

EU FOREIGN SUBSIDIES REGULATION: FINAL IMPLEMENTING REGULATION AND FILING FORMS PUBLISHED

The European Commission (Commission) has published the final versions of the Implementing Regulation and filing forms for the EU Foreign Subsidies Regulation (FSR) in preparation for its application from 12 July 2023.

With the publication of the final forms, businesses should act quickly to put in place or finalise the relevant information gathering systems, on the basis of these final filing forms, in order to avoid delays in the filing and clearance of their M&A transactions or their participation in public tenders, when the filing regime commences on 12 October.

INTRODUCTION

From 12 July 2023, the FSR starts applying providing the Commission with the power to investigate subsidies that businesses have received from "third countries" and to impose redressive measures on those that it considers to distort the EU's internal market. For these purposes, third countries include all non-EU governments and (public or private) entities whose actions are attributable to non-EU countries, including, but not limited to, State-owned undertakings.

In addition, mandatory filing and standstill obligations will apply to notifiable M&A transactions that are signed on or after 12 July 2023 and which have not closed by 12 October 2023. However, it will not be possible to formally notify until 12 October, which may result in delays for some transactions that would otherwise have closed in October or November (see our blog post [here](#) for details). Similarly, while not yet publicly confirmed by the Commission, it appears that filing obligations will apply to notifiable public procurement procedures that are initiated on or after 12 July and which have not been finalised by 12 October 2023.

The procedural aspects of the filing regimes do not differ materially from those set out in the consultation draft of the Implementing Regulation that was published in February, but there have been meaningful changes to the forms. These changes reduce, to some extent, the burden that the notification obligations will impose on businesses and reflect some of the comments submitted in response to the consultation.

Key points

- The Commission has published the final Implementing Regulation and filing forms for the FSR.
- The information requirements of the M&A filing form have been very substantially reduced in comparison to the consultation draft published earlier in the year. The requirements of the public tender form have been reduced in some respects but increased in others.
- Parties that are anticipating participating in high value M&A and public tenders should act quickly to put in place the relevant information gathering systems, on the basis of these final filing forms, to avoid delays in the filing and clearance of their transactions / public bids.

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 (in a similar way to the notifications required by EU merger control rules).

One of the filing thresholds relate to foreign financial contributions (FFC). Under the FSR, the definition of a FFC is broad, going beyond the notion of "subsidy" and including the provision or purchase of goods or services and financing arrangements involving third countries 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.

Concerns have been expressed by respondents to the Commission's earlier consultation on the draft Implementing Regulation and forms that gathering this data would have stretched most businesses' administrative functions to the limit. The Commission has taken many of these concerns into account in the final form. In particular:

- Individual FFCs in the past three years will only need to be reported if their individual value is equal to or exceeds €1 million and (for FFCs falling outside one of the categories of most likely highly distortive subsidies) if the combined value of all FFCs received from the same third country in the past three years reaches or exceeds €45 million. The filing form also clarifies that, when determining whether the €45 million threshold is met, only certain types of individual FFCs (*i.e.*, those with a value equal or above €1 million provided that those are not already otherwise excluded as indicated below) need to be taken into account.
- Transactions of any value involving the sale or purchase of goods or services on market terms and in the ordinary course of business are excluded from the reporting requirements. These changes will substantially reduce the information gathering and filing burdens from those that would have been imposed by the consultation draft of the filing form. However, the notifying parties will still have to report all transactions involving the sale or purchase of financial services involving third countries, even if they are on market terms and in the ordinary course of business, where they meet the thresholds mentioned above. This will impose significant burdens both on notifying parties in the financial sector and those in other sectors that deal with third country State-owned banks or other financial services suppliers.
- Also excluded from the disclosure requirements are non-selective deferrals of payment of taxes and social security contributions, tax amnesties and tax holidays, and normal depreciation and loss-carry forward rules as well as to the application of tax reliefs for avoidance of double taxation.
- For notifiable transactions involving investment funds or businesses controlled by an investment fund, FFCs granted to other investment funds managed by the same investment company but with a majority of different investors (or granted to portfolio companies controlled by these other funds) will not need to be included in the filing, provided the following conditions are met:

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 fund which controls the acquiring entity must be subject to the EU Alternative Investment Fund Managers Directive or to equivalent third country legislation in terms of prudential, organisational and conduct rules, including requirements aimed to protect investors; and
 - there are no, or limited, economic and commercial transactions (such as sales of assets, loans, credit lines or guarantees) between the fund which controls the acquiring entity and the other investment funds (and the companies controlled by these funds) managed by the same investment company.
- For FFCs falling outside one of the categories of most likely highly distortive subsidies (rescue and restructuring subsidies, unlimited State guarantees, export financing not in line with OECD Arrangement and FFCs that directly facilitate a M&A transaction), notifying parties will now not have to list each FFC separately, but will be able to group them per third country and per type of FFC and provide aggregated value information in ranges per third country. However, they will have to indicate the purpose of each type of FFC and the granting entity or entities. This will allow the Commission to request further information in relation to any that pique its interest, so notifying parties will need to consider carefully the overall legal narrative within which they present these FFCs.
 - The final filing form also reduces the information that must be provided in respect of the notifying parties' and target's activities, as well as information on other bidders and potential bidders for the target, although it is anticipated that the Commission will still request the latter information from the seller in appropriate cases.
 - While detailed information and internal documents are still required for FFCs that fall into certain most likely "highly distortive" categories, disclosure requirements for some categories of documents are now limited to those prepared by or for, or received by the parties' board members.

