

FOREIGN SUBSIDIES REGULATION

HOW WILL NEW REGULATION IMPACT AND RESHAPE THE M&A AND PUBLIC TENDER OFFERS MARKET?

I. WHAT IS THE FSR REGULATION?

On 12 January 2023 the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (hereinafter: the “FSR Regulation”) has entered into force.

The FSR Regulation, which will apply from 12 July 2023, equips the European Commission (hereinafter: the “Commission”) with new tools preventing distortion in competition of the internal (EU) market resulting from “foreign subsidies” meaning subsidies granted by the non-EU states to the entities operating on the internal market.

Wide scope of notion “foreign subsidies” combined with application of the FSR Regulation to M&A deals and public tender offers is expected to diminish the unfair advantage of beneficiaries of foreign subsidies.

II. WHY IS THE FSR REGULATION NEEDED?

Fair competition and creation of the level-playing field on the internal market has been one of the key goals within the EU. Distortions of competition resulting from subsidies granted by the EU Member States have detrimental impact on the internal market and undermine key goal - creation of a truly competitive internal market.

On the internal (EU) level such distortions are mitigated by a comprehensive set of rules concerning granting of the state aid - under the EU law, the subsidies granted by the EU Member States are subject to strict rules and close scrutiny.

While these rules effectively limit and diminish unduly distortions of the single market, they do not apply to foreign subsidies i.e., subsidies granted by the non-EU states which remain unverified.

Foreign subsidies give their beneficiaries an unfair edge when compared to other market players. For example, beneficiaries of foreign subsidies are able to present preferential rates in the public tenders or offer more attractive financial terms in the M&A transactions. This can clearly result in undercutting of competitors and distort in the long-run competition within the EU.

Therefore, amid the upcoming economic turmoil and to address the challenges to the competitiveness and transparency of the single market, the EU has passed legislation (i.e., the FSR Regulation) aimed on closing the regulatory gap pertaining to the foreign subsidies, eliminating of the distortions and finally bolstering a level playing field within the single market.

III. HOW WILL THE FSR REGULATION IMPACT M&A DEALS?

The FSR Regulation applies to all business undertakings operating on the EU market that benefit from the foreign subsidies construed as direct or indirect “financial contribution” such as:

- the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
- the foregoing of revenue that is otherwise due, such as tax exemptions or the granting



of special or exclusive rights without adequate remuneration; or

- the provision or purchase of goods or services.

Importantly such foreign subsidies are not banned as such. Their existence trigger, however additional layer of scrutiny in case of concentrations i.e., M&A deals transactions (mergers between two or more companies, acquisition of companies or assets, joint ventures) and public tenders.

The M&A deals in which respect:

- “at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million”; and
- “undertakings were granted combine aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest”.

are subject to a mandatory notification to the Commission.

Having received the notification on the transaction, the Commission has a 25 working day period of preliminary review which may be followed by an in-depth working day investigation of the deal (90 day working day review period) and may be further extended by 15 working days (under certain circumstances).

Importantly, the FSR Regulation includes a “standstill” undertaking which means that in the period of preliminary review of the notification that deal cannot be implemented. Further, if the Commission decides to carry out the in-depth investigation, the standstill obligation is also extended and the deal cannot be closed until the lapse of the 90 working days period following the opening of the in-depth investigation.

Depending on the outcome of the analysis, the Commission renders one of the following:

- a decision not to object against the transaction;
- a decision allowing the transaction subject to certain commitments of the parties to the deal aimed on remedying the distortions to the market;

OR

- a decision prohibiting a transaction if the Commission concludes that a foreign subsidy distorts the internal market.

While the turnover threshold (EUR 500 million) is rather high, the financial contribution threshold (EUR 50 million within 3 years preceding the transaction) is relatively low, especially in the light of a very broad definition of “financial contribution”. Thus, the provisions of the FSR Regulation will demand additional layer of scrutiny within the due diligence processes concerning a given transaction and will affect both the transaction documents and the timeline of the deals which fall within the scope of the FSR Regulation.

IV. WHAT ABOUT PUBLIC TENDERS?

The mandatory notification of the Commission also arises in case of certain public tenders. If a given company is engaged within the EU into the public tender, it must notify the Commission if jointly the following thresholds are met:

- the contract is equal or exceeds the value of EUR 250 million, or in case of the tender divided in lots, the value of the lot or the aggregate value of the lots applied is equal to or exceeds the value of EUR 125 million;
- the tenderer (including its subsidiaries and/or holding company) and its main subcontractors (or suppliers) involved in the same tender received aggregated foreign financial contributions of at least EUR 4 million in the three years prior to the notification.



In respect of the public tenders, the Commission carries out the preliminary review of the notification within 20 working days and may extend that time limit by 10 working days. If the Commission decides to make an in-depth review, such analysis shall be finalized within 110 working days from the date of receipt of the complete notification. If the Commission finds the foreign subsidies distorts the internal market, the Commission will render decision:

- accept the commitments and redressive measures offered by the tenderer and make them binding;
- prohibit award of the contract to the tender if the tenderer does not offer relevant commitments or if such commitments are found by the Commission as inappropriate or insufficient.

If the foreign subsidy is found by the Commission as not having distorting impact on the internal market, the Commission makes a decision authorizing the tender.

V. CAN THE COMMISSION CARRY OUT OTHER INVESTIGATIONS UNDER THE FSR REGULATION?

The FSR Regulation includes also the “catch-all” measure allowing the Commission to carry out ex officio examination of all potentially distortive foreign subsidies.

Foreign subsidies that do not exceed the EUR 4 million over the consecutive period of three years are deemed unlikely to distort the internal market.

VI. HOW TO PREPARE FOR THE FSR REGULATION’S REGIME?

Business undertakings acting on the EU market may and in-deed shall prepare themselves for the requirements stemming from the FSR Regulation.

Considering, that the Commission may instigate ex officio proceedings related to the foreign subsidies, proper tracking and collection of in-

formation regarding scope and extent of the foreign subsidies may be required even if a given company is not engaged in the public tender or M&A deal.

Companies participating in the public tenders and M&A transactions shall also consider new notification obligations and standstill requirement which would add another layer of paperwork and will affect the timeline of the given process.

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