

Benelux Competition Law



things you need to know about the EU Foreign Subsidies Regulation (FSR)

Intro

The Foreign Subsidies Regulation (FSR) will have a significant impact on transactions, as it gives the European Commission greater powers to regulate financial contributions granted in non-EU countries. Our Benelux Competition team highlights five things you need to know about the FSR, which will apply from 12 July 2023. The key five things we have identified are:

#1 Game changing regulation addresses potentially distortive foreign contributions

#2 Notifiable M&A transactions must receive EC approval before they can close

#3 Public procurement bids fuelled by financial contributions are also notifiable

#4 Wide-reaching investigative powers require data monitoring and updating

#5 The regulatory scrutiny and complexity for deal making in the EU further increases

#1



The FSR addresses the distortions to the EU's internal market caused by financial contributions granted by non-EU countries to companies active in the EU.

Companies operating in the EU that receive financial support in non-EU countries should be well aware of the Foreign Subsidies Regulation (FSR). These new rules introduce an additional filing and notification obligation for companies engaging in M&A deals and public tenders. Similar to EU merger control, a transaction within or beyond the EU cannot be implemented before receiving clearance of the European Commission, as the parties are subject to a standstill obligation.

Game changing regulation addresses potentially distortive foreign contributions

According to the FSR, foreign subsidies include any form of direct or indirect financial contribution from a non-EU country. Examples are capital injections, private sector investments, loans, guarantees, tax exemptions, state loans, government contracts, support packages for COVID-19 and green initiatives such as US Inflation Reduction Act tax incentives and investment programs to reduce renewable energy costs for organisations. The purpose of the FSR is to enable the European Commission to scrutinise such foreign financial contributions (FFCs) and address any distortions of competition caused by them.

The FSR is applicable to all economic activities within the EU and covers M&A transactions, public procurement procedures and other market situations. Similar to merger control proceedings, notifiable transactions must receive Commission approval before they can close, creating a standstill obligation for companies engaging in M&A deals and public tenders.

#2



A transaction within or beyond the EU cannot be implemented before receiving clearance of the European Commission, as the parties are subject to a standstill obligation.

Notifiable M&A transactions must receive EC approval before they can close

Under the FSR, companies need to notify the European Commission of mergers, acquisitions and joint venture formations where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and the transaction involves an FFC of more than €50 million.

Before it approves the transaction, the Commission will consider whether these financial contributions constitute a subsidy, and whether that subsidy distorts the EU market. The Commission may request prior notification on any M&A transaction before their implementation if it considers it necessary to investigate the FFCs granted to the parties involved in the transaction. Mandatory notification will apply from 12 October 2023, and concerns all transactions signed as of 12 July 2023.

#3



Pending the Commission's review, the investigated bidder cannot be awarded the contract.

Public procurement bids fuelled by financial contributions are also notifiable

The Commission can also impose a mandatory filing and standstill obligation to subsidised companies participating in tender procedures for large public contracts and infrastructure projects. They have to notify the Commission when the bid involves an FFC of at least €4 million per third country and the estimated contract value is at least €250 million.

The notification must list the aggregate FFCs received over the three preceding years by the tenderer or consortium members, subsidiaries without commercial autonomy, holding companies and the main subcontractors and suppliers involved in the tender. In all other cases, tenderers must list all FFCs received and confirm that they are not notifiable. The Commission also has the right to request prior notification when the FFCs estimated value is below the notification threshold.

#4



The regulation imposes mandatory ex ante filing obligations on companies engaging in concentrations. It also gives the EC broad powers to start a review on its own initiative.

Wide-reaching investigative powers require data monitoring and updating

The Commission's third instrument is the power to conduct an ex officio investigation (at its own initiative) if it suspects that distortive foreign subsidies may be involved. Besides concluded M&A deals and public tenders, this covers market situations such as greenfield investments, and concentrations and public procurements below the thresholds. The Commission's wide range of investigative powers includes information requests, fact-finding missions and market investigations into specific sectors or types of subsidies.

The Commission can investigate foreign subsidies to ten years from the date on which they were granted. The Commission's powers under the ex officio instrument enter into force on 12 July 2023, and the FSR applies to subsidies granted in the five years prior to this date. Going forward, records of foreign subsidies should be kept updated on an ongoing basis and retained for ten years. If the Commission establishes that an existing FFC is distortive, it will balance its negative effects, in terms of the distortion, with its positive effects to determine appropriate countervailing measures or to accept commitments.

#5



The additional filing and notification obligation further complicates deal execution, on top of merger control reviews and FDI screening, and affects timelines and transaction risks.

The regulatory scrutiny and complexity for deal making in the EU further increases

The FSR comes on top of the EU merger control rules, EU competition law, foreign direct investment (FDI) control and trade defence instruments. Monitoring financial contributions significantly adds to the administrative burden of companies with activities in the EU as well as EU companies active in non-EU countries. Furthermore, the FSR can lead to increased scrutiny for mergers and acquisitions, and a prolonged public tender process. Given the FSR's broad scope, and the extent of information required, it is important for companies to prepare for its application by gathering information on all FFCs from non-EU countries granted to them as of 12 July 2018 onwards.

About the Competition team

At NautaDutilh, we understand the importance of navigating the complex landscape of competition law when it comes to joint ventures, mergers, acquisitions and other cooperations. Our team is well versed in EU and national competition law across a wide range of market sectors, allowing us to provide comprehensive and practical advice to our clients.

Contact

For further information on the FSR and its impact, please contact:



Mauricette Schaufeli Netherlands
+31 20 71 71 608
+31 6 46 92 93 79
Mauricette.Schaufeli@nautadutilh.com



Evi Mattioli Belgium
+32 2 566 8500
+32 499 69 84 79
Evi.Mattioli@nautadutilh.com



Vincent Wellens Luxembourg
+352 26 12 29 34
+352 621 15 61 78
Vincent.Wellens@nautadutilh.com

Contributors

Jurriaan Bos | Chehak Khajuria