

# Kluwer Competition Law Blog

## Key Trends Emerging from the Start of the EU Foreign Subsidies Regulation Regime

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The first months of application of the EU Foreign Subsidies Regulation (FSR) have involved a large number of notifications, lengthy and wide-ranging requests for information, and the opening of the first in-depth investigation. We take a look at the key highlights from the FSR's opening period and practical implications for companies navigating the still quite uncharted waters of the FSR.

### What is the FSR?

The EU Foreign Subsidies Regulation provides the European Commission with powers to intervene to tackle foreign subsidies distorting competition in the EU internal market. The FSR imposes mandatory notification and approval requirements for M&A transactions with significant turnover in the EU and large public tenders in EU Member States. The European Commission also has powers to launch *ex officio* investigations. The FSR took effect on 12 July 2023 with notification obligations starting on 12 October 2023.

### Greater number of cases than expected

In an [FSR policy brief published in February](#), the European Commission released statistics that reveal a high number of FSR M&A notifications, multiple cases at pre-notification discussion stage, and a large proportion of cases involving investment funds.

In the first 100 days (12 October 2023 to 20 January 2024), there have been pre-notification discussions in 53 M&A cases. Out of those cases:

- 14 were formally notified;
- nine were fully assessed; and
- one was abandoned in pre-notification.

More than half of the cases communicated to the Commission involve non-EU to EU M&A transactions, although the FSR seems to also be catching purely EU to EU M&A deals and even

non-EU to non-EU deals. Approximately one-third of all M&A cases in pre-notification involve an investment fund as a notifying party.

So far, no M&A deal has been taken for in-depth investigation, but the numbers of cases in pre-notification (around 29) could be a signal that certain cases are being looked into very closely.

Overall, the number of communicated cases is strikingly high, especially considering that the European Commission, [in its 2021 Impact Assessment](#), predicted only 33 M&A notifications per year. In the first months of the FSR alone, the number of communicated transactions exceeded the annual estimate (60 communicated deals by the third week of February 2024).

### **New Directorate to deal with mounting workload**

Facing up to its responsibility as the sole enforcer of the FSR, and to tackle the mounting workload arising from new notifications, the European Commission (DG COMP) has acted quickly to replace the FSR taskforce unit (which was running with limited resources) with a brand new FSR Directorate.

On 1 March 2024, a Directorate K was established within DG Competition with three separate units tasked with enforcing the FSR. Many of the officials in the units, including the head of the new Directorate K, have significant experience in State aid cases.

It is likely that the new FSR Directorate will lead to an uptick in enforcement activity.

### **First in-depth FSR investigation**

Just after four months of the FSR notification regime being in force, the European Commission launched on 16 February 2024 its first in-depth investigation under the FSR. The investigation relates to a bid by CRRC, a Chinese State-owned train manufacturer, in a public procurement procedure opened by Bulgaria's Ministry of Transport and Communications for the provision of 20 electric trains as well as related maintenance and staff training services.

The European Commission considers that there are "sufficient indications" that CRRC received foreign financial subsidies that distort the EU internal market. In the [Summary notice concerning the opening of the in-depth investigation](#), the European Commission sets out very briefly the following grounds for opening the investigation:

- CRRC allegedly received EUR 1.745 billion of foreign financial contributions which was five times larger than the bid, which were not disclosed in the Form FS-PP; and
- CRRC's offer was allegedly "substantially lower" than the bid of the only other bidder.

A contributing element to the opening of the investigation appears to have been the European Commission's view that CRRC did not provide complete information.

In the 2019 merger prohibition of Siemens/Alstom, the European Commission rejected arguments that it should have allowed the creation of a European champion to compete with CRRC, considering that timely and sufficient market entry in the EU by CRRC was not likely. The

prohibition attracted criticism, in particular that the European Commission should have taken greater account of competition at the global level, and that certain non-EU market players are competing with the backing of their governments.

The CRRC case illustrates that the European Commission does not adopt a particularly high threshold for opening an in-depth FSR investigation. The European Commission must merely have “sufficient indications” that the notifying party has received foreign financial subsidies that distort the EU internal market. The Summary Notice in the CRRC case sets out the grounds for opening the investigation with extreme brevity.

### **Pre-notification period involves wide-ranging questions**

In our experience, the number of RFIs in pre-notification can vary significantly (from one to 10 or even more), depending on the type of transaction. These circumstances determine the duration of the pre-notification, which, depending on the complexity of the transaction from an FSR perspective, can vary between less than a month and three months or more.

The European Commission asks wide-ranging questions, including:

- sources and details related to the financing of the deal. This has particularly been the case if there is any involvement of a non-EU country in the financing of the deal, but also if there is involvement of banks in which a non-EU country has a shareholding;
- how the transaction originated (in particular if there was no structured bidding process);
- how price was determined for the target and the correlation between the purchase price and the value of the target; and
- how the foreign financial contributions data collection was carried out by the Notifying Party(ies) and specific questions about the foreign financial contributions. We have seen the European Commission ask detailed questions as to why notifying parties qualify for the disclosure exemptions (e.g., why they consider their contracts to be on market terms), but also on foreign financial contributions in non-EU countries where the notifying parties are below the disclosable minimum of EUR 45m.

The key takeaway from the first cases is that collecting in advance complete and relevant data is key to ensuring smooth and timely assessment by the European Commission. This, in particular, includes identifying the correct identification of reportable financial contributions and the proper delineation of financial contributions that may fall within the categories considered most likely to be distortive. Waiver requests may be available in relation to certain information if: (i) the relevant information is not reasonably available and best estimates can be provided instead; and (ii) the information is not necessary for the examination of the case. That said, in our experience, the European Commission has so far been reluctant to waive the disclosure of information concerning any likely distortive FFCs.

### **Key considerations for navigating the FSR**

Intensifying enforcement within the FSR regime reinforces the importance for business to anticipate FSR issues early. Key steps for M&A transactions include the following.

- Implement a system for collecting information about your non-EU financial contributions. Effective information-gathering protocols are critical.
- Determine the applicability of the FSR and conduct an FSR risk assessment at the very first stage of considering an M&A transaction.
- Reflect the need for FSR regulatory clearance in the deal documents. Ensure that the M&A transaction documentation includes FSR-specific conditions precedents and cooperation requirements. Consider appropriate clauses allocating the risk around obtaining FSR approval, long-stop dates, break-fee arrangements, and requirements for offering and/or accepting remedies.
- Discuss with your counsel whether the financing of the deal raises FSR issues.
- Remember that a greater number of the documents from the preparatory stage of the deal will need to be submitted to the Commission in the course of a phase 1 FSR filing than would be the case in phase 1 merger control.

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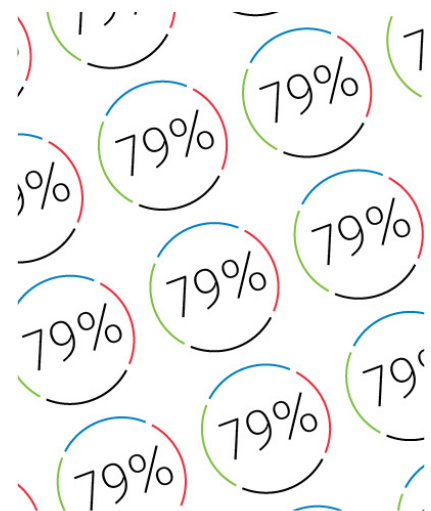
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This entry was posted on Thursday, March 7th, 2024 at 9:00 am and is filed under [European Commission](#), [Foreign subsidies](#), [Foreign Subsidy Regulation](#)

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