non-EU financial contributions do not have to be reported if they amounted to less than EUR 4 million per country in the prior three years. Finally, the form specifically requests information on possible justifications to demonstrate that any public procurement bid was not unduly advantaged by the financial contribution, such as explanations relating to the economics of the good or service provided, the originality of the work, or compliance with relevant regulations.

Conclusion

Although the Commission leaves the door open to possible waivers or simplification, the current proposal appears to cast a very wide net in terms of the breadth and complexity of the information requested in merger proceedings. By contrast, the Commission adopts a more targeted approach for public procurement procedures. For mergers, the request for a list of all foreign contributions above the *de minimis* monetary thresholds, irrespective of whether the financial contributions amount to subsidies or are connected to the concentration, could be very burdensome for large (EU or non-EU) parties carrying out transactions with a strong EU nexus (meeting the threshold of the target having an annual EU turnover of EUR 500 million). Some of the information requested might also be in the possession of third parties (such as the seller or the third country granting the financial contribution), or may raise issues under applicable legal privilege rules. It remains to be seen how much the Commission may be ready to revise its proposal to take these concerns into account. Stakeholders who may be impacted by these notification procedures should consider participating in the public consultation in order to make their views known, and may want to start gathering information on financial contributions received in the past three years in case the Commission maintains its current proposal.

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