

Foreign Subsidies Regulation

Benjamin Loertscher,

Dr Dominik Welter, Marie Grote

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1 Introduction

1. When the Spanish football division Liga Nacional de Fútbol Profesional (“LaLiga”) lodges a complaint against the French Ligue 1 top club Paris Saint-Germain (“PSG”), which is fully owned by Qatar’s sovereign wealth fund, with the European Commission (“EC”) arguing that PSG’s funding mechanisms seriously distort the European Union’s internal market,¹ something important is going on, not only for the European football leagues. Indeed, the Foreign Subsidies Regulation (“FSR”) has come into effect.² The FSR has the potential to level the playing field not only in sports, but more broadly, in the EU internal market.³
2. But why is the FSR needed? If an undertaking acts in a liberalised sector where competition is at least possible, it could have a distortive effect on the internal market if that undertaking receives money from a government while its competitors not. For example, the subsidised company might be able to set unduly low prices in tenders or facilitate an acquisition of a competitor. To prevent this type of distortion, State aid from EU member states is generally prohibited.⁴ However, “*foreign subsidies are currently not subject to Union State aid rules.*”⁵ Thus, the FSR complements State aid rules with respect to financial support received from governments of non-EU member states.
3. In the following, we outline the five main steps of the process of investigating foreign subsidies under the FSR and discuss some of the challenges involved.

2 Classification

4. The crucial first step in the assessment under the FSR is to determine whether a financial contribution classifies as a foreign subsidy. A foreign subsidy is defined as a financial contribution (including support measures not limited to monetary transfers) that
 - is granted directly or indirectly by a third country (i.e., non-EU member state),
 - confers a benefit to an undertaking engaging in an economic activity in the internal market, and
 - is confined to one or more undertakings or industries.⁶
5. The definition is broader than that of State aid which involves a transfer of public funds and there must therefore be (a concrete risk of) a burden on the state.⁷ A financial contribution may however be classified as a foreign subsidy even if it is provided by a private entity whose actions can be attributed to a foreign state.⁸

¹ See [LALIGA: LALIGA files complaint against PSG with EC](#) [accessed 07.09.2023]. A similar complaint was made against the Belgian football club ‘Lommel SK’ which is, as Manchester City, part of a group that is held by Abu Dhabi’s Sheikh Mansour bin Zayed Al Nahyan (see [Royal Excelsior Virton news item](#), accessed 07.09.2023).

² Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45.

³ The FSR entered into force on 12 January 2023 and took effect on 12 July 2023. In addition, on 10 July 2023 the EC published its FSR Implementing Regulation setting the final rules for implementing the FSR.

⁴ Article 107 TFEU.

⁵ FSR, Recital 2.

⁶ FSR, Article 3(1).

⁷ Case C-379/98 *PreussenElektra AG v Schleswag AG*, ECLI:EU:C:2001:160, para.59–62.

⁸ FRS, Recital 12 and Article 3(3)(c).

6. Whether an undertaking has received a [selective] benefit will likely be contentious in many cases. It may for example prove difficult for the EC (and third-party complainants) to establish that an undertaking active in the EU only through a subsidiary passed subsidies on to this subsidiary.⁹ At the same time, this will likely also prove challenging for undertakings active in the internal market. In order to meet their notification obligations, they may need access to information that is not in their possession.
7. For the existence of a benefit, the appropriate comparative benchmark must be identified. As in State aid investigations, the key question will often be whether the financial contribution was provided in accordance with the Market Economy Operator Principle: A financial contribution is not a subsidy if the terms and conditions would be acceptable to a private investor operating under normal market economy conditions.

3 Procedure

8. The effects of a financial contribution found to be a foreign subsidy will come under review by the EC if
 - the recipient is involved in a concentration,
 - the recipient engages as a bidder in a public tender, or
 - the EC initiates an investigation on its own initiative [*ex officio* investigation].
9. An ex-ante notification obligation applies to concentrations and public procurement procedures if certain thresholds are met¹⁰ or if the EC requests it directly¹¹.
10. The EC will undertake the review of a concentration under the FSR separately from the merger control review. It may be that a transaction is notifiable under the FSR even if it isn't under the Merger Regulation.
11. On the basis of the "*ex officio*" review tool, the EC may on its own initiative examine information from any source, regarding alleged foreign subsidies distorting the internal market.¹²
12. Investigating competition concerns resulting from foreign subsidies the EC will first undertake a preliminary review and, if it has sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, the EC will adopt a decision to initiate an in-depth

⁹ This might be the case where a foreign undertaking has received a foreign subsidy and (partly) uses this for a green-field investment in the EU.

