SOMEWHAT MORE CLARITY ON THE REACH OF THE NEW FOREIGN SUBSIDIES REGULATION

EUROPEAN COMMISSION PROVIDES GUIDANCE IN QUESTION AND ANSWER

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EU Antitrust, Competition, and Trade Regulation Alert

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As of 12 October 2023, the Foreign Subsidies Regulation (FSR) will require businesses intending to undertake substantial mergers and acquisitions (M&A) or participate in major public procurement projects, to submit a notification to the European Commission (Commission) listing financial contributions they have received from third countries if certain thresholds are met. The Commission now published Questions and Answers (Q&A) clarifying issues in relation to the FSR, notably focusing on M&A transactions.

While the Q&A is not binding, it provides a good indication of how the Commission interprets the provisions of the FSR. Some of the main clarifications made in the Q&A are set out below. An implementing regulation (see our client alert here) containing further details on the content of the notification shall be adopted before 12 July 2023.

DATE OF APPLICATION OF THE NOTIFICATION REQUIREMENT

On the scope of the FSR, the Commission first clarifies that no notification is required where a notifiable M&A transaction is signed (in the Commission's words "concluded") after 12 July 2023 and closed (in the Commission's words "implemented") before 12 October 2023. However, if a notifiable M&A transaction is *closed after 12 October 2023*, the Commission will need to be notified under the FSR.

CALCULATION OF THE NOTIFICATION THRESHOLDS

The Commission considers the following to be financial contributions, which need to be taken into account for the calculation of the notification thresholds triggering the obligation to notify the Commission of an M&A transaction:

- The commercial sale of goods and services to a public body at market price;
- Exemptions from ordinary tax regimes and tax holidays granted by a third country;
- Financial contributions which could also be considered to be subsidies within the scope of the World Trade Organization Agreement on Subsidies and Countervailing Measures; and
- Financial contributions granted by European-Economic-Area or European-Free-Trade-Association countries (Iceland, Lichtenstein, and Norway).

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Financial contributions provided directly by international financial institutions such as the International Finance Corporation (part of the World Bank) do not count towards the calculation of the notification threshold because they are not attributable to a third country.

The relevant date for determining whether a financial contribution was granted within the relevant three years prior to the conclusion of the agreement, and as such has to be taken into account for calculating the notification threshold, is the date when the financial contribution was granted, i.e., when the beneficiary obtains the legal entitlement, not the date when it was received. This means:

- For grants: the date of the granting act (full amount of the grant to be allocated to that date, irrespective of the date of disbursement);
- For loans: the date of signature of the loan agreement (full amount of the loan to be allocated to that date, even if payable in multiple installments); and
- For a contract for the purchase or sale of goods or services: the date of signature of the contract (full amount to be allocated to that date).[1]

CONTENT OF THE NOTIFICATION FORM

The notification form will be annexed to the forthcoming implementing regulation. It is not yet clear whether all financial contributions that will be taken into account for calculating the notification threshold must also be reported in the notification form. However, we expect the notification form to reflect a practical approach and go a long way to lessen the reporting burden, potentially by narrowing the scope of financial obligations to be reported. The notification form is expected published prior to 12 July 2023.

Businesses will also have the possibility to request a waiver, whereby the Commission can allow businesses to submit a notification form not containing all information normally required. The Q&A now clarifies that instructions on how to make such requests will be included in the notification form.

PRE-NOTIFICATION

The Commission adds that pre-notifications (for notifiable M&A transactions and notifiable participation in public procurement projects) are welcome at any time following the adoption of the implementing regulation. Businesses planning a major M&A transaction can do so using the Directorate-General for Competition's (DG COMP) Foreign Subsidies Registry functional email address comp-fsr-registry@ec.europa.eu and may already use this email address to indicate their plans to the Commission before the adoption of the implementing regulation. Public procurement pre-notifications can be submitted to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs' (DG GROW) functional email grow-fsr-pp-notifications@ec.europa.eu. Further practical information for pre-notification contacts and notifications, such as address, means of delivery, and formalities for the submission of notifications and other documents, as well as the necessary templates (including powers of attorney) will be published on the Commission's website by the time the implementing regulation is adopted.

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COMPLAINTS

The Commission welcomes information about possible foreign subsidies that may distort the EU internal market. Where these possible distortions relate to public procurement processes, information can be submitted to DG GROW's email grow-fsr-pp-notifications@ec.europa.eu. For all other areas, the information should be submitted to DG COMP's email comp-fsr-registry@ec.europa.eu.

While the Q&A brings welcome clarifications on several important aspects of the FSR, businesses will have to wait for additional details, notably on the content of the notification, until adoption of the implementing regulation, which is expected to take place before 12 July 2023.

FOOTNOTES

[1] If the contract is a framework agreement and the price to be paid is not determined in the framework agreement but changes over time, each portion of the price should be allocated to the date on which it is fixed.

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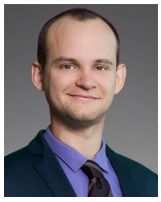

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