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FACTSHEET FOREIGN SUBSIDIES REGULATION

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Introduction

On 12 July 2023, Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (**"Foreign Subsidies Regulation"** or **"FSR"**) entered into force. The FSR aims to strengthen the level-playing field in the EU's internal market by closing a regulatory gap. Previously, subsidies by third countries were left unregulated, whereas Member States' subsidies have been subject to the EU's State aid regime. The FSR grants the European Commission three tools to counter distortive foreign subsidies: a general investigative competence and – from 12 October 2023 – a notification obligation in public procurement, and concentration control. This factsheet provides an overview of the key elements of the FSR.

Scope and key concepts

The regulation applies to undertakings active in the EU internal market that received foreign subsidies from outside the EU. The concept of a foreign subsidy and the underlying concept of a financial contribution are essential to the functioning of the FSR.

Key concept 1: Foreign subsidy

A foreign subsidy is deemed to exist when four cumulative criteria are met:

(1) A financial contribution;
(2) The contribution is provided by a public authority from a third country outside the EU or private or foreign public entities whose actions can be attributed to a third country outside the EU ;
(3) The contribution confers a benefit;
(4) The benefit is limited to a certain undertak-ing or certain undertakings.

Key concept 2: Financial contribution

The FSR applies a wide definition to financial contributions. Financial contributions include, inter alia:

(1) The transfer of funds or liabilities;
(2) The foregoing of revenue that is otherwise due; or
(3) The provision and purchase of goods or services.

Distortive foreign subsidies

A foreign subsidy is deemed to be distortive when it is liable to improve the competitive position of an undertaking and actually or potentially negatively affects competition in the internal market. Indicators of distortion include the amount, nature, purpose and conditions of the foreign subsidy, as well as the situation of the undertaking and its activities on the internal market.

Low probability of a distortion

- Subsidy lower than EUR 4 million in 3 years
- Subsidy aimed at making good damage caused by natural disasters or exceptional occurrences

High probability of a distortion

- Subsidies granted to ailing undertakings
- Unlimited guarantees for debts or liabilities
- Export financing measures not in line with the OECD Arrangement on export credits
- Subsidies directly facilitating a concentration
- Subsidies enabling the submission of an unduly advantageous tender

Ex officio review

The European Commission may on its own initiative examine information (e.g. based on a complaint) regarding alleged foreign subsidies, open a preliminary review and, if necessary, initiate an in-depth investigation.

During the preliminary review and in-depth investigation the European Commission may request information, carry out inspections within and outside of the EU, adopt interim measures and impose fines for non-compliance.

Based on the investigation, the European Commission may take a non-objection decision, a commitment decision or a decision with redressive measures.

Non-exhaustive list of redressive measures

- Obligations to offer licensing, research results or access to infrastructure, production capabilities or essential facilities;
- Obligations to reduce capacity or market presence;
- Obligations to refrain from certain investments;
- Divestment obligations;
- The dissolution of a concentration;
- An obligation to repay the foreign subsidy;
- An obligation to adapt the undertaking's governance structure.

Notification procedure – public procurement

The FSR imposes a notification obligation on undertakings having received foreign financial contributions of EUR 4 million or more in public procurement procedures with an estimated value of EUR 250 million or more [1]. When foreign financial contributions do not meet the EUR 4 million threshold, tenderers must submit a declaration to the contracting authority enumerating certain foreign financial contributions. The contracting authority are required to transfer notifications and declarations to the European Commission.

In the notification, tenderers must report foreign financial contributions of at least EUR 1 million. Whereas financial contributions of at least EUR 1 million with a high probability of distortion must always be reported, other financial contributions must only be reported when the foreign financial contributions granted by a country amount to at least EUR 4 million.

When the European Commission receives a notification, it must carry out a preliminary review within 20 working days. If necessary, the European Commission carries out an in-depth investigation within 110 working days. In the meantime, all procedural steps may continue, except the award of the contract.

The European Commission may decide not to object or, if the foreign subsidy distorts the internal market, take a commitment decision or prohibit the award of the contract to the economic operator concerned.

Notification obligations - concentrations

The second notification obligation in the FSR is an obligation to notify concentrations where (1) at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million and the undertakings combined (2) were granted financial contributions of more than EUR 50 million from third countries.

Similarly to the public procurement notification, all financial contributions of at least EUR 1 million with a high probability of distortion must be reported whereas other financial contributions must only be reported when they originate from a third country that contributed at least EUR 45 million.

After receiving a notification, the European Commission initiates a preliminary review and, within a period of 25 working days, decides whether to open an in-depth investigation. The in-depth investigation is in principle concluded within 90 working days. In the meantime, a stand-still obligation applies.

As is the case for public procurement notifications, the European Commission may issue a non-objection decision, or when the concentration distorts the internal market, a commitment decision or a decision prohibiting a concentration.

[1] Unless the public procurement procedure is divided into lots. In that case the value of the lot(s) to which the tenderer applies must be EUR 125 million or more.

Key contacts

IIf you have any questions about the Foreign Subsidies Regulation, please do not hesitate to contact AKD's FSR specialists named below:

Pieter Kuypers
Lawyer, partner
pkuypers@akd.eu
+31 88 253 5083
+32 496 12 21 94

Tom Binder
Lawyer
tbinder@akd.eu
+31 88 253 50 57
+32 471 61 04 00

Karst Vriesendorp
Lawyer
kvriesendorp@akd.eu
+32 2 629 4275
+32 472 91 02 32

akd

benelux law firm

+31 88 253 5000
info@akd.eu
www.akd.eu