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The European Commission Consults on Draft FSR Guidelines

The Commission's draft guidance seeks to clarify certain legal concepts under the Foreign Subsidies Regulation, including when a transaction below the notification threshold can be "called in."

Overview

On 18 July 2025, the European Commission (the "Commission") [launched a public consultation](#) on a draft of the Foreign Subsidies Regulation Guidelines (the "Draft FSR Guidelines"), which it is required under the FSR to publish by 12 January 2026. The Draft FSR Guidelines summarise certain substantive legal concepts under the [FSR regime](#) and learnings from the Commission's [first commitment decision](#). However, the challenge for the vast majority of FSR notifications is the far-reaching and uncertain reporting obligations, rather than the substantive analysis assessment, meaning that the draft guidelines will be of limited relevance for most FSR filings (of which approximately one third involve investment funds). Its practical value is reserved for the limited number of more complex cases involving potentially distortive foreign subsidies granted by a non-EU country – in the merger space, only two in-depth investigations have been launched to date from over 230 case files that have been opened.

The Draft FSR Guidelines describe in detail how the Commission intends to:

1. determine whether a foreign subsidy distorts the internal market,
2. balance negative competitive effects against any positive contributions, and
3. exercise its powers to require ad hoc notifications of otherwise non-notifiable concentrations.

Key Takeaways

- Call-in risk for below-threshold deals.
 - ◆ The Draft FSR Guidelines highlight that even transactions well below the EUR 500 million EU-turnover threshold may be scrutinised using the Commission's call-in powers where strategic assets or roll-ups in sensitive markets are present.
 - ◆ There is no reference to any particular country or region being higher or lower risk. It is clear that the Commission sees the FSR as a key strategic tool to protect economic sovereignty and a level playing field for EU businesses. Note that a subsidy does not need to originate from a hostile or geopolitically sensitive state to raise concerns.

- ◆ The call-in power is more likely to be used in situations including where:
 - the current level of activity of the target business does not reflect its actual or future economic significance;
 - the transaction concerns strategic assets (innovative technologies and critical infrastructure);
 - the acquirer has a pattern of serial acquisitions or bidding in sensitive sectors; and
 - there are indications that the subsidy facilitates the transaction.
- Determining a distortion
 - ◆ The Draft FSR Guidelines do not indicate any quantitative or qualitative test for assessing whether a subsidy improves the competitive position of the recipient beyond the *de minimis* thresholds set out in the FSR and its implementing regulation (i.e., less than €1 million per individual foreign financial contribution (FFC)/foreign subsidy, less than €45 million in total FFCs from any one ex-EU state and less than €4 million in total FFCs over any consecutive period of three years).
 - ◆ The draft specifies that the foreign subsidy does not need to be the only reason, or even the main reason, for a negative impact on competition from the transaction, but it must make some contribution to it. This approach has the effect of simplifying the interaction between the FSR analysis and, for example, the Commission's antitrust analysis of the transaction under merger rules. Action can be taken under the FSR as long as the Commission can show that some degree of negative distortion flows from the subsidy.
- The balancing test
 - ◆ The balancing test between the negative distorting effects and positive contribution of a foreign subsidy can take into account positive impacts on innovation, sustainability and resilience (particularly EU initiatives in these areas). Parties should be ready to present robust economic and technical evidence to prove positive benefits, including showing that they are causally linked to the subsidy and proportionate (i.e., they could not be achieved with less distortion).
 - ◆ It will be particularly challenging to justify a subsidy within the Article 5 categories of subsidies most likely to distort competition – this includes unlimited guarantees, export financing not in accordance with OECD requirements and subsidies to enable a merger.

Next steps

Interested parties have until 12 September 2025 to comment on the Draft FSR Guidelines.

The Commission is required to publish the final guidelines by 12 January 2026, with periodic updates expected as case practice develops (which, given the low number of formal decisions, will likely not be the case for a very long time – only one full decision has been issued, with one more in-depth review currently underway).

The Commission is also working on a review of the FSR regime as a whole, which it is required to do under the FSR by July 2026. A call for evidence and public consultation will follow later this year.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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