

The EU Regulation on foreign subsidies that distort the internal market enters into application and its Implementing Regulation is adopted

July 2023

The new regulation clarifies the rules, notification obligations and procedures related to the application of the new regulation on financial contributions granted by third states to companies operating in the EU.

On 10 July 2023, the European Commission adopted the [Implementing Regulation](#) detailing the rules and procedures applicable in relation to the [Regulation on foreign subsidies distorting the internal market](#), which entered into force on 12 January and is applicable as of 12 July 2023.

[As we explained at the time](#), the Regulation on foreign subsidies establishes a new and ambitious control regime for **subsidies granted by third countries to companies operating and domiciled within the EU, regardless of their nationality**. This new regime includes a **system of notification and prior authorization for concentrations and public procurement operations** that exceed certain quantitative thresholds:

- The notification obligation applies to **concentrations involving companies** that have received foreign subsidies of more than **EUR 50 million** in the previous 3 years; provided that one of the merging companies, the acquired company or the joint venture is established in the EU and has a turnover in the EU of at least **EUR 500 million**.
- The notification obligation applies to **public procurement operations** involving companies which in the previous 3 years have received foreign subsidies of more than **EUR 4 million** per country; provided that the estimated value of the public contract or operation is **equal to or more than EUR 250 million** (or, in the case of a decision to divide them into lots, where the cumulative value of all lots is equal to or more than **EUR 125 million**).

In addition, the new regime allows the **Commission to examine, condition and, where appropriate, order the recovery of foreign subsidies granted since 18 July 2018** that, irrespective of their amount, may distort the internal market, even in the absence of a concentration and public procurement.

The newly adopted Implementing Regulation provides that **the notification obligations under this new regime will apply to companies as of 12 October 2023**. The Implementing Regulation also details the rules and procedures applicable in relation to **notification forms** for concentrations and public procurement, the European Commission's **investigative powers**, the possibility for undertakings to offer **commitments**, the **rights of parties** subject to investigations, the calculation of time **limits**, **access to file** and **confidentiality** of information.

The main practical aspects of this new regulation are summarized below.

1. Concentrations and public procurement notifications

In concentrations, the notification must be submitted jointly by **the parties** to the concentration or to the acquisition of joint control and, in all other cases, by **the person or undertaking acquiring control of the whole or parts of one or more undertakings**. In public procurement transactions, the notifier is the **main contractor** or the **main concessionaire**.

The information to be provided by notifying parties in concentrations and public procurement transactions is detailed in two **forms** which are attached as annexes to the Regulation. This information varies depending on the type of financial contribution received by the undertaking in particular:

- **In relation to concentrations**, undertakings must provide information on contributions **in excess of EUR 1 million** received in the 3 years preceding the notification. This information must be detailed in relation to those financial contributions which Article 5 of the Foreign Subsidies Regulation considers to be most likely to distort the internal market (foreign subsidies granted to undertakings in difficulty, providing unlimited guarantees, financing exports, facilitating a concentration, or enabling an unduly advantageous bid to be made). For financial contributions not covered in the previous category, it is sufficient for undertakings to provide a general description of contributions exceeding **EUR 1 million** received during the last 3 years from countries which have granted contributions to **all parties** amounting to at least **EUR 45 million** in the 3 years preceding the notification.
- **In public procurement transactions**, notifying undertakings will have to provide detailed information on all financial contributions most likely to distort the internal market that they have received in the last 3 years amounting to **at least EUR 1 million**.

For all other financial contributions, the notifying undertakings will have to provide a general description of contributions of **at least EUR 1 million** received during the last 3 years from countries that have provided **each of the notifying parties** with contributions of at least **EUR 4 million** in the previous 3 years.

Companies are not required to provide information on foreign financial contributions that do not exceed EUR 1 million and on contributions that involve: (i) deferrals of payment of taxes and/or social security contributions, tax amnesties, as well as write-offs or loss carry-forwards, provided that they are generally applicable and not limited to certain sectors, regions or companies; (ii) application of tax relief to avoid double taxation in accordance with bilateral, multilateral agreements and national legislation in force; and (iii) supply or purchase of goods and services (except financial services) at market terms in the ordinary course of business.

