

New Regulatory Challenges in M&A and Public Procurement

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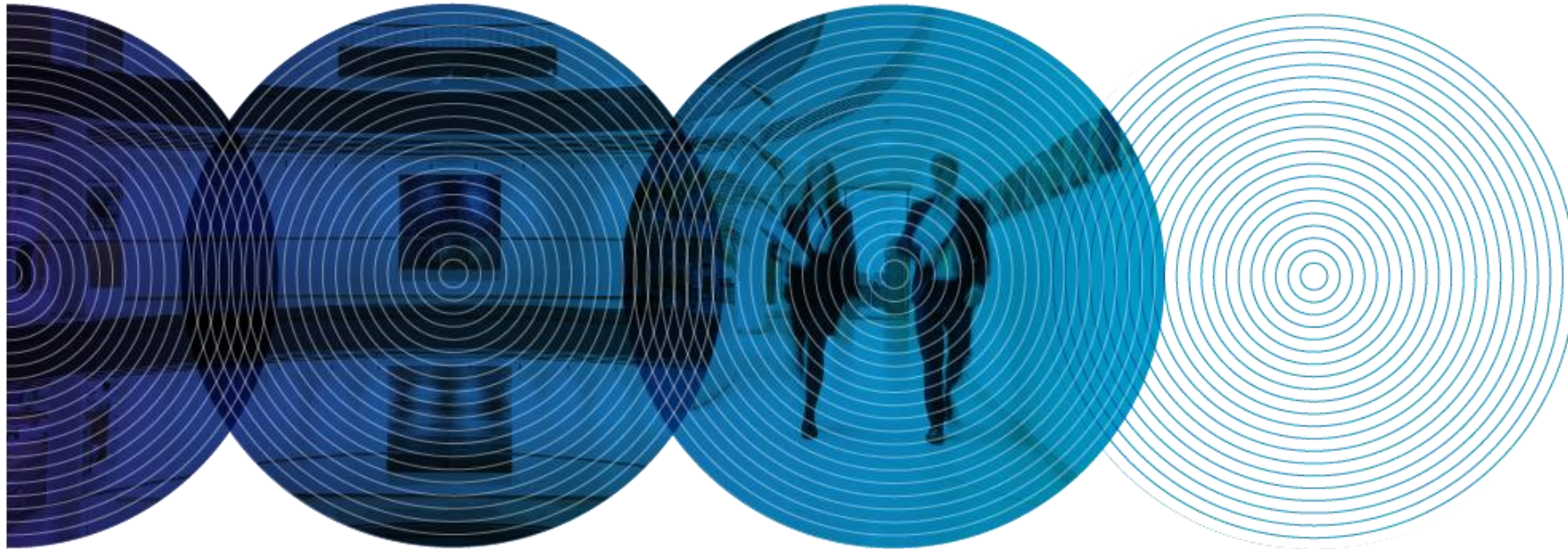
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Overview

- Introduction
- Foreign Subsidies Regulation
 - Public Procurement
 - Competition law
- Foreign direct investment

Foreign Subsidies Regulation



Background

- [Regulation \(EU\) 2022/2560](#) aims to level the playing field between EU and non-EU entities
 - Gives the European Commission power to investigate and take action against state-subsidised, non-EU entities, doing business within the EU
 - Recognises that EU based entities are subject to strict EU State aid rules but that third countries do not necessarily have equivalent constraints
 - Foreign subsidies could allow third country entities to undercut EU firms and distort competition on the market
 - FSR entered into force 12 July 2023
 - As of 12 July European Commission empowered to do *ex officio* reviews
 - Notification obligation kicks in on 12 October 2023

What is a foreign subsidy? (Article 3)

- 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**.
- Distinction between “foreign subsidy” and “foreign financial contribution”
- Very broad definition of a ‘financial contribution’ which includes:
 - a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
 - b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
 - c) the provision of goods or services or the purchase of goods or services, including payment by a third country for goods and services rendered under a public contract.
 - Note that this last item is exempt from the notification obligation, so while it is technically a “financial contribution” (and contributes towards the assessment of whether the notification threshold is met), it does not actually need to be notified.

What entities grant foreign subsidies?

- What is a “third country”?
 - a) Any country other than the 27 EU member states
 - b) i.e. UK, EFTA etc are “third countries”
- A financial contribution provided by a third country includes :
 - a) the **central government and public authorities** at all other levels;
 - b) a **foreign public entity whose actions can be attributed to the third country**, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government’s role in the economy;
or
 - c) a **private entity whose actions can be attributed to the third country**, taking into account all relevant circumstances.

