

# EU ADOPTS FOREIGN SUBSIDIES IMPLEMENTING REGULATION

## Foreign Subsidies Implementing Regulation adopted - with (some) relaxation of the administrative burden

On 10 July 2023, the European Commission (EC) adopted the final text of the legislation implementing the [Foreign Subsidies Regulation \(FSR\)](#). The FSR came into force on 12 January 2023 and started to apply from 12 July 2023 (see dedicated briefing [here](#)). The FSR regime is intended to address distortions in the EU internal market caused by foreign subsidies. The regime introduces a new mandatory and suspensory regime for M&A transactions and public tenders above certain financial thresholds. It also includes a ‘general market investigation tool’, which allows the EC to investigate lower-value concentrations and public procurement procedures, and all other market situations where a distortive foreign subsidy may be involved.

The [Implementing Regulation \(Final IR\)](#) sets out the procedures for FSR notifications and investigations, and includes a package of notification forms for M&A filings (Annex I - Form FS-CO) and public procurement filings (Annex II - Form FS-PP). The EC has also updated its [Q&A](#) and provided further [Practical Information](#). The obligations for companies to notify qualifying concentrations and public procurement procedures will start to apply from 12 October 2023. The EC is now encouraging companies to engage in pre-notification discussions in respect of relevant transactions.<sup>1</sup>

The Final IR has taken on board some of the strong feedback received from stakeholders to the public consultation exercise on the [draft IR](#) in February 2023 urging the EC to relax the administrative burden related to information disclosures. This briefing focuses on the main improvements introduced by the Final IR regarding

<sup>1</sup> The FSR filing obligation will not apply to M&A deals that (i) were signed on or after 12 July 2023, but closed before 12 October 2023, and (ii) were signed before 12 July 2023, regardless of whether they were closed by 12 October 2023. The filing obligations will also not apply to public tender contracts awarded or initiated before 12 July 2023.

the reporting of notifiable foreign financial contributions (FFCs). FFCs are defined broadly to cover a wide variety of arrangements that companies may have with governmental (and associated) entities.

## Readjustments to the scope of reportable FFCs and related disclosure requirements

The FSR jurisdictional thresholds and the scope of financial contributions remain unchanged, as these are specified in the FSR itself. However, the Final IR has done away with the previously suggested “catch-all” approach to notification obligations that would have required detailed reporting for all FFCs worth EUR 200,000 or more. In addition to raising the threshold for inclusion of individual FFCs to EUR 1 million across all types of FFCs, the Final IR introduces tiered reportability and disclosure requirements depending on the nature of the FFCs.

## Likely distortive FFCs - detailed disclosure

For FFCs falling into one of the categories viewed by the FSR as “most likely to distort” competition in the EU (**likely distortive FFCs**), notifying parties and targets need to report and disclose detailed information for those FFCs individually worth EUR 1 million or more (the **de minimis threshold**) in the relevant 3-year period, including various supporting documents.<sup>2</sup> FFCs in this category include, among others, those granted to companies in financial difficulty, those directly facilitating a transaction or unlimited guarantees.

<sup>2</sup> It remains to be seen whether companies in practice will cause third-party countries to “slice” the FFCs they grant with the effect that they fall below the de minimis threshold and therefore circumvent the reportability requirements (in violation of Article 39(1) of the FSR). It is anticipated that the EC will react to such practices if and when confronted with this.

### Secondary FFCs - aggregate disclosure

For other FFCs (**secondary FFCs**) that individually meet the de minimis threshold in the relevant 3-year period, notifying parties (but not the target or seller) are required to report and disclose information in an aggregate fashion, and only for those third countries for which the aggregate amount of contributions received is equal to or exceeds EUR 45 million (M&A deals) or EUR 4 million (public tenders) in the relevant 3-year period.<sup>3</sup> This aggregate disclosure involves grouping together secondary FFCs per third country and per type within a specific table format, and does not require the provision of supporting documentation.

This means that where the aggregate amount of such secondary FFCs granted by a particular third country in the relevant 3-year period is less than EUR 45 million (M&A deals) or EUR 4 million (public tenders), they will not need to be reported in the notification.

