EU Foreign Subsidies Regulation: What You Need to Know in the Run-up to October 12

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On 10 July 2023, the European Commission (**EC**) adopted its long awaited Foreign Subsidies Regulation (**FSR**) implementing rules (the "**Implementing Regulation**").[1] The Implementing Regulation lays down, *inter alia*, the timings and procedures for notifying, and content of the notifications that will be required under the FSR. Key takeaways include:

- The FSR entered into force on 12 January 2023 and created a new regime aimed at addressing distortions caused by foreign subsidies on the EU internal market. Under the FSR, companies will have to notify the EC of certain transactions and participations in public procurement procedures meeting the relevant notification thresholds (a key limb of which is the value of any foreign financial contributions (**FFCs**) received by the relevant parties).[2]
- The mandatory notification obligation comes into effect on 12 October 2023 and, from 12 July 2023, the EC will have the power to launch an *ex officio* investigation into any foreign subsidies it considers could potentially have a distortive effect on the EU internal market.
- Despite extensive criticisms and wide-scale lobbying during the public consultation process, the Implementing Regulation has not sought to narrow the concept of what constitutes an FFC, meaning that the FSR still captures FFCs granted on pure market terms that are incapable of having distortive effects.
- As such, it remains the case that in the funds context investment commitments from non-EU Sovereign Wealth Funds (**SWFs**) or State Owned Entities (**SOEs**) will be classified as FFCs. Similarly, the revenue generated from the provision of goods/services to, or the purchase of goods or services from, foreign public (or even private, but publicly controlled) entities will also constitute FFCs (even if these sales/purchases take place on market terms in the ordinary course of business).
- While the final Implementing Regulation has not lead to a material reduction in the number of transactions or public procurement procedures subject to the mandatory notification obligation, it has significantly reduced the scope of the information that will need to be included in the majority of filings. This is particularly true for investment funds, who, subject to certain conditions being met, will no longer be required to include in the filing details regarding FFCs granted to other investment funds managed by the same investment company but with different investors (or granted to portfolio companies controlled by these other funds).
- The EC has committed to begin clarifying the concepts of "distortion" and the "balancing test", both of which have an important role in the EC's substantive assessment of notified foreign subsidies, within one year. However, the EC is only targeting publishing more fulsome guidelines on the key concepts included in the FSR "within three years". Therefore, for the time being, further clarity is only likely to come from engaging in transaction-specific consultations or pre-notification discussions with the EC.

On 6 February 2023, the EC published a draft version of the Implementing Regulation—including annexes containing the draft notification forms, i.e., the Form FS-CO (for notifiable transactions) and Form FS-PP (for notifiable public procurements)—and invited stakeholders to provide feedback by 6 March 2023. Unsurprisingly

given the negative noise that the FSR has attracted since its coming into force, during this public consultation process the EC received a large number of submissions (in excess of 150 in total) from a plethora of stakeholders, including several EU Member States (17), third country stakeholders and governments (24), business and industry associations and individual companies (c. 100), as well as law firms, academic institutions, trade unions, NGOs, other public authorities and individual citizens.

One of the more common criticisms raised by stakeholders related to the broad jurisdictional scope of the regime that flows directly from the wide definition of FFC included in the FSR. For example, the PE industry specifically raised the fact that investment commitments by limited partners (LPs) on market terms do not lead to any type of market distortion (including when the investment comes from a foreign SOE or SWF) and so should not be deemed to be an FFC. Likewise, the PE industry was also critical of the adoption of the merger control concept of "acquirer group" when calculating the quantum of any FFC received. The result being that, when assessing whether the FSR filing thresholds are exceeded, a PE entity will be required to take into account any FFCs received by all of its controlled portfolio companies (of which there could be tens, if not, hundreds), including those not otherwise involved in the transaction or that are controlled by funds in the group that are themselves not directly involved in the transaction. In particular, the PE industry raised concerns regarding the information gathering burden they would face in light of the above.

