

Oppenheimoff

EU Foreign Subsidies Regulation

Regulation (EU) 2022/2560 – Practical implications for M&A proceedings

The EU Foreign Subsidies Regulation (FSR) in a nutshell

The FSR has been **in force since 12 January 2023**. It gives the EU Commission **new powers to investigate and counteract market-distorting subsidies** granted by non-EU governments.

Three new tools for the EU Commission:

- (1) **Ex-ante notification obligation** including **stand-still obligation** for **M&A transactions** (independent from EU Merger Regulation)
- (2) **Ex-ante notification obligation** for **public procurement procedures**
- (3) **Ex-officio investigations** for **all other market situations for up to 10 years**, including to request ad-hoc notifications for non-notifiable transactions any time before closing

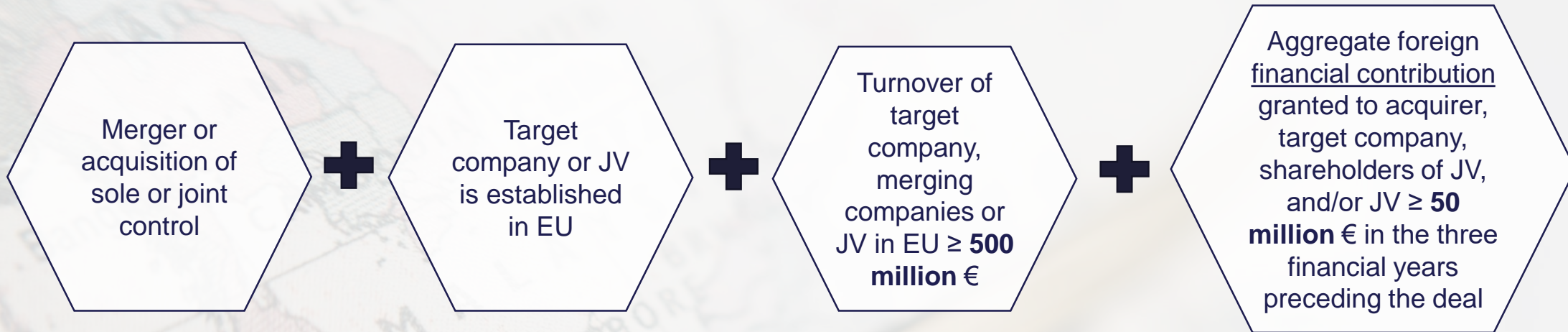
What is it about?

Foreign subsidy: Financial contribution from a **non-EU government to non-EU as well as EU undertakings** providing a **certain benefit** which is **'selective'**, i.e. limited to one or more undertakings or industries.

Financial Contribution: Wide range of public interventions, e.g. positive advantages (grant, capital, loans), relief from economic burdens (tax exemptions) and supply contracts with foreign public counterparties

The EU Foreign Subsidies Regulation (FSR) in a nutshell

Ex-ante notification obligation and stand-still obligation for M&A transactions, if:



What does the Commission review?

- I. Does a **financial contribution** by a non-EU country constitute a **foreign subsidy**?
- II. Does the foreign subsidy lead to a **distortion in the EU Single Market**?
- III. If (1) + (2) yes: Consideration of the **market-distorting effects** of the foreign subsidy versus the **potential benefits** in a wider sense (**balancing test**)
 - If the positive effects prevail: **No objection** by the Commission
 - If the negative effects prevail: **Prohibition** or decision with **remedies** by Commission

Timeline and implications for EU companies

What happens on 12 July 2023

Ex officio tool starts to apply:

FSR allows Commission to review subsidies granted **10 years in the past**

FSR only applies to subsidies granted in the **five years prior to 12 July 2023**

What happens on 12 October 2023

Ex-ante notification obligation including stand-still obligation for M&A transactions applies:

Notification requirement for transactions signed on or after 12 July 2023 but which have not yet been closed on 12 October 2023

- **No notification requirement** for transactions signed before 12 July 2023
- **No notification requirement** for transactions signed on or after 12 July 2023, but closed before 12 October 2023

Notification requirement for public procurement procedures initiated on or after 12 July 2023

What Companies should do now:

Setting up a system to collect, analyze and classify all financial interactions between all business units and non EU governments from the last five years (12 July 2018), monitored and updated on a continuous basis (**subsidies scorecard**)

Required information:

- receiving/granting entity,
- third country,
- type of the financial contribution,
- its amount and the date of granting,
- purpose,
- economic rationale and
- possible positive effects of the financial contribution

Adjust deal planning:

- Closing conditions
- Cooperation obligations
- Timing

Oppenhoff – Your contact to us



Dr. Daniel Dohrn

Partner • Attorney-at-Law

Konrad-Adenauer-Ufer 23 • 50668 Cologne
P: +49 221 2091 441 • M: +49 172 147 975 8
E: Daniel.Dohrn@oppenhoff.eu



Dr. Carsten Bormann

Junior Partner • Attorney-at-Law

Konrad-Adenauer-Ufer 23 • 50668 Cologne
P: +49 221 2091 329 • M: +49 175 3282 907
E: Carsten.Bormann@oppenhoff.eu