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ALERT MEMORANDUM

The EU Foreign Subsidies Regulation in practice: first cases and enforcement trends

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Almost eight months since taking full effect, the EU's enforcement agenda for the Foreign Subsidies Regulation (**FSR**) is coming into focus. The European Commission (**EC**) has launched several in-depth and *ex officio* cases, and reviewed over 150 notifications.

This alert reports on recent enforcement activity and risk factors that may lead to lengthy review for cases. For an overview of the legislation, see our general briefing.

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FSR enforcement: figures and trends

The FSR targets distortive subsidies granted by non-EU states to companies active in the EU single market. It requires businesses to notify and obtain prior clearance for certain large mergers and public procurement tenders and allows the EC to open *ex officio* investigations into potentially distortive non-EU subsidies. The EC has powers to impose stringent remedies including fines, recovery of the subsidies, or divestitures.

FSR agenda. The FSR is a pillar of the EU's "open strategic autonomy" policy to ensure the EU can "*act autonomously when required and work with partners wherever possible*".[1] Under this model, the EU aims to strengthen internal production capacity while promoting mutually beneficial trade relations. Recognizing that "*in a world powered by technology, those who lead are those who control the most critical technologies, and their supply chains*",[2] the EC's FSR enforcement is expected to prioritize strategic sectors such as clean technologies, semiconductors, artificial intelligence, cloud technologies, *etc.* By contrast, complaints concerning "*financial doping*" in football have not been a priority.[3]

[1] Spanish Presidency of the Council of the EU, "Open Strategic Autonomy for a competitive and resilient EU" (source here).
[2] Speech by Executive Vice President Vestager on technology and politics at the Institute for Advanced Study, (EC Speech 24/1927, April 9, 2024).
[3] See press reports of a complaint filed with the EC by a Belgian football club alleging that foreign subsidies are distorting the professional football market in the EU.

The EU is also deploying broader policies and powers such as trade defence tools[4] to meet its objectives. Vice President Margrethe Vestager has proposed a G7 alliance on trustworthiness criteria for supply chains,[5] and the EU recently approved laws to secure supplies of critical raw materials[6] and corporate responsibility for supply chains.[7]

FSR investigations. To date, the EC has opened:

- two *ex officio* investigations in (i) wind turbine supplies for wind parks in Spain, Greece, France, Romania, and Bulgaria;[8] and (ii) security equipment, including a dawn-raid at the producer's premises in the Netherlands and Poland.[9]
- three in-depth investigations following public tenders notifications for (i) solar photovoltaic supplies in Romania (two suppliers); and (ii) electric "push-pull" trains in Bulgaria.[10]
- one in-depth investigation into an acquisition in the telecom sector by a State-controlled telecommunication operator based in the United Arab Emirates.[11]

FSR notifications. In the first 100 days since the opening of the notification window, the EC has reviewed over 100 public tender notifications and 53 merger notifications, compared to the estimated 40-70 filings a year anticipated in the legislative proposal. A third of the merger notifications have concerned investment fund acquirers.

FSR enforcement: risk factors

As the FSR applies a novel legal framework, businesses face significant uncertainty in assessing when non-EU subsidies could be problematic. Pending further guidance,[12] certain case features are more likely to draw detailed questions or a lengthier review, based on EC enforcement practice.

Chinese subsidies. All but one of the EC in-depth and *ex officio* investigations to date have targeted Chinese companies that might have received potential subsidies from China. While the FSR is designed to be country-neutral, Chinese subsidies are a focus because the EC is familiar with the role of subsidies in China's economy (and recently updated its lengthy report on the subject). The FSR preparatory documents themselves discussed perceived distortions from such subsidies,[13] and cited examples involving Chinese businesses to

[4] On October 4, 2023, the European Commission published a notice of initiation of EU anti-subsidy investigations into EU imports of battery electric vehicles (BEVs) from China. The total number of anti-dumping and anti-subsidy investigations, across new cases opened and reviews to extend or adjust existing measures, reached a five-year high in 2022 (DG Trade 2022 Annual Report, p.2). According to a Breugel report, since 2008, the Commission has launched 342 anti-subsidy investigations against imports from China (out of a total of 431 investigations against imports from all third countries), of which 101 have been closed without countervailing duties.

