

Sonsoles Centeno, Inmaculada Vigón

Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market

- This is a new instrument that specifically affects companies participating in transactions and public procurement procedures from 12 July 2023.
- New obligations are introduced for all companies that receive subsidies from third countries and new reporting obligations above certain thresholds are also established.
- The European Commission is exclusively responsible for the application of this Regulation.
- This briefing addresses the main elements of the new instrument and its implications for companies operating in the European Union through the analysis of the following questions: (i) A new and complex instrument that specifically affects M&A and public procurement: What is the purpose of the Foreign Subsidies Regulation?; (ii) What is a foreign subsidy?; (iii) Does the Regulation add new obligations for M&A transactions?; (iv) How does it affect public procurement procedures?; (v) Common rules: What powers does it give to the European Commission? and (vi) What are the implications of this Regulation for companies?

I. A new and complex instrument that specifically affects M&A and public procurement: What is the purpose of the Foreign Subsidies Regulation?

1. On 23 December 2022, Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies that distort the internal market (the “**Regulation**”) was published in the Official Journal of the European Union (“**OJEU**”).
2. The purpose of this new Regulation is to create a regulatory framework at EU level to enable the European Commission to prevent subsidies or financial contributions from third countries from distorting the internal market by altering the conditions of competition within the internal market.
3. The Regulation will apply from 12 July 2023 and will apply to foreign subsidies granted in the previous three years and, in exceptional circumstances, to foreign subsidies granted in the previous five years, where such subsidies distort the internal market after 12 July 2023¹.
4. The Regulation affects both public and private companies, and not only foreign companies operating in the European Union, but any company domiciled in an EU Member State.
5. This new supervisory regime supplements the state aid control policy provided by Articles 107 and 108 of the TFEU, and the obligations contained herein supplement those that exist in other “neighbouring” regulations, such as merger control or public procurement rules. This new regime should not be confused with Foreign Direct Investment (FDI) control regimes, the objective of which - to protect strategic activities - is different from that of the Regulation and is governed by national legislation.

¹ Article 53 of the Regulation.

6. This is a new and necessary instrument that seeks to prevent aid from third countries from favouring certain companies, fragmenting the internal market and, ultimately, harming the consumer.
7. It is also a complex instrument in that it will have to interact with other rules with partly overlapping objectives, such as the merger control regulation, or all public procurement rules, and therefore runs the risk of creating not only more formal obligations but also some confusion in its application.
8. The Regulation has a “general scope” in that it is intended to apply to all economic sectors, by establishing a harmonised framework to address distortions caused by foreign subsidies in the internal market. However, it focuses on two distinct areas: (i) M&A transactions and (ii) public procurement procedures.
9. This briefing has two objectives: (i) to outline the changes to which companies may be exposed, particularly when approaching a transaction, or when participating in a public procurement procedure, and the new powers given to the European Commission on foreign subsidies and (ii) to draw attention to the possibility of submitting comments on the Implementing Regulation that the European Commission will shortly submit for public consultation under its Article 47, in order to limit as much as possible the administrative burden on potential notifying parties while ensuring that it complies with the ultimate objective of the Regulation which is to ensure a true level playing field for all companies participating in the internal market.

II. What is a foreign subsidy?

10. The Regulation defines a foreign subsidy as a financial contribution², financed by a public or private entity from a third country that distorts the internal market.
11. The Regulation defines the concept of “foreign financial contribution” very broadly, attempts to specify the distortion of the internal market³, and completes the definition with a list of examples identified as “categories of foreign subsidies most likely to distort the internal market”⁴.
12. However, it should be noted that the EU legislature has left a wide margin to the European Commission, as it only provides criteria, which are not exhaustive lists, to be applied taking into account the ultimate purpose of the instrument. However, it should be noted that the ultimate interpretative criterion is for the Court of Justice to decide, and it is to be expected that there will be a large number of disputes in the first years of its application.
13. This margin becomes more evident when the Regulation itself speaks of a “balancing test” to be carried out by the European Commission, weighing the negative effects of the foreign subsidy on the internal market against its positive effects, referring in particular to the latter

² It may take different forms, as provided in Article 3(2) of the Regulation, such as the transfer of funds or obligations, including capital contributions, subsidies, loans, loan guarantees, tax incentives, offsetting operating losses, offsetting financial charges imposed by public authorities, debt forgiveness, conversion of debt into equity or debt rescheduling; the forgoing of revenues that would otherwise be due, such as the granting of tax exemptions or the granting of special or exclusive rights without adequate remuneration; or the provision or acquisition of goods or services.

