

THE FOREIGN SUBSIDIES REGULATION – A NEW TOOL TO PROTECT THE LEVEL PLAYING FIELD IN THE INTERNAL MARKET*

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1. INTRODUCTION

The European Union has long been committed to ensuring a fair, competitive, and open internal market. For decades, EU State aid rules have prevented Member States from granting subsidies that distort competition. Yet, until very recently, there was a major blind spot: subsidies granted by non-EU governments to companies operating in the Union were not subject to equivalent scrutiny. In a global economy, marked by the rise of state-driven economic models, foreign public authorities increasingly support their domestic industries through grants, loans, guarantees, tax exemptions, and other forms of financial assistance that allow firms to expand abroad, acquire competitors, or underbid rivals. When such resources are used to compete in EU markets, they can undermine companies that rely solely on market-based financing.

It is against this backdrop that Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, commonly known as the Foreign

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Subsidies Regulation (FSR), was adopted. Applicable since July 2023, the FSR empowered the European Commission to identify, assess and, where necessary, redress distortions caused by foreign subsidies. That said, it is very important to highlight that the purpose of the FSR is *not* to prevent foreign investment or restrict access to the EU market, but to make sure that all businesses that engage in an economic activity in the EU, do so on equal footing.

2. OBJECTIVES OF THE FOREIGN SUBSIDIES REGULATION

The FSR pursues several interlinked objectives. Its primary purpose is to ensure a level playing field in the internal market by guaranteeing that EU and non-EU undertakings compete on equal terms. Fair competition encourages business investment in research, technological development and productive capacity, ultimately strengthening the European economy.

It also closes a regulatory gap in EU law. Before the FSR, the EU could address distortions caused by Member State subsidies through State Aid rules or subsidized imports through Trade Defense Instruments (TDI). However, the existing framework did not fully address distortions in the internal market caused by subsidies granted by third countries. The FSR fills this gap, allowing the Commission to investigate whether foreign subsidies confer an unfair advantage and to act where such distortions are identified.

The FSR further supports broader strategic goals. By enabling the EU to remain open to trade and investment while preventing distortive practices, it fosters resilience and competitiveness and contributes to the EU's open strategic autonomy. By safeguarding fair competition, it also complements industrial policy initiatives, such as the Critical Raw Materials Act, the Clean Industrial Act, and other sectoral strategies.

Given its importance, keeping the FSR fit for purpose is key. This entails, *inter alia*, requiring triennial reviews and ongoing refinement where necessary. For such purpose, a public consultation (August–November 2025), alongside a call for evidence, gathered market feedback. The contributions (already made public) will feed into the Commission's review report due by July 2026.

Additionally, considering the instrument's novelty and the importance of FSR's main substantive concepts (discussed below), on 9 January 2026 the Commission adopted Guidelines clarifying the notions of distortion and balancing, as well as its powers to require prior notifications in concentrations and public procurement. The Guidelines enhance predictability and

transparency, particularly at this early stage, and establish an initial assessment framework to be further developed through Commission practice and jurisprudence of the EU Courts.

3. MAIN SUBSTANTIVE NOTIONS

The FSR applies to all undertakings that engage in economic activity in the internal market that may have received distortive foreign subsidies. This entails the assessment of two notions – *foreign subsidy* and *distortion*.

A *foreign subsidy* will be deemed to exist where four cumulative conditions are met: i) an undertaking has received a financial contribution; ii) granted directly or indirectly by a third country; iii) which confers a benefit; and iv) which is limited to certain undertakings or groups of undertaking. A foreign subsidy can be granted through various forms of financial contributions: direct transfer of funds (such as provision of grants, loans, guarantees, or capital injections), the foregoing of revenue (such as debt forgiveness or exemptions or reductions in tax due) and the provision or purchase of goods or services by third countries.

Unlike State aid, which is prohibited unless explicitly found compatible, foreign subsidies are not prohibited *per se*, but insofar as they are liable to distort competition.