#### An illustrative example for reportable secondary FFCs

The acquirer in a notifiable M&A transaction has received several FFCs from government entities in the same non-EU jurisdiction (a) in the relevant 3-year period:

Year	FFC
Year 1	1: EUR 75,000,000 in the form of a loan from authority A for project A
	2: EUR 800,000 in the form of a direct grant from authority B for project B
Year 2	3: EUR 600,000 in the form of a loan from authority X for project X
	4: EUR 900,000 in the form of a direct grant from authority Y for project Y
Year 3	5: EUR 1,100,000 in the form of a direct grant from authority Z for project Z
	6: EUR 2,000,000 in the form of a direct grant from authority Y for project Y

The reporting requirement kicks in because the EUR 45 million aggregate threshold is met on the basis of FFC 1 alone. Other FFCs to be considered for calculating the aggregate threshold are FFC 5 and FFC 6. FFC 2 and FFC 3 do not meet the de minimis threshold. Whether FFC 4

<sup>3</sup> The 'likely distortive FFCs' meeting the de minimis threshold will also have to be considered alongside the relevant secondary FFCs for the purposes of assessing whether the aggregate thresholds are met in each third country.

should be considered may depend on the exact facts - while it does not meet the de minimis threshold on an individual basis, FFC 4 and FFC 6 appear to have been granted by the same authority for the same project, and therefore it is possible that they are two payments reflecting a single FFC for reporting purposes. The table should report on the following FFCs:

Acquirer		
Third country	Type of financial contribution	Brief description of the purpose of the financial contribution and the granting entity
(a)	Loans	FFC1
	Direct grant	FFC 5 + FFC 6 (+FFC 4)

#### Specific exemptions to the reportability of secondary FFCs

The Final IR also has exemptions from the reportability requirements for secondary FFCs (even if they exceed the de minimis threshold) relating to:

- certain measures and reliefs relating to taxes and social security contributions to the extent that they are not selective; and
- supply/purchase of goods/ services (except financial services) at market terms in the ordinary course of business.<sup>4</sup>

These secondary FFCs do not count towards calculating whether the EUR 45 million (M&A deals) or EUR 4 million (public tenders) aggregate threshold (per third country) is met for reporting purposes. Secondary FFCs below the de minimis threshold also are not included for these purposes.

#### Investment fund exemption to the reportability of secondary FFCs

In response to the market consultation feedback, the Final IR establishes a specific reportability regime for secondary FFCs granted to investment funds that engage in notifiable M&A transactions. These changes will allow investment funds to report on a fund-by-fund basis subject to certain conditions:

<sup>4</sup> This confirms our earlier understanding that even loans obtained in line with normal market conditions will be classified as FFCs that may require reporting under the FSR.

- Secondary FFCs granted to the fund (and its portfolio companies) directly involved in the M&A transaction are reportable and require aggregate disclosure (assuming the M&A aggregate and de minimis thresholds have been met).
- Secondary FFCs granted to other funds (and their portfolio companies) managed by the same investment company (general partner), but with a majority of different investors (limited partners) are exempt from reporting if the following cumulative conditions are met:
  - (a) The fund that controls the acquiring entity is subject to the EU's Alternative Investment Fund Managers Directive (or equivalent third-country legislation); and
  - (b) The economic and commercial transactions (such as sales of assets, ownership in companies, loans, credit lines or guarantees) between the fund which controls the acquiring entity and other investment funds (and their portfolio companies) managed by the same investment company are non-existent or limited.

Where the exemption is triggered, the secondary FFCs in question do not count towards calculating whether the

M&A aggregate threshold has been met in a particular third country.

The investment fund exemption regime does not apply to 'likely distortive FFCs' granted to funds (and their portfolio companies), meaning that 'likely distortive FFCs' received by any fund managed by the same investment firm are reportable (and require disclosure of detailed information), if they individually meet the de minimis threshold in the relevant 3-year period.

### Conclusion

The revisions set out above are welcome improvements alleviating the administrative burden on companies regarding reportability and disclosure. However, there will remain significant information-gathering burdens on companies in order to assess whether a particular transaction is notifiable, particularly as the above arrangements only relate to the question of reportability and disclosure in the notification form. All FFCs granted to a company must still be considered when determining whether the notification obligation itself has been met, as this threshold is specified in the FSR and not the Final IR, and the assessment on reportability itself necessitates a detailed understanding of all FFCs granted. The speed and complexity of the process post-notification also remains untested.

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