

# Strelia Competition Newsflash

July 2023

## Notification of transactions under the EU Foreign Subsidies Regulation: The Commission is ready (as of September 2023) !

### 1. Introduction

The Foreign Subsidies Regulation (EU) 2022/2560 (FSR) adopted on 14 December 2022 aims to address the distortions caused by foreign subsidies to the EU internal market and to ensure a level playing field for all undertakings operating in this market<sup>1</sup>. The FSR applies automatically and uniformly to all Member States and does not require a transposition into national law. The FSR became applicable on 12 of July 2023 and parties will have to notify, under the FSR, transactions satisfying certain thresholds for which the agreement was concluded on 12 of July or later, but which are not yet implemented on 12 October 2023. The FSR provides three tools: (i) notification obligations for concentrations; (ii) notification obligations for public procurement; and (iii) *ex officio* investigations. Notifying parties are encouraged to engage in pre-notification contacts, in principle as of September 2023, in advance to facilitate the submission of notifications as from 12 October 2023.

Following the FSR, the European Commission (hereafter, “the Commission”) adopted the rules for implementing this Regulation on 10 July 2023<sup>2</sup>. This Implementing Regulation (EU) 2023/1441 provides guidance on the practicalities of the FSR and the annexes to the Implementing Regulation contain notification forms for foreign subsidies relating to concentrations or public procurement procedures.

Any undertaking intending to do business within the internal market could be affected and must understand the impact of the FSR. In this respect, three key dates must be considered: (i) 12 January 2023, (ii) 12 July 2023 and (iii) 12 October 2023.

This newsflash will first discuss the scope, the notification obligations, the *ex officio* investigative powers of the Commission, the procedure and the sanctions laid out in the FSR, the Implementing Regulation, and finally elaborate on the three key dates related to the FSR.

### 2. What falls within the scope of the Regulation?

The FSR applies to foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. The definition of a foreign subsidy consists of the following four cumulative elements<sup>3</sup> :

- (i) a direct or indirect financial contribution;
- (ii) the financial contribution must be provided by a third country;
- (iii) the financial contribution must benefit an undertaking engaging in an economic activity in the internal market;  
and
- (iv) the financial contribution is limited to one or more undertakings or industries (selectivity).

The first two conditions are further specified in the FSR.

The FSR’s understanding of “financial contribution” is very broad. The FSR provides examples of possible financial contributions, ranging from interest-free loans and tax incentives to the provision of goods or services.<sup>4</sup>

<sup>1</sup> Article 1 Foreign Subsidies Regulation (EU) 2022/2560, OJ L 330/1, 23.12.2022.

<sup>2</sup> Commission Implementing Regulation (EU) 2023/1441, OJ L 177/1, 12.7.2023.

<sup>3</sup> Article 3 §1 FSR.

<sup>4</sup> Article 3 §2 FSR.

The financial contribution must be provided by a) the central government and public authorities of a third country, b) a foreign public entity whose actions can be attributed to a third country, or c) a private entity whose actions can be attributed to a third country.<sup>5</sup>

### 3. Distortions on the internal market

The FSR makes a distinction between (i) foreign subsidies which are most likely to distort the internal market, (ii) foreign subsidies that may be considered not to distort the internal market, and (iii) foreign subsidies that could be distortive based on a case-by-case assessment.

Pursuant to Article 5 FSR, the following types of subsidies are presumed to be most likely to distort the internal market: (i) foreign subsidies to ailing undertakings, (ii) foreign subsidies in the form of unlimited guarantees for debts and liabilities, (iii) export financing measures not in line with the OECD rules, (iv) foreign subsidies directly facilitating a concentration, and (v) foreign subsidies enabling an undertaking to submit an “unduly advantageous” tender.<sup>6</sup> In these cases, the Commission does not need to perform a detailed assessment. The undertaking could prove that the foreign subsidy could not distort the internal market.

Article 4 FSR provides two situations in which a foreign subsidy may be considered not to distort the internal market: (i) foreign subsidies to an undertaking that do not exceed 4 million EUR over any consecutive period of 3 years and (ii) foreign subsidies making good damages from national disasters or exceptional occurrences.<sup>7</sup> On the other hand, foreign subsidies to an undertaking that do not exceed 200 000 EUR per third country over any consecutive period of three years, shall not be considered to distort the internal market.<sup>8</sup>

In the other situations, the Commission must establish the distortion on the internal market by carrying out an in-depth economic assessment of the impact of the foreign subsidy on the recipient of the subsidy and its position on the internal market. The FSR provides a non-exhaustive list of indicators for the assessment (amount and nature of the subsidy, the situation of the undertaking, etc.).<sup>9</sup>

### 4. When is the notification procedure due?

The FSR introduces a notification-based tool to investigate concentrations and bids in public procurement procedures above a certain threshold.

