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Fact Sheet on the EU Foreign Subsidies Regulation

Foreign Subsidies Regulation

The EU's Foreign Subsidies Regulation (FSR) gives the European Commission (EC) broad powers to control subsidies from non-EU countries, complementing the EU's longstanding state aid regime that deals with subsidies from EU Member States.

Under the FSR:

- Companies must notify to the EC:
  - M&A transactions involving companies active in the EU that meet specified turnover and foreign financial contribution (FFC) thresholds.
  - Bids for large tenders in the EU by companies that have received FFC above a specified threshold.
- The EC can conduct investigations of foreign subsidies in other market situations on its own initiative (ex officio).

If the EC finds that foreign subsidies granted to a company distort the EU's internal market, it can require commitments to remedy the situation, prohibit the transaction or the public procurement award, or impose redressive measures such as repayment of the subsidy.

The notification requirement kicked in on October 12, 2023. It covers transactions signed or bids submitted on or after July 12, 2023, and not completed as of October 12, 2023.

What Qualifies as a Foreign Subsidy?

A foreign subsidy is defined as a **i**) FFC, i.e., a financial contribution provided directly or indirectly by a non-EU country **ii**) conferring a benefit to a recipient, and **iii**) which is limited to one or more undertakings or industries.

The notion of FFC is very broadly defined and covers:

- positive financial contributions (e.g., 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, etc.);
- negative financial contributions (foregoing of government revenues otherwise due, e.g., tax credits, granting of special or exclusive rights without adequate remuneration, etc.); and/or
- provision or purchase of goods or services.

FFC is a key concept. It is the basis for the calculation of the notification thresholds and information on FFCs must be provided to the EC in the notification form.

Mandatory Notifications

If the notification thresholds are met, companies must notify the transaction or bid to the EC. The notification has a suspensory effect, meaning that pending the EC's review, companies cannot complete the M&A transaction or validly accept the award of a tender.

M&A Thresholds

i. **a)** the target (in case of an acquisition), at least one of the merging parties (in case of a merger) or the joint venture is established in the EU, and **b)** generated an EU turnover of at least EUR 500 million (approx. USD 539 million) in the previous financial year; **and**

ii. the parties concerned received combined FFCs of more than EUR 50 million (approx. USD 54 million) in the three years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Public Procurement Thresholds

i. the estimated contract value of the public tender is at least EUR 250 million (approx. USD 269 million) net of VAT (in case of tenders divided into lots, an additional threshold applies); **and**

ii. the main bidder (prime contractor) together with its main subcontractors and supplier received at least aggregate (per third country) FFCs of EUR 4 million (approx. USD 4.2 million) in the three years prior to notification.

The EC can request ad-hoc notifications for smaller concentrations and public procurement procedures if it suspects the existence of distortive subsidies.

The EC can also launch an *ex officio* investigation to probe other market situations (such as completed transactions and public procurements, or greenfield investments).

Parallel notifications may arise under merger control and foreign direct investment screening.

Enforcement and Fines

The FSR gives the EC comprehensive investigation powers including mandatory requests for information, inspections, and the ability to impose sanctions.

Where the EC establishes that foreign subsidies granted to a company distort the EU's internal market, it can require commitments to remedy the situation, prohibit the concentration or the public procurement award, or impose redressive measures (such as repayment of the subsidy).

As for mandatory notifications, failure to notify and disregarding the suspension obligation prior to receiving EC clearance can each lead to a fine up to 10 percent of a company's annual worldwide turnover.

If you have any questions regarding compliance with the FSR, please contact Jindrich Kloub or Deirdre Carroll from Wilson Sonsini's antitrust and competition practice.

Thibault Henry contributed to the preparation of this fact sheet.

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