

EU Foreign Subsidies Regulation

Foreign Subsidies, timing & rationale

What - A new **standalone control framework** based on an open-ended definition whereby “a foreign subsidy shall be deemed to exist, where a **non-EU country** provides, directly or indirectly, a financial **contribution which confers a benefit** on an undertaking engaging in an economic activity in the internal EU market and which is limited, in law or in fact, to one or more undertakings or industries” - Think also of tax exemptions & reliefs, any mitigation of charges normally included in the budget of an undertaking, etc.

Who - Any undertaking with activities in the EU which receives support from **outside of the EU**

When - First ex officio investigation by European Commission as from **12 July 2023** and notification duty as from **12 October 2023**

Why - To make the EU more competitive

Ex Officio review / notification duty

3 tools to assess foreign subsidies:

- I. **Notification duty in M&A transactions:**
Concentrations involving a financial contribution by a non-EU government, where the EU turnover of the merging company, acquired company or the joint venture is at least €500 million and the foreign financial contribution is above €50 million
- II. **Notification duty in public tenders:** Bids in public procurements involving a financial contribution by a non-EU government, where the estimated value of the procurement is at least €250 million
- III. **Ex Officio review (not limited to M&A and tenders!):**
Review and request ad-hoc notifications by the European Commission into all other market situations, and smaller concentrations and public procurement procedures

Measures & takeaways

If the European Commission finds that there (i) exists a foreign subsidy that meets certain thresholds, that (ii) it has a distortive effect on the internal market, and that (iii) it is not balanced with the positive effects of the subsidy, it may impose a variety of measures such as:

- Interim measures pending final review
- Fine of up to 10% of the aggregated turnover for non-compliance with standstill obligation;
- Prohibition to implement concentration or award a contract in the public bid;
- Repayment of the subsidy;
- Great variety of limitations to the companies involved (“commitments”).

Main takeaways:

- Uncertainty in the first years is expected
- Additional compliance burden on international groups of companies
- Not just in M&A or public tenders!

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How can PwC Legal help you?

Mapping of 'foreign subsidies' risks within your organisation

- Assistance in determining which financial contributions of third countries qualify as a 'foreign subsidy' - definition of essential parameters tailored to your organisation or assessment on a case-by-case basis;
- Setting-up a continuous monitoring process;
- Risk assessment on (i) whether applicable thresholds are met and (ii) the potential distortions on the internal market

Applicability assessment of notification duties and related assistance

- Analysing whether a notification duty is / may be applicable to your envisaged transaction (concentration or public tender);
- Preparation of the notification and related documentation to the European Commission, in joint cooperation with your teams;

Risk management in transaction documentation

- Advice on the most appropriate way to mitigate any identified foreign subsidies risks in your transaction agreements and adaptation of existing review processes for M&A transactions
- Drafting/reviewing of the relevant contractual arrangements with respect to EU Foreign Subsidies, such as conditions precedent, representations and warranties, cooperation obligations, etc., also taking into account the intended timing of your transaction