[5] Speech by Executive Vice President Vestager on technology and politics, cited above.

[6] The EU Critical Raw Materials Act received final approval in March 2024; for an introduction to this legislation, see this Cleary Alert Memo.

[7] The Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) received final approval in May 2024. *See* the Cleary Alert Memo on Supply Chain Obligations for a comparative overview of the new compliance burdens in Germany, France and the EU.

[8] Speech by Executive Vice President Vestager on technology and politics, cited above.

[9] EC Press Release, "Commission carries out unannounced foreign subsidies inspections in the security equipment sector" (MEX/24/2247, April 23, 2024) and Reuters, "China's Nuctech raided in EU over foreign subsidies concerns", April 24, 2024 (source here).

[10] These public tender in-depth investigations have all since been closed, after the tenderers withdrew their bid from the process.

[11] EC Press Release, "Commission opens in-depth foreign subsidies investigation into e&'s acquisition of parts of PPF Telecom" (IP/24/3166, June 10, 2024).

[12] The EC has promised initial guidance on its distortion and balancing tests by July 2024, and formal guidelines within the FSR's first three years of operation.

[13] The Commission's impact assessment accompanying its legislative proposal ("**Impact Assessment Report**") for the FSR contains over 170 references to "China" or "Chinese" in 120 pages (Staff Working Document – Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (SWD/2021/99 final)). The China Chamber of Commerce to the EU (CCCEU) was one of only two third country stakeholders invited to participate in the Targeted Consultation organized by the Commission.

illustrate the "regulatory gap" in mergers and public tenders.[14]

State-linked companies. The EC is particularly focused on tenderers and acquirers with state connections, such as state-owned enterprises, sovereign wealth funds, and government-owned investment funds. The EC is likely to inquire into these relationships with state bodies, including ownership and governance interests, participation in management and business decisions, as well as any financial links or special legal treatment. When private investment funds are the acquirers in a transaction, the investments of any state-linked investors in the fund are nominally viewed as foreign financial contributions made for the purpose of an acquisition, so the fund should be prepared to explain whether those investments were made on the same conditions as "private" investors.[15]

Strategic sectors. Businesses active in strategic sectors should expect closer scrutiny, as the EC will be particularly interested in understanding the impact of subsidies in these markets. Even if they have no official status under the FSR, complainants could be influential in prompting investigations, particularly if they bring substantial evidence of potential subsidies and distortions.[16] Some organizations have publicly called for the EC to investigate subsidies in specific sectors such as shipyards.

Value of FFCs received relative to bid or contract value. To show that subsidies enabled an unduly advantageous tender, the EC compares the value of subsidies received to the value of the tender or the public contract. In the electric trains cases, CRRC (the investigated party) received at least EUR 1.745 billion in foreign financial contributions, which was five times larger than the value of its bid.[17] In the photovoltaic cases, the EC observed that potential foreign subsidies received were "*significantly higher*" than the contract value of EUR 375 million.[18]

Value of bid relative to rivals. Due to their commercial sensitivity, the value of the investigated tenders have not been officially disclosed but were reportedly much cheaper than the next highest bid. In the electric trains case, reports indicate that CRRC's bid was about half the value of its Spanish rival, Talgo.[19] In wind turbines, WindEurope has claimed that Chinese wind turbines may be up to 50% cheaper than Europe-made turbines, and offered on non-OECD compliant deferred payment terms.[20]

Incomplete notifications. The EC may be prompted to open in-depth investigations because it does not receive sufficient information to rule out concerns during prenotification or the short preliminary review phase. This is particularly relevant for public tenders, as an in-depth investigation extends the 20 working day preliminary review period by an additional 110 working days. In the electric trains case, the tenderer stated it had no reportable foreign financial contribution in their initial notification, which led to a request for information with a two-day deadline. In the photovoltaic cases, the bidding parties filed an initial notification that was declared "*incomplete*", and subsequently failed to show that they would not have benefited from potential subsidies granted to their parent entities, *e.g.*, by providing relevant

