

# European Commission Consults on Draft Foreign Subsidies Regulation Guidelines

***The European Commission has published its long-awaited draft EU FSR guidelines for public consultation.***

## Key Points:

- The EU Foreign Subsidies Regulation came into effect in July 2023. Its aim was to ensure a “level playing field” for companies operating within the EU by addressing competitive advantages provided by non-EU state subsidies.
- The FSR added to the EU regulatory red tape. Over the last two years, more than 200 M&A deals and 500 public procurement bids required FSR clearance before implementation. The FSR allows the EC to also conduct own-initiative investigations. The EC is currently investigating at least two companies (and potentially more) for foreign subsidies that potentially distort the EU market.
- The FSR Guidelines attempt to codify the approach followed on the substantive assessment of foreign subsidies; namely whether a subsidy (i) distorts the EU market; and (ii) results in positive effects that could mitigate the effect of the distortion.
- The FSR Guidelines also attempt to provide clarity on when the EC is more likely to “call in” for review a below-threshold M&A deal / public procurement bid.
- Interested parties can provide comments until 12 September. Final guidelines are expected in January 2026.

On 18 July 2025, the European Commission (EC) published the [draft guidelines on the implementation of the Foreign Subsidies Regulation](#) (FSR Guidelines). The FSR Guidelines draw on the EC’s Foreign Subsidies Regulation (FSR) experiences and practices so far, and provide guidance on (i) the notion of distortion of competition caused by a foreign subsidy, (ii) the balancing test, which considered whether positive effects could counterbalance the distortive effects from a foreign subsidy, and (iii) the EC’s competence to call-in below-threshold M&A deal / public procurement bid.

## What Can Be a Distortion?

If the EC identifies a foreign subsidy, it is required to prove that the foreign subsidy distorts competition in the EU. To prove distortion in the EU market, based on Article 4(1) of the FSR, the EC needs to evidence that the subsidy: (i) is liable to improve the company's competitive position in the EU, and (ii) has an (actual or potential) negative effect on competition in the EU.

The FSR Guidelines focus on the assessment of notion of distortion, and introduce a detailed two-step assessment on both relevant conditions.

### **First condition: Subsidy is liable to improve the company's competitive position in the EU.**

- **The functioning of the foreign subsidy.** A foreign subsidy is liable to improve the company's competitive position in the EU when it (a) is used in the EU, (b) is intended or directed to the EU, or (c) is non-specific in its purpose, allowing the company to use it for any of its economic activities, including those in the EU.
  - *(a) Foreign subsidies used in the EU.* If a foreign subsidy is used in the EU, no further assessment will be required to conclude that it is liable to improve the company's competitive position.
  - *(b) Foreign subsidies intended or directed to the EU.* If a subsidy is intended to support a company's economic activity in the EU, the EC will only need to analyse the purpose and scope of the foreign subsidy to assess distortion. Examples are subsidies to support the economic activities of the company in the EU (e.g., subsidising costs), subsidies conditional on events related to an economic activity in the EU (e.g., subsidies conditioned on investments), or subsidies that support activities outside the EU, which are likely to be used in the EU (e.g., technology and know-how developed outside the EU which is likely to be used in the EU).
  - *(c) Cross-subsidisation from general foreign subsidies.* Even if a foreign subsidy is general or non-specific and granted for activities outside the EU (such as building a manufacturing plant or incentivising employment in a third country), the EC may consider that it frees up financial resources that could be used in the EU and thus potentially improves the company's competitive position by cross-subsidising EU activities. The FSR Guidelines include a list of parameters to assess this, including examples of situations which may prevent this cross-subsidisation (e.g., regulatory restrictions, agreements with third parties). Interestingly, the EC considers that the existence of transfer pricing rules is in itself not sufficient to prevent cross-subsidisation.
- **No *de minimis* threshold.** Beyond the *de minimis* thresholds set out in Articles 4(2) and 4(3) of FSR (i.e., €4 million in total, or €200,000 (per third country) over any consecutive period of three years), it is not possible to set general quantitative or qualitative tests to assess the distortion

caused by a foreign subsidy. Therefore, any non-*de minimis* foreign subsidy will require a case-by-case assessment based on relevant indicators (e.g., comparing the amount of the foreign subsidy to the size of the company's EU activities).

