EU Foreign Subsidies Regulation – Key takeaways for affected businesses

The Foreign Subsidies Regulation is applicable to businesses operating within the EU

- The Foreign Subsidies Regulation applies to financial contributions granted by non-EU member states (foreign subsidies) to businesses operating in the EU's internal market.
- Under the regulation, the notion of 'financial contribution' is broad. A foreign subsidy may consist of e.g., capital injections, grants, loans, loan guarantees, tax breaks or debt forgiveness.

Foreign subsidies from the past ten years may be subject to review by the European Commission

- The new regulation grants the European Commission power to investigate, ex officio, foreign subsidies alleged to distort competition in the EU. Information for the investigation may be gathered from any source, such as Member States or any natural or legal person or an association.
- If the information regarding the foreign subsidy indicates a possibility of having a distortive effect in the EU, the European Commission shall initiate a preliminary review of the subsidy. At its disposal, the European Commission has extensive investigative tools, including mandatory requests for information and inspections.

The EU Commission's review of foreign subsidies

1) **Has a foreign subsidy been granted?**
A foreign subsidy exists where a non-EU member state has provided a financial contribution which confers a benefit to a business operating within the EU. The foreign subsidy may e.g., be a transfer of funds, grants and capital injections, but may also e.g., be given in the form of loans, loan guarantees, tax exemptions or special or exclusive rights without adequate remuneration.

2) **Does the foreign subsidy distort competition in the EU's internal market?**
A foreign subsidy distorts competition in the EU's internal market if it is liable to improve the competitive position of the undertaking concerned and thereby actually or potentially affects competition negatively. A foreign subsidy that does not exceed the amount of EUR 4 million (over any consecutive period of three years) shall be considered unlikely to distort competition in the EU's internal market.

3) **Do the positive effects of the foreign subsidy outweigh the negative effects? *(balancing test)***
If a foreign subsidy is found to have a distortive effect on the EU's internal market, the regulation still provides a possibility for the European Commission - when deciding whether to impose measures or not – to balance the negative effects of the foreign subsidy with the positive effects on the development of the relevant economic activity in the internal market.

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Requirements to notify foreign subsidies in the context of concentrations or public tenders

Thresholds and standstill obligation: Under the regulation, foreign subsidies shall – subject to certain thresholds – be notified when the relevant business is part of a concentration (e.g., a merger) or participates in public tenders. Notifiable concentrations and public tenders may not be implemented prior to the European Commission's approval (standstill)

- **Concentrations:** The Foreign Subsidies Regulation requires an undertaking concerned in a concentration resulting in a change of control to notify foreign subsidies to the European Commission if:

  (i) one of the undertakings concerned is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million, and

  (ii) the undertakings concerned were granted an aggregate of foreign subsidies amounting to more than EUR 50 million in the three years preceding the concentration.

- **Public tenders:** The Foreign Subsidies Regulation requires a business participating in a public tender to notify foreign subsidies to the European Commission if:

  (**i**) the total value of the public procurement or framework agreement is equal to or exceeds EUR 250 million, and

  (ii) the participating business, including its main subcontractors, has been granted financial contributions from non-EU states of a combined value of at least EUR 4 million over the three years prior to the notification.

The European Commission may impose redressive measures, commitments and fines

The European Commission may impose redressive measures and Commitments if it concludes that a foreign subsidy distorts competition

- Redressive measures and commitments may consist of, e.g.;
  - Prohibiting a concentration or a public contract award
  - Imposing an obligation on a business to refrain from certain investments
  - Imposing an obligation on a business to divest certain assets
  - Imposing a repayment of the foreign subsidy (including interest rate)
  - Imposing an obligation to adapt a business' governance structure

The European Commission may impose fines and penalties on a business that does not comply with the Foreign Subsidies Regulation

- Fines and periodic penalty payments may be imposed on businesses for:
  - intentionally or negligently withholding information, or providing incorrect information (fines up to 1% of the aggregate annual turnover and/or periodic penalty payments of up to 5% of average daily turnover/per)
  - intentionally or negligently failing to comply with decisions or notification requirements (fines up to 10% of the aggregate annual turnover and/or periodic penalty payments of up to 5% of average daily turnover)

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Key takeaways

- All foreign subsidies received in the last ten years may be subject to the European Commission's review. If a foreign subsidy is found to distort competition in the internal market the recipient business may face redressive measures.

- Concentrations and participation in public tenders could be subject to a notification requirement to the European Commission, subject to certain thresholds, and such mergers or public tenders may not be implemented before the European Commission has completed its review of the foreign subsidy.

- The notification requirements and the European Commission's investigative powers are supplemented by enforcement powers enabling the European Commission to impose redressive measures as well as fines and periodic penalties – of up to 10% of the annual turnover – on non-compliant businesses. Additionally, if the European Commission concludes that a foreign subsidiary distorts competition, it may order e.g., a repayment of the foreign subsidy (including interest).

What may businesses do to prepare for the Foreign Subsidies Regulation?

- Businesses should keep a record of any financial contribution granted by non-EU member states to mitigate the risk of non-compliance with the notification obligations, and evaluate the risk of having to repay the contributions following an *ex officio* review of foreign subsidies.

- Businesses should have policies in place ensuring that future grants of foreign subsidies are made on market terms or can be justified due to positive effects in the EU's internal market.

- Businesses that consider themselves adversely affected by competing businesses' foreign subsidies may proactively notify suspicions of such subsidies to the European Commission, or contracting authorities or entities.