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The Foreign Subsidies Regulation goes live – New challenges for companies and public authorities

October 12, 2023, marks the “D-day” for Regulation 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (the “FSR”). From this day on, companies become subject to the obligation to notify to the European Commission (“Commission”) transactions and participation in public tenders. The power to carry out *ex officio* procedure has been in force since July 2023. Recent reports indicate that the Commission may be inaugurating this tool soon.

1. The obligation to notify transactions

According to recent reports,¹ there are 17 M&A deals in prenotification discussions to determine whether such transactions are notifiable and what is the breadth of the information to be provided. For a transaction to be notifiable the EU target’s turnover must be above EUR 500 million and the foreign financial contributions needs to be equal or above EUR 50 million in the three years prior to the transaction.²

The definition of financial contribution is very broad, including even transactions with public authorities in the ordinary course of business. The Implementing Regulation exempts companies from the duty to provide information on such transactions, but their amount is still relevant to determine the duty to notify.³

During the pre-notification, companies can provide information as to why they consider that the financial contribution is not a “subsidy”, a notion that is very similar to that of State aid in the EU. For instance, if a loan from a State-owned bank has been granted under normal commercial terms, that will be evidence that the financial contribution is not a subsidy. This should allow the notifying party to obtain a phase-1 clearance after 25 working days. Otherwise, the Commission may have to start an in-depth review.

The FSR procedure is designed to mirror that of the EU merger control. Indeed, in the 17 transactions mentioned above there are parallel tracks between FSR and EU merger control, and the advice is indeed to keep that parallelism.

Therefore, while dealmakers should factor in also the time needed to complete the FSR procedure in their planning, the overall duration of the regulatory process should not be longer than the current planning for merger control.

2. The obligation to notify participation in public tenders

There is less visibility on how companies are preparing for the notification obligations as regards participation in public tenders. For public tenders, the threshold is EUR 250 million. If tenders are divided into lots, there is a

¹ See Mlex reporting on the online seminar organized by the Commission Directorate for Competition “Let’s Talk Competition — Unpacking the Foreign Subsidies Regulation”, Oct. 10, 2023.

² Article 20 of the FSR.

³ Commission Implementing Regulation 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, See Annex 1, Form CO-FS, Table 1, point 6.

notification obligation when an undertaking applies for a total value of more than EUR 125 million.⁴ Subcontractors and suppliers are also subject to the notification obligation.

The duty to notify rests on the companies participating in the tenders. However, the procedural channels are different from the M&A because the companies will send the notification to the contracting authorities which, in turn, will send the notification(s) to the Commission “*without delay*”.⁵ Therefore, the FSR implies the necessary cooperation also of national authorities.

Moreover, the FSR calls upon the national authorities to interact with the Commission in a number of new ways. For instance,⁶

- The contracting authority must inform the Commission when a tenderer fails to submit a notification, following a notice to do so (which triggers a rejection decision by the contracting authority, the adoption of which must also be communicated to the Commission).
- Upon request by the Commission, the contracting authority must adopt a rejection decision, when the Commission makes a finding of incomplete notification, and the party fails to remedy the breach.
- In addition, the contracting authority may not award a tender until the Commission concludes the in-depth investigation.

This novel set of obligations gives rise to a web of interactions between contracting authorities and the Commission that is yet untested. It will have to be seen how contracting authorities can cope with these new challenges.

3. Ex officio procedures

According to recent press reports,⁷ Chinese wind turbines could become the object of an ex officio investigation under the FSR. More specifically, European producers complain that Chinese wind turbine suppliers can offer much cheaper products due to subsidies received at home. A start of an ex officio investigation into this matter is more likely than pursuing complaints against the funding of football clubs by Qatar and the United Arab Emirates.⁸

4. Takeaways

It is well-known scientific fact that fishes can suffer from stress. The fish metaphor is an apt one because, according to Commissioner Vestager’s remarks, the FSR is a net designed to catch the big fish, “*because only big fish have the teeth to do damage to the internal market*”.⁹ From now on, the fisherman is indeed out for the catch. Fishes, big and small, are advised to keep calm and carry on.

⁴ Article 28 of the FSR.

⁵ Article 29, para. 2 of the FSR.

⁶ Article 29, paras 3 and 4 and Article 32 of the FSR.

⁷ Mlex article, “Chinese wind turbines may face EU foreign-subsidy probe to level the domestic playing field” (29 September 2023).

⁸ Mlex article, 13 september.

⁹ Commissioner Vestager speech, 6 march 2023.

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