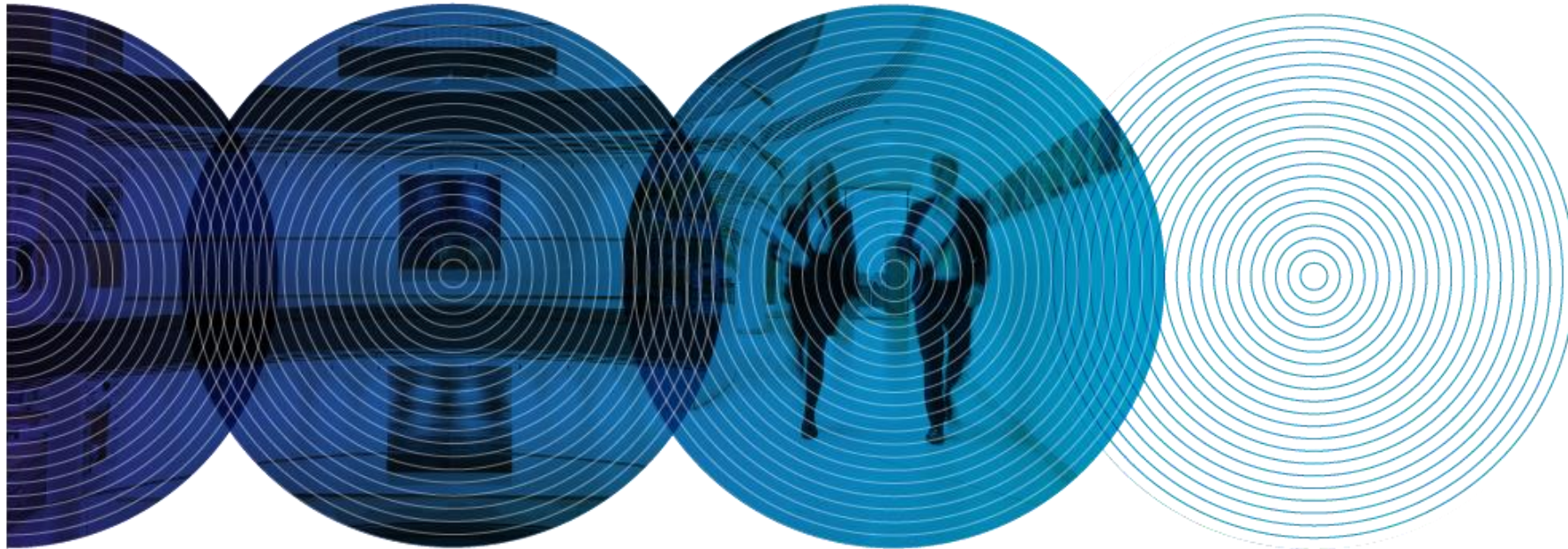
Distortions in the internal market (Articles 4 & 5)

- 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.
- Foreign subsidies most likely to distort the internal market include:
 - a) a foreign subsidy granted to an ailing undertaking, namely an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and that plan includes a significant own contribution by the undertaking;
 - b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee;
 - c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;”
 - d) a foreign subsidy directly facilitating a concentration;
 - e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.

Balancing test (Article 6)

- The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union.

FSR – Public Procurement



Overview of the FSR as it applies to procurement

- **Obligations:**
 - On ***Tenderers*** to send the contracting authority (“CA”), during tender processes:
 - A notification of ‘foreign financial contributions’ which exceed certain thresholds; OR
 - A declaration that they have not received foreign financial contributions exceeding the relevant values.
 - On ***Contracting authorities*** to
 - Pass on the notifications to the European Commission and
 - To notify the Commission of any suspicions as to any FFCs have not been declared/notified.

What tender competitions does the FSR apply to?

- FSR applies to procurement procedures initiated after **12 July 2023** and that are covered by the following procurement directives:
 - Public Contracts Directive
 - Utilities Directive
 - Concessions Directive
- FSR does not apply to:
 - Contracts which are directly awarded without competition by virtue of extreme urgency; or
 - Procurement procedures covered by the Defence and Security Directive.

