

EU, COMPETITION & PROCUREMENT

# The EU's Foreign Subsidies Regulation *European Commission scrutiny of non-EU subsidies*

The [Foreign Subsidies Regulation](#) entered into force on 12 January 2023 and applies from 12 July 2023.

The Foreign Subsidies Regulation (**Regulation**) is designed to deal with distortions of the EU's internal market which arise as a result of subsidies granted by non-EU countries to businesses operating in the EU (for example by providing their recipients with an unfair advantage to acquire companies or obtain public procurement contracts in the EU). The Regulation grants wide-ranging powers of monitoring and enforcement to the European Commission (**Commission**) and the Commission published a draft [Implementing Regulation](#) on 6 February 2023 on the practical application of the Regulation.

The Regulation is an important, complex and controversial regulatory hurdle for companies (whether or not based in the EU) before they can: (a) complete certain acquisitions in the EU and (b) participate in certain public procurement tenders in the EU. In addition, the Regulation introduces a general market investigation tool allowing the Commission to launch its own review of smaller acquisitions and public procurement processes as well as carrying-out wider market investigations involving potentially distortive foreign subsidies affecting the EU.

With the power to block affected M&A and prevent certain public procurement awards in the EU together with the power to fine companies up to 10% of their turnover for a range of breaches, the Regulation is a powerful new measure for the Commission to contain distortive foreign subsidies.

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## The Regulation

Subsidies granted by Member States are subject to EU State aid control under Articles 107-109 of the Treaty on the Functioning of the European Union. However, until now, there has been no EU instrument to review the effect in the EU of subsidies granted by non-EU countries. To address this, the Commission tabled a proposal for the Regulation on 5 May 2021 and the final text of the Regulation was adopted by the Council on 28 November 2022. The Regulation aims at preventing distortions of competition in the EU created by subsidies granted by public authorities of non-EU countries to companies operating in the internal market. Companies affected by the Regulation include both non-EU companies and companies based in the EU.

Overall, the Commission can: (i) review foreign financial contributions in a number of situations, (ii) determine if they are distortive subsidies, (iii) apply a balancing test of positive and negative competition effects on competition in the internal market and (iv) decide what measures (if any) are needed to remedy the position.

## What does the Regulation do in relation to foreign subsidies?

The Regulation establishes a framework for the Commission to examine economic activities which benefit from a foreign subsidy and which may distort competition in the internal market.

The Commission believes that, in many cases, such subsidies would be problematic if granted by Member States when assessed under the EU State aid rules. The Regulation aims at ensuring fair competition between all companies - both EU and non-EU - operating in the internal market.

### What is a foreign subsidy under the Regulation?

A foreign subsidy exists where a non-EU country, including through a central government or foreign public entities, provides a “financial contribution” which confers a benefit on a company engaging in an economic activity in the EU and which is limited to one or more companies (or industries).

### What is a financial contribution under the Regulation?

The Commission's jurisdiction centres initially on the existence of a financial contribution provided by a non-EU country (which may then be found ultimately to be a distortive foreign subsidy). A financial contribution is a broad concept which can take different forms and includes the:

- transfer of funds or liabilities (including capital injections, grants, loans, loan guarantees, fiscal incentives, setting-off of operating losses, compensation for financial burdens imposed by public authorities, debt-forgiveness and debt-to-equity swaps or rescheduling), or
- foregoing of revenue that is otherwise due (e.g. tax exemptions).

### If a foreign subsidy distorts competition, what are the Commission's options?

If the Commission finds that a foreign subsidy exists and that it would distort competition in the internal market, the Commission then carries out a balancing test. This assesses the balance between the positive and negative effects of a foreign subsidy. If the negative effects of a foreign subsidy outweigh the positive effects, the Commission can then impose

“redressive” measures (including structural and behavioural measures) to remedy the distortion in the internal market (relevant to general market investigations by the Commission). The company concerned may also offer commitments to the Commission to remedy the distortion (relevant to reviews of notified concentrations and public procurement procedures as well as market investigations by the Commission).