The **notification will become effective on the date on which the Commission receives a complete notification**. The Commission may consider that the information provided by the parties is incomplete (for example, in case of incorrect or misleading information); In that case the notification will become effective on the date on which the parties provide the outstanding information.

If the undertakings concerned fail to comply with their notification obligation, the Commission **may request notification in order to examine the transaction**. In such a case, the Commission will not be bound by the time limits applicable in the review procedure. In addition, **in the event of deliberate or negligent non-compliance, the Commission may impose fines on the undertakings concerned of up to 10% of their total turnover in the preceding financial year**.

2. Procedure for examination by the Commission

As in State aid and merger control, the Commission's investigation procedures may comprise two phases: (i) a **preliminary examination** (first phase) and, if the Commission has sufficient indications that the undertaking concerned has received a foreign subsidy that distorts the internal market, (ii) an in-depth investigation (second phase).

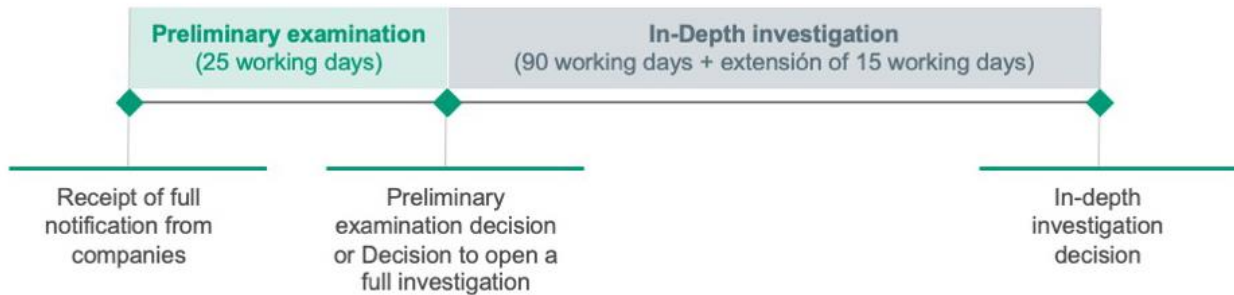
In the framework of these procedures, the Commission will enjoy extensive powers of investigation, being able to **request information** from both the companies under investigation and the contracting authorities in charge of public procurement procedures, **to conduct interviews** with any natural or legal person who agrees to be interviewed, and to **carry out inspections and sector investigations**.

The Commission may impose **reporting and transparency requirements**, including regular reporting on the implementation of remedies and commitments proposed by undertakings. The Commission may also adopt **interim measures and impose fines** on companies that do not cooperate in the framework of these investigations.

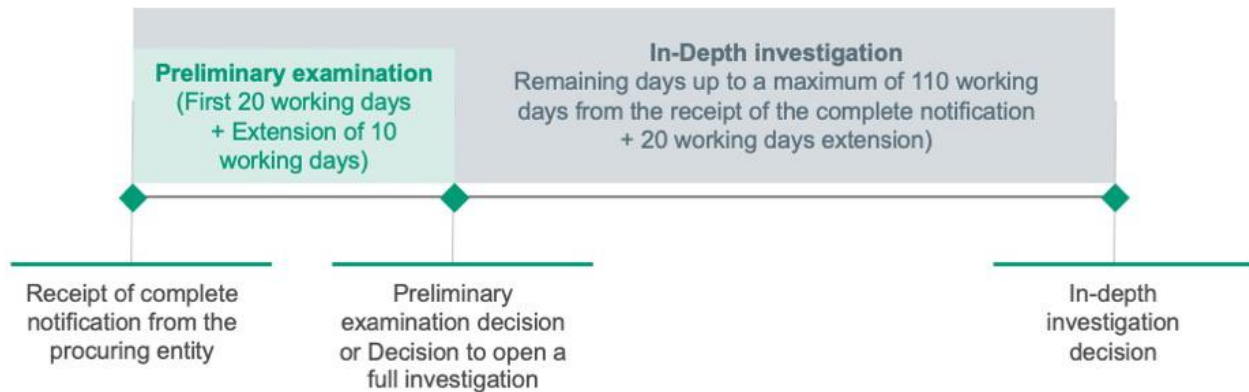
3. Time limits for the Commission's examination procedure

The indicative investigation and resolution deadlines, largely modelled on those applicable to EU concentrations, vary according to the type of transaction. These deadlines are in any case extendable and may be preceded by a pre-notification phase.