Financial thresholds

- Notification of a foreign financial contribution to the CA in a public procurement procedure arises where:
 - a) The **estimated value** of a public procurement or framework agreement (exclusive of VAT) or a specific procurement under a dynamic purchasing system is **equal to or greater than €250 million**; and
 - b) The tenderer, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main sub-contractors and suppliers involved in the same tender in the public procurement procedure, was granted **aggregate financial contributions** in the **three years prior** to notification **equal to or greater than €4 million** per third country.
- A sub-contractor or supplier shall be deemed to be ‘main’ where their participation ensures key elements of the contract performance or where the economic share of their contribution exceeds 20% of the value of the submitted tender.
- If a procurement has been divided into lots, notification also arises where the above thresholds are met and the **value of the lot**, or the aggregate value of all the lots, to which a tenderer has applied shall be **equal to or greater than €125 million**.

Notification obligation (Article 29)

- If the thresholds have been met, the tenderer must notify the CA when submitting its tender:
 - **Open procedure:** notification is submitted once (together with the tender)
 - **Multi-stage procedure:** notification is submitted twice (first, with the qualification submission and second, as an updated notification submitted with the final tender)
- Once submitted to CA, CA must transfer the notification (or declaration) to the Commission without delay.

What needs to be notified?

- Implementing Regulation (EU/2023/1441) published 10 July 2023 – sets out the procedural steps and practicalities of the FSR notification system.
- Following concerns raised by businesses during a consultation on the FSR in early 2023, the Commission has sought to limit the administrative burden faced by tenderers by only requesting detailed information on foreign financial contributions that are ‘most likely’ to cause distortion.
- **Form FS-PP:**
 - **‘Likely distortive’ foreign financial contributions:** Companies must provide detailed information on all financial contributions falling within the “**likely distortive**” category and worth at least **€1 million** individually.
 - **‘Non-distortive’ foreign financial contributions:** For all other foreign financial contributions in public tenders, companies must provide an overview (in tabular format) of financial contributions granted to the notifying party(/ies) of an individual amount of at least €1 million and in relation only to countries that have granted each notifying party(/ies) at least €4 million per country over the three years prior to the notification.

What needs to be notified? (2)

- Where detail is required in Form FS-PP, the notifying party should provide a description of the main elements and characteristics of each relevant foreign financial contribution
 - Should include information to be taken into account by Commission in the balancing test e.g. why the Tenderer believes the tender was not unduly advantageous or any positive effects of the subsidy
- Exemptions – FCs that count towards the threshold but for which detail does not need to be included in the notification form:
 - FCs below the value of €1m
 - General tax amnesties and double taxation relief pursuant to treaties
 - Contracts for the supply/purchase of goods/services (except financial services) that have been concluded on market terms
- Tenderers are encouraged to engage in pre-notification discussions with Commission but not clear how this would work in a procurement process where there is a hard obligation to notify the CA within the timelines of the tender process.

Review by the Commission (Article 10)

- **Standstill obligation:**
 - the CA may not award the contract to any party who submitted a notification until it has transferred the notification(s) to the Commission and the Commission has completed its review.
 - CA can continue the competition to the point of award
 - CA can conclude a contract with a tenderer who did not have any notifiable FFCs while an Commission investigation is ongoing.
- **Timelines:**
 - Commission has 20 working days to carry out a preliminary review
 - Commission has 110 working days for an in-depth investigation.

In-depth investigation by the Commission

- Following an in-depth investigation, the Commission shall adopt one of the following decisions:
 - **No objection decision:** the Commission permits the award of the contract to the notifying party after finding that (a) the preliminary review which led to the opening of the in-depth investigation was not confirmed; or (b) any distortions on the internal market were outweighed by the positive effects (within the meaning of Article 6).
 - **Decision with commitments:** Commission approves the award of the contract by the CA to the notifying party benefitting from the foreign financial contribution but subject to certain commitments or redressive measures offered by the notifying party that fully and effectively remedy any distortion. E.g.
 - Repayment of the foreign subsidy to the non-EU country
 - Divestment of assets
 - Reduction of the notifying party's capacity or market presence
 - Publication of research and development information
 - **Prohibitive decision:** Where the Commission has found a distortive foreign subsidy and the notifying party has failed to offer commitments or provides commitments which the Commission deems to be inappropriate or insufficient, the Commission will issue a decision that the CA must exclude the notifying party from the procurement process.
- Before adopting any decision, the notifying party under investigation shall be given the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision (Article 42).