The Regulation lists a number of possible redressive measures and commitments. One measure includes the Commission requiring that access be granted under fair, reasonable and non-discriminatory conditions to an infrastructure that was acquired or supported by a distortive foreign subsidy. Another possible measure under the Regulation is the repayment of the foreign subsidy (including an appropriate interest rate).

### How will the Regulation be implemented in practice?

On 6 February 2023, the Commission published a draft Implementing Regulation containing rules and procedures on:

- i. the submission of notifications to the Commission under the Regulation for applicable concentrations and public procurement procedures. The format of the notifications is set out in two annexes to the Implementing Regulation and it also sets-out detailed procedural requirements for submission of the notifications (this will likely be a significant and time-consuming exercise for notifying parties),
- ii. processes and procedures for investigations carried-out by the Commission under the Regulation (including (a) timelines for submission of views to the Commission, (b) oral statements during inspections and (c) information from the contracting authorities and contracting entities in public procurement procedures),
- iii. commitments and redressive measures under the Regulation (including (a) time limits for the submission of commitments under notified concentrations and investigations in the context of public procurement procedures, (b) procedures for the submission of commitments and (c) the appointment of trustees), and
- iv. the use of information and treatment of confidential information under the Regulation (including the identification and protection of confidential information).



## How will the Regulation enable the Commission to review foreign subsidies?

The Commission has three means (or “tools”) to review foreign subsidies under the Regulation: two notification-based tools and one general market investigation tool.

### 1. M&A and public procurement notification tools

#### *A. Notification to the Commission of M&A involving foreign financial contributions*

Under the Regulation (and separate from any obligation to notify the Commission under the EU Merger Regulation or under Member State merger control systems), companies must notify the Commission of certain mergers, acquisitions or full-function JVs (i.e. “concentrations”) where:

- a. the merging companies, the target company or the JV is established in the EU and generates an aggregate EU turnover of **at least €500m**, and
- b. all the companies involved in the concentration (for example: (i) the merging parties, (ii) the acquirer and target company or (iii) the JV (as well as its parents)) were granted combined aggregate financial contributions from non-EU countries in the 3 years prior to conclusion of the agreement (or announcement of the public bid or acquisition of a controlling interest) **of more than €50m**.

The definitions and procedures for notification of such concentrations largely reflect those under the EU Merger Regulation. The assessment and time-periods(s) for review are also similar to those under the EU Merger Regulation (i.e. broadly, a time-period of 25 working days after receipt of a complete notification if reviewed in Phase 1 and an additional 90 working days if reviewed in Phase 2 (extendable)).

In terms of procedure, the Commission approves the concentration in Phase 1 (i.e. where there are no, or insufficient indications, of distortive foreign subsidies) or refers the concentration to a more in-depth Phase 2 review after which the Commission approves (with or without commitments) or prohibits the concentration (where the Commission finds that the foreign subsidy distorts the internal market).

The Commission can also impose interim measures.

The requirement to notify concentrations to the Commission applies from 12 October 2023. The Regulation does not apply to concentrations for which the agreement was



concluded (or the public bid was announced or a controlling interest was acquired) before 12 July 2023. The Regulation applies to foreign financial contributions granted in the 3 years prior to 12 July 2023 in relation to concentrations.

Separately, the Commission can call-in a concentration for notification which does not require to be notified to the Commission (as described above) at any time prior to its implementation where the Commission suspects that the companies involved “may have been granted” foreign subsidies in the 3 years prior to the concentration. That concentration is then regarded as notifiable under the Regulation and cannot be completed unless and until approved by the Commission.