The definition of a concentration is identical as under EU merger control rules: *i.e.*, a change of control in an undertaking on a lasting basis resulting from a merger, an acquisition or the creation of a full-function joint venture.<sup>10</sup>

The FSR defines a public procurement procedure as any EU public procurement instrument as listed in article 2(3).<sup>11</sup>

For concentrations, there are two thresholds to take into account when assessing whether a concentration notification must be made. First, there is the threshold regarding the aggregated turnover and secondly there is the threshold for the foreign financial contributions.

A concentration shall be notifiable when the two following thresholds are met:

- Turnover threshold: At least one of the merging undertakings, the acquired undertaking (*i.e.*, the target) or the joint venture is established within the European Union and generates an aggregate turnover of at least EUR 500 million in the preceding financial year in the European Union;<sup>12</sup>

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<sup>5</sup> Article 3 §2 FSR.

<sup>6</sup> Article 5 FSR.

<sup>7</sup> Article 4(2) and 4(4) FSR.

<sup>8</sup> Article 4(3) FSR.

<sup>9</sup> Article 4 (1) FSR.

<sup>10</sup> Article 20(1)-20(2) FSR.

<sup>11</sup> Article 2(3) FSR and the referrals to Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU and Directive 2009/81/EC.

<sup>12</sup> Article 20(3), (a) FSR.

- Foreign financial contribution threshold: and
  - (i) The merging undertakings (in the case of a merger), (ii) the acquirer(s) and the acquired undertaking (in the case of an acquisition) or (iii) the undertakings creating a joint venture and the joint venture (in the case of a joint venture) were granted combined aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.<sup>13</sup>

For public procurement, there are also two thresholds that must be met for the notification obligation to apply: a contract value threshold and a foreign financial contribution threshold.

- Contract value threshold:
  - (i) The estimated value (without VAT) of public procurement is equal to or greater than EUR 250 million,<sup>14</sup> or
  - (ii) If the procurement is divided into lots, the aggregate value of the lots for which the tenderer applies is equal to or greater than EUR 125 million, as long as the estimated value of the public procurement is equal to or greater than EUR 250 million.<sup>15</sup>
- Foreign financial contribution threshold: The tenderer (including its subsidiaries without commercial autonomy, its holding companies and, where applicable, its main subcontractors and suppliers involved in the same tender), received aggregate financial contributions equal to or greater than EUR 4 million per third country, in the three years prior to the (updated) notification.<sup>16</sup>

Following the notification, a standstill obligation is imposed. The undertakings notifying a concentration may not proceed on the merger, the acquisition, or the creation of a joint venture before the conclusion of the investigation by the Commission.<sup>17</sup> Similarly, for public tenders, the tender cannot be awarded to the notifying undertaking prior to the conclusion of the investigation by the Commission.<sup>18</sup>

## 5. *Ex officio investigation by the Commission*

For all economic activities of an undertaking receiving foreign subsidies that do not require a notification (*i.e.*, a concentration of a public procurement which should not have been notified or any other foreign subsidy that may distort the internal market), the Commission can conduct a review on its own initiative if it suspects the existence of a distortive foreign subsidy. *Ex officio* reviews into public procurements shall be limited to awarded contracts.<sup>19</sup>

The Commission can investigate foreign subsidies up to 10 years from the date on which they were granted as well as foreign subsidies granted in the 5 years prior to 12 July 2023 that distort the internal market after 12 July 2023. Any action taken by the Commission under Article 10 FSR (preliminary review), any request for information, any inspection within or without the EU interrupts this 10-year limitation period. After each interruption, the limitation period shall start to run afresh.<sup>20</sup>

The Commission must endeavor to adopt a decision within 18 months of opening the in-depth investigation.<sup>21</sup>

Although third parties don't possess the formal possibility to submit a complaint, they can communicate to the Commission any information they may have about foreign subsidies that may distort the internal market.<sup>22</sup>

<sup>13</sup> Article 20(3), (b) FSR.

<sup>14</sup> Article 28(1), (a) FSR.

<sup>15</sup> Article 28(2) FSR.

<sup>16</sup> Article 28(1), (b) FSR.

<sup>17</sup> Article 24 FSR.

<sup>18</sup> Article 32 FSR.

<sup>19</sup> Article 9 FSR.

