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## Foreign Subsidy Scrutiny in Merger Review: The EU and US on Parallel Tracks?

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European Union and United States legislators are increasingly concerned about the potentially distortive effects “*foreign*” subsidies may have on M&A transactions. EU and US authorities are both poised to require transaction parties to provide extensive information to allow authorities to evaluate subsidies granted by other jurisdictions. How do these initiatives compare, and how will the similarities and differences affect transaction parties?

The EU co-legislators adopted an EU [Foreign Subsidies Regulation](#) (FSR) in November 2022, creating a brand new legislative framework for notification and approval of M&A transactions involving targets with significant (€500+) revenues in the EU. A notification form – ‘[Form FS-CO](#)’ – under the FSR will need to be filed with the European Commission (the Commission) as of October 12, 2023, for qualifying transactions signed on or after July 12, 2023.

In the United States, President Biden signed legislation on December 29, 2022, including amendments (the HSR Amendments) to the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act), requiring the US Federal Trade Commission (the FTC) to promulgate a rule requiring filings under the HSR Act to include information on subsidies received from certain foreign governments or entities that are identified as “*foreign entities of concern*” in the US Infrastructure and Jobs Act. In passing this legislation, “*Congress determined that foreign subsidies can distort the competitive process or otherwise change the incentives of the firm in ways that undermine competition following an acquisition and are particularly problematic when provided by entities or countries that are strategic or economic threats to the United States*”. The FTC published the [proposed rule](#) on June 27, 2023, for a 60-day public notice and comments period – until August 28, 2023. Although the timeline for finalizing a proposed rule can be quite lengthy, this new rule could come into effect as early as the fourth quarter of 2023.

The parallels between these two initiatives are striking, but there are significant differences. The EU FSR will require notification in relatively few cases – the target revenue threshold is double the basic EU Merger Regulation threshold – but when notification is required, transaction parties will need to provide information on a much broader range of foreign subsidies (or, more precisely, foreign financial contributions (FFCs)). As detailed in the [Commission Implementing Regulation](#) adopted on July 10, 2023, information will need to be provided for all FFCs over EUR1M, covering all non-EU countries in which FFCs exceed €45m (although the information burden is somewhat lower for those FFCs not amongst those on the list of FFCs presumed to have

a distortive effect).

The FSR describes FFCs as, *inter alia*, the transfer of funds or liabilities (such as 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), the foregoing of revenue that is otherwise due (such as tax exemptions or the granting of special or exclusive rights without adequate remuneration), and the provision of goods or services or the purchase of goods or services, in each case from or to public authorities and public and private entities whose actions can be attributed to the non-EU country. FFCs are thus a much broader concept than “*foreign subsidies*”, which are defined in a similar way to “*State aids*” under the EU regime for the assessment of State aid from EU governments and entities attributable to them. The Commission will determine whether these FFCs constitute foreign subsidies and if so, whether they risk distorting competition on the EU internal market.

The proposed FTC rule would require disclosure of “*foreign subsidies*” from jurisdictions that are identified as “*foreign entities of concern*”. This concept is complex but is likely to include jurisdictions such as China, Russia, North Korea and Iran. The HSR Amendments noted that foreign subsidies “*can take the form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control*”, but did not define “*subsidies*”. The FTC proposes to adopt the definition from the US 1930 Tariff Act, which defines subsidies to include financial assistance to benefit the production, manufacture, or exportation of goods, including direct cash payments, credits against taxes, and loans at terms that do not reflect market conditions.

Notably, the Merger Filing Fee Modernization Act of 2022, which requires the FTC to promulgate rules to request this subsidy information does not give the FTC or DOJ additional powers to challenge mergers or acquisitions. Even with this additional information, the FTC or DOJ would have to bring a case to challenge a potentially anticompetitive merger under Section 7 of the Clayton Act. On signing the law, the White House explained that these subsidy disclosures “*would assist the DOJ and the FTC in preventing anticompetitive transactions through which adversaries could gain influence over important parts of the economy*”.

Both regimes require multinationals engaging in M&A activity to review their existing information and reporting systems and consider what changes will be required to ensure that the necessary information is collected on an ongoing basis to be available as needed for relevant filings. Collecting information for EU FSR filings is likely to be more burdensome, but relatively few transactions will be caught. The FTC rule would require less information, but the low HSR thresholds mean that the information requirements will be relevant in far more cases, especially for US-based multinationals. Multinationals adapting their systems to collect FFC information for potential EU FSR filings will seek to leverage these systems to be able to extract the new foreign subsidy information for US HSR filings.

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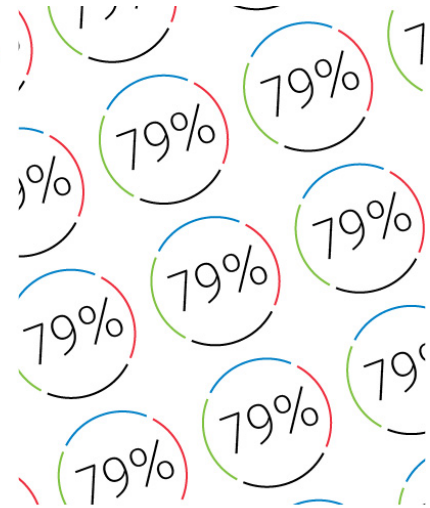
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