

Kluwer Competition Law Blog

The Foreign Subsidies Regulation – Lessons from the First Year of Enforcement

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Introduction

Since October 2023, the European Commission has been aggressively enforcing a revolutionary new European Union (EU) law, the [Foreign Subsidies Regulation](#) (FSR). The FSR is designed to prevent “foreign” – meaning non-EU — subsidies from distorting the EU internal market. The FSR introduced new legal concepts, in particular, the “foreign financial contribution” (FFC), and procedures into EU competition law, drawing on a variety of other bodies of EU law including State aid, merger review and trade laws. This vigorous enforcement will remain a priority for the incoming Competition Commissioner Teresa Ribera Rodríguez, as outlined in her [mission letter](#) from President Von der Leyen.

The first year of FSR enforcement provides lessons for companies that may need to notify mergers and acquisitions with a significant EU nexus, participate in significant public tenders governed by EU rules, or are active in an industry that may be targeted in a Commission *ex officio* investigation. In particular, the requirement to provide three years of groupwide information on FFCs for certain M&A transactions and public tenders means companies that may engage in such transactions need significant time to collect the required information from multiple sources including financial, tax and business reporting systems.

Background

The Commission proposed regulating foreign subsidies in a 2020 [White Paper](#), followed by a formal [regulation proposal](#) in 2021 and final adoption November 2022. The short 1.5-year period between proposal and adoption reflected the strong political support for action against foreign subsidies distorting the EU internal market.

The FSR imposes mandatory notification and approval requirements for companies engaging in M&A transactions and public procurement procedures that meet certain thresholds and gives the Commission extensive powers to launch *ex officio* investigations. If the Commission finds that such FFCs constitute distortive subsidies, it can impose measures to redress their distortive effects.

FFCs are defined very broadly to cover any form of direct or indirect contribution from non-EU

governments or any public or private entity attributable to a non-EU country. Examples of FFCs include grants, loans, tax incentives (e.g., exemptions/reductions), state-funded R&D, government contracts (regardless of size, whether they qualify as “subsidies” or whether they have any nexus to the EU), and grants of exclusive rights without adequate remuneration. By contrast, a foreign subsidy is a narrower concept including only FFCs conferring a benefit to their recipients that is not normally available on the market and specific to one or more companies or industries.

In July 2023, the Commission adopted an [implementing regulation](#) including notification forms and details on its procedures. The Commission has also published guidance in various forms and is required to publish formal guidelines by 2026.

M&A notifications

M&A transactions in which the target or a joint venture generates EU turnover of €500M+ and all undertakings concerned received FFCs of €50M+ in the prior three years must be notified to the Commission on Form FS-CO. The thresholds and review procedure are closely modeled on the EU Merger Regulation (EUMR), with a few key exceptions. Notably, unlike the EUMR thresholds, the FSR thresholds do not capture joint ventures based on the EU turnover of the joint ventures’ parents.

The first year of FSR enforcement has been much busier than anticipated. By the end of September 2024, the Commission engaged in prenotification talks in 120 M&A cases and received 91 formal notifications, considerably more than the 30 formal M&A notifications per year the Commission estimated in its 2021 legislative proposal. To tackle the increased workload and ensure proper enforcement, the Commission created a new Directorate K within the Directorate-General for Competition. Although not mandated by the FSR, DG Competition has started to publish information on [pending notifications](#), presumably to increase transparency.

The Commission’s notification form for M&A transactions, Form FS-CO, requires information on the parties (including the ownership, control and sources of financing), the concentration and FFCs received groupwide during the prior three years. Detailed information on individual FFCs is required only for specific types of foreign subsidy considered presumptively distortive under the FSR; for other FFCs, only the buyer(s) need to provide information on the FFCs they received. This information can be provided in summary form by country and type of FFC. In practice, however, case teams commonly request more detailed information, underlining the importance for potential acquirors of collecting FFC information ahead of time.

In most cases, the FSR notification process runs in parallel with other regulatory processes like EUMR and foreign direct investment (FDI) review. Thus, the timeline for M&A transactions is generally not impacted by the introduction of this new notification requirement, provided the parties have collected the three years of groupwide FFC information required. However, if the Commission suspects the existence of distortive subsidies, the FSR review process can take considerably longer than EUMR or FDI review. Extensive pre-notification talks may be needed to convince the Commission that no in-depth review is needed.

To date, the Commission has only opened one in-depth review, analogous to a Phase II investigation under the EUMR. In that case, the Commission investigated whether a Middle Eastern buyer aiming to acquire assets of a Czech telecommunications company benefited from

foreign subsidies including an unlimited guarantee and loans from state-controlled banks. In the Commission's view, these could have had negative effects on the acquisition process and led to a distortion of competition in the EU internal market post-transaction. To address these concerns, the buyer agreed to remove the unlimited guarantee, prevent parent-company financing of the target's activities in the internal market and require the buyer to inform the Commission of future acquisitions. (Unlike in the EUMR context, FSR remedies can be offered only in an in-depth investigation.) These remedies may have the counterintuitive effect of preventing the merged entity from realizing synergies from integrating the target into the buyer group.

