

Three years in: EU Foreign Subsidy Regime in review

European Commission publishes its three-year review of the operation of the Foreign Subsidies Regulation

The EU's Foreign Subsidies Regulation (the FSR), which came into force in January 2023, aims to address distortions in the EU internal market caused by foreign subsidies. It introduced a mandatory, suspensory regime for M&A (including joint venture) transactions and public tenders above certain financial thresholds, as well as broad powers for the European Commission (EC) to investigate other market situations. Three years on, the EC has released its first report and Working Document reviewing the FSR's implementation and enforcement.

Key findings in the report

The EC's report finds that whilst the FSR is fit for purpose and has delivered benefits to the internal market, there is a need for clarification, simplification and streamlining across FSR implementation and enforcement to increase the instrument's efficiency and proportionality.

- The report mentions that stakeholders' feedback "widely acknowledged and supported" the FSR's objective of maintaining a level playing field in the internal market.
- The report further sets out that the number of notifications received in relation to M&A under the mandatory regime has exceeded expectations (with around 100 notifications annually compared to their expected 30-40) but that the EC has closed around 97% of notified concentrations after preliminary review without opening an in-depth investigation. The EC notes that this is close to the proportion of notified mergers cleared at Phase I under the EU Merger Regulation. The report also identifies the successes of the EC in securing commitments from certain companies (following in-depth investigations) and highlights the importance of pre-notification engagement by parties.
- At the same time, the report identifies several areas in which stakeholders consider higher legal certainty

and clarity is needed, especially in relation to several substantive FSR concepts such as the scope and application of the concept of foreign financial contributions (FFCs) (in Article 3 FSR) and the practical relevance of the balancing test (in Article 6 FSR). The report notes that broader uncertainty remains over the application of the FSR's substantive provisions, accentuated by the currently limited body of EC decisions under the FSR.

- The report recognises that, in M&A cases, the data collection process for the FSR is seen by companies as being resource-intensive (particularly given the uncertainty over the FSR's scope and the fact that businesses are often concurrently conducting merger control and national FDI filings), and that there is uncertainty as to the EC's power to call in transactions falling below the relevant thresholds. Stakeholders identified similar issues in the review of public tenders particularly given the tightness of relevant deadlines.

Next steps and outlook for businesses

The report emphasises the EC's continuing decisional practice and the recent publication of the FSR Guidelines in providing further clarity and predictability on many of the issues identified by stakeholders, including the EC's call-in powers (although as noted in our March briefing, the broad risk of call-in remains even following this clarification).

More promisingly, following its review, the EC aims to implement "targeted" adjustments to the FSR procedural framework in 2027, with a consultation planned for this autumn. These adjustments will focus on reducing the administrative burden imposed by the FSR on businesses during the review of M&A transactions and public tenders. In the context of M&A transactions, these changes may include:

- Increasing the turnover notification threshold.

- Introducing a simplified notification procedure in some instances.
- Moderately increasing the threshold for FFCs that need to be reported and introducing new reporting exemptions.

Businesses will welcome an alleviation of the administrative burden imposed by the FSR, but the exact scope of these reforms is unknown at this stage. Whilst procedural adjustments may provide greater certainty on the precise FFCs that must be reported, it remains unclear if the reforms will go further and lead to fewer notifications under the regime altogether. Either way, the report makes clear that, three years in, the EC continues to view the FSR as an important tool to ensure a level playing field and protect the internal market from distortive foreign subsidies. Businesses should therefore pay close attention as the EC makes its next moves.

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