# Kluwer Competition Law Blog

## The Foreign Subsidies Regulation – One Year in Review: Challenges and Ways Ahead

Cécile Carlier (Simmons & Simmons) and Pierfrancesco Mattiolo (University of Antwerp) · Tuesday, December 10th, 2024

Adopted in November 2022, the Foreign Subsidies Regulation (FSR) is the latest arrival in the EU competition toolbox. Having just celebrated its second anniversary and with a few cases under its belt, the FSR is still the object of much discussion and curiosity from practitioners and stakeholders. To contribute to this debate, **an expert panel session was organised by Simmons & Simmons, the University of Vienna, the CELIS Institute and Wolters Kluwer** in Brussels on 20th November 2024. The event was hosted and moderated by **Alejandro Guerrero** and **Andrea Pomana** from **Simmons & Simmons** and convened experts from the European Commission (**Iveta Stoyanova, DG COMP; Bence Horváth, DG GROW**), academia (**Lena Hornkohl, University of Vienna, CELIS Institute**) and industry (**Fernando ?scar Rüland, thyssenkrupp**).

### The Enforcer's Insights: the Concentrations Procedure – Iveta Stoyanova, European Commission, DG COMP

Iveta Stoyanova, Officer of Directorate on Foreign Subsidies in DG COMP and co-author of the first FSR Brief on the concentrations procedure, presented the enforcer's experience after a little more than one year since the notification obligation started to apply (the period from 12th October 2023 to 31st October 2024). The Commission received more than 120 Case Team Allocation Requests (CTARs), *i.e.*, documents from notifying undertakings that start the pre-notification discussions. Of those, more than 100 progressed to formal cases, with over 90 already closed. Stoyanova observed that the volume of notifications exceeded the projections in the 2021 Impact Assessment Report (just over 30 per year), and this may be attributed in part to the changes made to the Draft Regulation. Most transactions were also notified under the Merger Regulation (EUMR) – the overlap between the two tools' scope in terms of assessment of jurisdiction was intentional and is reflected in the some of the sections of the Form CO and Form FS-CO, which follow the same structure. One case, involving the Emirati telecom company e&, was closed with a commitment decision following an in-depth investigation. Most of the FSR notifications came from various sectors of the economy, ranging from retail to tech.

Looking at the pre-notification discussions, their value has been acknowledged by both companies and legal counsel, as they streamline the process and assist in the application and interpretation of

exceptions. While most exceptions are based on the self-assessment of the notifying parties, the exception for private equity funds requires justification to be applied; therefore, parties should explain in the Form FS-CO why this exception applies to their case. The Commission also offers guidance through FAQs, clarifications (such as the one on the concepts of distortion and the balancing test, dated July 2024), and briefs (an additional one should be published soon, regarding the e& decision). Since October 2024, DG COMP has also started to publish on its website the fact of notification for individual cases, as part of an effort to improve transparency. Finally, Stoyanova shared that DG COMP had expanded the resources allocated to FSR enforcement, transforming the current task force in a directorate.

**The Enforcer's Insights: the Public Procurement Procedure – Bence Horváth, European Commission, DG GROW**

Bence Horváth, Officer at DG GROW, shared insights on the public procurement procedure. By the end of September 2024, approximately 1,300 submissions had been received. In the context of this procedure, 'submissions' encompass both notifications and declarations: as stipulated by Article 29(1) of the FSR, economic operators must submit a notification if they fall within the scope of Article 28(1) and (2). Otherwise, they submit a declaration listing all foreign financial contributions received as specified in Commission Implementing Regulation (EU) 2023/1441, and confirming that none are notifiable. Both types of submissions may be presented via an online form available through the DG GROW website. For a multi-stage procedure, both notifications and declarations must be submitted twice: first, when an economic operator requests to participate, and later, with the submitted or final tender. At present, all cases that reached the in-depth investigation phase—specifically, tenders for electric trains in Bulgaria and solar panels in Romania—were closed following the withdrawal of the bid of the notifying party.

Unlike the concentrations procedure, pre-notifications are less common in the public procurement module, partly due to the complexity of engaging in dialogue with consortia and the tight timelines involved in the public procurement procedure. Many parties may be involved alongside the main economic operator, increasing the number of contributions to report, while the procedure follows a strict 'no stop the clock' approach. Preliminary reviews must be completed by DG GROW within 20 days unless submissions are incomplete. In return, economic operators have a short time to provide any missing or additional information, which requires them to engage proactively with the Commission and prepare their submissions thoroughly.

The enforcer has also been facing other challenges. First, the volume of submissions has exceeded initial estimates of the FSR impact assessment. Second, submissions from economic operators are often incorrect or inconsistent. Some use incorrect forms, while others include the assessment under Article 3 FSR that is unnecessary at the notification stage and is instead conducted by the Commission. This lack of familiarity with the FSR among economic operators and contracting authorities is understandable, given the novelty of the tool. The Commission has sought to address these gaps by issuing guidance and Q&A documents. For their part, companies should systematically and continuously collect data systematically and continuously on financial contributions. Another difference from the concentrations procedure is the absence of a central case register, owing to confidentiality and varying publication rules across Member States.

**The Business' Insights – Fernando ?scar Rüland, thyssenkrupp**

Fernando ?scar Rüland, Senior Counsel at thyssenkrupp, shared the perspective of a major corporation with over 300 subsidiaries worldwide, primarily navigating the concentrations procedure. While businesses were initially concerned about the uncertainty and administrative burden introduced by the new tool, the Commission's guidance and support have eased some of their concerns. The enforcer has listened to companies' feedback, as evidenced by the Implementing Regulation. Nevertheless, FSR compliance still imposes a heavy burden on internal resources, particularly when identifying foreign financial contributions at the entity level, given the broad scope of notification requirements as well as the fact that the information required is usually not captured by standard accounting and reporting systems. Concepts like 'generally available' or 'market terms' in the ordinary course of business remain difficult to interpret, requiring companies to adapt and implement processes to monitor contributions.

