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PERSPECTIVES

THE EU FOREIGN SUBSIDIES REGULATION: WHAT THE NEW GUIDELINES MEAN IN PRACTICE

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The European Union (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, which clarify several aspects of its approach in the application of the FSR.

Key points of the FSR guidelines

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, as the FSR is still a relatively new regime and there has been limited enforcement so far.

A foreign subsidy distorts the internal market if it is liable to improve the beneficiary's competitive position in the EU and this improvement distorts competition in the EU. 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. The guidelines distinguish between targeted subsidies that support an economic activity in the EU – which will typically be considered to benefit EU activities, and non-targeted subsidies which are neither intended nor directed at the EU market, such as those of general scope or related to activities outside of the EU (such as grants to build manufacturing plants or incentives for employment in non-EU countries) – which may be considered liable to benefit EU activities where they free up resources that could be used for EU activities (cross-subsidisation).

When assessing the likelihood of cross-subsidisation, the EC will consider 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.

The second step of the distortion test prioritises maintaining a level playing field. The EC examines whether the subsidy changes the competitive landscape in a way that disadvantages other participants in the EU. Potential effects are sufficient, as long as the impact on competition is appreciable. The subsidy also does not need to be the sole cause; it is enough if it contributes to the negative impact.

The guidelines make clear that distortions of competition can play out in different ways. This includes in: (i) acquisition processes, such as enabling higher bids or otherwise facilitating acquisitions that might not otherwise take place; (ii) operating decisions, including lower prices or the expansion of production; (iii) investment decisions; and (iv) activities at different levels of the value chain.

The distortion test for public procurement procedures is narrow and concentrates on the specific tender procedure rather than broader market activities. Distortion is assessed based on whether a foreign subsidy allows a bidder to submit an unduly advantageous tender. The guidelines confirm that, due to 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. This is the case 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 and indirect parent entities).

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: (i) the development of the relevant subsidised economic activity in the EU, such as remedying a market failure or providing positive externalities from enhanced research & development; (ii) those linked to broader EU policy objectives, such as environmental protection, energy security, innovation, competitiveness, resilience and economic security (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); and (iii) 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.

The guidelines also clarify the circumstances in which the EC may call-in pending M&A transactions and public tenders that fall below the mandatory FSR notification thresholds if it suspects that foreign subsidies were granted in the preceding three years and considers the case merits prior review given its impact in the EU, taking into account factors such as: (i) targets whose turnover understates strategic significance; (ii) strategic sectors and assets including critical infrastructure and

innovative technologies; (iii) patterns of acquisitions, investments or procurement participation that build influence or economic presence over time; (iv) the fact that the EC has previously adopted an FSR decision finding distortive subsidies, or opened an

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in-depth investigation, involving the same or related businesses; and (v) other contextual information suggesting a distortion.

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 €4m in the relevant three-year period, low-value procurements and subsidies granted to address certain extraordinary circumstances.

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. According to the guidelines, the EC can exercise its call-in powers at any time before a transaction is fully implemented or a public contract is awarded.

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 EC has reviewed over 200 M&A notifications – about eight per month – with only two notifications leading to in-depth reviews (*e&/PPF* and *Adnoc/Covestro*). Out of more than 3500 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 and tenders.

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 extend beyond the EU in both cases (through the removal of state guarantees granted outside of the EU) and in *e&/PPF*, the target's EU activities are ringfenced 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.

While the FSR is designed to be country-agnostic, enforcement has targeted businesses from state-dominated economies – such as China and the Middle East and North Africa region – when they do business in the EU, even though these companies have so far made up only a small fraction of notifications. The two in-depth M&A reviews targeted acquirers with United Arab Emirates backing, the four in-depth reviews of public tenders all involve Chinese companies, and most ex officio investigations target Chinese companies in sectors such as wind turbines, security technology and online platforms – two of which have progressed to in-depth investigations. However, M&A deals involving such buyers are still being cleared and do not always trigger in-depth investigations.

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.

Companies should also 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.

Looking ahead: FSR developments expected 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 FSR and may be accompanied by legislative proposals, such as amendments to notification thresholds or the introduction of a simplified notification regime for straightforward transactions. In the meantime, the EC is likely to continue prioritising its strategic objectives as geopolitical tensions reshape its political agenda.

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