

COMPETITION & REGULATORY NEWSLETTER

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POLITICAL AGREEMENT REACHED ON EU FOREIGN SUBSIDIES REGULATION

On 30 June 2022 the [Council of the European Union](#) and the [European Parliament](#) reached provisional political agreement on a regulation to control foreign subsidies that distort the EU internal market. The Foreign Subsidies Regulation, or FSR, will empower the European Commission to investigate and address the effects of distortive foreign subsidies in the EU.

BACKGROUND

Foreign subsidies can take many different forms, including zero-interest loans, unlimited state guarantees, tax exemptions or reductions in respect of foreign investments or trade or dedicated state funding.

Currently subsidies granted by Member States are subject to state aid controls, whereas there is no EU instrument that controls subsidies granted by non-EU countries. This has allowed subsidies granted by non-EU governments to go largely unchecked, resulting in a distortive impact on the internal market according to the Commission.

To address this, in May 2021 the Commission tabled a [proposal](#) for a regulation on foreign subsidies distorting the internal market. The [European Parliament](#) and the [Council of the European Union](#) voted on their respective negotiating positions on 4 May 2022, and negotiations between them on the final form of the regulation commenced the following day. They reached a provisional agreement on 30 June 2022.

WHAT DOES THE FSR ENTAIL?

Under the FSR, the Commission will have three new tools by which to investigate financial contributions granted by the public authorities of a non-EU country to companies engaging in economic activity in the EU:

- Two 'prior authorisation tools', which aim to ensure a level playing field for the largest concentrations and bids in large-scale public procurement; and
- A 'general market investigation tool', to enable the Commission to investigate lower-value concentrations and public procurement procedures and all other market situations, if it suspects a distortive foreign subsidy may be involved.

CONCENTRATIONS

Companies will be required to notify concentrations where:

- The company to be acquired, one of the acquiring parties or the joint venture generates EU turnover of at least €500 million; and
- The companies concerned received a combined financial contribution from non-EU countries of at least €50 million in the three years prior to notification.

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Concentrations cannot be completed until cleared by the Commission, and the review timetable will be similar to that for merger control (i.e. a Phase I of 25 working days and a Phase II of 90 working days for an in-depth review).

PUBLIC PROCUREMENT

Companies participating in large public tenders in EU countries - where the estimated contract value is at least €250 million - will need to notify the Commission if the bid involves a financial contribution of at least €4 million per non-EU country.

Investigations in public procurement cases will take up to 160 working days, and it will not be possible to award the contract to a bidder under investigation until the bidder has been cleared by the Commission.

GENERAL MARKET INVESTIGATION TOOL

The Commission will also be able to investigate, on its own initiative, all other market situations and to request an ad-hoc notification for smaller concentrations and public procurement procedures if it suspects that a distortive foreign subsidy may be involved.

INVESTIGATIVE AND ENFORCEMENT POWERS

The Commission's investigative powers will include the ability to request information from companies, conduct fact-finding missions and inspections and launch market investigations. It may also rely on market information submitted by Member States, or by natural or legal persons. The Commission will be empowered to investigate subsidies granted up to five years before the entry into force of the FSR.

The Commission will be empowered to impose fines of up to 10% of a company's global turnover, as well as periodic penalty payments of up to 5% of its daily turnover, for procedural infringements of the FSR, such as failing to cooperate with the Commission, failing to comply with Commission decisions, failing to notify when required to, or gun-jumping.

Exclusive competence to enforce the FSR will lie with the Commission. As under the EU state aid control framework, if the Commission finds that a distortive foreign subsidy exists, it will conduct a balancing exercise of the positive and negative effects of the foreign subsidy. If the negative effects outweigh the positive, the Commission will be able to impose a range of measures, such as repayments, divestments of assets or providing access to infrastructure. In the case of notified transactions and bids, the Commission will be able to prohibit a subsidised concentration and prohibit the award of a public contract to the subsidised bidder.

NEXT STEPS

The provisional agreement is subject to approval by the Council of the European Union and the European Parliament. The FSR will then be published in the Official Journal of the EU and will become directly applicable across the EU six months after its entry into force. The notification obligations will then start to apply nine months after its entry into force - currently anticipated to be around mid-2023.

Implementing rules will be adopted and guidelines will be published on how the Commission will assess the distortive nature of foreign subsidies and how it will conduct the balancing exercise.

CONCLUSIONS

The FSR will directly impact all companies that participate in public procurement procedures or engage in M&A in the EU that receive financial contributions from non-EU countries. Where the FSR applies to concentrations, it will add another regulatory layer to existing merger control and foreign investment scrutiny, which can be expected to lead to increased complexity and delays to deal timetables.

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OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN COMMISSION LAUNCHES CONSULTATION ON ANTITRUST PROCEDURE RULES

On 30 June 2022 the European Commission [launched](#) a public consultation and call for evidence on whether its antitrust rules (Regulation 1/2004 and its implementing Regulation 773/2004 which set out the current procedural framework for the application of Articles 101 and 102 of the TFEU) remain fit for purpose. This consultation is part of a broader evaluation of the Commission's notices and guidelines launched in the past years, including most recently the publication of revised rules on vertical agreements. The exercise aligns with the Commission's commitment to assess the effectiveness of its procedural tools in order to ensure that they are fit for what Commission Executive Vice-President Margrethe Vestager described as "*the challenges brought about by the digitisation of our economy*".