Concentrations



Public procurement procedures



4. Participation in the file of the companies under investigation

Under investigation and interested companies may participate in the investigation proceedings conducted by the Commission by submitting **written comments**.

In the first instance, in cases where the Commission carries out an in-depth investigation, the investigated company and other interested parties may submit comments on the Commission's

decision to open this second phase investigation. The deadline for submitting comments will be no longer than one month from the date of publication of the summary of the decision in the Official Journal of the EU.

Subsequently, before adopting the decision closing the in-depth investigation, the company under investigation may also submit comments on the grounds on which the Commission intends to adopt its final decision. The time limit for submitting comments will be set by the Commission (which will be no less than 10 days) and may be extended upon request by the company.

Finally, in cases where the Commission intends to adopt interim measures, the undertaking may also submit comments on the grounds on which the Commission intends to adopt these measures. The time limit for submitting comments will be set by the Commission and may be extended at the request of the undertaking.

Furthermore, before the Commission adopts a final decision in the procedure in question, the undertaking under investigation will have **a right of access to the documents making up the Commission's file** (with certain exceptions, such as internal Commission documents or communications between the Commission and a Member State). In order to exercise this right, the company must submit a request for access to the Commission, which must provide the non-confidential version of all documents it intends to cite in its final decision, as well as a list of all documents making up the file.

5. Commitments

In both concentrations and public procurement proceedings, the companies under investigation will have **the possibility to offer commitments aimed at remedying the distortion identified by the Commission** (e.g., reimbursement of the subsidy, guaranteed access to infrastructure, temporary restrictions on the commercial activity of the company concerned or refraining from making certain investments).

The **deadline** for submitting commitments varies according to the type of operation: in concentrations the deadline is **65 days** from the date of the start of the second phase; and in public procurement operations the deadline is **50 days** from the same date. In exceptional cases, the Commission may consider commitments submitted outside these deadlines.

After analyzing the commitments, the Commission will either:

- **Accept** the commitments offered if it considers that they fully and effectively remedy the distortion; in this case, the Commission will make the commitments binding by decision; or
- **Reject** the commitments offered, if it considers that they do not fully and effectively remedy the distortion; in this case, the Commission will have the power to prohibit the concentration or the award of the contract in question.

6. Practical recommendations

It is important **for companies operating in the EU, or that may consider acquiring companies in the UE, to verify whether they may have been a recipient of foreign grants in excess of EURO 1 million from 12 July 2018 to date and to collect all relevant information in this regard.**

This verification exercise may be complex as it is likely that the Commission will decide to interpret the concept of foreign subsidy broadly, in line with the established case law regarding the notion of "State aid". In addition, such an exercise requires determining whether the foreign subsidy in question belongs to one of the categories that the Foreign Subsidies Regulation considers most likely to distort the internal market.

Companies should, **in addition to considering notification obligations, take into account the applicable deadlines and relevant substantive criteria when designing their participation in concentrations and tenders.** Failure to do so could delay the implementation of these operations and may even require the repayment of foreign subsidies received.

The entry into force of these new rules also provides an opportunity for companies wishing to bring to the attention of the European Commission possible foreign subsidies that may have distorted competition to the benefit of their **competitors.**

More information:

[EU and Antitrust Law](#)

GARRIGUES

Hermosilla, 3
28001 Madrid

T +34 91 514 52 00

info@garrigues.com

Follow us:



© 2022 J&A Garrigues, S.L.P. | This publication contains general information and does not constitute a professional opinion, or legal advice.

[**garrigues.com**](http://garrigues.com)