



THE EU FOREIGN SUBSIDIES REGULATION

A YEAR IN REVIEW

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Background

The EU's objective to ensure a level playing field for all companies operating in the internal market while remaining open to trade and investment

The EU Foreign Subsidies Regulation (EU FSR) entered into full effect as of 12 October 2023, with an objective to review and address distortions and unfair advantages resulting from foreign subsidies and financial contributions granted by non-EU countries to companies engaging in an economic activity in the EU.

In order to assess those potential distortions of fair competition in the EU, the EU FSR imposes a mandatory notification and suspensory regime both for large M&A deals and major procurement projects in the European Union, which means that such transactions cannot close without the prior approval of the European Commission (EC). The EC can also investigate on its own initiative (i.e. ex officio investigations).



Scope and Main Features of The EU Foreign Subsidies Regulation

The EU FSR consists of three main pillars:

- An obligation for companies to notify to the EC any transaction involving a financial contribution by a non-EU government where (i) the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and (ii) the foreign financial contribution involved is more than €50 million in the last three years before the deal.
- An obligation for companies to notify to the EC any participation

in public procurement procedures, where (i) the estimated contract value is at least €250 million and (ii) the foreign financial contribution involved is at least €4 million per non-EU country; the EC may prohibit award of contracts in such procedures to companies benefiting from distortive subsidies.

- In addition, the EC can start investigations on its own initiative (ex-officio) if it suspects that distortive foreign subsidies may be involved. This includes the possibility to request ad-hoc notifications for public procurement procedures and smaller concentrations which would not otherwise have required notification.

In this context, the FSR grants the EC a wide range of investigative powers to gather the necessary information, including: (i) sending information requests to companies; (ii) conducting fact-finding missions within and outside the EU, and (iii) launching market investigations into specific sectors or types of subsidies.

If, following an investigation (either prompted by a notification or launched ex-officio) the EC finds that a foreign subsidy exists and distorts the EU single market, it may balance its negative effects with its potential positive effects, e.g. on the development of the subsidised economic activity. If the negative effects outweigh the positive ones, the EC may impose structural or non-structural redressive measures, or accept commitments, to remedy the distortion (e.g. divestment of certain assets or prohibition of a certain market conduct).



On The Transactional Side: An Interesting Decision Which Led To A Conditional Clearance Subject To Remedies

The EC issued its first conditional clearance in September 2024 following an in-depth investigation of an acquisition under the FSR, being a foreign non-EU buyer. This decision constitutes the first major test case of a 'problematic' transaction, thus providing guidance on the type of remedies that the EC would be willing to accept to get a transaction through.

In this case, the transaction in question involved the acquisition of an Eastern European telecoms group by a United Arab Emirates (UAE) telecommunications company that is ultimately controlled by a UAE sovereign wealth fund.

Upon investigation, EC found that both the buyer and the UAE sovereign wealth fund received foreign subsidies from the UAE government, consisting notably in an unlimited State guarantee, as well as grants, loans and other debt instruments.

According to the EC, the foreign subsidies received by the buyer did not lead to actual or potential negative effects on competition in the actual acquisition process, as the buyer was the sole bidder for the target and had sufficient resources on its own to perform the acquisition, and the purchase price reflected the target's market value. However, the EC found

that the foreign subsidies received by the buyer and the UAE sovereign wealth fund could have led to a distortion of competition in the EU post-transaction by artificially improving the capacity of the merged entity to finance its activities in the EU internal market and increased its indifference to risk. As a result, the merged entity could have engaged in investments, for instance in spectrum auctions or in the deployment of infrastructure, or acquisitions, thus distorting the level-playing field relative to other market players by expanding its activities beyond what an equivalent economic operator would engage in absent the subsidies.

To address the EC's concerns, the buyer and the UAE sovereign wealth fund offered the following commitments, including (i) a removal of the unlimited state guarantee for the buyer, (ii) a prohibition on any financing from the buyer and the UAE sovereign wealth fund to the target's activities in the EU, except for emergency funding and other transactions that take place on market terms, (iii) a requirement that the buyer informs the EC of all future acquisitions, even if they are not notifiable under the FSR and (iv) the appointment of an independent monitoring trustee who will oversee the above commitments.

The EC concluded that the transaction, subject to these commitments, would no longer raise competition concerns, provided that the commitments in question will remain valid for a period of 10 years, which can be extended by the EC for another 5 years, or further if both the EC and the buyer agree.



On The Public Procurement Side: Several Investigations Into Chinese Companies

In February 2024, the EC opened an in-depth investigation following the notification by a Chinese state-owned train manufacturer, concerning a public procurement procedure launched by the Bulgarian Ministry of Transport and Communications, relating to the provision of several electric "push-pull" trains as well as related maintenance

and staff training services. As a result of this investigation, the company ultimately withdrew its participation from the tender.

A couple months later, in April 2024, the EC launched two additional in-depth investigations into notifications made by two Chinese photovoltaic companies in the context of a public tender for the design, construction and operation of a photovoltaic park in Romania.

In both instances, the EC suspected that significant potential economic advantages resulting from subsidies received by these two companies in the previous three years may distort the internal market.

Again, these in-depth investigations led to these companies withdrawing their participation from the tender.



Already Two EC Ex-Officio Investigations And The First Court Case

In April 2024, the EC launched its first ex officio investigation into Chinese suppliers of wind turbines, with a focus on the conditions for the development of wind parks in Spain, Greece, France, Romania and Bulgaria.

The EC also carried out unannounced inspections in April 2024 at the premises of a Chinese company active in the production and sale of security equipment in the Netherlands and Poland, on suspicion that this company may have received foreign subsidies that could distort the internal market pursuant to the FSR. The company sought to annul the EC's inspection decision, but the General Court dismissed the application.