A subsidy will be considered *distortive* where it meets two cumulative conditions: i) it is liable to improve the competitive position of the beneficiary in the internal market and, in doing so, ii) it actually or potentially negatively affects competition. The FSR sets a non-exhaustive list of indicators to assess whether a foreign subsidy is distortive, including amount and nature of the subsidy, purpose and conditions attached to it, as well as actual use in the internal market. In addition, the FSR contains a list of foreign subsidies considered most likely to distort the internal market. Those include subsidies to an ailing company, unlimited state guarantees, export financing measures, subsidies directly facilitating an acquisition or subsidies facilitating the submission of an unduly advantageous tender.

When assessing the scope of the distortion, the Commission may subsequently apply a *balancing test*, weighing the negative effects on competition in the internal market against any positive effects on the development of the subsidized activity on the internal market. The outcome of the balancing test could therefore influence the outcome of the Commission's assessment.

4. FSR ENFORCEMENT PROCEDURES

The Commission can rely on three enforcement procedures under the FSR – a general power to conduct *ex officio* investigations for any economic activity in the internal market and two notification-based procedures for concentrations and public procurement procedures (*ex ante* assessments).

4.1. Notification Obligation in Concentrations

A concentration needs to be notified under the FSR, where:

- (a) at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates at least EUR 500 million annual turnover in the EU, and
- (b) the undertakings involved in concentration were granted more than EUR 50 million foreign financial contributions in the 3 years preceding the conclusion of the transaction.

To enhance legal certainty, the FSR concentration module aligns key concepts with Council Regulation 139/2004 on the control of concentrations between undertakings (EUMR), notably *concentration* and *control*⁹. Review deadlines mirror the EUMR and notifiable concentrations are also subject to a standstill obligation (i.e. Commission clearance before implementation). Notifying parties must submit a form detailing the transaction and foreign financial contributions received in the previous three years, with reporting detail proportional to their type and amount. The Commission then investigates whether foreign subsidies could actually or potentially lead to a distortion either to the acquisition process or to the activities of the combined entity post-transaction.

4.2. Notification Obligation in Public Procurement

In public procurement procedures, the notification obligation exists, where:

- (a) the estimated contract value is at least EUR 250 million and,
- (b) the economic operator, including its subsidiaries without commercial autonomy, its holding companies and its main subcontractors and suppliers involved in the same tender, was granted foreign financial contributions of at least EUR 4 million in the three years preceding the notification.

If thresholds are met, the economic operator shall submit a notification to the contracting authority or entity listing all the foreign financial

contributions received, which is then forwarded to the Commission for assessment. During the assessment, all procurement procedural steps may continue except for the contract award.

The Commission assesses the presence of distortive foreign subsidies and may require commitments or exclude the bidder. Distortion arises where foreign subsidies enable the submission of an *unduly advantageous* tender that competitors cannot match (on pricing, quality or other competitive parameters) under normal market conditions.

4.3. *Ex officio* investigations

The third FSR enforcement mechanism is quite broad and allows the Commission to launch investigations on its own initiative, even below notification thresholds, when it suspects that foreign subsidies distort the internal market related to specific economic activity. This gives the FSR a flexible and far-reaching character.

Unlike State aid or TDI, there is no formal complaint procedure and the Commission may act on any market information suggesting the presence of potentially distortive foreign subsidies to initiate investigations.

5. ENFORCEMENT AT A GLANCE

In concentrations, by end-January 2026, the Commission has received 281 Case Team Allocation Requests to initiate pre-notification discussions. 226 cases were notified, 209 cases have been closed after Preliminary Review Phase, and two cases (in the telecommunications and chemicals sectors) underwent in-depth investigations and were closed with commitments decisions.

In public procurement, by end-January 2026 the Commission had received over 4,000 submissions relating to more than 700 procedures. There is however significant variation across Member States in the number and frequency of submissions, reflecting differences in procurement structures, market size, cross-border activity, or familiarity with the new rules. The Commission is closely monitoring these trends to support a more consistent FSR application across Member States.

By end-January 2026, four in-depth investigations in the railway and solar photovoltaic sectors were opened (three were closed following withdrawal, one remains ongoing at the time of writing). Additionally, the Commission

declared two tenders irregular in the IT and construction sectors and made a request for prior notification (call-in) in the construction sector.

