

# Legal Alert

3 October 2023 | [www.skslegal.pl](http://www.skslegal.pl)

## New Requirements in M&A Transactions and Public Procurement Preventing Foreign Subsidies Causing Distortions in the EU Market

As of 12 October, new obligations regarding the notification of transactions (concentrations) and public procurement contracts to the European Commission (“EC”) will apply.

### Source of new obligations

The new obligations derive from *Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market* (the “Regulation”), which aims to reduce distortions to the equal conduct of economic activity in the EU caused by **subsidisation of companies’ activities by countries outside the European Union**.

### Concentrations notifiable to the EC

A concentration is subject to prior notification to the EC when:

1. at least one of the merging companies, acquired companies or joint ventures is established in the EU and generates in the EU a **combined turnover of at least EUR 500 million**; and
2. respectively, the acquirer and the target company, the merging companies or the companies forming the joint venture and this company have together received from third countries a **total financial contribution of more than EUR 50 million in the three years** preceding the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

In addition, the **EC may call for prior notification of any concentration** where it suspects that foreign subsidies may have been granted to the companies concerned in the three years preceding the concentration.

Concentration refers to a situation of **permanent change of control** resulting from:

1. **mergers** of previously independent companies or parts thereof;
2. **the acquisition**, by one or more persons already controlling at least one undertaking or by one or more undertakings, of direct or indirect control of the whole or part of another undertaking.

A concentration is also the creation of a joint venture performing all the functions of an independent economic entity on a permanent basis.

Proceedings before the EC may end with a **decision**: either prohibiting a concentration, imposing commitments on an entrepreneur, or not raising objections.

Implementation of a concentration without the consent of the EC may result in an order to: **dissolve the concentration** or implement other measures aimed at dissolving the concentration. In addition, the EC will be able to impose **penalties** for failing to notify the concentration, implementing it in spite of the prohibition or circumventing the notification requirements for an amount of up to **10% of their total turnover** achieved in the year preceding the transaction.

**Comment:** the notification obligation should be included as an additional condition precedent in M&A agreements. This is a separate procedure from the merger notification procedure to national competition authorities or the European Commission. Although the thresholds for standard notification are quite high for Polish realities, the possibility of a request for notification by the EC should be borne in mind.

## Notifications of public procurement contracts

A public procurement agreement should be notified when:

1. the estimated **value of that public procurement or framework agreement net of VAT** or a specific procurement under the dynamic purchasing system is equal to or greater than **EUR 250 million**; and
2. **the economic operator**, including its subsidiaries without commercial autonomy, its holding companies and, where applicable, the main subcontractors and suppliers involved in the same tender in a procurement procedure has received, during the **three years preceding the notification, aggregate financial contributions of EUR 4 million or more per third country**.

Where the contract in question is divided into lots, consideration must also be given as to whether the value of the lot or the aggregate value of all the lots for which the tenderer is applying is equal to at least EUR 125 million.

If the above conditions are fulfilled, the economic operators participating in the procurement procedure should **notify** the contracting **authority of all the above-mentioned foreign financial contributions as defined in Point 2)**. In other cases, they should list all foreign financial contributions received and confirm that they are not reportable. The contracting authority shall then promptly communicate this information to the EC.

Furthermore, if the contracting authority suspects the existence of foreign subsidies when examining the tenders, it must immediately inform the EC of such suspicions.

As in the case of M&A transactions, where the EC suspects that a contractor may have benefited from foreign subsidies in the three years preceding the submission of a tender or request to participate in a procurement procedure, it may **require notification of the contract, which in general is not subject to prior notification**, before awarding the contract.

The EC proceedings may conclude with these decisions: imposing appropriate commitments, prohibiting the award of the contract to the trader in question or not objecting.

**Comment:** in a contract notice or in a procurement document, an obligation should be added for participants in the proceedings to declare information on foreign subsidies obtained and to indicate whether they are notifiable. In the case of an open tender, the declaration should be submitted with the bid. In a multi-stage procedure it must be submitted twice.

While such large proceedings are not very common, the need for representations and possible notification should also be taken into account for smaller proceedings, especially in sectors where the impact of these subsidies is already noticeable and which may be investigated by the EC ex officio. It must be taken into consideration that European competitors will bring such proceedings to the attention of the EC. Contractors and a contracting authority should also bear in mind the risk of a delay in the signing and commencement of the contract.

## Review of foreign subsidies

Under the Regulation, the Commission may also **on its own initiative investigate information on alleged foreign subsidies distorting the internal market**. If the Commission finds that a foreign subsidy distorts the internal market, it may take a decision imposing compensatory measures (e.g. offer access to infrastructure acquired with the subsidy, refraining from certain investments, reduction of production capacity, publication of R&D results). It may also confirm by decision the commitments proposed by an entrepreneur, or accept the return of the subsidy.

## What are foreign subsidies?

A foreign subsidy occurs when **a country outside the European Union makes a financial contribution**, directly or indirectly, which benefits an **enterprise operating in the EU** and which is limited to one or more enterprises or one or more industries. It may take the form of, inter alia: the transfer of funds or liabilities (e.g. capital injections, grants, loans), the foregoing of revenue (e.g. tax exemptions) or the purchase of goods or services.

A financial contribution is made by the state if it is made by central government institutions, public bodies at all other levels, a foreign public entity, or a private entity whose actions can be attributed to a third country.



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