***B. Notification of public procurement procedures to the Commission involving foreign financial contributions***

Under the Regulation, economic operators (including companies) participating in a public procurement procedure, are required to notify the contracting authority or contracting entity of all foreign financial contributions where:

- a. the estimated value of the public procurement (or framework agreement) is **at least €250 million**; and
- b. the company (including its subsidiary companies without commercial autonomy, holding companies, and, if applicable, main subcontractors and suppliers involved in the same tender in the public procurement procedure) was granted aggregate financial contributions in the 3 years prior to notification of **at least €4 million** (per non-EU country).

Where contracts are divided into different lots, an additional threshold of €125 million applies to the aggregate value of all lots for which the company is applying. This obligation also applies to the main subcontractors and suppliers if the economic share of their contribution exceeds 20% of the estimated contract value.

In terms of procedure, the contracting authority then sends the notification to the Commission for assessment. The Commission carries-out a preliminary review in Phase 1 within 20 working days (extendable once by 10 working days). If it is referred to an in-depth Phase 2 review, the Commission makes a decision within 110

days after notification (extendable once by 20 working days). If the Commission finds that the company benefits from a foreign subsidy which distorts the internal market, the Commission can accept commitments or prohibit the award of the contract to the company.

During the Commission investigation, the procurement process can continue, but the contract cannot, as an example, be awarded to a notifying participant until the Commission issues a favourable decision. If no notification is made by a company, it must declare to the contracting authority that it did not receive any applicable foreign financial contribution.

The Commission can also require notifications of foreign financial contributions received by a company in a sub-threshold public procurement procedure.

The Regulation does not apply to public procurement contracts that have been awarded or procedures initiated before 12 July 2023 and only foreign subsidies granted during the 3 years prior to the notification are taken into account in the assessment.

### Other features of the M&A and public procurement tools

#### *What are the sanctions for breach of the M&A and public procurement notification obligations under the Regulation?*

Among others, the Commission can impose fines of up to 10% of aggregate turnover on companies involved who fail to notify an applicable notifiable concentration or fail to notify foreign financial contributions during a relevant public procurement procedure.

#### *Can the affected concentration be completed or the investigated bidder be awarded the contract before Commission approval under the Regulation?*

No – the notification obligations under the Regulation are suspensory. Broadly, in M&A, the affected concentration cannot be completed and, in public procurement, an investigated bidder cannot be awarded the contract until approved by the Commission.

#### *When would a foreign subsidy be regarded by the Commission as distorting the internal market?*

If it is liable to improve the competitive position of the company concerned in the internal market and where, in doing so, it actually (or potentially) negatively affects competition in the internal market.

### 2. The general market investigation tool

Separately, the Regulation enables the Commission to review, on its own initiative (“ex officio”) from 12 July 2023 situations (e.g. completed concentrations and awarded public procurement contracts) where it suspects that a distortive foreign subsidy may be involved. In this regard, the Regulation grants the Commission powers to gather information necessary for its review including:

- sending information requirements to companies,
- conducting fact-finding missions and inspections, and

- launching market investigations into specific sectors or types of subsidy.

Failure by a company involved to comply with an information-gathering requirement by the Commission (and other procedural requirements under the Regulation) can lead to fines of up to 1% of turnover.

The Commission can impose interim measures where: (a) there are sufficient indications that a financial contribution constitutes a foreign subsidy and distorts the internal market and (b) there is a risk of serious and irreparable damage to competition in the internal market.

After concluding its review, the Commission can impose redressive measures, accept commitments or adopt a no-objection decision.

Failure by a company to comply with any redressive measures imposed by the Commission (e.g. paying back the distortive foreign subsidy), commitments offered or interim measures can lead to a fine of up to 10% of turnover.

### 3. General Provisions

#### *Can the Commission carry-out inspections under the Regulation?*

Yes, the Commission can carry-out inspections of companies (after giving notice) to enable the Commission to carry out its duties under the Regulation. Member State competition authorities (e.g. the Competition and Consumer Protection Commission in Ireland) can assist the Commission in such inspections. The Commission can also carry-out inspections of companies outside the EU provided that the government of that non-EU country has been officially notified and raises no objection to the inspection.