<sup>20</sup> Articles 38 and 53 FSR.

<sup>21</sup> Article 11 FSR.

<sup>22</sup> Article 35 FSR.

## 6. Procedure

The review of the foreign subsidy consists of two phases for all three tools (the two notification based tools and the *ex officio* tool): the preliminary review and the in-depth investigation.

During the preliminary review, the Commission will gather the information necessary to assess whether the financial contribution under examination constitutes a foreign subsidy distorting the internal market.<sup>23</sup> If the Commission decides that there are sufficient indications that the undertaking received a foreign subsidy that distorts the internal market, it can initiate an in-depth investigation.<sup>24</sup> If there are insufficient indications to initiate the in-depth investigation, the Commission can close the preliminary review.<sup>25</sup>

During the in-depth investigation, the Commission further assesses the foreign subsidy. If the Commission finds that the foreign subsidy distorts the internal market, it may balance the negative effects of the foreign subsidy in terms of distortion with the positive effects of the subsidy on the development of the subsidized economic activity.<sup>26</sup> If the negative effects outweigh the positive ones, the Commission may impose redressive measures (e.g. repayment of the subsidy, prohibition of the concentration or award of the public procurement) on the undertaking or accept commitments from the undertaking to remedy the situation.<sup>27</sup> The Commission shall adopt a no objection decision when the positive effects outweigh the negative ones or when the preliminary assessment is not confirmed.<sup>28</sup>

The FSR gives various procedural tools to the Commission to carry out its investigation in these two phases. It may issue requests for information, interview natural or legal persons and conduct dawn raids both within and outside (with approval of the relevant third country) the Union.<sup>29</sup> Sanctions may apply for non-cooperation (see below at point 7). In addition, interim measures may be adopted if there are sufficient indications and if there is a risk of serious and irreparable damage to competition on the internal market. No interim measures may be taken with regard to public procurement.<sup>30</sup>

Specific timelines exist for both phases of the two notification tools. For concentrations, a preliminary review is executed within 25 working days after the receipt of the complete notification. If an in-depth investigation is initiated, the Commission must take a decision within 90 working days (this time limit shall be extended by 15 working days where the undertakings concerned offer commitments). Requests for additional information by the Commission may suspend these time limits.<sup>31</sup> For public procurement procedures, a preliminary review is executed within 20 working days after receipt of the complete notification (this time limit may be extended by 10 working days once in duly justified cases).<sup>32</sup> If an in-depth investigation is initiated, a decision must be adopted within 110 working days (this time limit may be extended by 20 working days in duly justified exceptional cases). Derogation exists for multi-stage procedures whereby the preliminary review phase is suspended 20 days after the notification until the submission of the final tender.<sup>33</sup>

## 7. Sanctions

The FSR puts in place four separate but similar regimes for fines and periodic penalty payments.

### 7.1. Sanctions for obstruction of the investigation

The Commission has the authority to impose fines up to 1% of the aggregate turnover of the preceding financial year of the undertaking or association of undertakings that intentionally or negligently supplies incorrect, incomplete, or misleading information or does not provide the information within the prescribed time limit. These fines can also be imposed for refusing to submit to inspections or failure to comply with conditions for access to file.

<sup>23</sup> Article 10 §1 FSR.

<sup>24</sup> Article 10 §3 FSR.

<sup>25</sup> Article 10 §4 FSR.

<sup>26</sup> Article 6 FSR.

<sup>27</sup> Article 11(2)-11(3) FSR.

<sup>28</sup> Article 11(4) FSR.

<sup>29</sup> Article 13, 14, 15 FSR.

<sup>30</sup> Article 12 FRS.

<sup>31</sup> Article 25 FSR.

<sup>32</sup> Article 30 FSR.

<sup>33</sup> Article 30(6) FSR.

The Commission can also impose periodic penalty payments amounting up to 5% of the average daily aggregate turnover until the complete and correct information as required by the Commission is submitted or if the (association of) undertaking(s) submits to an inspection.<sup>34</sup>

Where the concentration has already been implemented, in particular in cases where no prior notification was required because the notification thresholds were not reached, the distortion can nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission should be able to decide to remedy the distortion by ordering the undertakings to dissolve the concentration.<sup>35</sup>

### **7.2. Sanctions for non-compliance with interim measures, commitments or redressive measures**

Where an undertaking does not comply with a decision with commitments, a decision ordering interim measures or a decision with redressive measures, the Commission may impose fines up to 10% of the aggregate turnover of the undertaking concerned in the preceding financial year or impose periodic penalty payments up to 5% of the average daily aggregate turnover of the undertaking concerned for each day of non-compliance.