³ Such distortion shall be deemed to exist under Article 4 of the Regulation where the competitive position of a company in the internal market is likely to be improved or competition is likely to be harmed. In assessing this question, various elements will be taken into account, such as the amount and nature of the subsidy, the situation of the target company and the markets or sectors concerned, etc.

⁴ Provided for in Article 5(1) of the Regulation. For example, subsidies granted to a company in difficulty, subsidies that take the form of an unlimited guarantee, foreign subsidies that directly facilitate an M&A transaction or subsidies that enable a company to submit an unduly advantageous bid.

as “strategic objectives of the European Union”, including a high level of protection for the environment and social standards or the promotion of research and development.

14. However, two rules of the Regulation that can provide some legal certainty to companies should be highlighted: (i) distortion of the internal market is unlikely where the total amount of a foreign subsidy granted to a company does not exceed EUR 4 million⁵ and (ii) any subsidy that does not exceed the *de minimis* aid amount as provided for in Regulation 1407/2013 during any consecutive period of three fiscal years (EUR 200,000 during any period of the three fiscal years) is exempted.

III. Does the Regulation add new obligations for M&A transactions?

15. The Regulation adds new obligations for certain M&A transactions⁶.
16. Specifically, M&A transactions are subject to a notification obligation where the following thresholds are met⁷:
 - (a) At least one of the companies in the M&A transaction is established in the EU and generates an aggregate EU turnover of at least EUR 500,000,000 and;
 - (b) Any of the companies involved has obtained from third countries, in the three financial years preceding the conclusion of the agreement, the announcement of the public offer or the acquisition of a controlling interest, combined financial contributions exceeding EUR 50,000,000.
17. However, the European Commission reserves the right to request notification of any M&A transaction before its implementation where it is suspected that foreign subsidies may have been granted to the companies concerned within the previous three years.
18. The Regulation establishes “two phases” for notification cases: (i) a preliminary review and, where appropriate, (ii) an in-depth investigation leading to a decision with commitments, or a decision to raise no objections or a decision prohibiting the M&A transaction.
19. The time limits for the European Commission’s investigation procedures to analyse the compatibility of this type of subsidies, in the case of M&A transactions, will be as follows⁸:
 - (i) The European Commission will have 25 working days from receipt of the notification to adopt a decision on whether to initiate an exhaustive investigation after a preliminary review.
 - (ii) In the event that such an exhaustive investigation is opened, the European Commission will have 90 working days (extendable by a further 20 working days) to make its decision.
20. If an M&A transaction subject to this obligation is not communicated, or is implemented without complying with the obligation to suspend it or if it has been prohibited by a decision of the European Commission, the dissolution of the merger or the divestiture of all acquired shares or assets may be required to restore the pre-existing situation, any other appropriate

⁵ However, this is not an automatic exemption.

⁶ Articles 19 to 26 of the Regulation.

⁷ Article 20(3)(a) and (b) of the Regulation.

⁸ Article 25 of the Regulation.

measures may be ordered, and the companies may also be exposed to penalties of up to 10% of the aggregate turnover of the preceding financial year⁹.

