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# Update

## European and Competition Law

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### The EU strikes back: Regulation on foreign subsidies that distort the internal market

Miguel Máximo dos Santos | [mxs@servulo.com](mailto:mxs@servulo.com)  
Morgana Grácio | [mgr@servulo.com](mailto:mgr@servulo.com)

#### 1. The Foreign Subsidies Regulation

On January 12, 2023, the **Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies that distort the internal market ('FSR')** entered into force.

This is an innovative piece of legislation whose impact, if it is properly shaped, will be significant in the years to come. It addresses, for the first time, the distortions of the internal market and competition arising from direct or indirect funding by third countries (therefore qualified as "foreign subsidies"). As it is well known, at internal level, competition in the EU is fundamentally based on the general rule of prohibition of State aid. In other words, barring exceptions, Member States may not grant financial advantages originating from state funds to undertakings, to the extent that it may cause distortions of competition in the internal market. The rules applicable so far in the EU do not cover, to a large extent, subsidies and financing from third countries, which have remained immune to rules on State aid. The impact of such foreign subsidies on the internal market is well known, undermining the EU's level playing field, notably in the case of mergers or public procurement where participating companies are fully or partly financed by foreign subsidies. It is against this backdrop that the FSR was adopted, acknowledging – as we see on a daily basis – that companies established in the EU, public or private, receive subsidies from third countries, which are often channeled to fund economic activities in the internal market, creating distortions.

It is worth clarifying that, for this purpose, a *"foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an*

*undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries” (Article 3).*

The powers granted to the European Commission are vast and varied. The European Commission can, on the basis of the information available, balance the negative and positive effects of a subsidy on the internal market and impose remedial measures to correct the actual or potential distortion caused by a foreign subsidy. The Regulation states that *“a distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market.”*

The FSR applies to all economic activities in the EU: it covers mergers and acquisitions, public procurement procedures and all other market situations.

The Regulation provides the Commission with three main types of instruments:

1. In the case of concentrations, a system of prior notification of concentrations involving a financial contribution from a third-country where *i)* the aggregate EU turnover of at least one of the merging undertakings, the acquired undertaking or the joint venture is of at least EUR 500 million and; *ii)* the combined aggregate foreign financial contribution is of at least €50 million in the three years prior to the conclusion of the contract, the announcement of the public bid, or the acquisition of controlling interests;
2. In public procurement, a prior notification procedure when such undertakings participate in public procurement procedures in which *i)* the estimated contract value is at least €250 million and *ii)* the bid involves a foreign financial contribution of at least €4 million per third country;
3. In other areas, the Commission can start investigations on its own initiative if it suspects that foreign subsidies which distort competition may be involved. Such includes the possibility to request *ad-hoc* notifications for smaller concentrations and or procurement procedures.

Finally, it should be noted that, as in the area of competition law, the Commission can impose fines and penalties (including up to 10% of aggregate annual turnover) if an undertaking or association of undertakings supplies incomplete, incorrect or misleading information or does not provide the information requested in a timely manner. It may also conduct on-site inspections, including in third EU countries if the country in question does not object to such an inspection.

## 2. Next steps

Notwithstanding exceptions, the FSR applies from the 12<sup>th</sup> of July 2023, and it is now up to the Commission to clarify the applicable rules and procedures, with the aim of ensuring a uniform implementation of the FSR in the EU.