Fines (Article 33)

- The Commission may impose fines or periodic penalty payments as set out in Article 17 and Art 33.
- With regard to public procurement procedures:
 - up to 1% of the notifying party's aggregate turnover in the preceding year for
 - providing incorrect or misleading information in a notification or declaration
 - providing incomplete or inaccurate information in response to Commission request
 - up to 10% of the notifying party's aggregate turnover in the preceding year
 - failing to notify of any relevant foreign financial contributions or
 - circumventing or attempting to circumvent the notification requirements; or
 - failing to comply with Commission decision or commitments given

Practical considerations for contracting authorities and tenderers involved in above-threshold public procurement procedures

- **Contracting Authorities:**

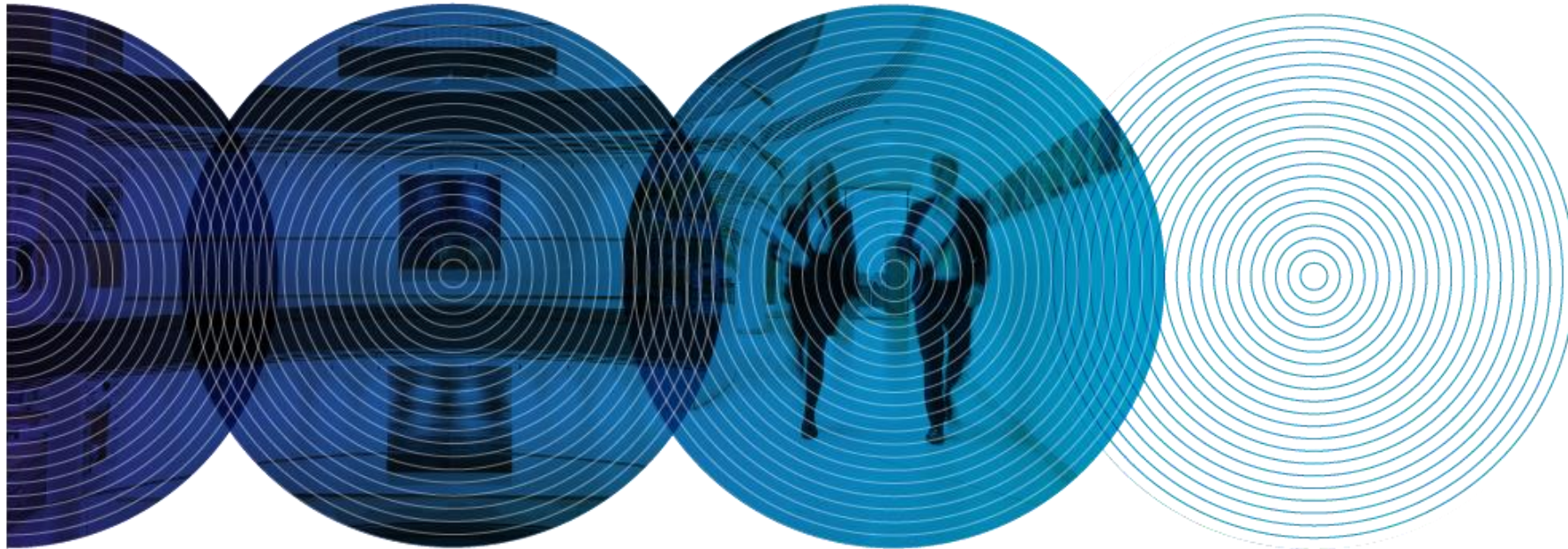
- **Plan:** build additional time into larger procurement procedures to account for an investigation by the Commission should a participating tenderer be in receipt of a foreign subsidy.
- **Documents:** update tender documents to inform tenderers of their obligations to notify CA of FS on pain of exclusion from competition

- **Tenderers:**

- **Get ready:** quantify any foreign contributions received in the previous 3 years to be able to accurately notify
- **Notify:** ensure that any qualifying subsidies are notified to the CA in all relevant tender processes. Failure to do so may result in exclusion from a tender process and/or severe financial penalties.
- **Justify:** be ready to provide justification to the European Commission if required, with a view to demonstrating that the subsidy does not have a distortive effect, or that the negative impacts of the subsidy are outweighed by the positive impact of the economic activity.

