

One year of the FSR: the first (in-depth) investigations and the impact on international trade dynamics

Connecting today, shaping tomorrow



On the first anniversary of the Foreign Subsidies Regulation (FSR), we reflect on the cases in which the European Commission has applied its novel regulatory tool to review and address distortions caused by foreign subsidies.

As described in our previous [update](#), the FSR consists of three pillars: the Commission can assess potential distortions following a mandatory notification by companies that (a) participate in large public tenders, (b) engage in large M&A deals, or (c) the Commission can investigate on its own initiative (*ex officio*). Based on the Commission's practice to date, we have observed two main developments: on the one hand, a determined enforcement by the Commission under the FSR and, on the other hand, an adverse effect on international trade dynamics.

This update provides an overview of the investigations initiated by the Commission so far, as well as a schedule with a more detailed description of the (still limited) substantive assessment (i.e. the type of foreign subsidies involved and the potential distortions identified).

1 The first year of FSR enforcement shows a determined Commission

One year after the entry into force of the FSR, the Commission has initiated four in-depth investigations following a mandatory notification (one in the context of an M&A deal and three in the context of a public tender) and two *ex officio* investigations. Not unexpectedly, these investigations show that the Commission has pointed its new regulatory instrument towards Chinese companies. More interestingly, these investigations shed some light (albeit limited) on the interpretation of the two important substantive concepts, namely the concept of 'foreign subsidy' and the concept of 'distortion in the internal market', as laid down in Articles 3 and 4 of the FSR respectively.

a. Three bids withdrawn following in-depth investigations into public tenders

On 16 February 2024, the Commission opened its first in-depth investigation following the notification by the indirectly state-owned Chinese rolling stock manufacturer [CRRC](#) following its bid for a public tender concerning the provision of 20 **push-pull trains**, rolling stock maintenance and staff training services. Following this case, below-market pricing strategies will play a much greater role. CRRC's bid was half the estimated value of the contract and half the value of a rival offer. This (blatant) below-market pricing, together with the total amount of foreign subsidies, which was five times larger than the value of the bid, provided sufficient indications for further investigation.

On 3 April 2024, the Commission opened two further in-depth investigations following notifications by two Chinese bidders ([Shanghai Electric](#) and [Longi](#)) in a public tender for the design, construction, and operation of a **solar panel park** in Romania. For both companies the Commission found indications of "significant potential economic advantages" resulting from foreign subsidies (amounting to at least several billion euros in the case of Shanghai Electric).

In all three cases the total amount of the foreign subsidies was significantly higher than the value of the contract or bid. The total amount of subsidies for CRRC was as much as five times the value of the bid. In its investigation of the two Chinese bidders for the solar panel park, the Commission also considered the lack of information on the financial proposal itself and on the nature, conditions, purpose or use of the foreign subsidies relevant as indications.

All three companies withdrew from the public tender shortly after the Commission initiated its in-depth investigation, well before the 110 working days deadline for the adoption of a decision.

b. One in-depth investigation into the acquisition by a foreign company of EU telecom operations

In the first 100 days after the mandatory notification regime became applicable on 12 October 2023, over 50 transactions were (pre)notified to the Commission. Out of these, 14 transactions were formally notified. The **most common FFCs** assessed in these cases included capital injections and equity contributions, loans obtained from financial institutions, as well as state guarantees, direct grants for specific projects and tax benefits (for an overview, see the Commission's first [Policy Brief](#) of 27 February 2024).

On 10 June 2024, the Commission opened its first in-depth investigation into an M&A deal, by which [e&](#), the United Arab Emirates' state-owned telecom operator, intends to acquire the **telecom operations** of the Czech conglomerate PPF Telecom Group in Bulgaria, Hungary, Serbia and Slovakia for approximately EUR 2.2 billion. The Commission is concerned that the unlimited state guarantee and the loans from state-controlled banks improved the competitive position of e& during the acquisition process and in the future, by allowing e& to obtain financing for its EU activities at preferential terms. The Commission has until 15 October 2024 to conclude its investigation.

c. Two *ex officio* investigations and the perspective of the first FSR court case

The Commission can also on its own initiative examine information regarding potential foreign subsidies that distort the internal market. These *ex officio* investigations are arguably the most powerful FSR tool, as they can cover all types of economic activities and the Commission has full discretion. In addition, the Commission has the power to start a preliminary review or in-depth investigation into foreign subsidies granted up to ten years previously, assuming these subsidies allegedly distort competition after 12 July 2023.

On 9 April 2024, the Commission announced its first *ex officio* investigation into the participation of two Chinese **wind turbine** producers (Envision and Mingyang) in five different wind procurement operations. The Commission said it would look into their activities in Spain, Greece, France, Romania and Bulgaria. With this investigation, the Commission delivers on the expectations created by the [2023 State of the Union address](#) by President von der Leyen, in which she stressed the importance of the EU wind industry, and the aspiration of the EU to counter the increasing winning of public tenders by Chinese wind turbine suppliers through aggressive pricing tactics in a sector where auctions are largely based on price.