[14] The Commission's Impact Assessment Report makes explicit reference to the CNCC/Pirelli and CRRC/Vossloh Locomotives transactions as examples of "*potentially subsidised acquisitions*". On public procurement, the EC made reference to the example of "*overbidding*" that the Dutch Province of Overijssel provided in its response to the Public consultation on the White Paper "on levelling the playing field as regards foreign subsidies".
[15] DG Competition 100 day FSR brief, p.4
[16] In its 100 day FSR brief, DG GROW stated that "*economic operators are also invited to inform the Commission about suspicions of unnotified foreign subsidies received by their competitors*".
[17] Summary notice concerning the initiation of an in-depth investigation in case FSP.100147 (C/2024/1913).
[18] Summary notice C/2024/2830 concerning the initiation of an in-depth investigation in Case FSP.100151 (C/2024/2280), and Summary notice C/2024/2832 concerning the initiation of an in-depth investigation in Case FSP.100154 (C/2024/2287).
[19] Railway Gazette International, "*European Commission investigates whether CRRC received market-distorting subsidy*" (February 21, 2024, source here); What's up EU, "*Les trains chinois dans le viseur de la Commission*" (February 19, 2024, source here).
[20] WindEurope, "EU Starts investigation into Chinese wind turbines under new Foreign Subsidies Regulation" (April 9, 2024, source here).

information on the subsidies' specific nature, conditions, purpose or use.

Origin of funds in M&A cases. The FSR process scrutinizes M&A deals to assess if the acquirer's bid was supported by foreign subsidies. As such, parties must provide detailed information on the sources of financing for their transaction. The EC has reported that the most common type of foreign financial contributions assessed to date "*relate to the sources of financing of the notified transactions*".[21] These may include capital injections and equity contributions, or loans from state-linked banks. To limit scrutiny, parties should demonstrate that these are provided on arms-length terms. Notably, the EC's in-depth M&A case focuses on alleged subsidies that directly facilitated the transaction (an unlimited guarantee from the UAE and a loan from UAE-controlled banks).[22]

Sales and purchases from state-linked bodies. As commercial dealings with state-linked actors are commonplace (*e.g.*, leasing public buildings, utilities contracts with state-owned bodies), the notification forms exempt parties from reporting such transactions where they are on market terms. However, such transactions are relevant for determining if filing thresholds are met, and the EC expects the parties to explain in the form why they meet the filing thresholds but are not reporting any FFCs.[23]

Enforcement powers: Dawn raids

The FSR allows the EC to conduct unannounced inspections within and outside the EU "*in order to carry out the duties assigned to it*" by the FSR (Article 14 FSR). For inspections outside the EU, the EC must first inform the government of the third country and may only act if no objections are raised. Inside the EU, the EC shall inform the relevant Member State and may request national authorities to actively assist with the inspection. The EC's recent dawn raids demonstrate that it is ready to make full use of this power, in this case, by conducting unannounced inspections in two different EU Member States on the same day.[24]

Conclusion and practical advice

These cases illustrate the EC's broad margin of discretion in referring cases for an in-depth investigation. They underscore the importance – particularly in complex or sensitive cases – of pre-notification engagements to ensure a timely and predictable review process. This dialogue helps ensure the EC has the information it needs to fully evaluate the filing during the preliminary review phase, to avoid recourse to an extended review procedure. This exchange also provides the parties with early indications of possible substantive concerns. To ensure a smooth process, businesses should have information prepared and be ready to engage with the EC prior to formal notification.

The recently opened *ex officio* cases signal the EC's intention to actively target FSR enforcement action at priority areas. It shows that businesses may not be able to avoid FSR scrutiny outside of large transactions and tenders. Finally, while the EC may not use its *ex officio* powers to unwind mergers and public procurement awards it has already reviewed, the foreign financial contributions reported to it during these procedures may be taken into account for *ex officio* enforcement.[25]

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[21] DG Competition 100 day FSR brief, cited above, p.2.
[22] EC Press Release, "Commission opens in-depth foreign subsidies investigation into e&'s acquisition of parts of PPF Telecom" (IP/24/3166, June 10, 2024).
[23] DG Competition 100 day FSR brief, cited above, p.3.
[24] The Chinese company that was subject to these inspections has started litigation to contest the dawn raids and seek interim measures. See Lewis Croft, Nicholas Hirst: "*Nuctech goes to EU court over foreign subsidy raids*", MLex (May 31, 2024, source here).
[25] FSR, recital 57.