**Second condition: Subsidy has an actual or potential negative effect on competition in the EU.**

- **Negative effect on competition in the EU.** A foreign subsidy negatively affects competition if it is likely to have a negative impact on the level playing field in the EU. This requires an impact on competitive dynamics to the detriment of other economic actors in the EU (including companies actually or potentially active in the EU, and other stakeholders, such as consumers or workers).
- **Reasonable link.** The FSR Guidelines clarify that the EC should show a reasonable link between the foreign subsidy, the improved competitive position of the subsidised company, and the negative impact on competition in the EU. However, according to the guidelines, it is sufficient for the EC to show that the foreign subsidy *contributes* to the negative impact. This is a very low threshold that stakeholders are expected to challenge ahead of the FSR Guidelines' finalisation. For the foreign subsidies labelled by Article 5(1) FSR<sup>1</sup> as "most likely to distort the EU market", the EC can presume a negative effect on competition without a detailed assessment.
- **Relevant timeframe.** The assessment will be based on the moment the company benefitted from the foreign subsidy (or, if the company is not active in the EU when the subsidy was received, from the time the company started contemplating entering the EU market).
- **Effects on other economic actors.** The EC will compare the competitive situation in the presence of the foreign subsidy with the counterfactual (i.e., the situation absent the foreign subsidy). The analysis will be based on a broad set of indicators, including (a) the scope, purpose, conditions, amount, and type of the foreign subsidy; (b) the size of the company and the scope of its activities; (c) the characteristics of the sector; and (d) the legal context.
- **Main categories of distortion.** These include: (a) distortion in the acquisition of other companies; (b) distortion caused by the commercial behaviour of the subsidised company (e.g., aggressive pricing, advantageous terms, etc.); (c) alteration of investment decisions of the subsidised company (e.g., investments with an impact on production levels, or investments in capabilities such as know-how); (d) distortion at other levels of the value chain (e.g., foreign subsidies contributing to the relocation of a given business or technology outside the EU).
- **Unduly advantageous tenders in public procurement procedures.** The advantageous nature of the tender can be assessed by comparing the tender against other comparable tenders and the contracting authority's own estimates, or by assessing the offer the subsidised tenderer would have submitted in the absence of the foreign subsidy at issue. The advantage will be considered "undue" when it cannot be justified by factors other than the foreign subsidy (e.g., cost-effectiveness, innovations, novel technical solutions, exceptionally favourable conditions).

## How to Assess a Subsidy's Positive Effects?

- If a foreign subsidy is found to have distortive effects, the EC will also assess whether potential positive effects on the EU can mitigate the potential distortive effects (the balancing test).
- **Positive effects.** Such effects can relate to EU objectives, especially those covered by EU State Aid rules (e.g., regional development, innovation, environmental protection, industrial decarbonisation, and clean technology). They can also relate to non-EU objectives, provided that they are relevant to the EU, such as promoting environmental protection and social standards.
- **Principles.** The positive effects need to be specific to the relevant foreign subsidy and establish with a certain degree of likelihood that they will change the company's behaviour. The balancing test compares the significance of the positive and negative effects. It considers the proportionality and necessity of the subsidy, with excessive subsidies less likely to outweigh negative effects.
- **Procedure.** A party claiming positive effects must provide evidence for their claims within the EC's prescribed time limits, not exceeding one month after notification of the in-depth investigation. The EC conducts the balancing test during the in-depth investigation phase and includes its assessment in the final decision.
- **Outcome.** If positive effects outweigh negative ones, the investigation would conclude without the need for a remedy. If the positive effects do not outweigh the negative ones, the balancing test can help to mitigate the scope of potential remedies to ensure that the positive effects will be preserved.

## Which Deals and Public Procurement Bids Are Likely to Be Called In?

- The FSR allows the EC to call in an otherwise non-reportable M&A deal or public bid any time before its implementation (for deals) or contract award (for bids), if it suspects that the relevant companies (including the target) received foreign subsidies in the last three years. The FSR Guidelines aim to provide guidance to stakeholders on deals and bids most likely to be subject to a call-in.
- **Relevant factors.** In assessing whether cases merit a call-in, the EC will consider several factors, including: (a) whether the target's turnover (in M&A deals) understates its actual or future economic significance; (b) whether the relevant sector or supply chain are of strategic importance in the EU, especially if the target owns critical infrastructure or strategic technologies; (c) roll-up acquisition strategies comprising multiple below-threshold deals; and (d) indications that the parties have received "most likely distortive" subsidies under Article 5 of the FSR.
- The EC invites EU Member States and other interested third parties to submit information and evidence on cases that could merit a call-in, similar to the process the EC had envisaged for below-threshold referrals in the now defunct EU Merger Control Article 22 guidelines.

## Next Steps

Interested parties can submit comments to the EC until 12 September 2025. The EC intends to publish the final guidelines by 13 January 2026.

## Conclusion

The EC deserves recognition for its efforts to conceptualise the substantive aspects of the FSR and provide guidance based on its recent experiences and practices. The FSR guidelines are largely focused on the substantive assessment of the notion of distortion, explaining in detail the steps of the assessment and providing examples where possible. While the effort is appreciated, we expect stakeholders to raise issues over the low threshold envisaged to prove effect on competition. Based on the current draft, any potential non-insignificant amount of subsidy would suffice to prove effect, and therefore a distortion. The ongoing public consultation allows stakeholders to share comments so that the EC can hone some of the guidance in its current draft.

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## Endnotes

<sup>1</sup> These are limited to the following five categories: (a) a foreign subsidy granted to a failing firm; (b) an unlimited guarantee; (c) an export financing measure not aligned with the OECD Arrangement on officially supported export credits; (d) a foreign subsidy directly facilitating an M&A transaction; or (e) a foreign subsidy enabling a company to submit an unduly advantageous tender.