#### *Is there a de minimis threshold for foreign subsidies under the Regulation?*

Yes. A foreign subsidy to a company is “unlikely” to distort the internal market if it does not exceed €4m over any consecutive period of 3 years. A foreign subsidy to a company “shall not be considered” to distort the internal market if its total amount is not more than €200k per non-EU country over any consecutive period of 3 years.

### 4. From when do the obligations apply under the Regulation?

While the Regulation came into force on 12 January 2023, the Regulation applies from 12 July 2023 and in particular:

- a. to foreign subsidies granted in the 5 years prior to 12 July 2023 where such foreign subsidies distort the internal market after 12 July 2023, and
- b. by way of derogation to (a) above, to foreign financial contributions granted in the 3 years prior to 12 July 2023 where such contributions were granted to a company notifying a concentration or notifying in the context of a public procurement procedure.

The Regulation does not apply to:

- a. concentrations for which the agreement was concluded (or the public bid was announced or a controlling interest was acquired) before 12 July 2023, and
- b. public procurement contracts that have been awarded or procedures initiated before 12 July 2023

The requirement to notify concentrations

under the Regulation applies from 12 October 2023.

### 5. Who will apply the Regulation?

The Commission is exclusively competent to enforce the Regulation (though Member States will, for example, be kept informed and will be involved, through the advisory procedure, in decisions adopted under the Regulation as well as in the context of any inspections by the Commission). The Regulation will be complemented by implementing rules and on 6 February 2023, the Commission published a draft Implementing Regulation.

## Comments and practical next steps

The Regulation comes into force at a time when non-EU subsidies are causing much debate in the EU (such as companies receiving financial advantages from the US Government under the US Inflation Reduction Act).

The practical application of the Regulation will not be without its uncertainties and challenges e.g. the identification of relevant concentrations and including:

- the scope of financial contributions,
- the application of the test for determining when there is a distortive foreign subsidy,
- the ex officio “call-in” feature for smaller concentrations (and tenders) for review,
- information-gathering outside the EU, and
- enforcement of the Regulation (particularly outside the EU).

Given the subsidy “look-back” provisions under the Regulation, previous subsidies granted by non-EU countries are relevant and companies should begin to find ways of compiling information relating to non-EU country advantages received over the last number of years to prepare them for possible Commission investigation (including for M&A and public procurement procedures).

The pre-existing State aid assessment system under the EU rules may be useful in the application of parts of the Regulation but it is of wider effect than EU State aid law and there will be additional difficulties in applying EU law to subsidy systems outside the control of the EU (e.g. as a result of the US Inflation Reduction Act).

For merger control, FDI and public procurement practitioners (inside and outside the EU), the Regulation constitutes an additional, and novel, regulatory consideration for companies and their advisors as part of the preparation of M&A deals (and public procurement processes) can safely take place. This is quite apart from the possible impact of a general market

investigation by the Commission into a foreign financial contribution.

Third parties may also see opportunities to complain about and challenge M&A and public procurement processes which involve parties which they believe have not complied with the Regulation.

