

# COMPETITION & REGULATORY NEWSLETTER

## QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

[General competition](#)

## European Commission releases statistics on foreign subsidy regime and opens its first in-depth investigation

February has been a month of two firsts for the EU foreign subsidies regime. On 16 February 2024, the European Commission [announced](#) the launch of its first in-depth investigation under the EU Foreign Subsidies Regulation (FSR). A few days later, this was followed by the release of Commission [statistics](#) on the first 100 days of operation of the FSR regime, including an overview of general trends in notifications made under the regime and the Commission's engagement with cases.

### Background

The FSR regime empowers the Commission to investigate the effects of financial contributions granted by non-EU countries (foreign subsidies) to companies operating in the EU.

The regime created three new tools for the Commission to investigate foreign financial contributions:

- two new mandatory notification procedures allowing the Commission to assess foreign subsidies in the context of (i) large M&A transactions and (ii) large bids in public procurement procedures involving financial contributions granted by non-EU governments; and
- a general *ex officio* tool, under which the Commission has powers investigate lower-value concentrations and public procurement procedures and all other market situations, if it suspects a distortive foreign subsidy may be involved.

These tools are accompanied by powers for the Commission to fine companies and, where necessary, impose remedies to redress the distortive effects of foreign subsidies.

The FSR came into force on 12 January 2023 and started to apply from 12 July 2023, with the obligation to notify large concentrations kicking in on 12 October 2023. For more information on the FSR regime and notification requirements, please refer to our previous client [briefing](#) on this topic.

### FSR statistics: the 'first 100 days'

For further information on any EU or UK Competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

Square de Meeûs 40  
1000 Brussels  
Belgium  
T: +32 (0)2 737 94 00

One Bunhill Row  
London EC1Y 8YY  
United Kingdom  
T: +44 (0)20 7600 1200

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

The February edition of the Commission's policy brief on the FSR (the FSR Brief) contains statistics on the first 100 days following the application of the FSR notification requirement. The FSR Brief focuses on notifications made in respect of M&A transactions, for the period from 12 October 2023 to 20 January 2024.

During the period under review, there were 53 cases where the Commission received a case team allocation request and engaged in pre-notification talks with parties. The number of pre-notification discussions in this period already exceeds the 30 notifications that the Commission had estimated it would receive each year under the FSR.

Of these 53 cases:

- 14 were formally notified;
- 9 cases have been closed following an initial investigation, of which no cases were referred for an in-depth investigation;
- 33 involved cross-border EU to non-EU transactions, 7 involved a cross-border transaction within the EU, 6 involved transactions within the same EU Member State, and 7 involved a cross-border transaction outside the EU; and
- 42 pre-notified cases were also subject to a parallel assessment under the EU merger regime, 5 were subject to a national merger procedure, and 26 were subject to foreign direct investment screening in one or several Member States.

The FSR Brief notes that the most common types of foreign financial contributions assessed in the first notifications related to the sources of financing of the notified transactions. This has included, so far, capital injections and equity contributions, as well as loans obtained from financial institutions which could be considered as attributable to a non-EU country.

A 'notable trend' identified by the Commission is that a relatively large number of transactions, roughly one-third of all cases in which a case team allocation request was received, included an investment fund as a party.

## The first in-depth investigation under the FSR regime

### **Background**

Separately, the Commission has recently announced the launch of its first in-depth investigation under the FSR, in relation to a public procurement procedure.

The case relates to a notification submitted by CRRC Qingdao Sifang Locomotive Co. Ltd (CRRC Locomotive), a Chinese state-owned train manufacturer. CRRC Locomotive notified the Commission in relation to its tender in a public procurement procedure for the provision of several electric "push-pull" trains and related maintenance services. The public procurement procedure was launched by the Bulgarian Ministry of Transport and Communications, with the estimated value of the contract being around € 610 million.

After an initial review of the notification, the Commission considered that there were "*sufficient indications that this company has been granted a foreign subsidy that distorts the internal market*", considering the total amount of foreign financial contributions received by CRRC Locomotive and the fact that its bid was substantially

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

lower than the estimated costs of the contracting authority and the offer of its competitor. The Commission will further assess the effects of the alleged subsidies as part of its in-depth investigation.

### **Next steps**

The Commission has stated that the launch of this in-depth investigation “shows [its] determination to preserve the internal market’s integrity by ensuring that recipients of foreign subsidies cannot benefit from an unfair advantage to win public contracts in the EU, to the detriment of fair competition”. Interested parties have been invited to provide their views on the Commission’s investigation.

The deadline for the Commission to reach a decision is 2 July 2024. Depending on the outcome of its assessment, the Commission may issue a no-objection decision, accept commitments proposed by CRRC Locomotive if they fully and effectively address the Commission’s concerns, or prohibit the award of the contract.

The CRRC Locomotive case will be an interesting one to watch: it is expected to shed light on the Commission’s assessment of the distortive effects of foreign subsidies, which may also have implications for notifications made in relation to M&A transactions. In the meantime, the Commission has stated that it is “gaining experience”, together with notifying parties, “on the new regulatory steps in the review of concentrations” under the FSR.

