EU Foreign Subsidies Regime Ramps Up

May impact timing on deals signed from today

Deals signing from 12 July that will complete on or after 12 October 2023 have a new potential regulatory hurdle to contend with: the EU Foreign Subsidies Regulation (**FSR**). The FSR regime introduces a notification requirement that is both mandatory and suspensory. Qualifying deals must be notified to the European Commission (**EC**) and are barred from completing until approved. FSR clearance must now therefore be considered alongside factors such as antitrust and foreign investment approvals when assessing conditionality or closing timelines.

The FSR regime is designed to prohibit only those transactions that create a distortion within the EU internal market as a result of subsidies from non-EU countries. However, the regulatory net of the notification requirement is cast very wide. It catches transactions where one or more parties have received a "**financial contribution**". This concept is broadly defined—and extends well beyond the type of subsidies that the FSR is meant to address—to include capital contributions, investments, loans, guarantees and even the provision of goods and services by a non-EU country (or an entity controlled by a non-EU country).

Failing to notify a relevant transaction or "gun-jumping"—*i.e.* closing without approval—may result in high fines (up to 10% of worldwide group turnover).

What transactions are caught?

Most M&A deals are potentially in scope: the FSR applies in situations where there is a lasting change in control, such as acquisitions, mergers and certain joint-ventures.

Consequently, deal-makers should ascertain at the earliest possible stage whether a transaction meets the FSR thresholds. The regime captures all deals where:

1. the target, one of the merging parties or the JV generates annual **EU turnover** of at least **€500 million**; <u>and</u>
2. the transaction parties were granted combined **financial contributions** of more than **€50 million** from non-EU countries in the last three years.

The annual **turnover** threshold is intended to ensure that the FSR applies only to larger M&A deals with a clear EU nexus. This is likely to be the most common—and certainly the most straightforward—way to rule out the need for FSR approval.

By comparison, the threshold for **financial contributions** is set at a low level and covers a longer period (three years prior to signing or announcement). Assessing whether this second threshold is met will be a highly technical exercise, particularly for PE houses and financial sponsors, who will need to examine their entire portfolio of controlled entities.

What information must be disclosed?

The EC has published implementing regulations which set out in detail the information that needs to be disclosed, including as to the financial contributions received in the preceding three years.

For instance, in the case of acquisitions made by regulated investment fund groups, the disclosure of financial contributions can be limited to those received by the acquiring fund provided the wider group has not received any special categories of financial contributions (which are more likely to constitute distortive subsidies).

How long will FSR approval take?

It is not yet clear how long FSR approvals will take in practice. Formally, the EC will have an initial period of 25 business days after receiving a "complete" notification to determine whether one or more of the relevant financial contributions amount to foreign subsidies that distort the EU's internal market. If concerns cannot be excluded during this initial period, the EC will launch an in-depth investigation that can take an additional 90 business days (extendable by 15 business days).

What is not yet known is how long the EC will take to accept a notification as "complete"—in the EU antitrust context, the equivalent pre-notification period can take anywhere from several weeks to several months (or longer). Given that the regime is new, it would be prudent to allow more time for notification, as the EC will be grappling with novel questions on the level of disclosure required.

Who do I contact?

Simpson Thacher's market-leading European antitrust & foreign investment team can help clients successfully navigate the EU's FSR regime.

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