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CLIENT ALERT

EU Foreign Subsidies Regulation (FSR): Summary of An Eventful Summer

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The European Commission ("***Commission***") used the summer break to progress on two key agenda items related to the EU's Foreign Subsidies Regulation[1] ("***FSR***"). On July 18, following a very short call for evidence launched in March 2025, it published the anticipated draft of its first guidelines on the application of the FSR ("***Draft Guidelines***"). The purpose of the Draft Guidelines[2] is to give stakeholders more predictability on certain FSR-specific concepts, including:

- the assessment of the existence of a distortive foreign subsidy,
- the application of the balancing test between positive and distortive effects of a foreign subsidy, and
- the identification of cases where the Commission is likely to request a filing despite the filing thresholds not being met.

1 EU Regulation 2022/2560.

2 The Draft Guidelines are available: here.

On August 12, the Commission launched the first review of the FSR, aiming to gather evidence on the application of the FSR over the last two years and prepare a review report to present to the European Parliament and the Council. The public consultation is open until mid-November 2025. [3]

Assessment of the Distortive Nature of a Foreign Subsidy

Most importantly, the Draft Guidelines intend to provide more predictability on the Commission's assessment of whether a foreign subsidy distorts the functioning of the EU's internal market.

In this regard, the Commission proceeds with a two-step test. First, a distortive foreign subsidy must be liable to improve the target company's competitive position in the internal market, i.e., it is used, intended, or directed toward economic activities within the EU. This includes subsidies explicitly supporting EU-based operations (e.g., manufacturing, distribution, or R&D for EU markets), as well as those that free up resources for EU activities. The Commission examines the subsidy's design, conditions, and possibility of cross-subsidization. The assessment considers factors such as shareholding structures, third-party agreements, and applicable laws to evaluate the likelihood of a resource transfer. For foreign subsidies "most likely to distort the internal market" identified in Article 5(1) of the FSR,[4] the Commission may presume the existence of distortion without a detailed assessment, though undertakings can provide evidence to rebut this presumption. Generally, it stems from the Draft Guidelines that the existence of foreign financial contributions to a company or its group, with current or planned activities in the EU, enables the presumption of a benefit given to the subsidized company.

The subsidy must then actually or potentially negatively affect competition in the EU's internal market. This is established by analyzing whether the subsidy alters competitive dynamics to the detriment of other market players. The Commission evaluates the foreign subsidy's impact on the level playing field, considering the target company's market position, the nature and amount of the subsidy, and the sector's characteristics. The assessment can account for the cumulative effect of multiple subsidies, and the subsidy does not need to be the only or even the main factor of the negative impact on competition. The distortion may occur in the target company's direct activities or related sectors. In that respect, the Draft Guidelines describe, as an example of distortion, the case of outbidding or deterrence in a competitive acquisition process related to the presence of a subsidized bidder.

The Balancing Test

If the Commission determines that a foreign subsidy has a negative impact on the EU's internal market, Article 6 of the FSR requires it to proceed with a balancing, weighing the negative effects against the positive contributions of the foreign subsidy to the EU's policy objectives (e.g., innovation, environmental protection, or job creation). If the positives outweigh the distortions, the Commission may proceed with a clearance, without imposing redressive

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[3] See link to the consultation: here.

[4] As a reminder, these include: subsidies granted to an ailing undertaking; unlimited guarantees for the debts or liabilities of the undertaking; export financing measures not in line with the OECD Arrangement on officially supported export credits and subsidies directly facilitating a concentration or enabling an undertaking to submit an unduly advantageous tender in a public procurement procedure.

measures. The test is applied on a case-by-case basis, considering the specific circumstances and evidence provided during the review. The Draft Guidelines confirm that the Commission retains discretion in determining the relevance and weight of the positive effects. The standard of proof for the companies is to demonstrate that any claimed benefits are substantial, verifiable, and directly linked to the subsidy.

Below Thresholds Cases

Under Articles 21(5) and 29(8) of the FSR, the Commission may request the notification of concentrations or foreign financial contributions in public procurement procedures, prior to the implementation of the concentration or the award of the public contract, even if they fall below the filing thresholds. This power is exercised when the Commission has reasonable grounds to suspect that a foreign subsidy granted in the past three years may distort the internal market, considering the subsidy's amount, nature, or the company's market behavior.

The Draft Guidelines provide some clarifications, but could become more valuable if the Commission provided more concrete examples that would help companies better assess the risks associated with the different financial flows within their group. For instance, the Draft Guidelines would benefit from the identification of nonissue cases, suggested by some stakeholders in the public consultation but not retained by the Commission so far.

Our Antitrust and Competition Teams are available to assist with any FSR-related questions.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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