Foreign Subsidies Regulation

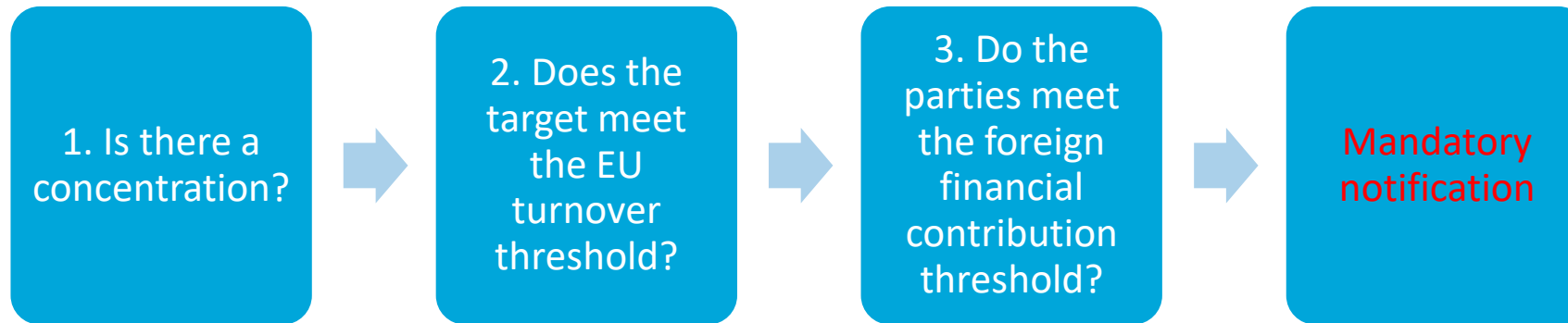
Application to M&A transactions ('concentrations')



In a nutshell

- New regime applicable to acquisitions of large EU businesses, to allow European Commission to investigate subsidies from non-EU governmental and state-owned entities
- Mandatory notification to the European Commission of M&A transactions which meet specific thresholds
 - Note: call-in of below threshold deals, and *ex officio* investigations into completed deals, possible in certain circumstances
- Notification will trigger standstill obligation → cannot close deal before clearance
- Foreign subsidies will be more closely scrutinised if they are specifically granted to facilitate the deal, granted to an ailing undertaking, or in the form of an unlimited guarantee
- Will it apply to your deal?
 - May apply if deal signed from **12 July 2023** onwards and completion occurs from **12 October 2023** onwards
 - Only targets with significant EU turnover (**at least €500 million**) will be caught by thresholds
 - However, if such a target is present, mandatory notification may be triggered once combined ‘foreign financial contributions’ of parties **exceed €50 million**

Is it notifiable?



1. Is there a concentration? (Article 20(1), (2) FSR)

- Change of control on a lasting basis in the form of either:
 - Merger between two or more previously independent undertakings
 - Acquisition of direct or indirect control of the whole/part of an another undertaking
 - Creation of a full-function joint venture

Is it notifiable?

2. EU turnover threshold (Article 20(3)(a) FSR)

- Target is (i) established in the EU and (ii) has turnover in the EU of at least €500 million
 - Establishment in the EU: includes a subsidiary incorporated and/or a permanent business establishment in the EU
 - ‘Target’ whose turnover is to be calculated will vary depending on form of acquisition

Transaction	Relevant ‘target’ for EU turnover threshold
Acquisition of sole control	Target of sole control
Merger	Any one of the merging parties
Creation of newly set-up (greenfield) JV	Newly set up JV <i>Note: will not have any turnover and threshold will not be met</i>
Creation of JV over existing business	Existing business <i>Note: no need to add parent’s turnover</i>

Is it notifiable?

3. Foreign financial contribution threshold (Article 20(3)(b) FSR)

- Buyer and target* were granted combined financial contributions by third countries of more than €50 million in the three years before signing
- Same definitions of ‘financial contribution’ and ‘third country’ apply as in public procurement context

* or parents and JV in the case of a JV, or merging parties in the case of a merger

Substantive assessment

- Similar to substantive assessment for public procurement

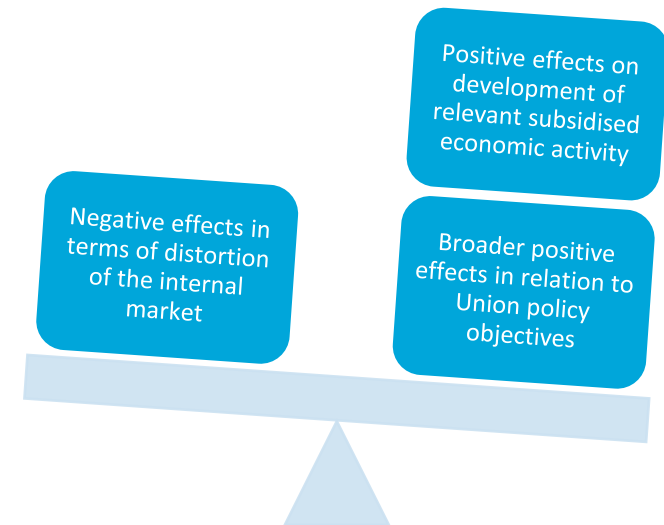
1. Is there a foreign subsidy in the transaction? (Articles 3 & 19 FSR)

