

PROPOSED IMPLEMENTING REGULATION ON FOREIGN SUBSIDIES CLARIFIES THE NEW FILING BURDENS FOR M&A AND PUBLIC TENDERS

On 6 February 2023, the European Commission (Commission) has published for consultation the Draft Implementing Regulation on foreign subsidies distorting the internal market (DIR). The DIR clarifies practical and procedural aspects related to the application of the Foreign Subsidies Regulation (FSR), including the draft notification forms to be used by the relevant parties when a filing is triggered.

In particular, the DIR clarifies the extent of information on Foreign Financial Contributions (FFCs) that is likely to be required for filings relating to certain M&A and public tender procedures. Businesses can use these clarifications to design and implement systems to gather the relevant data, in preparation for the entry into force of the mandatory filing regimes in October 2023. Interested stakeholders have until 6 March 2023 to provide their feedback.

INTRODUCTION

On 12 January 2023, the FSR entered into force. It will apply as of 12 July 2023, with the notification obligation applying to M&A transactions that meet the thresholds and sign (or public offers launched) on or after 12 July 2023 and which have not closed before 12 October 2023 (formal notification being possible only from 12 October) and to qualifying public tenders that are initiated on or after 12 October. Even if primarily aimed at foreign (i.e., non-EU) companies, the FSR gives the Commission powers to intervene in M&A transactions by both EU and foreign acquirors involving EU targets and in EU public procurement exercises by both EU and foreign bidders, as both EU and foreign acquirors and bidders are subject to the notification obligations under the FSR.

One of the relevant thresholds triggering a filing in both M&A and public procurement context relates to the financial contributions received from third

Key points

- The Commission published a draft implementing regulation on the FSR aiming at adopting a pragmatic approach
- *De minimis* thresholds, focus on most distortive types of subsidies and waiver requests provided by the DIR attempt to ease the companies' burden in relation to the FSR
- Significant preparation ahead of implementation of the FSR is required – a considerable amount of information / level of details still needs to be gathered and assessed ahead of any filing to be submitted as of 12 October 2023
- The deadline for contributions to the consultation on the DIR is 6 March 2023

(i.e., non-EU) countries, including from public and private entities whose actions are attributable to third countries. Under the FSR, the definition of financial contribution is broad, including the provision or purchase of goods or services and financing arrangements (regardless of whether the transaction is on arm's length terms), as well as the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration. The definition of FFCs catches even the smallest of transactions, such as the purchase of a travel ticket or a utility bill from a foreign State-owned operator. Consequently, gathering data on every single FFC related to a non-EU country would stretch most businesses' administrative functions to the limit.

In an attempt to address some of the concerns about the potentially disproportionate filing burdens imposed by the FSR, the Commission included draft notification forms in the DIR. Even though significant preparation by the companies will still be required, this is a first step towards a pragmatic approach. The Commission aims with these draft forms to ease the companies' task by including *de minimis* exemptions, focusing on the most distortive types of subsidies (i.e., those covered by Article 5 of the FSR) and offering the option of waiver requests, which, if granted, would exempt the companies from the obligation to provide specific information.

In addition to the notification forms, the DIR provides clarification on several procedural aspects such as the timeline of an in-depth investigation, the use of information collected by the Commission, the access to file, the role of trustees, the transparency requirements and the calculation of time limits.

Following the public consultation, the Commission will submit the DIR, potentially amended, to the Foreign Subsidies Advisory Committee, which is made up of Member State representatives. This committee will issue an opinion and the Commission, having the final say, will then adopt the text. In terms of timing, the Commission indicated that the implementing regulation should be "*finalised and adopted by mid-2023.*"

M&A FILINGS

M&A transactions that meet the FSR's filing thresholds (see box) must be notified to and cleared by the Commission before they close.

