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Foreign Subsidies Regulation adopted

The Regulation on foreign subsidies distorting the internal market ("**FSR**"), a new EU tool aimed at preventing foreign subsidies from distorting competition in the internal market, was adopted on 28 November 2022.

What is it about? At present, subsidies granted by Member States must comply with stringent EU state aid rules, but there is no EU instrument to control similar subsidies granted by non-EU countries. The FSR aims to address distortions created by financial contributions that are granted by non-EU countries to companies active in the EU single market. It lays down the procedural rules for the European Commission to investigate such contributions in the context of large concentrations and bids in large public procurement procedures. The Commission is also granted powers to redress these distortions.

Under the FSR, the Commission will have different tools at its disposal to investigate a financial contribution by a public authority in a non-EU country.

A prior authorisation mechanism based on a notification must ensure a level playing field for the largest mergers and bids in large-scale public procurement procedures involving players benefiting from foreign subsidies.

Under that mechanism, companies will have to notify the Commission of, and suspend, mergers and acquisitions if one of the parties involved has an EU turnover of at least EUR 500 million and a foreign financial contribution of at least EUR 50 million is involved. For public procurement procedures, the notification threshold is a value of the procurement of least EUR 250 million and an aggregate foreign financial contribution to an operator involved in the tender of at least EUR 4 million. If an undertaking fails to comply with the notification requirement, the Commission will be able to impose fines and examine the foreign financial contribution as if it had been notified.

Generally, the Commission will be empowered to investigate foreign subsidies granted up to five years prior to the entry into force of the FSR where such subsidies distort the internal market after this entry into force. If it finds that a foreign subsidy exists and that it distorts competition, it will perform a balancing test to assess its positive and negative effects. If the negative effects outweigh the positive effects, the Commission can impose redress measures, including structural and non-structural remedies and the repayment of the foreign subsidy or to accept commitments from the undertakings concerned in order to remedy the distortion caused by the foreign subsidy.

In addition, a market investigation tool will allow the Commission to investigate other market situations, such as mergers below the threshold. Also, the FSR empowers it to conduct *ex officio* reviews on the basis of information from any source regarding concluded transactions and tenders, but such reviews cannot lead to cancellations of award decisions or the termination of contracts.

Finally, the FSR grants the Commission far-reaching investigation and sanction powers.

What's next? The FSR is expected to be published in the Official Journal shortly and will enter into force 20 days thereafter. It will be applicable six months after its entry into force. The notification obligation for M&A deals and public tenders will apply nine months after its entry into force.