

Navigating the EU Foreign Subsidies Regulation: New Guidelines, Growing Enforcement and What Lies Ahead

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Executive Summary

- What's new:** On 9 January 2026, the European Commission adopted much-anticipated guidelines on how it intends to conduct substantive assessments under the Foreign Subsidies Regulation, following a period of steadily increased enforcement since the FSR took effect in mid-2023.
- Why it matters:** The guidelines provide greater clarity for companies operating in the EU and help them to better identify and address FSR risk in complex cases, but also largely reaffirm the EC's broad enforcement discretion and the extensive reach of the FSR rules.
- What to do next:** Businesses may want to familiarise themselves with the FSR's analytical framework, consider FSR requirements early in M&A transactions and public tenders, remain alert to the possibility of unexpected investigations and closely monitor developments — including the ongoing review of FSR implementation and enforcement.

The EU Foreign Subsidies Regulation (FSR) grants the European Commission (EC) powers to address distortions of the EU internal market caused by foreign (non-EU) subsidies through a review of notified transactions and public procurement procedures, as well as through investigations launched on its own initiative into any economic activity. Since the regime entered into force in mid-2023, the EC has steadily increased enforcement efforts in this area. Building on this early experience, the EC issued formal guidelines on 9 January 2026 (Guidelines), which clarify several aspects of its approach in the application of the FSR. This briefing summarises the key takeaways from these recent developments and what to expect from the FSR this year.

FSR Guidelines — Key Takeaways

- The EC's guidance is not a checklist.** The Guidelines provide clarifications and methodologies on how the EC will assess distortions, balance any distortions against positive effects, and exercise its call-in powers for M&A transactions and public tenders that fall below the FSR filing thresholds. However, the Guidelines are not intended as a mechanical checklist; the EC will interpret its FSR powers broadly, assessments will remain case-specific and the Guidelines will evolve as case law develops. This is not surprising — the FSR is still a relatively new regime and there has been limited enforcement so far.
- The cross-subsidisation test remains expansive.** A foreign subsidy distorts the internal market if (1) it is liable to improve the beneficiary's competitive position in the EU (including through cross-subsidisation); and (2) this improvement distorts competition in the EU. The EC takes into account a wide, non-exhaustive range of factors to reflect the particular circumstances of each case. An important clarification in the Guidelines is how the EC will connect a foreign subsidy to the recipient's activities in the EU in the first step of the distortion test.
 - Targeted subsidies that support an economic activity in the EU will typically be considered to benefit EU activities. Examples include subsidies for EU manufacturing or distribution activities, for licensing technology to EU companies, or conditional on EU investment.

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- Non-targeted subsidies which are neither intended for nor directed at the EU market, such as those of general scope or related to activities outside of the EU (e.g., grants to build manufacturing plants or incentives for employment in non-EU countries), may still be considered liable to improve a company's competitive position in the EU where they "free up" resources that could be used for EU activities (cross-subsidisation). The EC will assess whether there are any credible legal or economic barriers preventing such use, considering several factors such as shareholding structure, links between entities, the subsidy's design and conditions, agreements with third parties, applicable laws, and the beneficiary's economic situation. For example, the Guidelines recognise that fiduciary duties between limited partners and fund managers and certain obligations in shareholder agreements may prevent cross-subsidisation.
- There are some limited safe harbours for subsidies addressing market failures outside the EU, subsidies with purely social or non-economic objectives, disaster relief, de minimis subsidies and amounts insignificant relative to the recipient's EU activities. Such subsidies are considered not liable to benefit EU activities and will therefore not be distortive.
- **The distortion test emphasises a level playing field.** The second step of the distortion test prioritises maintaining a level playing field — a concept closely related to state aid rules. The EC examines whether the subsidy changes the competitive landscape in a way that disadvantages other participants in the EU. Key points include:
 - Potential effects are sufficient, as long as the impact on competition is appreciable.
 - Harm can occur in relation to any downstream, upstream, related or otherwise indirectly affected sectors to those where the beneficiary is present.
 - Subsidy need not be the sole cause; it is enough if the subsidy contributes to the negative impact.
- **Distortions of competition can play out in different ways.** This includes in:
 - Acquisition processes, such as enabling higher bids or otherwise facilitating acquisitions that might not otherwise take place.
 - Operating decisions, including lower prices or the expansion of production.
 - Investment decisions.
 - Activities at different levels of the value chain.
- **Subsidies granted to sister companies can be examined in tenders.** The distortion test for public procurement procedures is narrow, and concentrates on the specific tender procedure

rather than broader market activities. Distortion refers to whether a foreign subsidy allows a bidder to submit an unduly advantageous tender.