Even with the above concessions to proportionality, there remain significant uncertainties regarding the methodology for identifying and calculating reportable FFCs. While the Commission has clarified some basic points of methodology in its recent Q&A (see our [blog post](#)) it does not envisage issuing detailed guidance until some years after the regime enters into force. Consequently, early filings under the new regime could face lengthy pre-notification discussions, in particular if the Commission were to disagree with the methodologies adopted by the notifying parties and their advisors.

In addition, it remains the case that the €50 million filing threshold is based on the value of all FFCs received, including FFCs that are exempt from disclosure, such as those below €1 million in value.

Procedurally, there will be close alignment of FSR clearance timing and procedures with those of the EU Merger Regulation, subject to certain key differences, such as the absence of a formal mechanism for transactions to be cleared on the basis of remedies in Phase 1 or the lack of publication of clearance decisions following a preliminary phase 1 review.

PUBLIC TENDER FILINGS

For bidders in public tender procedures that meet the relevant thresholds (see box), the FFC disclosure requirements in the final filing form have been largely aligned with those of the M&A filing form (see above), except that notifying

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 it is also the case that 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.

bidders will be required to disclose certain FFCs equal to or over €1 million from any third country that has given them equal to or over €4 million of FFCs in aggregate in the past three years, in contrast to the much higher €45 million threshold that has been introduced for the M&A form. The other main difference is that one of the categories of most likely highly distortive FFCs in respect of which more detailed information is required is those that "enable an undertaking to submit an unduly advantageous tender" (as opposed to those that directly facilitate a M&A transaction). In certain respects, the filing burden under the final form will be higher for some bidders than was envisaged in the consultation draft, as summary information on FFCs that do not fall into one of the most likely highly distortive categories will now be required.

In addition, if none of the parties to a bidding consortium that is participating in a public tender that exceed the €250 million (and, if relevant, €125 million) value threshold have received FFCs of €4 million or more per third country in the three years prior to the tender, they will be required to make a declaration to that effect, and to prove this by disclosing all FFCs received. This is subject only to an exception for FFCs received from the same third country with an aggregate value of less than €200,000 over the previous three-year period. While bidders can provide some of this information (e.g., related to FFCs that are of a value of above €200,000 but below €1 million) in summary format, that will not relieve them from the obligation to gather the data in the first place.

As is the case for the M&A filing form, many of the information and internal document requirements of the draft filing form for public tenders focus on subsidies that are considered most likely to be distortive. However, bidders will have the additional possibility to explain why any subsidies received did not enable the bidder to submit an unduly advantageous tender. The form also relieves bidders from the obligation to provide certain information that has already been provided in the context of the relevant public procurement process, e.g., where bidders submit their information through the European Single Procurement Document (ESPD).

Furthermore, unlike the M&A form (which requires notifying bidders to provide information relating to FFCs received by any member of their corporate group, subject to the exception mentioned above for investment funds), the public procurement form only requires bidders to provide information on FFCs received by the relevant main contractor, main subcontractors and main suppliers, their subsidiary companies without commercial autonomy and their holding companies. However, FFCs received by the entire corporate group must still be taken into account when determining whether the €4 million filing threshold is met.

The Implementing Regulation also contains various clarifications. Whereas main contractors as well as main subcontractors and suppliers are obliged to file and are deemed "notifying parties", the Regulation 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. Accordingly, the main contractor will have to cooperate closely with its main subcontractors and suppliers to ensure prompt submission of any filing.

CONCLUSION

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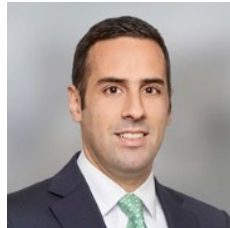
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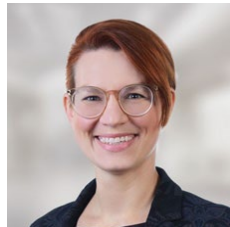
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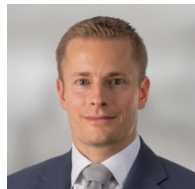
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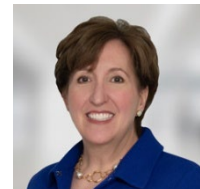
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