¹⁰ For concentrations the notification thresholds are that (a) at least one of the undertakings involved must have an aggregate turnover in the Union of at least EUR 500 million, and (b) the granted combined aggregate foreign financial contributions must exceed EUR 50 million in the three years preceding the planned transaction (FSR, Article 20(3)). Notification thresholds for public procurement procedures are that (a) the estimated value (net of VAT) of the public procurement is equal to or greater than EUR 250 million (or the lots applied for have a value of EUR 125 million or more), and (b) the aggregate financial contribution in the three years prior to notification is at least EUR 4 million per third country (FSR, Article 28(1) and (2)). Applications to public procurement procedures in the fields of defence and security [falling within the scope of Directive 2009/81] are excluded from the notification requirement (FSR, 28(3)). Applications for public procurement procedures under negotiated procedures which due to extreme urgency are run without a prior call for competition are also excluded from the notification obligation but may be subject to an *ex officio* review by the EC (FSR, Article 28(4)).

¹¹ FSR, Articles 21(5) and 29(8).

¹² FSR, Article 9.

investigation.¹³ If the indications are insufficient for such a conclusion, the EC will close the preliminary review without adopting a decision.¹⁴

13. A notifiable concentration must not be implemented before notification and until the EC either closes its preliminary review without adopting a decision or issues a [conditional] clearance decision following an in-dept investigation or until the time limits set out in the FSR for the review have passed without the EC issuing a decision.¹⁵
14. Similarly, a public procurement procedure must not lead to the award of a contract to a bidder that has notified the contracting authority that its foreign financial contributions meet the threshold set out in the FSR until the time limits set out in the FSR for the review have passed without the EC issuing a decision or the EC issues a no objection decision or a decision with commitments.¹⁶

4 Assessment of Distortion

15. Third, when the EC has initiated an investigation, it will examine whether the foreign subsidy in the specific case is liable to distort the internal market. To make such a finding the EC must demonstrate that
 - the foreign subsidy improves the competitive position of an undertaking to the detriment of competition and,
 - in doing so, competition in the internal market is actually or potentially negatively affected.¹⁷
16. The EC will determine the distortive effect on the internal market based on indicators, such as the amount and nature of the foreign subsidy and the specific situation of the recipient of a foreign subsidy on the markets concerned.¹⁸
17. Foreign subsidies are assumed to most likely distort the internal market if they fall into specific categories, namely, if
 - the undertaking would likely go out of business without the subsidy;
 - the undertaking benefits from an unlimited guarantee for its debts and liabilities;
 - export financing measures don't comply with the OECD arrangement on officially supported export credits;¹⁹
 - a concentration is directly facilitated; or
 - it enables the submission of an unduly advantageous tender.²⁰

¹³ FSR, Article 10(3).

¹⁴ FSR, Article 10(4).

¹⁵ FSR, Article 24(1).

¹⁶ FSR, Article 32(2) and (3).

¹⁷ FSR, Recital 18 and Article 4(1).

¹⁸ FSR, Article 4(1).

¹⁹ See OECD (2023). Arrangement on officially supported export credits, available at [https://one.oecd.org/document/TAD/P6\(2023\)7/en/pdf](https://one.oecd.org/document/TAD/P6(2023)7/en/pdf).

²⁰ FSR, Article 5(1).

18. The economic assessment of the actual or potential distortive effect of a foreign subsidy will likely require that the relevant markets concerned be defined to systematically identify the competitive constraints faced by the recipient of a foreign subsidy.
19. The actual or potential distortive effect of a foreign subsidy may be identified by way of a counterfactual analysis comparing the competitive conditions in the relevant market in the absence of the foreign subsidy with the competitive conditions [expected or observed].