- The EC first determines if a tender is advantageous by, for example, comparing it to other bids, the contracting authority's estimates on price and quality, and a counterfactual tender absent the subsidy. An advantage is not just about lower prices but can also appear as higher quality or better terms, which includes aspects such as innovation and sustainability features.
- Second, the EC assesses whether the advantage is undue — requiring bidders to prove that the advantageous nature of their offer results from legitimate factors rather than foreign financial support.
- Finally, the EC considers whether there is a negative effect, such as the award of the contract to the subsidised economic operator, an impact on the results of a negotiated procedure or deterred potential bidders.
- The Guidelines confirm that, given the risk of cross-subsidisation, the EC may scrutinise subsidies granted to any entity within the broader corporate group of the bidder (including sister companies) as well as its main subcontractors or suppliers; even though the FSR notification obligation for public tenders only strictly applies to companies linked by a linear ownership structure (*i.e.*, the bidder, its direct subsidiaries and its direct/indirect parent entities).

- **The balancing test considers a range of positive effects.**

In assessing subsidies during an in-depth review, the EC may conduct a balancing test to weigh potential distortive effects against positive effects when deciding whether to accept (or impose) remedies and what form they should take. The Guidelines set out a detailed methodology and process for the balancing test, clarifying that interested parties bear the burden of proof to show that positive effects are likely to arise but do not need to precisely quantify such effects. Positive effects include:

- The development of the relevant subsidised economic activity in the EU, such as remedying a market failure or providing positive externalities from enhanced R&D.
- Those linked to broader EU policy objectives (environmental protection, social standards, R&D, economic development, energy security, innovation, competitiveness, resilience, economic security, defence). Non-EU policy objectives may be considered if they are relevant to the EU, such as when foreign policies aim to improve global welfare or promote R&D that leads to innovative products or technology.
- For public procurements, whether there are other available sources of supply, in order to prevent scenarios where it becomes impossible to secure essential public services.

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- Call-in criteria are broad and open-ended but focus on strategically significant cases. The Guidelines clarify the circumstances where the EC may call in pending M&A transactions, and public tenders that fall below the mandatory FSR notification thresholds if it (1) suspects foreign subsidies were granted in the preceding three years and (2) considers the case merits prior review given its impact in the EU, taking into account factors such as:

- Targets whose turnover understates strategic significance.
- Strategic sectors and assets including critical infrastructure and innovative technologies.
- Patterns of acquisitions, investments or procurement participation that build influence or economic presence over time.
- The fact that the EC has previously adopted an FSR decision finding distortive subsidies, or opened an in-depth investigation, involving the same or related businesses.
- Other contextual information suggesting a distortion, including potential subsidies of the type “most likely to distort” the internal market (unlimited guarantees, on-OECD export financing, subsidies that directly facilitate a concentration or those enabling an unduly advantageous tender).

- The EC's call-in powers are largely unrestricted but have a limited safe harbour. The EC enjoys a margin of discretion in deciding to request prior notification, and the Guidelines introduce very limited carve-outs for foreign subsidies not exceeding €4 million in the relevant three-year period, low-value procurements and subsidies granted to address certain extraordinary circumstances.

- Call-ins can disrupt timelines. A suspension obligation takes effect from the date the EC issues its decision — addressed to the acquirer or bidder — requesting notification of a below-threshold case. The Guidelines confirm that the EC can exercise its call-in powers at any time before a transaction is fully implemented or a public contract is awarded. This can delay transaction schedules or disrupt a bidder's participation in a public procurement procedure and businesses should be prepared for information requests or call-ins even late in the process in some cases.

Increasing Enforcement Action

Recent enforcement highlights the EC's commitment to using the FSR's full range of tools, including unannounced inspections, to scrutinise potentially distortive foreign subsidies.

