



EU Foreign Subsidy Regulation (FSR)

ICC Sweden Discussion Paper



FSR: a (tax data reporting) barrier to trading in the EU

In brief: the EU Foreign Subsidy Regulation (FSR) aims to identify and combat distortions of competition on the EU internal market caused by **foreign subsidies** akin to the EU concept of state-aid. However, the interpretation of more broadly defined **'foreign financial contributions' (FFCs)**, specifically as it relates to taxes, places a disproportionate burden on businesses who have not benefitted from any such foreign subsidies. It also risks overwhelming the European Commission with unnecessary information.

A significant reporting challenge for businesses and material non-compliance risks

Uncertain interpretation and application of rules

FFC definition is broad and very unclear, especially in tax context

Significant volume of data to gather and review

May need to report on 3 years of data for entire group of companies; burden increased by very low €1m de minimis

Unique reporting document

New reporting systems and processes may be required for FSR compliance, not aligned to existing reporting cycles

Urgent filing requirement

Notifiable tenders/transactions must receive approval before they can be awarded/close – high commercial risk

Serious penalties for non-compliance

Tender rejected, M&A deal blocked, and/or fines up to 10% of turnover – significant penalties

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We would like to work with the European Commission to develop clarifying tax guidelines

We fully support and commend the Commission's efforts to implement robust rules to ensure the EU internal market is a level playing field for businesses across all sectors.

However, the risk of very significant financial penalties for perceived non-compliance together with broadly drafted rules means that businesses who have **not** benefitted from such foreign subsidies are being advised, in an abundance of caution, to gather and **report data beyond the intended scope of the FSR**. This is creating a disproportionate reporting burden for businesses who are not the intended target of the rules and, as a consequence, the European Commission will receive an excessive amount of data.

We propose that the European Commission confirms that tax measures that are generally applicable to all taxpayers and that are part of domestic tax legislation should not be reported. Such general provisions are also often similar to the provisions already found in the tax systems of the EU Member States. Such measures may include, but are not limited to:

- Participation exemptions for capital gains and dividend income
- R&D tax credits and patent / innovation box regimes
- Accelerated tax depreciation for specific categories of capital expenditure
- All temporary timing differences
- Provisions for loss relief between group companies

We also propose to ask the European Commission to clarify other matters relating to taxes, including:

- The application of FSR to indirect taxes,
- Whether corporate tax-related FFCs are granted to companies in a loss position, and
- How the grant date and value of a tax-related FFC should be determined.

European Commission Q&A clarifications re: tax

16. Are tax exemptions and tax holidays considered foreign financial contributions for the purposes of Regulation (EU) 2022/2560? And do they need to be included in the notification? —

Exemptions granted by third countries from ordinary tax regimes (e.g. profit-based taxes, property taxes, stamp duties etc.) constitute “foreign financial contributions” and should be counted for determining whether the notification threshold for concentrations procedures set out in Article 20(3) (b) of Regulation (EU) 2022/2560 is met.

However, as indicated in the Form FS-CO published as Annex I to the Commission Implementing Regulation, the following tax measures do not need to be reported in the notification, unless they fall into any of the categories of foreign subsidies most likely to distort the internal market, which are listed in Article 5 of Regulation (EU) 2022/2560: (i) deferrals of payment of taxes, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application, and (ii) application of tax reliefs for avoidance of double taxation in line with the provisions of bilateral or multilateral agreements for avoidance of double taxation, as well as unilateral tax reliefs for avoidance of double taxation applied under national tax legislation to the extent they follow the same logic and conditions as the provisions of bilateral or multilateral agreements. The Commission may, based on a case-by-case assessment, require additional information on those transactions at any stage of the assessment.

If foreign financial contributions are granted specifically to one or more undertakings engaging in an economic activity in the internal market; and if such benefit is limited, in law or in fact, to one or more undertakings or industries, then it will constitute a “foreign subsidy” within the meaning of Article 3(1) Regulation (EU) 2022/2560.

Whether that foreign subsidy is liable to distort the internal market falls to be assessed in accordance with Articles 4 to 6 of Regulation (EU) 2022/2560.

26. Based on Annex I, Table 1, point B(6)(a) of Implementing Regulation (EU) 2023/1441, information does not have to be provided on foreign financial contributions in the form of “deferrals of payment of taxes or of social security contributions, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application”. Does this exception include any tax benefit of general application? —

Annex I, Table 1, point B(6)(a) of Implementing Regulation (EU) 2023/1441 provides an exhaustive enumeration. Only tax benefits in forms explicitly included in this enumeration are excluded from the reporting obligation. Other tax benefits have to be reported regardless of whether the notifying party considers them general or limited – assuming that the other conditions for reporting in that Table are met.

Annex I, Table 1, point B(6)(a) of Implementing Regulation (EU) 2023/1441

B. Exceptions

6. You do **not** need to include in the Table information on the following foreign financial contributions:
 - (a) Deferrals of payment of taxes or of social security contributions, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application. If these measures are limited, for example, to certain sectors, regions or (types of) undertakings, they have to be included.
 - (b) Application of tax reliefs for avoidance of double taxation in line with the provisions of bilateral or multilateral agreements for avoidance of double taxation, as well as unilateral tax reliefs for avoidance of double taxation applied under national tax legislation to the extent they follow the same logic and conditions as the provisions of bilateral or multilateral agreements.
 - (c) Provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business, for example the provision/purchase of goods or services carried out following a competitive, transparent and non-discriminatory tender procedure.
 - (d) Foreign financial contributions below the individual amount of EUR 1 million.



Articles 3 and 5 of Regulation (EU) 2022/2560

Article 3

Existence of a foreign subsidy

1. For the purposes of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.
2. For the purposes of this Regulation, a financial contribution shall include, inter alia:
 - (a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
 - (b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
 - (c) the provision of goods or services or the purchase of goods or services.

A financial contribution provided by a third country shall include a financial contribution provided by:

- (a) the central government and public authorities at all other levels;
- (b) a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or
- (c) a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

Article 5

Categories of foreign subsidies most likely to distort the internal market

1. A foreign subsidy is most likely to distort the internal market where it falls under one of the following categories:
 - (a) a foreign subsidy granted to an ailing undertaking, namely an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and that plan includes a significant own contribution by the undertaking;
 - (b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee;
 - (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;
 - (d) a foreign subsidy directly facilitating a concentration;
 - (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.
2. An undertaking under investigation shall be granted the possibility to provide relevant information as to whether a foreign subsidy falling under one of the categories set out in paragraph 1 does not distort the internal market in the specific circumstances of the case.

