
The European Commission's New Guidelines on the EU Foreign Subsidy Regulation

JANUARY 20, 2026

Under the European Union's (EU) [Foreign Subsidies Regulation](#) (FSR), which took effect on 12 July 2023, the European Commission (Commission) may require US and other non-EU companies that have received subsidies from non-EU governments and are doing business in the EU to take far-reaching measures. Those measures can involve divesting assets, granting access to infrastructure or repaying subsidies. The Commission can impose measures if it determines that a foreign subsidy distorts competition in the EU. On 9 January 2026, the Commission issued [new Guidelines](#) that provide insight into what may constitute a distortion of competition in the EU and other aspects of the FSR. Companies that are active in the EU should know about the FSR, not only because it may subject them to regulatory risk but also because it may provide an opportunity to address concerns regarding unfair competition.

Background to the FSR

The FSR regulates grants of subsidies from non-EU governments to companies that are active in the EU (which can constitute merely selling into the EU).

For the purposes of the FSR, "foreign subsidies" are financial contributions that are (i) made on a selective basis (to one or more companies or industries), (ii) directly or indirectly by a government to a company that is active in the EU and (iii) which confer a benefit on that company. The Commission has enforcement powers if the subsidy is deemed to **distort competition in the EU (which is solely up to the Commission to determine)**. If it makes such a finding, the Commission may demand that the foreign subsidy recipient take **far-reaching steps to eliminate the alleged distortion**. Those steps can require the subsidy recipient to reduce its EU activities, refrain from making investments, divest assets, grant competitors access to infrastructure, or even repay the foreign subsidy to the foreign state. The FSR covers three situations:

First, the FSR authorizes the Commission to, on its own initiative, require **companies operating in the EU** that have received a foreign subsidy that is found to distort competition in the EU to take measures to eliminate the subsidy's distortive effect. Such requirements can arise even when a subsidy or the recipient's EU turnover is relatively small.

Second, the FSR empowers the Commission to review whether proposed *concentrations* (i.e. mergers, acquisitions of direct or indirect control of a whole or parts of another company, or creation of full-function joint ventures) distort a market in the EU. To facilitate the Commission's review, the FSR requires that parties notify intended concentrations for FSR review if:

- the parties to the concentration that are active in the EU have received **foreign subsidies** with a combined value of **€50 million** (\$58 million) **or more** in the past three calendar years; and
- at least one of the parties (or in the case of an acquisition, the acquiring party, and in the case of a joint venture, the joint venture or one of its parents) is established in the EU and **has an aggregate EU turnover exceeding €500 million** (\$580 million).

Additionally, even when these thresholds are not met, the Commission may request prior notification of a concentration if it suspects that a party may have received foreign subsidies in the previous three years.

Third, the Commission can assess whether a foreign subsidy causes or risks causing a distortion in a public procurement procedure. The FSR requires non-EU **bidders participating in a public tender** launched by authorities in an EU Member State to **notify** the national authorities (who must then notify the Commission) of the receipt of a **foreign subsidy** with an **aggregate value equal to or exceeding €4 million (\$4.7 million)** from any non-EU government if the estimated value of the procurement contract that would be awarded equals or exceeds **€250 million (\$290 million)**, excluding VAT.

Additionally, the Commission may request a notification before the award of the contract even if these thresholds are not met if it suspects that an economic operator may have benefited from foreign subsidies in the three years before the submission of the tender or the request to participate in the public procurement procedure.

The Commission can fine companies that infringe the FSR up to 10% of their global group aggregate turnover and levy penalties of up to 5% of their average daily global group aggregate turnover for each day of non-compliance.

The FSR includes a type of 'safe harbour'. Foreign subsidies that are under €4 million over a three-year period are deemed unlikely to distort EU competition. Above this amount, in evaluating whether the subsidy distorts competition, the Commission considers the foreign subsidy's nature, purpose, use and conditions, and the recipient's size and activities.

The Commission's New FSR Guidelines

The new Guidelines focus on three aspects of the FSR.

First, they provide guidance on **how the Commission will apply the criteria for determining whether there is a distortion of competition**. Specifically, the Guidelines analyse criteria for determining the following:

- Whether the subsidised company engages in an **economic activity** in the EU.