## **OTHER DEVELOPMENTS**

### **MERGER CONTROL**

#### **European Commission conditionally approves joint venture between Orange and MásMóvil in Spain**

On 20 February 2024, the European Commission [announced](#) its decision to grant conditional clearance under the EU Merger Regulation to Orange’s proposed joint venture with MásMóvil. Orange is a full mobile network operator while MásMóvil is a hybrid mobile network operator. MásMóvil relies on its own mobile network, which does not cover the entire Spanish territory, and on a national roaming agreement with Orange to provide retail mobile services.

The Commission initiated an in-depth Phase 2 investigation in April 2023 following its initial concerns that the transaction may reduce competition in the retail supply of mobile and fixed broadband services as well as of multiple-play bundles in Spain. Following its Phase 2 investigation, the Commission found that Orange and MásMóvil are direct competitors in the Spanish retail markets for the supply of mobile and fixed internet services. The Commission also found that MásMóvil has been steadily growing over the years, and that its main brands have attracted a significant number of customers from Orange in Spain. The transaction would therefore create the largest operator by customer numbers in Spain and eliminate a close and important competitor. Moreover, the transaction may lead to significant price increases for consumers in Spain, and any efficiencies that the transaction could have created would not have offset the transaction’s significant anti-competitive effects.

To address the Commission’s competition concerns, Orange and MásMóvil committed to divest spectrum held by MásMóvil to Digi, the largest mobile virtual network operator in Spain, across three frequency spectrum bands. According to the Commission, this will enable Digi to build its own mobile network and exert a strong competitive constraint on the joint venture. Orange and MásMóvil also committed to entering an optional national roaming agreement with Digi. This agreement gives Digi the option to use the JV’s network to complement its own network. The optional nature of this agreement will allow Digi to choose whether to remain with its current

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

wholesale provider or to choose an alternative mobile network operator. The Commission also approved Digi as a remedy taker.

## ANTITRUST

### JFTC proposes amendments to its sustainability guidelines

On 15 February 2024, the Japan Fair Trade Commission (JFTC) [published](#) a revised draft of its guidelines on the interplay between environmental issues and competition law (Green Guidelines) for consultation. The Green Guidelines are intended to help companies ensure that their sustainability efforts are compliant with competition law. The updates come after the business community called for further clarification on the Green Guidelines, which were first published in March 2023.

In its updated draft, the JFTC added case scenarios to illustrate whether there would be antitrust concerns arising from various sustainability activities and made clarifications to some of its existing scenarios. Some themes covered in the updates are particularly helpful:

- The JFTC noted that the environmental effects of different products, for example potential reduction in greenhouse gas emissions, may be relevant when considering product market definition, with the result that a new product may not be substitutable with an existing product. However, it has clarified that such products may still exert a degree of competitive influence.
- The JFTC has added examples of situations it considers unlikely to be problematic under Japan's Antimonopoly Act even if ordinarily sensitive areas, such as production volume, are affected - for example if anti-competitive effects are limited, or there are changes in the global market situation leading to increased pressure from imports.
- The JFTC also added information on how companies should calculate and evaluate decarbonisation effects when seeking to claim that these effects are pro-competitive, such as referring to the calculation methods set out in the Act on Promotion of Global Warming Countermeasures and the Energy Saving Act.

The updated Green Guidelines are expected to provide greater clarity in antitrust compliance for businesses intending to collaborate in sustainability initiatives. The consultation is open until 18 March 2024.

## GENERAL COMPETITION

### CMA launches market study into the supply of infant formula in the UK

On 20 February 2024, the UK Competition and Markets Authority (CMA) [announced](#) that it has launched a market study into the supply of infant formula and follow-on formula in the UK, looking at both the manufacturing and retail segments of the market. This follows the CMA's initial [findings](#) on retail competition in the groceries sector published on 29 November 2023. As part of these initial findings, the CMA identified ten product categories, including baby formula, for further analysis. This market study forms part of the CMA's broader effort to examine the groceries sector and consider whether competition issues might be contributing to cost-of-living pressures for consumers.

The CMA has indicated that its market study will gather additional evidence on consumer behaviour, including drivers of consumer choice and the information available to consumers to support their decisions; the role of the

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

regulatory framework and how it influences market outcomes; and supply side features of the market, such as barriers to entry and expansion.

In its invitation to comment on the market study, the CMA indicated that infant formula is an essential, non-substitutable product and an important public health priority. The CMA noted that the market for infant formula is highly concentrated. The CMA also highlighted the weak own-label presence in the market for infant formula. The CMA further observed that the average price of infant formula has risen by 25% over the previous two years and that families could make savings of over £500 over the first year of a baby's life.

Sarah Cardell, Chief Executive of the CMA said that *“whilst it's a positive sign that prices of some products have fallen since our update last November, the cost of infant milk remains at historically high levels. We're concerned that parents don't always have the right information to make informed choices and that suppliers may not have strong incentives to offer infant formula at competitive prices”*.

The CMA is inviting comments to the market study by 13 March 2024 and intends to publish a final report by September 2023.

**London**

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

**Brussels**

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

**Hong Kong**

T +852 2521 0551

F +852 2845 2125

**Beijing**

T +86 10 5965 0600

F +86 10 5965 0650

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