5 Balancing Test

20. If the EC concludes in an in-depth investigation that a foreign subsidy distorts the internal market, the EC may undertake a balancing test.²¹ The EC is not required to undertake a balancing test on its own initiative. However, as a matter of procedural fairness the EC should consider evidence received that any distortion to the internal market would be outweighed by positive effects.²²
21. The balancing test compares the distortive effects of the subsidy with “the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union.”²³ Under the balancing test the positive and negative effects of the foreign subsidy are therefore first considered within the same relevant market(s) [the relevant subsidised economic activity]. But other positive effects outside the relevant market should be taken into account “*where appropriate*,” to avoid unjustified discrimination of an undertaking under investigation.²⁴ This may be the case for example if undertakings receiving foreign subsidies compete with undertakings benefiting from State aid received from EU member states legally granted thanks to positive effects outside the relevant market. The failure to consider the positive effects of the foreign subsidy outside the relevant market may therefore be considered discriminatory.
22. In addition, broader positive effects in relation to policy objectives outside the relevant market should be considered as well. This is familiar from State aid rules under which broader policy interests are also taken into account.²⁵ There are three main questions relevant for the balancing test in State aid investigations.²⁶ These are likely also relevant for a balancing test under the FSR in a similar form:
 - Is the subsidy aimed at a well-defined policy objective? In FSR investigations the policy objectives positively affected by the foreign subsidy will need to be identified to be able to investigate and potentially quantify the effects to be considered in the balancing test. Certain foreign subsidies relate to policy objectives shared by the EU and third countries granting subsidies (e.g., policies aimed at combatting climate change). If the financial contribution is aimed at a specific policy objective which the third country granting the subsidy shares with the EU, the positive effects may be more likely to materialise.

²¹ FSR, Article 6[1].

²² FSR, Recital 21.

²³ FSR, Article 6[1].

²⁴ FSR, Recital 21.

²⁵ See Article 107[3] TFEU.

²⁶ See Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3, Recital 9.

- Is the subsidy well-designed to deliver the policy objective?²⁷ This will also affect the likelihood of the positive effect materialising as well as its magnitude. The conclusion that a better designed subsidy could lead to more limited distortive effects or potentially greater positive effects could inform the remedies design at a later stage.
- Are the distortions of competition limited so that the overall balance is positive? In most cases the positive and distortive effects will not be quantified but their general magnitude (and likelihood to materialise at all) will be assessed for the balancing test. The outcome of the balancing test may be conclusive from the EC's point of view if effects that are likely very small and uncertain are compared to effects that are expected to be large and certain. In other cases, where the comparison of effects is not as evident because of the magnitude and certainty of the effects but also because distortive effects in a particular market (apples) must be compared with positive effects in relation to policy objectives (oranges) the EC may consider intervening by imposing redressive measures, accepting commitments or issuing a prohibition.

6 Remedies

23. In in-depth investigations the EC may accept commitments submitted by the undertakings under investigation if it considers that the commitments remedy the distortion in the internal market.²⁸ This contrasts with merger control where the EC may also accept commitments in Phase I. In addition, where the EC has opened an investigation on its own initiative, it can impose redressive measures to remedy the distortion.²⁹
24. The (non-exhaustive) list of potential remedies in Article 7(4) of the FSR contains structural remedies (e.g., divestiture of certain assets), access remedies (e.g., access to infrastructure and licensing of assets) as well as behavioural remedies (e.g., publication of R&D results or temporary restriction on commercial activity).³⁰ The repayment of the foreign subsidy (including interests) is also a possibility to remedy the distortion.
25. The EC may prohibit notified concentrations and the award of a contracts in public procurement procedures to undertakings that have notified financial contributions, if no commitments were proposed or if the EC does not accept the commitments offered.³¹
26. As in merger control and antitrust investigations, the EC can accept commitments only if they are
- **effective**, i.e., if they "fully and effectively remedy the distortion actually or potentially caused by the foreign subsidy in the internal market", and

²⁷ Secondary related questions are: Is the subsidy an appropriate policy instrument to address the policy objective concerned? Is there an incentive effect, i.e., does the subsidy change the behaviour of the recipient? Is the subsidy proportionate to the problem, i.e., could the same change in behaviour not be obtained with a more limited subsidy?