- Foreign subsidy is narrower than FFC: must confer a benefit and be limited in law or fact to one or more undertakings/industries
- Looks back at foreign subsidies granted in 3 years prior to transaction

2. Does it distort the internal market? (Articles 4 & 5 FSR)

- Liable to improve the competitive position of an undertaking
- In doing so, actually or potentially negatively affects competition in the internal market
- *De minimis* exceptions
 - Foreign subsidy will not be distortive if total amount received per non-EU country does not exceed €200,000 over any consecutive 3 year period
 - Foreign subsidy unlikely to be distortive if total amount received by undertaking does not exceed €4 million over any consecutive 3 year period

3. If so, what is the balance of the negative effects of the foreign subsidy in terms of distortion of the internal market against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other broader positive effects in relation to relevant Union policy objectives? (Article 6 FSR)



Timing and outcomes (Article 25 FSR)

Preliminary review

- **25 working days** from receipt of complete notification
- Outcomes:
 - Close the preliminary review and inform parties
 - Open an in-depth investigation (if sufficient indications that undertaking has been granted a foreign subsidy that distorts internal market)



In-depth investigation

- **90 days working days** from opening of in-depth investigation*
- Outcomes:
 - No objection decision
 - Acceptance of commitments
 - Decision prohibiting transaction
- *various extensions possible, including stopping the clock for failure to meet information request deadlines

EC may even order dissolution or other restorative measures in respect of transaction, where notifiable/called-in but already implemented

Other European Commission powers relevant to M&A

Call-in power (Article 21 (5))

“The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 20 at any time prior to its implementation where the Commission suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration. Such concentration shall be deemed to be a notifiable concentration for the purposes of this Regulation.”

- Applies to transactions which have not yet closed
- Threshold for exercise is that foreign subsidies were granted in three years prior to concentration
- Once called-in, standstill obligation applies

Ex officio investigations (Article 9)

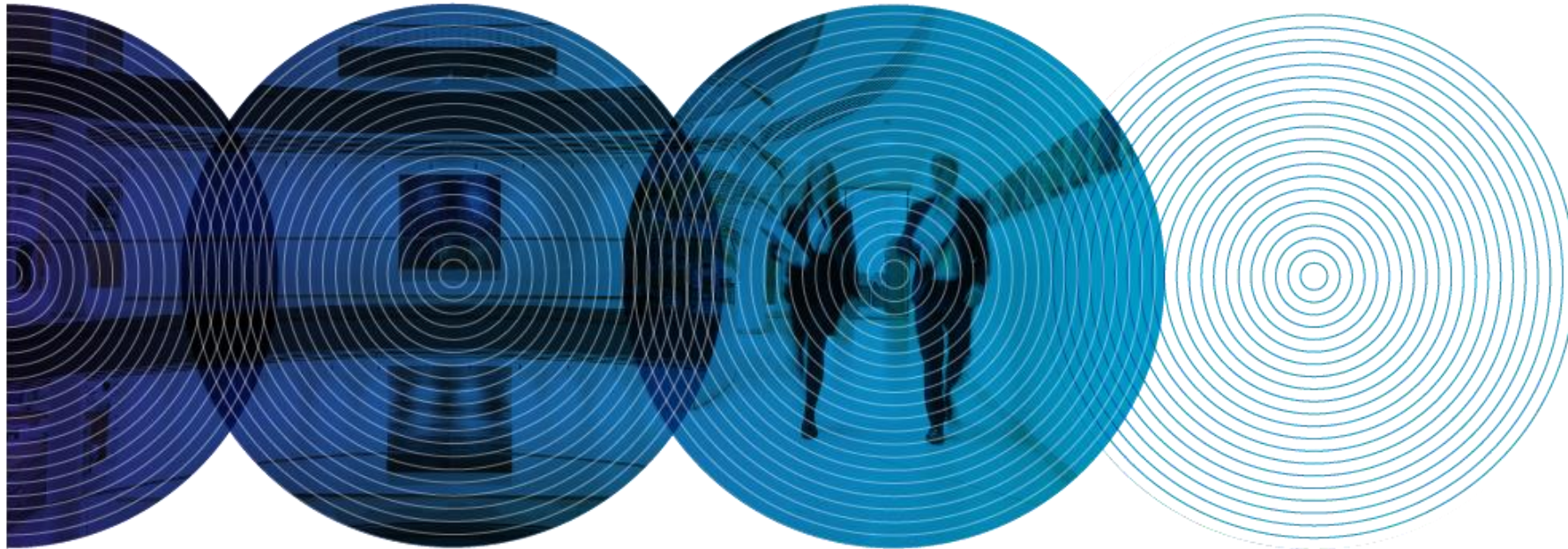
“The Commission may on its own initiative examine information from any source, including Member States, a natural or legal person or an association, regarding alleged foreign subsidies distorting the internal market.”