The current antitrust framework came into effect in 2004. Whilst the Commission's enforcement actions have evolved and adapted to new technologies and market changes, its procedural framework has remained largely unchanged. As part of the evaluation, the Commission is seeking to understand how the current framework has worked well, and where there is scope for more efficient procedures and effective enforcement. The consultation aims to look into topics of particular importance for the evaluation such as the Commission's investigative and enforcement powers, parties' and third parties' procedural rights, and the Commission's cooperation with national competition authorities and courts.

The Commission has issued two questionnaires - a short general questionnaire and a more detailed one containing more technical questions. Interested parties have until 6 October 2022 to respond. Alongside the public consultation, the Commission will conduct targeted consultations with Member State national competition authorities and has commissioned an external expert survey. The Commission is to publish the results of its evaluation in the form of a Staff Working Document in the second quarter of 2024.

STATE AID/SUBSIDY CONTROL

UK GOVERNMENT CONSULTS ON DRAFT SUBSIDY CONTROL ACT GUIDANCE

The UK Government's Department for Business, Energy & Industrial Strategy has published a [consultation](#) on draft statutory [guidance](#) on the UK's current Subsidy Control Act 2022, which received Royal Assent at the end of April.

The draft guidance is the latest in a number of regulations outlining how public bodies should navigate through the new subsidy regime. Other than the Subsidy Control Act 2022 itself, Government has issued *inter alia* regulations setting out which subsidies and subsidy schemes will be "*of interest and of particular interest*", and regulations modifying the powers of the Competition and Markets Authority (CMA). Until 1 January 2020, subsidy regulation in the UK was formally governed by EU state aid law. The Act, when in force, will replace the subsidy control provisions of the Trade and Co-operation Agreement between the UK and the EU which have governed subsidy control in the interim following the UK's exit from the EU. For details on the new regime, see our [previous blogpost](#).

The draft guidance aims to further explain the provisions of the Act and assist public bodies in applying and navigating the new regime. It will provide advice to help public authorities to develop subsidies and subsidy schemes that are appropriate and in compliance with the Act. It is also aimed at supporting subsidy recipients and wider stakeholders to understand the new requirements.

The draft guidance covers topics such as:

- deciding whether the financial assistance constitutes a subsidy, including the application of the four specific conditions set out in the Act;

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- assessing whether a proposed subsidy complies with the subsidy control principles;
- understanding how the *de minimis* threshold functions and should be applied, as well providing guidance on the various exemptions and permitted modifications to subsidies;
- how subsidies for Services of Public Economic Interest, such as postal services, should be provided;
- guidance on the categories of subsidy that are outright prohibited;
- the types of subsidies that public authorities will need to refer to the CMA Subsidy Advice Unit for further advice as well as the procedure for requesting a report; and
- how the regime will be enforced and what a public authority can do to recover a subsidy it believes is being misused.

The purpose of this consultation is to seek views from stakeholders on the form and content of the guidance and not the Act itself. The feedback received will inform the final version of the guidance that Government will publish ahead of implementation of the Act in autumn. The consultation closes on 10 August 2022.

GENERAL COMPETITION

CHINA PASSES REVISIONS TO ITS ANTI-MONOPOLY LAW

After over two years of consideration and consultation, the Chinese legislature [passed](#) its first amendment to the Anti-Monopoly Law (AML) on 24 June 2022, which will take effect on 1 August 2022. The revisions are broadly in line with the proposed amendments published during the previous consultations since January 2020 (as reported in a [previous client briefing](#)). Corresponding updates to detailed antitrust and merger regulations were published for consultation shortly after the revised AML was passed, with the respective consultations due to close on 27 July 2022.

Refinements have also been made to bring Chinese antitrust rules more in line with international equivalents. They include new safe harbour provisions for qualifying vertical agreements, a rebuttable presumption of illegality for resale price maintenance, express liability for facilitators of anti-competitive agreements, and language which aims to give the State Administration for Market Regulation (SAMR) the flexibility to better regulate the digital economy in future.

Penalties for AML infringements have been significantly increased. In particular, the maximum fines for gun-jumping have increased from RMB 500,000 (approximately £60,000/€70,000) to 10 per cent of turnover in the preceding year if the deal has anti-competitive effects, or RMB 5 million (approximately £600,000/€700,000) for other cases. In addition, where antitrust violations have been particularly egregious, a new “*two to five times penalty multiplier*” may be imposed to further increase the fine. Individuals in charge of Chinese businesses or responsible for a company’s anti-competitive conduct may now also find themselves personally accountable for any AML infringements.

There are also fundamental changes to the existing merger control regime. The revised AML includes a new mechanism for regulators to suspend the merger review period where more time is needed and a classification and grading system which allows better administration of merger filing reviews, including allocating cases to SAMR’s provincial or local branches. The updated draft merger thresholds regulation further proposes higher jurisdictional thresholds to better target transactions for review and a ‘catch-all’ power for ‘killer acquisitions’ that do not meet the jurisdictional thresholds.

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