²⁸ FSR, Articles 7(2), 11(3), 25(3)(a), 31(1).

²⁹ FSR, Recital 22 and Article 7(1). Note that the option of a decision with redressive measures pursuant to Article 11(2) is not included among the types of decisions the EC can adopt after in-depth investigations of notified concentrations [Article 25(3)] or of notified financial contributions in public procurement procedures [Article 31].

³⁰ For a discussion of the types of remedies used in EU competition law see B. Lörtscher and Frank P. Maier-Rigaud, On the Consistency of the European Commission's Remedies Practice, in: Gerard, Damien & Assimakis Komninos (eds.) Remedies in EU Competition Law - Substance, Process and Policy, 53-72, Wolters Kluwer, 2020.

³¹ FSR, Articles 24(1) and 31(2). Note that in ex officio investigations the EC has the power to dissolve a concentrations already implemented. However, contracts that have already been awarded through a public procurement procedure cannot required to be terminated [FSR, Articles 25(6)] and 9(2).

- **proportionate**, i.e., if there are different remedies that would be effective the Commission must choose the least onerous one.³²

27. In addition, the EC may issue a decision prohibiting the award of a contract to an undertaking that has notified financial contributions in a public procurement procedure if the EC considers the commitments offered not “appropriate”.³³ The FSR is silent as to the interpretation of this term³⁴ and it remains unclear why the “appropriateness” of commitments only needs to be considered in the context of public procurement procedures. This test may give the EC additional leeway to reject commitments and issue a prohibition decision.
28. The remedy design will likely prove different than in State aid cases, where the aid measures often have not been implemented and can still be subject to change. Foreign subsidies by contrast are not notifiable at the time they are granted. The EC can investigate a foreign subsidy within a period of ten years from the date of it being granted, and in the context of a concentration or public procurement procedure the assessment will only take into account foreign subsidies granted during the preceding three years.³⁵ This means that it may be too late to improve the design of the subsidy such that other remedies must be considered.
29. Furthermore, differences may well also arise out of the fact that in State aid cases the EU member states are the addressees who may then commit to ensuring that an undertaking implements the commitments accepted by the EC. By contracts, under the FSR the undertakings investigated will be the addressees of the EC’s decisions.

7 Conclusion

30. The evaluation of financial contributions under the FSR requires complex assessments. Parties concerned with FSR investigations will need legal as well as economic advice.
31. In particular, as highlighted by the EC, a case-by-case assessment is needed, e.g., when discussing the distortive effect of a foreign subsidy and when performing the balancing test. While experience can be drawn from State aid investigations and merger control, the FSR will be new territory and it is uncertain whether the EC will apply the same standards in its assessment. For example, the level of proof required to convince the Commission of merger efficiencies is high and it remains to be seen whether the Commission will be more easily swayed by arguments relating to positive effects of foreign subsidies.
32. The case law and the guidelines to be published by the Commission will hopefully also help reduce the uncertainty related to the difficulty inherent to comparing negative effects in a particular market with positive effects in relation to other policy objectives.
33. The impact of the FSR overall cannot be gauged at this point. It clearly results in additional administrative burden to undertakings that receive foreign financial contributions and may reduce

³² FSR, Article 7[3].

³³ FSR, Article 31[2].

³⁴ The German version of the FSR uses the word “*geeignet*” in Article 31[2]. This can also be translated as “suitable” which may suggest that the “appropriateness” of commitments relates to their suitability and therefore effectiveness to remedy the distortion.

³⁵ FSR, Articles 19 and 27. For concentrations, this relates to the three years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. For foreign subsidies notified in the context of a public procurement procedure, the date of the notification is relevant.

some investments by foreign states in the EU. However, the positive impact from reduced distortions of competition and positive effects of foreign subsidies on the development of the relevant subsidised economic activity and on policy objectives are uncertain. In this sense, it is not obvious that the FSR would meet the requirements of a balancing test asking questions similar to those asked in relation to State aid and foreign subsidies.