



# EU Regulation on foreign subsidies enters into force

## Implications for investors

January 2023

### What is the issue?

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The EU is concerned about subsidies granted by non-EU countries that could distort competition in EU markets. In November 2022, the European Parliament and the Council of the EU adopted the **EU Foreign Subsidies Regulation** (FSR) which entered into force on 12 January 2023 and will start to apply on 12 July 2023 (with some exceptions). It introduces, among other instruments, a new notification regime for mergers and acquisitions where the parties have received subsidies from a third country. This is a new requirement that is independent of merger control or foreign direct investment (FDI) filing requirements, and will run in parallel to them. The notification obligation will apply from 12 October 2023.

### What will change?

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Under the FSR, concentrations between undertakings must be notified to the EU Commission if:

- the acquired undertaking, joint venture or at least one of the merging undertakings is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and
- the undertakings concerned received from third countries an aggregate financial contribution in three calendar years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of more than EUR 50 million.

The terms “concentration” and “undertaking” have the same meaning as under EU merger control – ie looking at all of the investments controlled by the investment firm. The term “financial contribution” is deliberately wide and includes essentially any transfer of funds or liabilities, the foregoing of revenue that is due (eg non-ordinary course tax benefits), or the purchase of goods and/or services by public authorities of a third country. It is therefore expected to capture financial investments by third countries into investment funds.

During the first phase of the notification procedure (25 working days) the EU Commission will assess whether the financial contribution distorts the internal market. If that is likely to be the case, the EU Commission can open an in depth procedure (90 working days). If the concerns remain, the EU Commission may prohibit the concentration. The parties to the transaction can also submit commitments to remedy the concerns.

A concentration that is notifiable may not be implemented before approval of the EU Commission has been obtained. As with EUMR filings, a failure to notify can result in fines of up to 10% of aggregate turnover of the parties concerned.

In addition, the FSR introduces a notification requirement for participants in public procurement procedures in the EU having an estimated value of EUR 250 million or more (or at least EUR 125 million if the tender is divided into lots), if they have received aggregated foreign financial contributions of at least EUR 4 million per third country in the three years preceding notification. Further, there is a catch all ex officio investigation power for the EU Commission, enabling it to investigate any distortive foreign subsidies that are not caught by the notification requirements.

### What are the implications?

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The FSR will subject many transactions to an additional notification requirement, which will run concurrently with EUMR or other merger or FDI filings. To ensure compliance with this requirement, financial sponsors will need to monitor financial contributions that they or any of their portfolio companies have received in the three years prior to notification and track this for each fund. Unlike the EUMR, the FSR does not allow calculations of financial contributions to be based on the last financial year, meaning that financial sponsors will either need to have systems in place within their portfolio companies which require reporting on a constant basis, or there will need to be an information gathering exercise which is more event driven (which may be a competitive disadvantage in a competitive process given delays in obtaining information).

Undertakings that have received financial contributions from a third country that could distort the internal market may experience prohibitions of certain concentrations or face remedy requirements. Jurisdictions which have subsidy regimes which are considered equivalent to the EU rules (such as the UK) are expected to be viewed more leniently than those which do not.

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