Non-compliance with a Commission decision requiring an undertaking under investigation to inform the Commission of participation in future concentrations or public procurement procedures may also result in the imposition of these fines or periodic penalty payments.<sup>36</sup>

### **7.3. Sanctions regarding concentrations**

Failure to notify concentrations, not respecting the stand-still obligation, circumventing notification requirements or implementing a prohibited concentration can be fined up to 10% of the concerned undertakings' aggregated turnover in the preceding financial year.<sup>37</sup>

The intentional or negligent supply of incorrect or misleading information in a notification can be sanctioned with a fine up to 1% of the aggregate turnover in the preceding year.<sup>38</sup>

### **7.4. Sanctions regarding public tenders**

Failure to notify foreign financial contributions during the public procurement procedure or (attempting to) circumventing the notification requirements can lead to fines up to 10% of the aggregate turnover in the preceding financial year of the economic operator.

The intentional or negligent supply of incorrect or misleading information in a notification can also be sanctioned with a fine up to 1% of the aggregate turnover in the preceding year.<sup>39</sup>

## **8. The Implementing Regulation**

The Implementing Regulation provides guidance on how the Commission is going to screen foreign subsidies by third countries. It covers the procedure for notifications, the Commission's investigation process, the procedural rights of the parties, the time limits as well as the transmission and signature of documents.

The annexes to the Implementing Regulation set out the information that needs to be included in the notification forms for concentrations (Annex FS-CO) and public procurement procedures (Annex FS-PP).

For concentrations, companies are required to report detailed information on all foreign subsidies which are presumed to be most likely to distort the internal market under Article 5 FSR, that amount to at least EUR 1 million, and which have been granted to one of the notifying parties (or the target) by one third country over the past three years.<sup>40</sup>

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<sup>34</sup> Art. 17 FSR.

<sup>35</sup> Recital (25) FSR.

<sup>36</sup> Art. 17(5) FSR.

<sup>37</sup> Art. 26 §2 FSR.

<sup>38</sup> Art. 26 §1 FSR.

<sup>39</sup> Art. 33 FSR.

<sup>40</sup> Annex I, recital (2), (b).

All other foreign financial subsidies, which are not presumed to be most likely to distort the internal market under Article 5 FSR, must be reported insofar as they amount to at least EUR 1 million and only in relation to one third country that has granted at least EUR 45 million to the notifying party(ies) over the three years prior to the concentration.<sup>41</sup>

For foreign financial contributions in public procurement procedures, financial subsidies to the notifying party(ies) which are presumed to be most likely to distort the internal market under Article 5 FSR of at least 1 million EUR in the three years must be reported.<sup>42</sup> All other foreign financial contributions, which are not presumed to be most likely to distort the internal market under Article 5 FSR, must be reported insofar as they amount to at least 1 million EUR and only in relation to those countries that have granted to the notifying party/parties at least 4 million EUR per country over the three years prior to the notification.<sup>43</sup> If no notifiable foreign financial subsidies were granted in the last three years, a declaration must be submitted instead of a notification.<sup>44</sup>

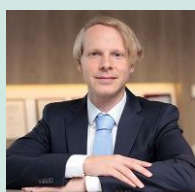
## 9. Key dates

On 12 January 2023, the FSR Regulation entered into force. Six months later, *i.e.* on 12 July 2023, the Commission's *ex officio* investigative powers started to apply. The notification requirements of concentrations and foreign financial contributions in the context of public procurement procedures will only start to apply to transactions implemented on 12 October 2023 or later (and concluded on 12 July 2023 or later). This means that from that moment notifying parties will be required to submit formal notifications according to the forms provided by the annexes to the Implementing Regulation. Concentrations for which the agreement has been concluded on or after 12 July 2023, but that have not been implemented on 12 October 2023 need to be notified. On the contrary, concentrations for which the agreement was concluded on or after 12 July 2023 but that have been implemented before 12 October 2023, do not need to be notified. Notifying parties are encouraged to engage in pre-notification contacts, in principle as of September 2023, in advance to facilitate the submission of notifications as from 12 October 2023. During these pre-notification contacts, waivers to submit certain information may be requested.

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**For any additional information, please do not hesitate to contact us or your usual Strelia contact person.**

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<sup>41</sup> Annex I, Table 1, point 3.

<sup>42</sup> Annex II, Section 3, 3.1.

<sup>43</sup> Annex II, Table 1, point 3.

<sup>44</sup> Article 5(2) Implementing Regulation.