- The majority of cases are unproblematic. The EC has reviewed over 200 M&A notifications — about eight per month — with only two notifications leading to in-depth reviews. Out of more than 3,500 procurement-related submissions, the EC

has launched only four in-depth reviews. This low intervention rate has raised questions about whether the current notification requirements are proportionate for non-problematic deals.

- Focus on businesses from state-dominated economies.

While the FSR is designed to be country-agnostic, enforcement has targeted businesses from state-dominated economies, such as China and the MENA region, when they do business in the EU, even though these companies have so far made up only a small fraction of notifications. Although M&A deals involving such buyers are still being cleared and do not always trigger in-depth investigations, companies with state connections — such as those controlled by sovereign wealth funds — should consider FSR requirements early and account for potentially lengthy pre-notification periods in deal timetables.

- The two in-depth M&A reviews targeted acquirers with UAE backing (*e&PPF and Adnoc/Covestro*).
- The four in-depth reviews of public tenders all involve Chinese state-owned companies. Three of these reviews were closed without formal decisions after the relevant bidders withdrew from the procurement process. The fourth investigation, which concerns a subcontractor in a tender, is still ongoing.
- The EC has launched several preliminary reviews under its own initiative powers into sectors such as wind turbines, security technology and online platforms, including two that followed unannounced inspections. Most of these investigations target Chinese companies. One of these has progressed to an in-depth investigation. There are no statutory timelines for ex officio investigations, and some current cases have been ongoing for over a year.

- Prioritization of strategic sectors. Enforcement has closely aligned with the EC's strategic priorities, targeting sectors vital to EU competitiveness and resilience such as green energy, infrastructure and telecommunications. Businesses may want to consider these broader priorities in their regulatory strategies, such as when putting forward positive effects, designing commitments or assessing the risk of unexpected and prolonged investigations.

- The EC is seeking to review non-notified cases. Companies should prepare for the risk of intervention even if no notification has been made, through a call-in or own-initiative inspection. While the EC is increasingly using its ex officio powers, there has been only one call-in so far, related to a below-threshold public tender, although the EC has not yet released any details about this case. No M&A call-ins have been announced, but the EC is actively monitoring transactions and has been sending inquiries to market participants.

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“We . . . intend to focus more and more on below-threshold procedures to ensure that subsidised economic operators do not systematically bid below threshold to avoid . . . scrutiny.”

– Bonifacio García Porras, head of FSR Unit, DG GROW, October 2025

- Remedies are extensive. Both in-depth M&A reviews resulted in behavioural remedies.

- While the EC’s ready acceptance of behavioural commitments is a positive sign, the remedies are extensive, extending beyond the EU in both cases (the removal of state guarantees granted outside of the EU) and, in the *e&/PPF* case, the target’s EU activities were ring-fenced from the rest of the merged group for 10 years.
- The remedies in *Adnoc/Covestro* include an obligation to share the target’s sustainability-related patents with certain market participants on fair terms, highlighting that the EC might be receptive to commitments addressing broader policy objectives beyond case-specific theories of harm.
- Since no formal decisions have been issued in any of the procurement cases, the scope of acceptable remedies in procurement remains uncertain.

What to Expect From the FSR in 2026

- The EC is scheduled to present its report on the implementation and enforcement of the FSR by mid-July 2026. The report will review the EC’s practical experience of the regulation and may be accompanied by legislative proposals, which could include amendments to notification thresholds or the introduction of a simplified notification regime for straightforward transactions.

- A ruling in the Nuctech case before the EU General Court (*Case T-284/24*) may be handed down this year. Nuctech, the first business to face an unannounced inspection under the FSR, challenged the EC’s demand to access data stored on servers outside of the EU. Although Nuctech was denied interim measures, the main ruling is still pending.
- The EC is likely to continue prioritising its strategic objectives as geopolitical tensions reshape its political agenda. Notably, the Guidelines now recognise economic security and defence as positive factors in the balancing test.

The EC will “continuously monitor for new cases that warrant ex officio action,” focusing on “sectors most affected and types of foreign subsidies that are most harmful to fair competition in the Single Market.”

– Teresa Ribera, EC executive vice president for a clean, just and competitive transition, November 2024

For further background on the FSR, connect with your usual Skadden contact or with Skadden’s Brussels team dedicated to helping companies efficiently gather the relevant information, assess risk and navigate the FSR notification process.

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