Additionally, EU firms must inform their non-EU M&A partners about FSR obligations. Many investors with substantial resources come from jurisdictions with a strong presence of State-Owned Enterprises (SOEs), such as Gulf countries or China. This often necessitates extra due diligence, which can delay transactions that must be closed quickly for economic/business reasons. As a result, the FSR increasingly influences deal timelines and partner selection.

**The Academia's Insights – Lena Hornkohl, University of Vienna and CELIS Institute**

Lena Hornkohl, Assistant Professor at the University of Vienna and Director of the CELIS Institute, concluded the *tour de table*. While the Commission's procedural guidance has been invaluable to practitioners and scholars, some substantive concepts remain unclear and in flux, such as distortions, the balancing test and the exception for private equity. From the July 2024 clarifications and the e& decision, it appears that the Commission applies a two-step test when assessing distortions in a concentration: first, it analyses the distortion to the acquisition process and, second, the distortion to the activities of the merged entity post-transaction. However, is the Commission defining the market by following the EUMR practice, or does it consider a broader scope? Finally, the FSR emerges as a strategic tool aligned with the EU's broader goals of autonomy and resilience, with its regulatory impact expected to expand amidst rising global political tensions.

**Discussion and Q&A**

The session then transitioned into a prolific discussion. **Stoyanova** outlined DG COMP's intention to publish more comprehensive guidelines on substantive issues by 2026, as indicated by the Regulation. She reiterated that the Commission does not base decisions on the country of origin of financial contributions. However, certain relationships between states and companies may be relevant, particularly if they could serve as tools for potential government influence. The FSR examines the specifics of each case and the companies involved. For scrutinising subsidies from a specific country related to imports of particular products/goods in the EU, trade defence mechanisms are employed instead. Article 44(9) of the FSR ensures that such tools do not overlap. For instance, the FSR may not play a significant role in examining subsidies granted under the US Inflation Reduction Act, which primarily concerns goods. The public inquired whether the

Commission coordinates with Member States' investment screening authorities for better alignment or with non-EU partners interested in adopting their own 'FSRs'. Stoyanova confirmed ongoing communication and cooperation with Member States, adding that the Commission is aware of the efforts and reflections on similar regimes by other countries, such as the US and the UK.

**Horváth** commended companies for developing internal procedures to improve FSR compliance and encouraged them to seek guidance from the Commission when needed. He emphasised that assessment under the FSR does not differentiate based on the country of origin of economic operators. DG GROW also treats declarations and notifications equally, despite the latter being more detailed. When asked whether the FSR discourages 'good investment,' citing the instances where companies withdrew bids following the opening of in-depth investigations, Horváth acknowledged that while a business opportunity might be lost, other economic benefits could be gained. He advised companies to undergo the in-depth investigation if they believe their subsidies are non-distortive. **?scar Rüland** added that companies typically withdraw if they anticipate losing the case. This trend pushes EU companies to favour less lucrative deals with known, reliable partners over higher-value opportunities with entities exposed to greater regulatory risk. Foreign SOEs often lack awareness of FSR obligations and may be unwilling or unable to share necessary data with their EU counterparts, including for EUMR compliance. In some cases, even data such as turnover is withheld by parent companies from their subsidiaries for commercial reasons. It will take time for foreign entities to adapt to the FSR and establish updated reporting systems.

The public also raised questions about the legal standing of competitors and market participants under the FSR. **Hornkohl** highlighted differences between the FSR and State aid rules: only in State aid cases are there formal and informal complainants, with the former granted additional procedural powers. For the FSR, law firms often submit informal 'complaints,' though it remains unclear whether these are processed by the Commission. She suggested that introducing formal complaints under the FSR might become necessary, as private actors frequently possess critical information, which has historically driven many high-profile State aid cases. **Pomana** agreed, noting that complainants are also involved in EUMR and Article 102 TFEU cases, while antidumping rules include mechanisms to 'filter' qualified complaints. **Stoyanova** responded that the Commission intends to wait to gain more practical experience before introducing reforms or simplifying procedures, and drew parallels to the evolution of State aid law, which initially did not allow formal complaints. Currently, DG COMP receives substantial 'market information' from private parties, though these are not treated as formal complaints. **?scar Rüland** remarked that companies can submit informal papers to the Commission, often yielding favourable results without the costs associated with formal involvement in a proceeding. However, he noted that it would be ideal for companies to also have the option of formal participation in FSR procedures.

The discussion then shifted to compliance challenges. The **Commission** clarified that companies struggling to collect specific data can request waivers. They can also resubmit recent financial contributions data provided in a previous notification, provided they commit to updating it before submitting the formal notification. Given the tight deadlines of the public procurement procedure, companies are advised to prepare all documentation in parallel with the preparation of the offer or contact the Commission promptly if some information cannot be provided by the submission deadline of their bid.

Finally, the public asked whether more *ex officio* investigations could be expected now that the Commission has processed the first wave of notifications. Both officers confirmed that such

investigations are likely to increase in the near future. We can expect new developments in FSR enforcement soon.

---

*To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.*



This entry was posted on Tuesday, December 10th, 2024 at 9:00 am and is filed under Conference, European Commission, Foreign subsidies, Foreign Subsidy Regulation, Geopolitics, Merger control, Merger notification, Merger Thresholds, State aid, State owned enterprise (SOE), Subsidies, Tender, Trade Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.