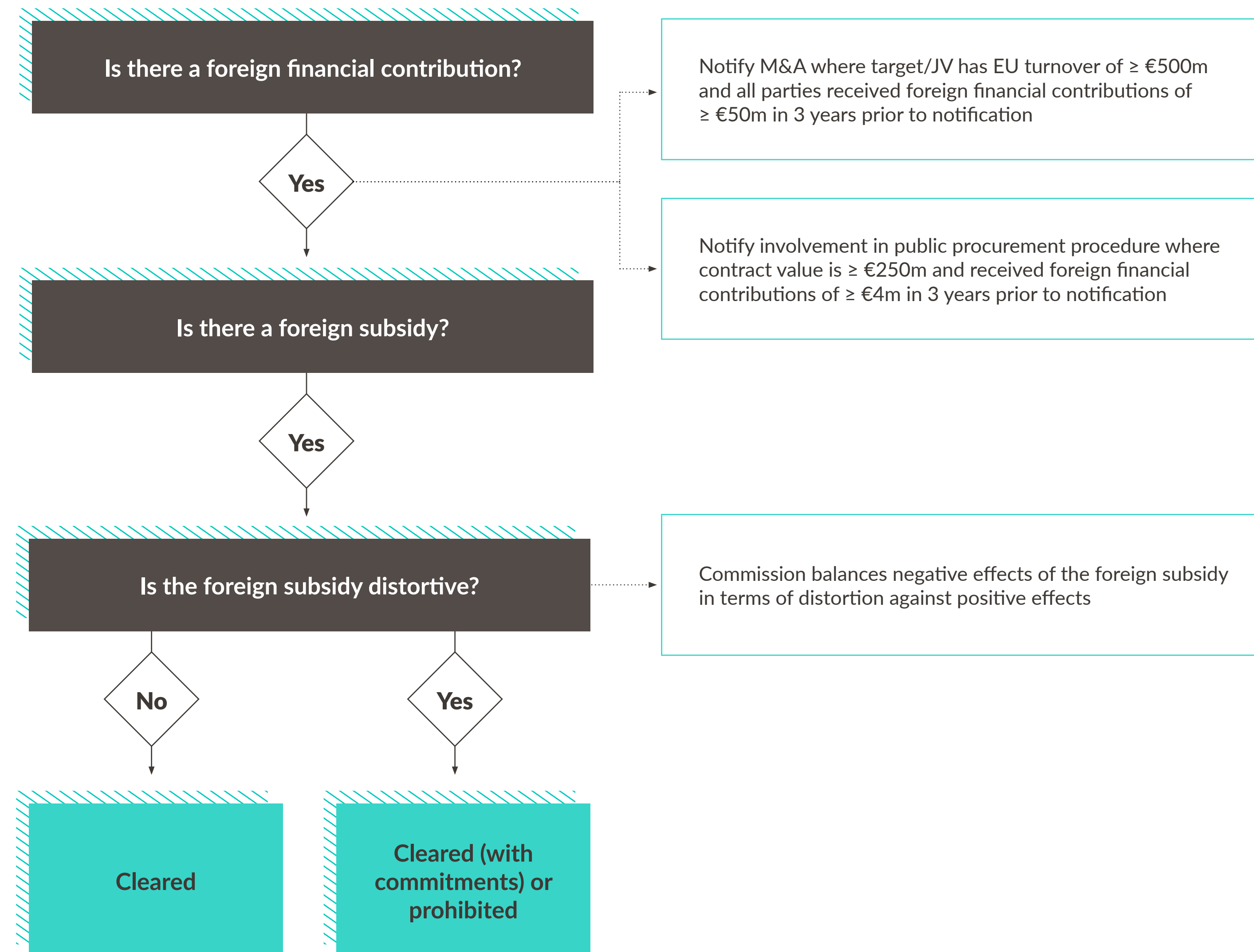
The Regulation has come into force at a time when the EU and its Member States are carefully scrutinising FDI in the EU and are also looking more carefully at the impact of subsidies (e.g. the strengthening of World Trade Organisation rules on industrial subsidies). The Regulation also increases the possibilities of economic retaliation by non-EU Governments.

The EU, Competition and Procurement team at A&L Goodbody has substantial experience advising on these issues and is ready to assist businesses in preparing for the application of the Regulation.

For further information in relation to this topic, please contact [Alan McCarthy](#) or any member of the [EU, Competition & Procurement Group](#).



## Outline of assessment of foreign subsidies by the Commission under the Regulation



**Note:** The Commission can also "call-in" sub-threshold M&A and participation in public procurement for notification.

**Note:** Separately from the review of notifiable M&A and participation in public procurement, the Commission can carry out an ex officio review of potentially distortive foreign subsidies in a range of circumstances - this can lead to the Commission accepting commitments or imposing redressive measures.

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