



INTERNATIONAL LEAGUE
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Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

Foreign Subsidy Regime

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Martin Farley, European Commission Legal Service

Jacques Derenne, Sheppard Mullin

Natura Gràcia, Linklaters LLP

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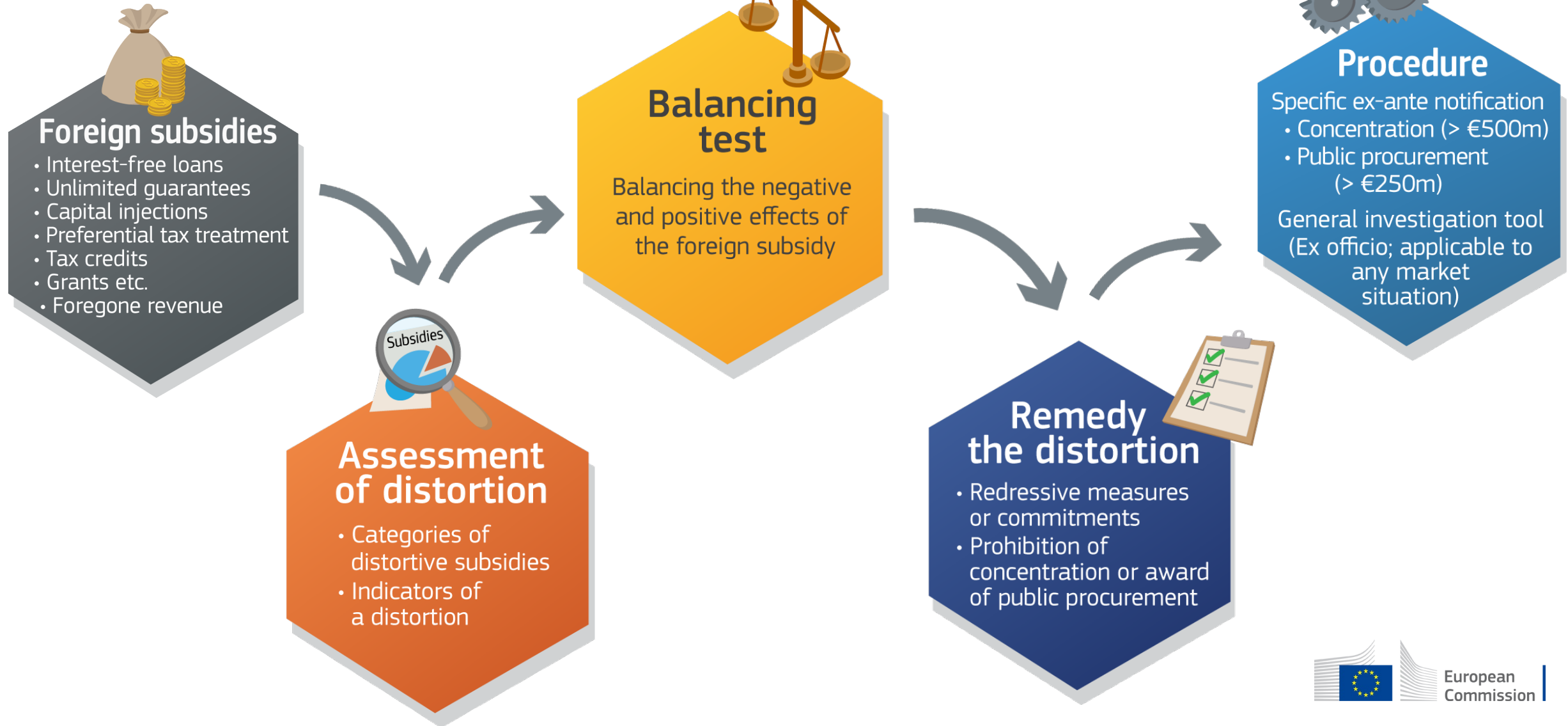
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Martin Farley

European Commission Legal Service
[Speaking in a personal capacity]

A quick reminder: what are foreign subsidies and how do we assess them?

FSR at a glance



Definition of foreign subsidy

Four cumulative conditions (Art 3 FSR)

Financial contribution

Provided **directly or indirectly** by third country

Confers a **benefit**

Limited to one or more undertakings or industries



Foreign subsidies

- Interest-free loans
- Unlimited guarantees
- Capital injections
- Preferential tax treatment
- Tax credits
- Grants etc.
- Foregone revenue

Inspired by the definition of “subsidy” in the ASCM and “aid” under State aid rules

Investigative procedures (I)

- **Scope:** all economic activities / divided into three chapters:
 - Ex-officio investigations (Chapter 2);
 - Foreign subsidies in the context of concentrations (Chapter 3)
 - Merged undertaking / target / JV turnover in EU \geq €500 million; and
 - Aggregate foreign financial contribution \geq €50 million from third countries over 3 preceding years
 - Foreign subsidies in the context of public procurement (by Member States) (Chapter 4)
 - Estimated value of PP \geq €250 million
 - Foreign financial contribution \geq €4 million per third country over 3 preceding years

Investigative procedures (II)

- Preliminary review
 - Information requests (Art 13 FSR)
 - Conduct inspections (Arts 14 and 15 FSR)
- Outcomes? Indications of existence of foreign subsidy that distorts internal market?
 - Yes – open in-depth investigation (Art 10(3) FSR)
 - No – close the investigation (Art 10(4) FSR)

Investigative procedures (III)

- In-depth investigation
 - Decision with redressive measures (Art 11(2) FSR)
 - Decision with commitments (Art 11(3) FSR)
 - No objection decision (Art 11(4) FSR)

FSR Implementing Regulation – what does it cover?

