

# Kluwer Competition Law Blog

## The Impact of the New Foreign Subsidies Regulation on Dealmaking in Europe

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With the introduction of the Foreign Subsidies Regulation (FSR), the European Union (EU) embarked on a new regulatory era. This landmark regulation aims at addressing the distortive effects of subsidies granted by foreign – non-EU – countries to companies operating within the EU, and ensuring a level playing field and fair competition across the internal market.

The FSR has brought about significant challenges for foreign trade and investments that involve European companies. Investors commonly raise concerns on the vast application of the FSR and its chilling effects on foreign investments in the EU. Indeed, parties to any (larger) M&A transaction or public procurement must be aware of the potential application of the FSR – in addition to the merger control and Foreign Direct Investment regimes, which in themselves become increasingly complex (in this respect, see [here](#) and [here](#)).

### Contextualising the Commission’s Powers

The Commission acts as the primary enforcer of the FSR, possessing broad powers to investigate, evaluate, and intervene in transactions and public procurement that may distort competition within the EU. The Commission can launch *ex-officio* investigations if it suspects the presence of distortive foreign subsidies, including those related to non-notifiable transactions and greenfield investments. Moreover, it has the authority to retrospectively assess foreign subsidies up to five years after they are granted.

The FSR’s first year has seen proactive enforcement by the Commission, with notifications and filings well exceeding initial expectations. While the impact assessment for the Foreign Subsidies Regulation initially estimated around 30 notifications per year for M&A transactions and around 36 for public procurement, this number is now well over 100 and 1,300, respectively – just a year later, as per 31 October 2024.

The large majority of these cases are unproblematic. Stakeholders therefore query the efficiency of this new tool and whether its net is indeed “designed to catch the big fish, because only big fish have the teeth to do damage to the internal market” as once put by the former Commissioner for Competition Vestager in her [speech](#) in March 2023.

Additionally, many filings related to M&A transactions involve private equity firms and investment funds. The Commission has acknowledged the heavier notification burden on these entities and simplified some disclosure requirements. While many cases are straightforward, firms must still evaluate foreign financial contributions across all funds and portfolio companies to determine if they meet the notification threshold or qualify for exemptions.

### **Highlights of FSR Enforcement**

In some cases, the FSR did show its teeth. Some of the Commission's in-depth investigations raised serious concerns and ultimately led to certain foreign investors abandoning their participation in the public procurement process – for example in respect of tenders for electric trains in Bulgaria (see [here](#) and [here](#)) and photovoltaic parks in Romania (see [here](#) and [here](#)).

In an M&A context, foreign investors carefully weigh their FSR risk profile before launching bids for European targets. In some cases, certain foreign investors were made to leave the bidding process empty-handed given the uncertainty regarding the completion and timing of the transaction under their risk profile (see for example in respect of Haier's intended acquisition of Purmo, see [here](#)).

The Commission also recently conducted an in-depth investigation in an M&A context. In September 2024, it approved the acquisition of PPF Telecom Group B.V. by Emirates Telecommunications Group Company PJSC (e&) subject to commitments (see [here](#)). This case sheds valuable insights into the Commission's balancing test on foreign subsidies potentially distorting competition in the EU.[1]

### **First Litigation under the FSR**

Already in its first year of application, the FSR undergoes a significant review before the EU courts. In April 2024, the Commission used its *ex-officio* powers to conduct a dawn raid – an unannounced inspection – into Nuctech, a company specialising in security inspection equipment active in the EU and controlled by a Chinese company (see [here](#) and [here](#)). The Commission suspected that the company received Chinese support that allowed it to compete unfairly in the EU. Nuctech challenged these raids seeking interim measures, but lost before the EU General Court in August 2024 (see [here](#)). The company also requested interim measures before the Court of Justice to block the use of the evidence gained by the Commission (see [here](#)).

### **Impact on Business Strategies**

The FSR has significantly impacted the timing and structure of deals, with companies now required to factor in additional review periods and the possibility of interventions and *ex-officio* investigations by the Commission. This necessitates a strategic re-evaluation of transaction planning.

Particularly, the regulation requires companies to identify and maintain records of their foreign

financial contributions, posing compliance challenges because the information is not usually captured by standard accounting and reporting systems. Companies must nevertheless gather data on their foreign financial contributions three years prior to M&A transactions or public procurement notifications. Some firms collect data manually and on an ad-hoc basis, others develop automated tools. Both requires significant time and expense. Early preparation and engaging with the Commission is key to meeting filing obligations and potential *ex-officio* investigations.

The regulation's standstill obligation and potential fines for non-compliance of up to 10% of the annual global revenue underscore the importance of diligent preparation and transparency in business transactions. Companies should also expect increased *ex-officio* investigations and prepare for the fact that the FSR may be used by competitors to submit complaints in the possible attempt to torpedo certain investments.

### **Looking Forward: The Evolving Landscape**

As the FSR continues to be applied and interpreted through various cases, its long-term implications for the EU's competitive landscape and global business practices are becoming increasingly clear. The regulation has underscored the need for a balanced approach to addressing the challenges posed by non-EU financial contributions, ensuring that the EU market remains open and competitive while at the same time safeguarding against distortive practices.

The Commission will continue to walk this fine line while taking account of the increased calls in recent months to ease the regulatory burden on European companies. This is emphasized in a recent [report](#) by Mario Draghi on the future of European competitiveness of September 2024 that calls for a reduction of the regulatory burden on EU companies to rekindle the competitiveness of the European economy. In her recent [speech](#) of 10 December 2024, the new Commissioner for Competition Ribera emphasizes that the Commission will focus on regulation and enforcement where it matters most for competition.

While the Commission will continue to offer helpful guidance and clarifications, and increase transparency, the FSR is here to stay. Therefore, it's important that companies develop and maintain internal procedures to improve their FSR compliance, prepare in good time and seek early guidance from the Commission when needed.

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Wolters Kluwer, Simmons & Simmons, the University of Vienna and the CELIS Institute recently organized a superb event in Brussels with representatives of the Commission. For a summary of the discussion see [here](#).

[1] The Commission's investigation revealed that e& and its controlling entity, Emirates Investment Authority (EIA), had received significant foreign subsidies from the UAE, including an unlimited State guarantee. Although these subsidies did not affect the acquisition process since e& was the sole bidder, the Commission had concerns about potential market distortions post-closing. To mitigate these concerns, e& and EIA proposed commitments valid for 10 years with a potential

5-year extension. These include removing the unlimited State guarantee, prohibiting internal financing from EIA to PPF's EU activities (with exceptions), ensuring transactions occur on market terms, and informing the Commission of future acquisitions not subject to FSR notification.

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The image is a promotional graphic for a survey report. It features a dark background with a circular inset showing a gavel resting on a glowing digital circuit board. The text is white and blue. At the top left, it says '2024 Future Ready Lawyer Survey Report'. Below that, in large bold letters, is 'Legal innovation: Seizing the future or falling behind?'. A blue button with white text says 'Download your free copy ->'. At the bottom left is the Wolters Kluwer logo. At the bottom right is the 'Future Ready' logo with 'LAWYER' written below it.

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