The second *ex officio* investigation is very interesting for a number of reasons. First, the company under investigation – the Chinese **security scanner** company Nuctech – was the target of the Commission’s **first dawn raid** under the FSR. The inspection took place without prior notice on 23 April 2024 at Nuctech’s company offices in Poland and the Netherlands. The purpose of the inspection is to gather information necessary to assess whether the company has received foreign subsidies that distort the internal market. The Commission suspects that Nuctech has benefited from Chinese state subsidies enabling it to undercut rival bidders in EU tenders.

Second, on 29 May 2024, Nuctech brought the **first appeal** against the FSR inspection before the EU courts ([Case T-284/24](#)) relying on five pleas, including that the Commission’s inspection decision was unlawful because “compliance with the decision would compel the undertaking to violate Chinese law, including criminal law” and raising the ‘usual suspects’ such as an infringement of the right to privacy (Article 7 of the Charter of Fundamental Rights) and the right of defence.

Third, the company has already caused political and economic controversy due to national [security concerns over cargo screening equipment](#) (U.S.) and [airport luggage scanners](#) (Lithuania). The FSR does not provide for the possibility to take into account potential threats to national security. The ‘negative’ effects that the Commission can consider against the ‘positive effects’ of the foreign subsidies in the ‘balancing test’ under Article 6 of the FSR relate to effects ‘in terms of distortion of the internal market’, and parallel investigations of Foreign Direct Investment (FDI) only occur in the context of FSR investigations of M&A deals. However, we cannot ignore the Commission’s ability to be creative and find a way to incorporate national security considerations under the FSR.

The Commission's first substantive assessments under the FSR

| Theory | Article 3 FSR - Foreign subsidy Foreign financial contribution (FFC) conferring a benefit on the undertaking, including: | Article 4 FSR - Distortion in the internal market Where a foreign subsidy is liable to improve the competitive position of the undertaking, based on: |
|--|--|---|
| | Practice | <ul style="list-style-type: none"> • Transfer of funds or liabilities • Foregoing of revenue • Provision/purchase of goods/services |
| CRRC <ul style="list-style-type: none"> • Public procurement contracts of over EUR 7,5 billion, where CRRC failed to prove these contracts were awarded on competitive market conditions • Government grants of EUR 804 million accounted for as deferred income • Grants not closely related to company's business of EUR 941 million | | <ul style="list-style-type: none"> • Total amount of foreign subsidies of EUR 1.745 billion (five times larger than value of bid) |
| <ul style="list-style-type: none"> • Government grants and financing • Tax refunds, fiscal incentives and levies • Sale of goods and provision of EUR 546 million (for Shanghai Electric). | | <ul style="list-style-type: none"> • The absolute amount of potential foreign subsidies significantly higher than the contract value (recital 19 FSR), and the Commission is not given insight into the financial proposal of the tender • No information provided on the nature, conditions, purpose or use of foreign subsidies, and no proof of limiting cross-subsidisation • Financial support from group entities and loss-making characteristics of the parent company's foreign operations (additional indications) |
| e& <ul style="list-style-type: none"> • Unlimited guarantee, which derives notably from exemption of e& from applicable UAE Bankruptcy Law • Term loan granted by five state-owned banks • Other FFCs preliminary identified as 'foreign subsidies' (notably in relation to awarded contracts) | | <ul style="list-style-type: none"> • Unlimited guarantee and term loan likely to directly facilitate the transaction and liable to improve competitive position afterwards by allowing to raise financing for EU activities at preferential terms • Preliminary identified subsidies liable to improve competitive position of e& on the internal market • Preliminary identified subsidies likely to have improved competitive position in the acquisition process (further review in particular in view of existence of potential other interested buyers and whether e& would have been able to acquire on the same conditions without the relevant subsidies). |

2

...and further increases tensions in international trade dynamics

The safeguard of EU interests and the focus on Chinese companies appear to act as a catalyst for growing tensions between the EU and China. The China Chamber of Commerce to the EU (CCCEU) has been very vocal about its dissatisfaction with the use of the FSR as (in its own words) “a new tool of economic coercion to interfere with the reasonable and lawful economic operations of Chinese enterprises in the EU”.

More recently, the discontent has moved beyond vocal criticism to political and economic retaliation. For example, on 27 June, China’s Ministry of Commerce (MOFCOM) announced that it is reviewing a request from its national industry to launch a ‘barrier investigation’ into the Commission’s enforcement of the FSR. Chinese lobby groups and companies are urging their government to take the necessary countermeasures and are warning EU exports (in particular agricultural exports) to expect a range of retaliatory measures if the Commission continues its “selective transparency and potentially discriminatory application of the FSR”.

Our Competition team

At NautaDutilh, we understand the importance of navigating the complex landscape of competition law when it comes to joint ventures, mergers, acquisitions and other cooperations. Our team is well versed in EU and national competition law across a wide range of sectors, allowing us to provide comprehensive and practical advice to our clients.

Contact

For further information on the FSR and its impact, please contact:



Mauricette Schaufeli | partner | Netherlands

+31 6 46 92 93 79

mauricette.schaufeli@nautadutilh.com



Evi Mattioli | senior associate | Belgium

+32 499 69 84 79

evi.mattioli@nautadutilh.com



Vincent Wellens | partner | Luxembourg

+31 6 46 92 93 79

vincent.wellens@nautadutilh.com

Contributor – Céline Hennink