The Implementing Regulation - Overview

- **9 Chapters**

- Scope and definitions (chapter I),
- Notifications and transmission of documents (chapters II and IX)
- Investigation by the Commission (chapter III)
- Commitments and redressive measures (chapter IV)
- Submission of observations (chapter V)
- Use of information, confidential information and access to file (chapter VI and VII)
- Time limits (chapter VIII)

- **Annexes – Notification Forms**

- Form FS-CO (concentrations)
- Form FS-PP (public procurement)

Implementing Regulation – the public consultation

- Public consultation on IR and notification forms: 6 February - 6 March 2023
 - Nearly 90 submissions
 - Most from businesses/associations, but also MS and third countries
- Type of comments received:
 - Clarifications/guidance
 - Financial contributions / administrative burden
 - International agreements
- Overarching conclusion: administrative burden is too high

FSR Implementing Regulation – principal changes following the public consultation

Implementing Regulation – overview of changes

- Changes aimed at ensuring better clarity:
 - Art. 1 - reference to sub-paras of Article 47(1) FSR
 - Art. 8 – more precise text on starting date for submission of comments after opening
- Changes related to scope of empowerment:
 - Art. 15(3) – signing of commitments in investigations
 - Art. 17(2) – possibility of sending request for information / inspections for ensuring compliance with imposed commitments / redressive measures

Notification form FS-CO: overview of changes (1)

- Section 5: Foreign Financial Contributions (FFC):

Consultation version	Final version
<p><u>List</u> all FFC in preceding 3 years:</p> <ul style="list-style-type: none">• Individual amount \geq €200 000• Total amount per 3rd country and per year \geq €4 million <p><u>Explain</u> connection to concentration if any</p> <p><u>Detailed info</u> of FFC listed if it may fall within Art 5(a)-(d) of FSR</p>	<p>Section 5 – <u>detailed info</u></p> <ul style="list-style-type: none">• FFC in preceding 3 years;• Individual amount \geq €1 million; and• May fall within Art 5(a)-(d) of FSR. <p><u>List</u> other FFC in preceding 3 years if:</p> <ul style="list-style-type: none">• Individual amount \geq €1 million• Aggregate amount per 3rd country \geq €45 million• Info to be grouped by country and type, and provided in ranges

Notification form FS-CO: overview of changes (II)

- Calculation of aggregate amounts for listing FFCs
 - **Include** FFC for which detailed information has been provided in Section 5
 - **Exclude**
 - Tax deferrals / social security contributions / tax holidays (unless measures are limited to certain beneficiaries)
 - Tax relief for avoiding double taxation
 - Provision/purchase of goods / services (except financial services) at market terms and in the ordinary course of business
 - Individual FFC < €1 million
 - For investment funds – exclusion of FFC to other funds within the group under certain conditions

Notification form FS-PP: overview of changes (I)

- Notifiable FFCs - changes similar to those for FS-CO
 - **Detailed** information for FFC in the last 3 years:
 - Individual FFC \geq €1 million
 - May fall within Art 5(1)(a)-(c) and (e)
 - **List** FFC in last 3 years
 - Not falling in Section 3 of Form FS-PP
 - Individual FFC \geq €1 million
 - Aggregate amount per 3rd country \geq €4 million
 - Information grouped by country and type and provided in ranges

Notification form FS-PP: overview of changes (II)

- Declarations
 - Notification thresholds met
 - In last 3 years, FFCs received < €4 million / 3rd country
- Introduction of Table 2 for aggregated reporting per country
 - Include FFCs < €1 million
 - Exclude FFCs < de minimis Regulation over preceding 3 years

What's next?

Next steps

- Publication of adopted FSR IR in the Official Journal
- Q&A documents
 - First batch of Q&A went live on DG COMP site on 6 June 2023 – focus on procedural, implementation and practical issues.
 - Similar Q&A will also be published on DG GROW site for public procurement-specific questions.
 - Updated batch of Q&A to be published very soon.
- Technical documents

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Concepts - Implementation

- Relevance of *State aid*
 - Benefit = advantage?
 - Issue: identifying State origin in third-countries?
 - Balancing test and remedies: economic analysis like aid compatibility assessment?
 - Implementing FS recovery: burden on recipient companies but what if no legal basis in third-country?
- *Inflation Reduction Act* – applicability of FSR?
 - EU policy: see answer by EVP Vestager to MEP written question [P-000441/2023]
 - IRA tax credits “are expected to be granted to companies engaging in an economic activity in the US.” FSR on a case-by-case basis. Goods: Agreement on Subsidies and Countervailing Measures and EU Reg 2016/1037.
- FFC data gathering
 - *KYC/KYB*
 - €1M threshold – multinationals, no need of full data base. SMEs: Art. 5 FSR requires to identify all FFC for threshold.
 - *Distortion and balancing test* – Clarification in 1 year. Too late?
 - Guidelines on key concepts in 3 years. Too late?

Administrative burden and notification

- Detailed notification of FFC limited to “*most likely to distort*” AND > €1 million (over past 3yrs) – sections 5.1., 5.2. of annex I of IR
 - Burden? Comp. *de minimis* EU State aid (sole obligation to aid beneficiaries). Category of FS “likely” to be distortive still too broad?
- Exclusions - no need to declare FFC if they are:
 - Tax deferrals, social security contributions, tax amnesties, tax holidays, normal depreciation *unless they are limited to certain sectors, regions or undertakings*
 - however, these tax incentives are usually not general but selective – link with Art. 3.1. FSR?
 - Provision/purchase of goods or services (except financial services) at *market terms in the ordinary course of business*
 - meaning?
- Waivers
 - provisional waiver depending on the Commission’s assessment?

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Questions?