

Kluwer Competition Law Blog

When The European Commission Rings at Dawn: First Dawn Raid under the FSR!

Maren Tamke, Dominika Wojewska (Dentons) · Thursday, May 2nd, 2024

At the crack of dawn, the European Commission embarked on a milestone enforcement endeavor: the first unannounced inspection under the new [EU Foreign Subsidies Regulation \(FSR\)](#)!

The European Commission, in tandem with national competition authorities, conducted its first dawn raids under the FSR at the Polish and Dutch offices of Nuctech, a Chinese company specialized in security scanning equipment and systems. What were they searching for? Evidence to substantiate “indications” of foreign subsidies that could distort the internal market.

Observers have been eagerly waiting to see whether, and if so when and how, the European Commission would fully utilize its new capabilities under the FSR. Now, it appears, they have their answer.

Quick recap: What the FSR is all about

The FSR, which entered into force on July 12, 2023, allows for the examination of third country (read: non-EU) subsidies to determine whether they distort the internal market within the EU. The regulation addresses situations where third-country subsidies could enhance a company’s competitive position within the internal market, potentially distorting fair competition. In essence, the FSR aims to ensure fair conditions for competition in the EU and a level playing field.

Three instruments under the FSR

The regulation provides for three instruments to achieve this aim:

- An obligation on companies to notify M&A transactions above certain thresholds;
- A requirement to report bids in procurement procedures above certain thresholds; and
- Powers to the European Commission to initiate investigations *ex officio* (i.e. investigations on its own initiative).

The obligation to notify started to apply on October 12, 2023.

Cases and enforcement actions so far

During the first 100 days, the European Commission has [engaged](#) in pre-notification discussions with 53 parties with respect to M&A transactions, while 14 cases have been formally notified.

Further, the European Commission has received more than 100 submissions regarding public procurement procedures. So far, it has opened three in-depth investigations in the context of public procurement: One into a [Chinese company bidding to supply electric trains](#) in Bulgaria (following which the deal was abandoned by the parties) and a further two into [Chinese companies tendering for contracts in a solar park](#) in Romania.

As regards *ex officio* investigations, Margrethe Vestager (European Commissioner for Competition) recently [announced](#) at the beginning of April that the European Commission has launched its first *ex officio* investigations into Chinese suppliers of turbines for wind parks in Spain, France, Romania, Bulgaria and Greece. The *ex officio* instrument was also used in the Nuctech case.

Investigative powers of the European Commission

Where the European Commission considers that there is an indication that a foreign subsidy distorting the internal market exists, they have the power to seek all the information they consider necessary to assess, on a preliminary basis, whether that foreign subsidy distorts the internal market. The *ex officio* instrument allows the European Commission to examine information from any source, including Member States.

The investigative powers of the European Commission include requests for information or unannounced inspections (dawn raids). These types of requests and inspections are reminiscent of those encountered in antitrust law. As part of the European Commission's right to inspect a company, officials can enter business premises, seize electronic devices and data, and question employees, etc. Notably, the European Commission even has the power to conduct inspections in third countries (if their governments consent).

What we know so far about the Nuctech case – and what remains uncertain

Now, let's turn our attention back to the Nuctech case and explore what we know about it so far. The European Commission did not provide any details in its press release and only referred to a company active in the production and sale of security equipment. In parallel, however, Nuctech a company ultimately owned by the Chinese state, confirmed that it was targeted by the dawn raids. According to the press, European governments have granted over 160 contracts to Nuctech in the past decade.

While the [Mission of China to EU](#) has criticized the investigation and expressed “grave concern” over the inspection, and the China [Chamber of Commerce to the EU](#) (CCCEU) has also expressed serious concern, shock and dissatisfaction over the dawn raids, Nuctech reportedly stated that it is

cooperating with the European Commission and committed to defending its reputation as a fully independent and self-supporting economic operator.

What is important to note is that the dawn raid does not establish that Nuctech received third country subsidies that may distort competition; a dawn raid does not determine the outcome of an investigation. The raid is only an initial investigative step taken as part of a preliminary review. If the European Commission finds sufficient evidence, it will proceed with an in-depth investigation.

To determine whether its initial concerns can be confirmed the European Commission must conduct a three-step analysis:

- First, it has to assess whether Nuctech has received third-country subsidies.
- Second, it will need to consider whether the third country subsidy is likely to improve the competitive position of Nuctech on the internal market and is thereby actually or potentially affecting competition on the internal market.
- Last, it will conduct a balancing exercise, considering positive and negative effects of the foreign subsidy, thereby also taking into account positive effects on the development of the relevant economic activity in the EU and/ or objectives of the EU.

Politically sensitive case: present and past controversies based on national security concerns

What is certain, beyond the legal aspects of this case, are the complex political sensitivities and controversies surrounding it that are tied up with ever increasing trade tensions. In 2020, Nuctech was added to the US government's Entity List "for its involvement in activities contrary to the national security interests of the United States" and Lithuania's government prevented Nuctech from supplying baggage-scanning equipment for its airports, citing national security concerns.

While the FSR is about the distortion of competition in the internal market, the balancing test is conceived widely. It allows to consider "positive effects" of a foreign subsidy beyond competition. However, it does not take into account other potentially negative effects. In particular, it is not designed to address security concerns. Security concerns generally fall within another regulatory domain, namely foreign direct investment (FDI) control. Yet, FDI control laws do not directly apply to domestic companies that were already incorporated by a foreign owner without further changes in their ownership structure; they primarily pertain to new investments. Consequently, Nuctech's business activities cannot be reviewed under FDI control law. Against this background, it will be interesting to see what role security considerations will play in the present case (if any).

What happens if the European Commission finds a distortion to competition?

Now, let's explore what actions the European Commission can take if it identifies a distortion of competition within the internal market. If the Commission's investigations confirm a distortion of competition in the internal market, the FSR provides various remedies. For instance, the European Commission could require the company under investigation to inform the Commission of their participation in future concentrations or public procurement procedures in the Union for an appropriate period of time. However, the Commission's powers are not limitless. Importantly, the *ex officio* investigation cannot change the contractual position of the firm being investigated – i.e.

the investigation cannot result in the cancellation of a decision awarding a contract or in the termination of a contract.

First take-aways on FSR enforcement

As confirmed by Commissioner Vestager, the European Commission is “vigorously” enforcing the FSR. Nevertheless, this is remarkable in view of the European Commission’s limited resources and the larger number of notifications the authority needs to deal with under the FSR. It marks a pivotal moment in the EU’s enforcement practice and underpins in particular both its firm stance on enforcing the FSR and the spotlight it is shining on Chinese companies. As tensions simmer between the EU and China, tit-for-tat reactions loom large.

While it is uncertain whether this heightened enforcement pace will continue, companies should prepare for the enforcement of the FSR, including further dawn raids, to gain momentum in the coming months. Although the focus is and will likely continue to be on Chinese companies and state support, it should also be kept in mind that companies and subsidiaries from third countries other than China can also be examined under the FSR. Although all investigations so far have related to companies receiving state support from China, Vestager has stressed that the European Commission plans to challenge distortive subsidies from any third country.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Thursday, May 2nd, 2024 at 9:00 am and is filed under [Dawn raids](#), [Foreign subsidies](#), [Foreign Subsidy Regulation](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.