- Could apply to completed transactions
- EC can investigate foreign subsidies granted up to 5 years before entry into force of FSR regime on 12 July 2023
- No time limits for review but EC has indicated it will endeavour to complete within 18 months
- If determined that subsidies distort the internal market, EC can require parties to unwind the transaction

Practical points to note

- Very broad definition of financial contribution
 - No need for any link between financial contribution and transaction
 - No need for any nexus to the EU
 - No need to also qualify as a ‘foreign subsidy’ – foreign subsidy concept is relevant for substantive assessment not thresholds
- All FFCs in prior 3 years may count towards thresholds, even if not disclosable in notification
 - May be cumbersome in practice to gather info to assess if threshold met
- With respect to acquisitions of large EU targets:
 - Gather information on FFCs well in advance
 - Need to build in additional time to transaction planning
 - Timetable may, but will not necessarily, align with merger control review
 - Closing conditions in transaction documentation

Foreign Direct Investment



Screening of Third Country Transactions Act 2023

- Enables DETE to review full or partial acquisitions of Irish “undertakings” or assets where the acquirer is from “third country” that present risks to security and public order and requires mandatory notification for transactions in certain areas of activity.
- A third country is any state or territory other than Ireland, an EU Member State, a European Economic Area state and Switzerland.
- Due to be operational in Q2 2024
- Retrospective application – call-in power for transactions completed up to 15 months prior to the regime coming into force.

Infrastructure of the TCTA 2023

Two regimes- Mandatory Notification & Call-in Power

1. **Mandatory notification in certain sectors/areas of activity** for certain types of transactions- “notifiable deals”
 - Breach of notification obligation is a criminal offence
 - A standstill obligation will apply & breach is a criminal offence
 - It will be possible for the Minister to review an unnotified transaction within, whichever is the later, of 5 years of completion or 6 months from the date on which the Minister first becomes aware of the transaction
2. Call in: everything else - **non-notifiable “third country undertaking” acquisitions** for review up to 15 months after closing
 - Transitional period: can call-in deals that completed up to 15 months before the call-in power comes into operation

Conditions for Mandatory Notification

- Transaction is notifiable where **all** of the following conditions are met:
 - a) **a third country undertaking or a person connected to that undertaking** either:
 - i. acquires control of an asset in the State or
 - ii. acquires control of an undertaking in the State, or
 - iii. changes the percentage of shares or voting rights in an undertaking in the State to above 25% or above 50%;
 - b) transaction value is €2 million or more (calculated cumulatively with other transactions involving the same parties over the prior 12 months); and
 - c) the transaction **relates to, or impacts** upon, (i) physical or virtual critical infrastructure, (ii) critical technologies and dual-use items, (iii) supply of critical inputs, (iv) access to sensitive information, (v) the freedom and pluralism of the media;

Definition of a “third country undertaking”

- A “third country undertaking” is defined as any undertaking that is:
 - a) constituted or otherwise governed by the laws of a third country; or
 - b) controlled by at least one director, partner, member or other person, that is (i) a third country national or (ii) an undertaking constituted or otherwise governed by the laws of a third country; or
 - c) a third country national.
- Control over an undertaking = *“where that person can exercise decisive influence over the activities of the undertaking”*
- Control of an asset = ownership of, or the right to use, all or part of an asset

Sensitive Sectors/Areas of Activity

Broad range

- **Taken from Regulation 4(1) of the EU Regulation 2019/452**
 - 1. Physical or virtual critical infrastructure**, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure
 - 2. Critical technologies and dual use items**, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies
 - 3. Critical inputs**, including energy, raw materials or food security
 - 4. Access to Sensitive Information**, including personal data or the ability to control such information
 - 5. Media**, including impact on freedom and pluralism of the media

Mandatory Review Regime- What is the process?

