

CLIENT ALERT

The EU Commission Finalizes the Criteria and Methodology for Identifying Distortive Foreign Subsidies Under the EU FSR Framework

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Following a public consultation launched last summer,¹ the European Commission (“**Commission**”) has now adopted the final version of its new guidelines (the “**Guidelines**”) on the application of certain provisions of the EU Foreign Subsidies Regulation (“**FSR**”).²

The Guidelines aim to clarify certain procedural points and, most importantly from a companies’ perspective, provide guidance on how to assess the existence of a distortion, the application of the balancing test, and the conditions under which the Commission may proactively request notification for concentrations or public tenders despite falling below the filing thresholds.

¹ See previous [Client Alert](#).

² EU Regulation 2022/2560.

In summary, the Guidelines were highly anticipated and therefore do not introduce fundamentally new elements. The guidance is welcome but, as with any effect-based analysis, it still leaves a broad space open for case-by-case assessments and grey zones that will be dealt with only when specific cases are brought to the Commission.

Characterization of a distortion

To assess whether foreign (non-EU) subsidies are distortive, the Guidelines set out a two-pronged test for determining the existence of a distortion.

First, **the foreign subsidy must be liable to improve the competitive position of an undertaking in the internal market.** The Commission distinguishes between targeted and non-targeted foreign subsidies:

- Targeted subsidies are those that directly or indirectly support economic activities in the EU's internal market and are generally presumed to improve the competitive position of the beneficiary. For instance, these include subsidies granted to support manufacturing or distribution activities in the Union, subsidies conditional on investments or acquisitions in the EU, or subsidies granted to fund research activities outside the EU that are related to technologies or know-how used for products or services in the EU's internal market.
- Non-targeted foreign subsidies are those, on the contrary, which do not support, directly or indirectly, the undertaking's economic activities in the EU's internal market, and where there is no clear indication as to how the undertaking uses or intends to use them. In these cases, the Commission will assess the likelihood of cross-subsidisation, taking into account all relevant factors to determine whether there are credible legal or economic barriers to the transfer or use of resources in the EU.

Consequently, although the Guidelines provide a framework for this analysis, they do not set out a clear line as to what constitutes an improvement of the competitive position and what does not. However, since a foreign subsidy is by nature defined as conferring a benefit to the recipient,³ it would not be surprising if eventually the Commission ended up with having only a very limited number of cases in which a foreign subsidy is not considered liable to improve the competitive position of the undertaking in the internal market.

Second, **the foreign subsidy must actually or potentially negatively affect competition in the EU's internal market.** A two-step analysis is contemplated here by the Commission: it will examine (a) how the subsidy affects the behaviour of the beneficiary and (b) whether this change in behaviour alters or interferes with competitive dynamics to the detriment of other economic actors. The Commission considers that it is not required to show an actual impact (meaning, more specifically, not a specific degree of negative impact). In order to assess the alteration of competition, the Commission announces that it will follow a holistic approach and consider all relevant indicators, including the scope, amount, and type of subsidy, the size and market position of the beneficiary, as well as the sectoral characteristics.

³ See paragraph 4 of the Guidelines.

Note that in the context of a public procurement filing, the assessment is focused on the tender in question. A subsidy is considered distortive if it enables a participant to the tender to submit an unduly advantageous bid, which may have actual or potential negative effects, such as deterring participation by other bidders or influencing the outcome of the contract award.

Consequences of the existence of a distortion

If the outcome of the assessment is that a distortion exists, the parties may put forward arguments documenting the positive effects of the foreign subsidy (e.g., the development of the subsidised economic activity, improvement of environmental protection, innovation, or social standards). To be considered, such positive effects must be sufficiently linked to the foreign subsidy and substantiated with verifiable evidence. In practice, this could be viewed as a significant difficulty for companies, limiting the chances of success of their arguments.

The role of the Commission is then to balance the negative and positive effects of the subsidy. If it finds that the positive effects outweigh the negative effects, it may refrain from imposing redressive measures (commitments or remedies).

Overall, the complexity of the assessment and the number of parameters to be considered may suggest that only a few cases will result in commitments or remedies (which is already the case). The Guidelines indeed leave room for debate and interpretation and their real value will only become clear as cases are handled in practice and the Commission discusses them. The implied practical risk for companies corresponds to the need for very detailed presentations and analysis of subsidies granted to them in order to convince the Commission that their positive effects outweigh the distortive ones. A solid evidentiary basis, combined with constructive engagement with the Commission case teams, will remain essential to achieving positive results.

Finally, for those cases falling under the radar of the FSR, the Guidelines set out the methodology the Commission will use to potentially call them in.

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