

Happy Birthday, Foreign Subsidies Regulation

Key takeaways from the European Commission's practice in the first year of application

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The Foreign Subsidies Regulation's (FSR) concentration and public procurement tool came into force one year ago in October 2023. Its first year of application has shown that the European Commission is determined to make use of its new tools to tackle third-country subsidies distorting competition in the EU internal market. In this briefing, we provide an overview of the most important FSR rules and the lessons learned from their first application.

The FSR in a nutshell

The FSR obliges companies operating in the EU to notify or declare financial contributions from non-EU countries when certain thresholds are reached in mergers or bids for public contracts. The term "*foreign financial contribution*" is very broad. It does not only include subsidies such as grants, but also (non-obvious) contributions such as capital injections, loans, loan guarantees, tax exemptions, and even the provision/purchase of goods and services.

Notification obligation for concentrations

Concentrations trigger a notification obligation if two cumulative thresholds are met:

- The aggregated turnover of at least one of the merging undertakings, the acquired undertaking or the joint venture established in the EU, exceeds EUR 500 m in the EU, and
- all undertakings involved in the concentration were granted combined aggregated foreign financial contributions of more than EUR 50 m in the three financial years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification and declaration obligation for bids in public procurement procedures

Regarding bids in public procurement procedures, the notification requirement applies where

- the estimated contract value is equal to or exceeds EUR 250 m, and

- the bidder, including its subsidiary companies without commercial autonomy and its holding companies, as well as main subcontractors/suppliers were granted foreign financial contributions of at least EUR 4 m per third country.

In cases where the value of the procurement exceeds EUR 250 m but the threshold of EUR 4 m in foreign financial contributions from a single country is not reached, companies must provide a declaration. This means that they must submit an overview of the foreign financial contributions received.

In addition, the Commission has the power to initiate proceedings under the FSR even outside of mergers and procurement procedures if it suspects third-country subsidies distorting the EU internal market.

A detailed overview of the obligations under the FSR can be found [here](#).

A driving force in practice

After the first year of its application, it can be stated that there is a significantly higher number of cases under the FSR than originally expected. It is said that the Commission dealt with around 100 merger notifications so far.

Just shortly before the FSR's first birthday, the Commission has approved the first concentration subject to commitments following an in-depth review. The Commission found that the acquirer, Emirates Telecommunications Group Company, and its parent company, a sovereign wealth fund controlled by the UAE, received subsidies from the UAE which could have led to a distortion of competition in the EU internal market after the planned acquisition of PPF Telecom Group, a telecommunication operator in Czechia, Bulgaria, Hungary, Serbia and Slovakia. According to the Commission's assessment, the subsidies could have enabled PPF Telecom Group to engage in investments, e.g. in spectrum auctions or in the deployment of infrastructure, which are not available to other companies due to a lack of subsidies. The parties were only able to avert a prohibition of the planned acquisition through commitments such as the waiver of an unlimited UAE state guarantee and safeguards to ensure that PPF Telecom Group's activities in the EU do not benefit from other UAE subsidies.

The FSR also plays a relevant role in public procurement procedures despite the high contract value threshold (EUR 250 m). In Germany, it has become more common in recent years for contracting authorities to bundle their procurement and initiate a joint procurement procedure (e.g. for all contracting authorities within a federal state). In addition to large infrastructure projects, it is also other sectors (e.g. IT) in which an FSR notification may be required due to transgression of the threshold. The Commission provides an online form for notifications and declarations which is based on the form for the European Single Procurement Document (ESPD). Accordingly, the form also asks for information which is not required under the FSR and the Implementing Regulation. This

leads to confusion and additional effort for companies, as information has to be provided twice in some cases. Therefore, it is to be hoped that the Commission will adapt the form shortly.

Additionally, the Commission uses its power to initiate ex officio investigations into foreign subsidies. In April, the Commission launched a review of Chinese subsidies in the wind power sector. The investigation is not only directed against Chinese firms, but EU companies are also affected. This is likely because the Commission is hoping to gain easier access to information on Chinese subsidies from EU wind farm developers than from their Chinese contractors. Therefore, it is also EU companies with Chinese suppliers that must be prepared to be targeted by the Commission under the FSR.

The fact that the Commission is willing to make full use of its powers under the FSR is also demonstrated by the information request and dawn raid carried out at the Chinese security inspection scanners manufacturer Nuctech. Nuctech's plea for interim relief from providing the content of a number of employees' mailboxes to the Commission was dismissed in the first instance by the General Court of the EU. The court did not recognise Nuctech's objection that the emails were stored on servers located in China and should therefore be subject to Chinese law. It would be an undue circumvention if a company operating in the EU could avoid the EU regulation by simply using servers in China. The European Court of Justice has not yet ruled on Nuctech's appeal. Still, the General Court's ruling gives the Commission momentum for further proceedings.

Preparation is key

In our experience, many companies are not yet sufficiently prepared for the new notification obligations. This poses considerable difficulties especially in procurement procedures due to the tight deadlines, in particular because the notification or declaration must already be submitted in full with the request to participate. As the financial contributions must be declared not only for the bidder, but also for its direct and indirect subsidiaries and parent companies as well as main subcontractors and suppliers, timely preparation before the start of a procurement procedure is essential. If information is not submitted on time or is incomplete, there is a risk of exclusion from the award procedure and considerable fines. In case of mergers, a standstill obligation applies, which means that failure to provide the relevant information on time will significantly delay the transaction.

We recommend to

- set up information-gathering protocols or suitable software tools to the required data,

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- establish internal compliance mechanisms with clear lines of responsibility to ensure that all relevant information is readily available and set up monitoring systems to keep track of all financial contributions from non-EU countries (including from public or private entities whose actions can be attributed to a third country),
- consider a pre-notification consultation with the Commission to minimize the information burden: The pre-notification phase can potentially lead to a significant reduction in the amount of information to be submitted to the Commission, as companies can request to be exempted from providing certain information required in the notification form.

BLOMSTEIN closely monitors any new developments regarding the FSR. For questions regarding the impact of the FSR on concentrations, please contact Max Klasse, Pia Hesse and Jasmin Sujung Mayerl. With regard to public procurement procedures, Pascal Friton and Ramona Ader are happy to answer any questions that may arise.