The decision signals that the Commission not only assesses the impact of foreign subsidies on the acquisition process itself, but also their effects on competition in the internal market post-transaction. Further, the Commission appears more willing to accept behavioural commitments in an FSR review than in EUMR cases where it prefers structural remedies. Finally, from a procedural angle, it is noteworthy that the Commission adopted its decision well before the in-depth review deadline, which would be unusual for a Phase II EUMR approval.

The full text of the decision once published, will shed more light on the Commission's substantive assessment of the potentially distortive FFCs. Although the Commission has given some helpful indications in a [Staff Working Document](#) (the SWD) on the concepts of distortion in the internal market and the application of the so-called "balancing test" (see our publication on the SWD [here](#)), comprehensive guidance on FSR theories of harm may not be issued before January 2026.

Another notable takeaway from FSR enforcement during the first year relates to the treatment of investment funds. Pursuant to the Commission's [FSR brief](#), in the first 100 days of application roughly one-third of transactions involved an investment fund as a notifying party. While Form FS-CO allows investment funds to limit their FFC reporting to the acquiring investment fund and its portfolio companies (subject to certain conditions), the Commission considers that investments made by limited partners attributable to non-EU countries (e.g., sovereign wealth funds) may fall into the "presumptively distortive" category. As a result, the Commission asks detailed questions to determine whether these investments have been made on market terms.

Public procurement filings

The FSR requires participants in public tenders subject to EU rules to submit a notification on Form FS-PP where (among other things) the value of the public tender is €250M+. Unlike Form FS-CO, notifications on Form FS-PP must be submitted to the contracting authority, which then forwards the notification to DG GROW, which is responsible for administering this module of the FSR.

Form FS-PP resembles Form FS-CO, including notably requiring detailed information on bidders' FFCs only where bidders received foreign subsidies considered most likely to distort the EU internal market. Notably, Form FS-PP requires information for a narrower category of group members, significantly reducing the FFC information to be provided. Like DG COMP case teams, however, DG GROW case teams reviewing Forms FS-PP tend to request more detailed information on relevant FFCs.

As of September 2024, the Commission reported a total of 1,108 submissions in connection with 213 tenders, exceeding the Commission's initial estimate of 36 public procurement filings per year.

Although DG GROW has not released a policy brief on the procurement casework, first indications on how the substantive assessment of FFCs will be conducted in public procurement cases are included in a staff working document (the [SWD](#)). Since each participant in an in-scope tender must submit a separate Form FS-PP, a single public tender may generate several notifications, in contrast to the M&A context.

Three in-depth investigations give first indications on the Commission's priorities in procurement cases. On February 15, 2024, the Commission launched its first in-depth investigation following a notification by an Asian train manufacturer relating to a Bulgarian bid concerning the procurement of several electric "push-pull" trains as well as related maintenance and staff training services. On April 3, 2024, the Commission launched two in-depth investigations following notifications by two Asian controlled companies in a Romanian bid concerning the design, construction and operation of a photovoltaic park in Romania. All three investigations were terminated when the bidders concerned voluntarily withdrew their responses to the customer tenders. Thus, in contrast to the M&A context, so far the Commission has not accepted remedies to address concerns about potentially distortive foreign subsidies.

Ex officio investigations

In addition to situations triggering mandatory FSR notifications, the Commission has the power to conduct *ex officio* investigations into all potentially distortive foreign subsidies. These *ex officio* powers permit the Commission to investigate support granted by third countries to companies up to 10 years before the start of the investigation (but not more than five years prior to July 2023). The Commission can also request an *ad hoc* notification for transactions and public procurement procedures that do not meet the thresholds but in relation to which it suspects that the companies concerned were granted foreign subsidies in the three years prior to the concentration/tender submission.

To date the Commission has initiated two *ex officio* investigations, which are still pending. Unlike notification procedures are not subject to a specific timeline. On April 9, 2024, the Commission launched its first *ex officio* investigation under the FSR regime for public procurement, which targets Asian suppliers of wind turbines and investigates the conditions for the development of wind parks in Spain, Greece, France, Romania and Bulgaria (see [Speech by Executive Vice President Vestager on technology and politics?at the Institute for Advanced Study](#)).

In the same month, the Commission conducted a dawn raid at an Asian company's premises in the Netherlands and Poland. The company subsequently brought an appeal against the FSR investigation in May 2024 seeking an interim injunction and an annulment of the Commission's decision. In August 2024, the General Court dismissed the company's suspension request and confirmed that the Commission is entitled to request information from all undertakings carrying out commercial activities in the EU.

On 20 November 2024, Wolters Kluwer will co-host an in-person event on "The FSR: One Year in Review" in Brussels. More information and registration [here](#).

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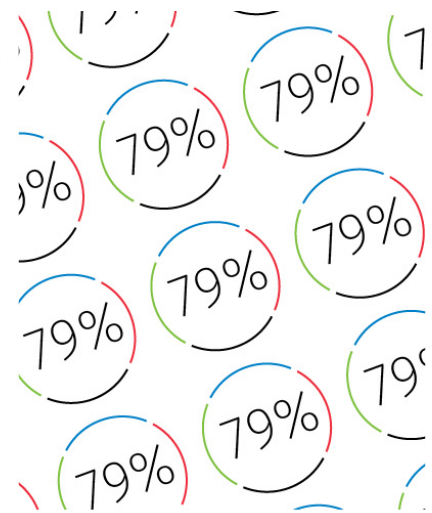
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