As regards the potentially burdensome requirements for disclosure of FFCs, the Commission's main concessions to proportionality are to limit:

- the disclosure requirements to those FFCs received in the three years prior to the transaction that meet both the following conditions:
 - the individual amount of the FFC is €200,000 or more; and
 - the FFC is from a third country for which the total amount of FFCs is €4 million or more per year;
- the level of detailed information required for FFCs other than those related to subsidies most likely to distort the internal market (i.e., those covered by Article 5 of the FSR)

In principle, these concessions would allow companies to avoid gathering data on every single utility bill and travel ticket acquired from a foreign State-owned operator in order to complete the form. However, it remains the case that the €50 million filing threshold is based on the value of all FFCs received, not just those in excess of the €200,000 threshold in the DIR and the same appears to

The M&A filing thresholds

Filing obligations will apply if:

- the target (or one of its subsidiaries) is established in the EU (e.g., through a legal entity or branch) and generates an aggregate **EU-wide turnover of at least EUR 500 million**. For joint venture transactions, the JV must meet this threshold and for legal mergers it can be either of the merging parties; and
- the parties to the transaction received from third countries combined aggregate "**financial contributions**" of **more than EUR 50 million** in the preceding three financial years. The relevant parties are the target and each party acquiring a controlling or jointly-controlling interest in it.

The Commission will be able to intervene in transactions below these thresholds on its own initiative.

the true for the €4 million disclosure threshold in the DIR. Consequently, businesses would need to consider two options: (a) gather data on all FFCs, with the aim of establishing either that no filing is required, or that FFCs over €200,000 need not be disclosed for a given country or (b) simply proceeding with the filing based on an admission that the thresholds are met and making the relevant disclosures (subject to the Commission confirming that this option exists). For companies with significant activities outside the EU, the latter option may save significant costs and allow a more targeted information gathering, given that in many cases it would be relatively easy to establish that the €50 million filing threshold is met.

Even with the above concession to proportionality, businesses will face significant challenges in complying with the proposed filing requirements if the DIR is adopted in its current form, including:

- identifying counterparties to transactions that are public bodies and State-owned entities of third countries, as well as any private entity (including those registered in the EU) *"whose actions can be attributed to the third country"*. In many cases it will be more cost effective to assume that all third country State-owned enterprises fall into this category. For private undertakings, there is a body of EU State aid case law and decisional practice that can assist in identifying those whose actions may be attributed to a country and companies will have to conduct with their advisors a detailed case-by-case assessment of this;
- identifying and putting a value to any *"foregoing of revenue [by a third country] that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration"*, where it is likely that often tax and economic analysis would be required; and
- submitting detailed information regarding certain categories of FFC (rescue and restructuring subsidies, unlimited State guarantees, certain forms of export financing and FFCs that directly facilitate the M&A transaction, with internal documents required for any that have a "possible link" to the transaction), copies of due diligence documents as well as details of the bidding process for the sale of the target and the impact on the business lines and activities of the recipient parties of any FFCs that have a *"possible link"* to the transaction; it may prove difficult to obtain several of these documents, especially from the grantor.

While some public clarifications may be issued in the early days of the regime, the Commission does not envisage issuing detailed guidance until some years after the regime enters into force. Businesses and their advisors will therefore need to work with the Commission to develop viable methodologies for compliance with the filing requirements, in particular through a flexible application of the possibility for waivers of information that is not *"reasonably available"* to the parties or is not necessary for the Commission's examination of the case.

Procedurally, the proposed M&A filing regime borrows heavily from the EU Merger Regulation, with broadly the same timetable for Phase 1 and Phase 2 reviews, and similar information gathering powers. However, there are also certain differences, such as the absence of a right to an oral hearing in the event of a Phase 2 investigation, earlier and more limited disclosure of provisional adverse findings, more scope for parties' advisors to access confidential documents in the Commission's file and no formal mechanism for transactions to be cleared on the basis of remedies in Phase 1.

As regards the question of how the Commission will substantively assess whether an M&A transaction involves subsidies that distort the EU's internal market – and should therefore be subject to remedies, unless justified by their positive effects on the EU's markets or on broader policy objectives – the DIR gives three insights. First, it appears that, in contrast to the position under the EU's State aid rules, distortive effects will not be presumed to flow from a subsidy, as the filing form demands substantial amounts of information to establish whether such effects may arise. Second, the Commission will not limit itself to assessing whether a subsidy has distorted competition between potential acquirers of the target but will also consider the wider impact of the subsidised transaction on EU markets. Third, it will be for the notifying parties to substantiate in the filing form any positive effects that justify an otherwise distortive subsidy (although they can choose not to if they are confident that no distortive effects arise in the first place); absent more specific guidance, the relevant State aid guidelines would shed light on how these positive effects could be considered.