- For example, the Guidelines clarify that *a company that purchases goods in the internal EU market and uses these goods to offer services to its customers, regardless of whether it offers these goods or services inside or outside the EU's internal market, will be considered to engage in economic activity in the EU.*
- Whether a foreign subsidy is **liable to improve the competitive position** of the company in the EU.
 - For example, the Guidelines note that *in cases of foreign subsidies of a general scope or objective, the Commission will assess whether the company is likely to be able to use the resources provided (or freed up) by the foreign subsidy to fully or partially cross-subsidise its economic activities in the EU's internal market.*
- Whether a foreign subsidy can be deemed to **actually or potentially negatively affect competition** in the internal market. The Guidelines explain that this question involves two assessments: (i) how the subsidy actually or potentially affects the behaviour of the company in the internal market; and (ii) the resulting alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market.
 - For example, *the foreign subsidy may enable the company to offer lower prices or improved sales terms or allow it to expand production or sales beyond the previously likely level, absent the foreign subsidy.*
- Whether there is a distortion in the internal market **in the context of public procurement** procedures.
 - For example, *a foreign subsidy may enable the subsidised company to submit a lower price tender, which would not be attainable absent the foreign subsidy and cannot be explained by other factors.*

Second, the Guidelines provide insight into how the Commission applies the **'balancing test'** (i.e. the weighing of the subsidy's negative effects against its positive effects on the internal market). Procedurally, they emphasise that the company under investigation must provide the necessary information to establish that positive effects exist.

Apart from the positive effects of the subsidies on the development of the relevant subsidised economic activity (such as remedying a market failure or providing positive externalities from enhanced research and development), the Commission will also consider the broader positive effects in relation to other EU policy objectives. While the Guidelines refer to the positive effects of subsidies set out in more than the 25 existing EU [State aid](#) guidelines in various sectors (for example, on energy, shipping, aviation, broadband), the Guidelines, unlike what has been found in most State aid decisions, do not suggest that positive effects are capable of outweighing negative effects. Yet, in the only two decisions following an in-depth investigation under the FSR so far, the Commission has relied heavily on its State aid decision-making practice and case law to support its conclusions.

Third, the Guidelines address the **Commission's power to request the prior notification** of concentrations and foreign financial contributions received in a public procurement **where the**

thresholds for mandatory notification under the FSR are not met. The Guidelines state that the Commission will use this power where an *ex ante* review would be merited given the **impact** (of the concentration or the bid) and the need to ensure a level playing field in the EU.

The Guidelines also contain a non-exhaustive list of factors that the Commission will account for in this assessment, such as the strategic or important character of the relevant economic activity, the potential influence or economic presence of the party based on its pattern of investments, and evidence suggesting the possibility of a distortion of competition.

Conclusion

The Guidelines seek to clarify certain aspects of the FSR's application. It bears noting, however, that the FSR was introduced in response to certain political concerns. It remains to be seen whether the Commission will follow the Guidelines closely, in practice, or may depart from them to address political exigencies.

Non-EU companies that operate in EU markets should carefully consider the FSR as a potential regulatory risk. But, in some circumstances, the FSR may be used to address concerns that non-EU competitors are distorting European markets through government subsidies. The FSR allows any natural or legal person to provide information to the Commission regarding alleged distortions to competition by non-EU companies.

WilmerHale's lawyers are well positioned to assist clients in bringing forward such claims and information to the Commission.

Authors



Anne Vallery

PARTNER

Partner-in-Charge,
Brussels Office

✉ anne.vallery@wilmerhale.com

☎ +32 2 285 49 58



Cormac O'Daly

PARTNER

✉ cormac.o'daly@wilmerhale.com

☎ +44 (0)20 7872 1534



Lena Sandberg

PARTNER

✉ lena.sandberg@wilmerhale.com

☎ +32 2 285 49 08



Frédéric Louis

PARTNER

✉ frederic.louis@wilmerhale.com

☎ +32 2 285 49 53

Ioannis Dellis

STAGIAIRE

✉ ioannis.dellis@wilmerhale.com

☎ +32 2 285 49 15