In this context, while the final version of the Implementing Regulation should be welcomed as it provides some clarity on procedural aspects and eases the information burden that companies will face when preparing the necessary notifications required under the FSR, it does not (as some hoped it would) lead to a material reduction in the number of transactions or public procurement procedures that will be subject to the mandatory notification obligation. Notably, while the scope of information required to be included in the filing for certain FFCs has been reduced, it remains the case that all FFCs received within the relevant timeframe must be taken into account for the purposes of determining whether the notification threshold is met (including FFCs that are on market terms or that have been granted to portfolio companies of different investment funds managed by the same investment company).

When it comes to easing the information provision burden, under the final Implementing Regulation, instead of the catch-all approach contained in the draft Implementing Regulation (which required details to be provided regarding all FFCs of €200k or more), a more focused approach has been adopted:

1. For notifiable **acquisitions of control**, companies have to report: (i) for "high risk" FFCs,[3] detailed information on all FFCs of an individual amount of at least €1 million granted to the parties to the transaction over the past three years; and (ii) for all other FFCs, subject to certain exceptions, an overview of FFCs granted to the parties over the past three years of an individual amount of at least €1 million and in relation only to those non-EU countries that have granted to the parties to the transaction contributions of at least €45 million over the same three year period.
2. For notifiable **public procurement procedures**, companies have to report: (i) for "high risk" FFCs, detailed information on all FFCs of an individual amount of at least €1 million granted to the parties to the transaction over the past three years; and (ii) for all other FFCs, an overview of the FFCs granted to the parties of an individual amount of at least €1 million and in relation only to those non-EU countries that have granted to each of the parties to the transaction contributions of at least €4 million per country over the same three year period.

In addition, in a concession to the PE industry, the Implementing Regulation expressly notes that, provided that certain conditions are met, investment funds are not required to include in their filings details regarding FFCs granted to other investment funds managed by the same investment company but with different investors (or granted to portfolio companies controlled by these other funds). In brief, the relevant conditions require that it be demonstrated to the EC that the fund controlling the acquiring fund is subject to financial prudential rules

(i.e., either the EU Alternative Investment Fund Managers' Directive, or an equivalent third country legislation) and that the economic and commercial transactions (e.g., sale of assets, loans, credit lines or guarantees) between the fund controlling the acquirer and these other investment funds (and their portfolio companies) are either non-existent or limited.

Likewise, to further streamline the review process (and reduce the burden on companies), there will be no need to include in filings details regarding FFCs stemming from the supply/purchase of goods/services (except financial services) that take place on market terms in the ordinary course of business. As such, by way of an example, details regarding income received via a contract with a non-EU public entity awarded in the context of a competitive tender process would not need to be included in the filing. The same applies to general tax reliefs and tax payment deferrals (or similar), provided that they are not limited to certain sectors, regions or types of companies.

Therefore, while the final Implementing Regulation is certainly a step in the right direction (particularly with respect to the level of information that needs to be included in the filing) and shows that the EC took onboard a number of the concerns raised during the public consultation process, it still falls short of providing the additional clarity that many had hoped for, with there still being many open questions when it comes to applying the FSR and precisely identifying and calculating FFCs. As such, pre-notification discussions and early engagement with the EC will continue to be an essential part of any FSR process.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

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[1] See https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/legislation_en#implementing-regulation.

[2] In high-level terms, the FSR sets out an obligation for companies to notify: (i) concentrations where the acquired company, one of the merging parties, or the joint venture is established in the EU and generates an EU turnover of at least €500 million and where the parties to the transaction were granted combined aggregate FFCs of at least €50 million over the past three years; and (ii) FFCs in public procurements procedures, where the estimated contract value is at least €250 million and the bid involves combined aggregate FFCs of at least €4 million per third country over the past three years.

[3] That is, the FFCs that are considered by the FSR as being most likely to distort the internal market (e.g., FFCs granted to ailing companies, FFCs granted in the form of unlimited guarantees and FFCs that directly facilitate the transaction).