21. These deadlines are harmonised with the provisions of Regulation 139/2004.

IV. How does it affect public procurement procedures?

22. The Regulation applies to public procurement procedures which enable an economic operator to submit an unduly advantageous bid in relation to the works, supplies or services which are the subject of the contract¹⁰. These provisions do not cover the access of economic operators from third countries to the EU public procurement market.
23. The thresholds establishing the notification obligation for public procurement procedures are as follows¹¹:
 - (a) The estimated value of the public contract, framework agreement or specific contract under the dynamic purchasing system, net of VAT, is equal to or greater than EUR 250,000,000, and;
 - (b) The economic operator, its non-commercially autonomous subsidiaries, its holding companies and, in certain situations, its subcontractors and main suppliers, where these are participating in the same public tender or contract, have received financial contributions from a third country amounting to EUR 4,000,000 or more in the three financial years preceding the notification.
 - (c) In the event that the procurement in question is divided into lots, a third condition applies; the value of the lot or the aggregate value of all the lots to which the tenderer applies for must be equal to or greater than EUR 125,000,000.
24. However, for those who are not obliged to notify, the Regulation provides the obligation for every economic operator to submit a declaration of all foreign financial contributions received, confirming that they are not subject to the reporting obligation¹². The European Commission also has the right to examine any tender from an entity suspected of having received a financial contribution from a third country before the award of the contract.
25. The time limits for the Commission's investigation procedures to analyse the compatibility of this type of subsidy, in the case of public procurement procedures, shall be as follows¹³:

⁹ Article 26 of the Regulation.

¹⁰ In relation to the concept of contract or public procurement procedure, it is necessary to refer to Article 2, which defines "contract" as "in the context of public procurement procedures, it shall be understood, unless otherwise provided, that the term covers the concept of a "public contract" as defined in Article 2(5) of Directive 2014/24/EU, the concept of "contract" as defined in Article 1(2) of Directive 2009/81/EC and the concept of "supply, works and services" as defined in Article 2(1) of Directive 2014/25/EU, as well as the concept of "concession" as defined in Article 5(1), of Directive 2014/23/EU" and "public procurement procedure" as "a) any type of award procedure regulated by Directive 2014/24/EU for the conclusion of a public contract or by Directive 2014/25/EU for the conclusion of a supply, works or services contract; b) an award procedure adjudication of a works or service concession regulated by Directive 2014/23/EE; c) contract award procedures falling within the scope of Directive 2009/81/EC, unless they have been the subject of an exception granted by Member States under Article 346 of the TFEU; d) the contract award procedures referred to in Article 10(4)(a) of Directive 2014/23/EU, Article 9(1)(a) of Directive 2014/24/EU or Article 20(1)(a), of Directive 2014/25/EU".

The rules in Chapter 4 do not include the "procedures for the award of contracts as provided in Article 32(2)(c) of Directive 2014/24/EU and in Article 50(d) of Directive 2014/25/EU" which are governed by the provisions of Chapter 2 of the Regulation. This concerns procedures negotiated without prior publication for reasons of extreme urgency brought about by events which could not have been foreseen by the contracting authority.

¹¹ Article 28 of the Regulation.

¹² Article 29(1) of the Regulation.

¹³ Article 30 of the Regulation.

- (i) The European Commission shall have a maximum of 20 working days, extendable by a further 10 business days, to carry out its preliminary review.
 - (ii) In the event that it decides to open an in-depth investigation, the European Commission will have 120 working days from receipt of the complete notification, which may be extended by 20 working days in exceptional cases. The contract cannot be awarded until the European Commission has taken the relevant decision or the deadlines have expired¹⁴.
 - (iii) In cases of multi-stage procurement procedures, the preliminary review shall be suspended until the submission of a final tender, and a new 20-working-day period shall then commence. In the event that an in-depth investigation is opened, the maximum time limit for a decision shall be 90 working days from the submission of the updated notification¹⁵.
26. Companies involved that intentionally or negligently fail to notify foreign financial contributions or that evade or attempt to evade the reporting requirements provided in the Regulation, shall be liable to penalties of up to 10% of their aggregate turnover in the preceding financial year¹⁶.
27. The effectiveness of this Regulation in the public procurement procedures will depend to a large extent on complaints from competitors and cooperation with contracting authorities. Furthermore, this new procurement notification obligation, if not properly managed, may lead to longer procurement procedures to the detriment of the contracting authority's needs.

V. Common rules: What powers does it give to the European Commission?

28. The Regulation relies exclusively on the European Commission for its enforcement by providing it with enforcement powers to ensure monitoring and compliance by companies. These powers include the following:
- (a) Carrying out ex officio reviews.
 - (b) Sending requests for information.
 - (c) Adopting interim measures.
 - (d) Opening in-depth investigations.
 - (e) Carrying out inspections within and outside the territory of the EU.
 - (f) Imposing fines, periodic penalty payments or redressive measures.
29. Within the framework of an investigation, the European Commission may adopt different types of decisions¹⁷, such as a decision to raise no objections; decisions with commitments, in which the European Commission accepts the commitments made by the subsidised company; decisions with redressive measures; or, even, decisions to adopt interim measures¹⁸.