- Notification to Minister no later than 10 days before completion
 - All parties obliged to notify- process for “deemed compliance” where one party can make the notification having informed the other that they will do so, shared the information being submitted and the other party agrees
 - Offence to fail to notify or to provide misleading information & transaction is deemed to be prohibited from the date of completion
- Notification form
- Minister issues a “screening notice” as soon as practicable after commencing review
 - Summarises reasons for the review
 - Clock runs from the date of issuance of the screening notice

Mandatory Regime

- Standstill obligation
- “Screening decision” to issue on or before:
 - 90 days from date of screening notice issuing or
 - A date specified by the minister to the parties, but not later than 135 days from date of screening notice
- “Stop the clock” information request – time recommences upon Minister notifying of compliance or 10 days from submission
- Deemed clearance if Minister fails to issue a screening decision
- Minister can elect not to provide reasons for the screening decision where it creates a risk to security or public order.

Call-in of non-notifiable deals

- Transactions which are **not notifiable may still be reviewed** where:
 - reasonable grounds to believe the transaction will influence security or public order in the State; and
 - the transaction has or will result in a Third Country undertaking acquiring or changing the extent of its control over or its interest in an undertaking or asset based in the State
- Limit of 15 months from completion for call-in.
- This power could apply in respect of deals that fall outside of the mandatory sectors or below the prescribed thresholds.
- Once called in – process is as per the mandatory regime

Assessment criteria

- Does the transaction affect, or would it be likely to affect, the security or public order of the State?
- Minister shall have regard to
 - a) whether or not a party to the transaction is **controlled** (whether through ownership structures or by other funding) **by a government** (which reference to government shall include, for the purposes of this paragraph, the state bodies or armed forces of the third country concerned) of a third country and, where relevant, the **extent to which such control is inconsistent with the policies and objectives of the State;**
 - b) the extent to which a party to the transaction is, at the time the transaction is being reviewed, **already involved in activities relevant to the security or public order of the State;**
 - c) whether or not a party to the transaction has **previously taken actions affecting the security or public order of the State;**
 - d) whether or not there is a **serious risk of a party to the transaction engaging in illegal or criminal activities;**

Assessment criteria (continued)

- e) whether or not the **transaction presents**, or is likely to present, a person with an **opportunity to— (i) undertake actions that are disruptive or destructive to persons in the State**, or to enhance the impact of any such action, (ii) **improve the person's access to sensitive undertakings, assets, people or data in the State**, or (iii) **undertake espionage** affecting or relevant to the interests of the State;
- f) whether or not the transaction is likely to have a **negative impact in the State on the stability, reliability, continuity or safety of one or more of the matters** referred to in points (a) to (e) of Article 4(1) of the Regulation;
- g) whether or not the transaction would result in persons **acquiring access to information, data, systems, technologies or assets that are of general importance to the security or public order of the State**;
- h) where applicable, **comments of Member States and the opinion of the European Commission** referred to in Article 6(9) of the Regulation;
- i) the extent to which the transaction affects, or would be likely to affect, **the security or public order of a Member State other than the State or of the European Union**;
- j) the extent to which the transaction affects, or would be likely to **affect, projects or programmes of Union interest within the meaning of Article 8 of the Regulation**

Actions Minister May Order

- Minister makes a Screening Decision that transaction affects or would be likely to affect the security or public order of the State & can include directions that must be complied with.
- Direction may include, order to take any of the following actions:
 - a) **not to complete the transaction**, or such parts of the transaction as the Minister may specify;
 - b) **not to complete** the transaction, or such parts of the transaction as the Minister may specify, **before or after such date or dates as the Minister may specify**;
 - c) to **sell or divest itself of any matter**, including business, assets (tangible or intangible), shares, real property or intellectual property;
 - d) to **modify or constrain its conduct or practice** in specified ways;
 - e) to **cease a specified conduct or practice**;
 - f) to **prevent the flow of competitively sensitive information** between **undertakings or within divisions, units, departments** or other organisational units within an undertaking;
 - g) to **report to the Minister, on such terms as the Minister may specify, on the parties' compliance with conditions imposed under this section**; (h) to pay to the Minister, or such other person as the Minister may specify, such amounts as the Minister may specify in order to meet the reasonable costs associated with monitoring compliance with conditions imposed by the Minister under this section.

Determinations

- (5) Where the Minister believes that providing reasons for a screening decision would create a risk to the security or public order of the State, the Minister— 30
 - (a) may decide not to provide the parties with such reasons, to the extent necessary in order to avoid or minimise such risk, and
 - (b) shall include in the notice referred to in *subsection (2)* a statement that the Minister is declining, under this subsection, to give reasons for the decision.



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