Finally, the Commission has opened two ex-officio in-depth investigations (security equipment sector and wind sector), ongoing at the time of writing.

6. WHY THE FSR MATTERS FOR MEMBER STATES

6.1. Member States play a role in the enforcement

While the FSR enforcement is centralized at EU level, Member States continue to play a critical role. In public procurement, for example, contracting authorities are responsible for ensuring that notifications from bidding economic operators are properly submitted and reach the Commission.

Under the FSR, Member States are informed about on-going investigations, and they have the obligation to share with the Commission any information regarding the presence of potentially distortive foreign subsidies. Even more crucially, Member States are consulted via a dedicated Advisory Committee, which gives its opinion on final decisions in individual cases and certain horizontal acts, such as the FSR Implementing Regulation.

To strengthen cooperation, a network of National Contact Points and an Expert Group on the FSR have been established. These bodies serve as a bridge between national authorities and the Commission, facilitating structured dialogue, feedback, and capacity-building. Their effectiveness, however, depends as well on awareness, training, and engagement at national, regional, and local levels – a joint effort for all involved, to which this article aims to contribute.

6.2. Local effects of a wider competition tool

As internal market actors, Member States inherently benefit from its economic health, resilience, and diversity. Nevertheless, smaller economies, such as Portugal, may have particular incentives to pay close attention to the implementation and enforcement of the FSR.

The FSR plays an important role in protecting the integrity of public spending in the EU. Public buyers are often leaders in sensitive sectors such as construction, transport, energy, ICT and health, where procurement decisions can shape markets and long-term outcomes. While substantially lower offers may appear attractive in the short term, they can entail significant long-term risks. In third countries, public funding is not necessarily granted with transparency or regulatory safeguards. Beneficiaries of such

support may therefore compete in EU tenders on the basis of state backing rather than intrinsic economic merits, potentially distorting competition and reducing market diversity. Over time, this may create structural dependencies on foreign-subsidized providers, weaken security of supply, and undermine the consistent application of EU safety, security and sustainability standards, particularly in sensitive sectors. By enabling scrutiny of economic operators receiving foreign subsidies, the FSR helps mitigate these risks. Alongside national industrial policies, the FSR can help protect sensitive sectors, acting as an additional filter for strategic acquisition funding and rebalancing potential bargaining-power asymmetries.

Subsidies facilitating acquisitions may lead to outbidding, favoring certain acquirers and distorting the level playing field for other (potential) investors. When foreign-subsidized companies enter local markets, the risk is not only that contracts are lost, but that entire sectors could become distorted. Ultimately, this may further lead to consolidating market power, hindering market entry for other players or negatively impacting consumers through reduced choice and potentially higher prices. This can especially harm domestic SMEs or startups, which often compete on quality and innovation rather than state support.

That said, although the FSR does *not* aim to block foreign investment and foreign subsidies are not prohibited per se (only when liable to distort competition), certain investments may be subject to closer scrutiny to uphold the FSR's level-playing-field objectives. In the initial years of enforcement, this may give rise to some friction or discourage non-distortive foreign investments that could generate significant regional or national benefits. This underscores the importance of mitigating unintended consequences in the early enforcement of the FSR.

7. CONCLUSION

The FSR represents a landmark step in adapting EU competition policy to the realities of a global, state-influenced economy. It aims to filter beneficial from distortive foreign investment, safeguarding a fair, competitive, and resilient internal market that wants to remain open to trade and investment.

For businesses, legal advisors and national authorities, understanding and applying the FSR into daily practice is essential. For smaller Member States, including Portugal, the FSR can be a strategic instrument to mitigate distortions, safeguard domestic industries and SMEs, protect public resources, and

strengthen confidence in procurement procedures and competitive markets. For the Commission, entrusted by the Member States to enforce the FSR, this represents a challenging mandate: to implement and continuously refine a new and innovative legal instrument in a complex and ever-evolving global context. Promoting consistent application and actively integrating the FSR into national practices will be key to achieving its objectives and ensuring that the internal market continues to operate on the principles of transparency and fair competition.