PUBLIC TENDER FILINGS

Under the FSR, distortive foreign subsidies for the purposes of public procurement procedures are those that "*enable an undertaking to submit a tender that is unduly advantageous in relation to the works, supplies or services.*" Main contractors as well as main suppliers and subcontractors that meet the filing thresholds (see box) are obliged to notify.

In some respects, the proposed FFC disclosure requirements in the public tender filing form are less onerous than for the M&A filing form. In particular, FFCs are only required to be disclosed if both the following conditions are met:

- the FFC was granted by a third country from which the recipient has received €4 million of FFCs in aggregate in the three years prior to notification; and
- the FFC falls into one of the categories of subsidies considered most likely to be distortive, namely rescue and restructuring subsidies, unlimited State guarantees, certain forms of export financing, as well as foreign subsidies allowing an unduly advantageous tender to be offered (including subsidies for operating costs, subsidies that directly finance the tender offer and subsidies to increase the capacity or technical performance of the tendered products or services).

As the categories of disclosable subsidies are relatively unusual for most businesses, and easily identifiable, this should considerably alleviate the burden for notifying parties. There will also be the same possibilities as under the M&A filing regime to request waivers for information that is not reasonably available or that is not necessary for the Commission's examination of the case.

In contrast, public tender bidders that do not meet the filing thresholds would be required by the DIR to declare that the thresholds are not met and to prove this by disclosing all FFCs received, no matter how small. This is likely to be the case only for procurement contracts that exceed the €250 million value threshold, but this will need to be confirmed in the final text of the Regulation. Unless the Commission can be persuaded to implement a more proportionate approach in the final text of the DIR, then (as is the case for M&A filings) some businesses may find that declaring that the thresholds are met and submitting

Public tender filing thresholds

Filing obligations will apply to undertakings participating in EU tenders if:

- the procurement contract is worth at least **€250 million** (if the tender is divided into lots, filing is required if the aggregate value of the lots for which the undertaking is bidding exceeds €125 million; and
- the undertaking has been granted aggregate financial contributions of at least **€4 million per third country in the three years** prior to notification.

a "full" filing is a more cost-effective option than gathering data on all FFCs received.

Many of the information and internal document requirements of the draft filing form for public tenders are similar to those of the draft M&A form, in that they focus on subsidies that are considered most likely to be distortive. However, the parties would have the additional possibility to explain why any subsidies received do not confer on them an undue advantage in the tender. The draft form also relieves notifying parties from the obligation to provide certain information that has already been provided in the context of the relevant public procurement process, e.g., where the parties submit their information through the European Single Procurement Document (ESPD),

The DIR contains other clarifications. Whereas main contractors as well as main subcontractors and suppliers are obliged to file and are deemed "notifying parties", the DIR indicates that it will be for the main contractor to ensure the submission of the relevant notification (or declaration) on behalf of all notifying parties on a single form (although business secrets can be submitted separately as annexes). Main subcontractors and suppliers are those whose participation ensures key elements of the contract performance and in any case those whose contribution represents more than 20 % of the value of the submitted tender.

CONCLUSION

As the FSR is close to its implementation, the DIR moves towards the right direction. That said, the requested information gathering, and detailed analysis will still require significant preparation by both EU and non-EU investors, which should put the relevant processes in place now to address the far-reaching and imminent consequences of the FSR, and to ensure that notifiable deals are not delayed by the new filing burdens when the notification obligations become effective on 12 October 2023.

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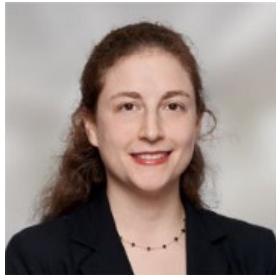
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C L I F F O R D
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