¹⁴ Article 32(2) of the Regulation.

¹⁵ Article 30(6) of the Regulation.

¹⁶ Article 32 of the Regulation.

¹⁷ Article 11 of the Regulation.

¹⁸ Only in relation to M&A transaction proceedings and where there is sufficient evidence of the existence of a foreign subsidy that distorts the internal market and there is a risk of serious and irreparable harm to competition in the internal market.

30. In the event that the European Commission's decision provides for the adoption of commitments or the imposition of redressive measures, such commitments or redressive measures are required to be proportionate and effective in fully resolving the distortion created by the subsidy. These measures may consist of:
- (i) The reduction of production capacity or market presence.
 - (ii) A temporary restriction on commercial activity.
 - (iii) Refraining from making certain investments.
 - (iv) The publication of research and development results.
 - (v) The divestment of certain assets.
 - (vi) The obligation for the companies to dissolve the concentration concerned.
 - (vii) The repayment of the foreign subsidy, including an appropriate interest rate, calculated using the method provided in Regulation 794/2004¹⁹.
 - (viii) The obligation for the companies concerned to adapt their governance structure.
31. Finally, in addition to the provisions on fines, a series of general provisions are included, such as dialogue with third countries²⁰, limitation periods²¹, or the publication of decisions²² that supplement the new regime with the aim of guaranteeing the right of defence of the companies concerned in the investigations that are initiated and guaranteeing the coherence of state aid policy within the EU and trade policy with third countries.

VI. What are the implications of this Regulation for companies?

32. The adoption of the Regulation is intended to fill a gap in the European Union's competition policy, which was unable to control state aid from third countries that had an impact on the EU's internal market.
33. Therefore, it is a positive instrument, although its effectiveness will depend on its implementation by the European Commission, which has a challenge ahead of it as it is responsible for all supervision, without any cooperation, in principle, from the national authorities.
34. However, this additional protection mechanism will increase the administrative burden on companies and may to some extent hamper their dynamism in economic activity. Thus, companies will have to increase their internal information management and verification procedures, which will require adequate preparation by companies and authorities to avoid unwanted delays in M&A transactions or public procurement procedures, which would be a burden on economic activity.

¹⁹ European Commission Regulation (EC) 794/2004 of 21 April 2004 providing detailed rules for the implementation of Council Regulation (EU) 2015/1589 providing detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJEU L 140, 30.4.2004, p.1.

²⁰ Article 37 of the Regulation.

²¹ Article 38 of the Regulation.

²² Article 40 of the Regulation.

35. Finally, the uncertainty caused by any new regulatory instrument should be noted, so it will be important not only to ensure that the European Commission implements it rigorously but also that companies can assist in its proper implementation in five ways:
- (i) **Providing** comments in the public consultation on the new implementing instrument that will be presented shortly.
 - (ii) **Anticipating**, by studying the instrument and in particular the concept of “foreign subsidy”, analysing its possible impact on the company’s activity. Thus, it should be verified as to whether they have received public subsidies from third countries in the three years prior to the date on which the Regulation starts to apply.
 - (iii) **Including** the analysis of the impact of possible subsidies from third countries in the different transactions and in the participation in public procurement procedures, as well as preparing the documentation in this regard.
 - (iv) **Reporting** to the European Commission possible foreign subsidies that may benefit other companies within the European Union.
 - (v) **Appealing** to the European Court of Justice in the event of disagreement with the decisions of the European Commission. The first cases before the Court of Justice of the European Union will set the standard for the fundamental interpretation of the new Regulation.

CONTACT



Sonsoles Centeno
Partner, European Union Law
and Competition
scenteno@perezllorca.com
T: +32 (0) 2 79 67 51

www.perezllorca.com | Madrid | Barcelona | London | New York | Brussels | Singapore

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice.

This document was prepared on 9 January 2023 and Pérez-Llorca does not assume any commitment to update or revise its contents.

NOW AVAILABLE | [New Pérez-Llorca App](#)

