

COMPETITION & REGULATORY NEWSLETTER

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European Commission issues draft Foreign Subsidies Implementing Regulation

On 6 February 2023, the European Commission published a [draft Implementing Regulation](#) containing detailed rules and procedures for the application of the new EU Regulation on foreign subsidies. The draft text provides clarity on the practical aspects of the new regime, including the notification thresholds for foreign subsidies and the possibility to engage in pre-notification discussions with the Commission.

BACKGROUND

As reported in a previous [edition](#) of this newsletter, the EU [Foreign Subsidies Regulation](#) (FSR) entered into force on [12 January 2023](#). The new regime empowers the Commission to investigate, for the first time, the effects of financial contributions granted by non-EU countries (foreign subsidies) to companies operating in the EU.

The FSR establishes three new tools for the Commission:

- two ‘mandatory notification tools’ which aim to ensure a level playing field for large M&A transactions, as well as 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.

These tools are accompanied by new powers for the Commission to fine companies and, where necessary, impose remedies to redress the distortive effects of foreign subsidies. Details of the new regime, including the Commission’s powers, were covered in a previous [edition](#) of this newsletter.

The FSR will start to apply as of 12 July 2023, and the notification obligation for companies will be effective from 12 October 2023. The draft Implementing Regulation recently published by the Commission aims to clarify the practical and procedural aspects of the new FSR regime.

WHAT DOES THE IMPLEMENTING REGULATION COVER?

The draft Implementing Regulation sets out the detailed rules for the submission of FSR notifications to the Commission in the context of acquisitions, mergers and other concentrations, as well as for public procurement procedures.

NOTIFICATION REQUIREMENTS

The draft Implementing Regulation sets out both the standardised form which notifications should take and the information required in such notifications. In overview, this includes:

- detailed information on the foreign financial contributions received by the relevant parties over the past three years;

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- information to facilitate the Commission's assessment of the potential distortive effects of such foreign contributions on the internal market, as well as potential positive effects (e.g. effects in line with the EU's policy objectives); and
- supporting evidence in each case.

This information would not typically feature in EU or national Member State merger control filings and may not be straightforward to gather in practice. Companies participating in M&A transactions or procurement procedures in the EU should therefore be aware of the additional document collection work and administrative burden that will be generated by the application of the FSR.

The draft Implementing Regulation introduces some minimum thresholds as regards the foreign subsidies that must be notified:

- For concentrations, foreign financial contributions need to be notified if the individual amount of the contribution is equal to or in excess of €200,000, and the total amount of contributions per third country and per year exceeds or is equal to €4 million.
- For public procurement processes, foreign financial contributions need to be notified if their aggregate amount is equal to or exceeds €4 million per third country in the three years prior to the notification.

In practice, calculating the total amount of foreign contributions (broadly defined) received over the past three years may prove challenging for many notifying parties.

WAIVER REQUESTS AND PRE-NOTIFICATION ENGAGEMENT WITH THE COMMISSION

The draft Implementing Regulation contemplates that parties will be able to request a waiver from providing any of the information in the notification form, where the relevant information is not reasonably available to them and/or where that information is not necessary for the Commission's examination of the case.

The Commission expressly invites parties to participate in pre-notification discussions: *"while not mandatory, pre-notification contacts can be extremely valuable to both the notifying party(ies) and the Commission in determining, among other things, the precise amount of information required in a Notification Form and may result in a significant reduction in the information required"*. From a practical perspective, early engagement with the Commission will therefore be desirable to reduce the additional administrative work resulting from the new FSR regime.

TIMELINE AND REMEDIES

The draft Implementing Regulation sets out the time limits for the various stages of the Commission's review, including the equivalent of the Phase 1 and Phase 2 (in-depth investigation) stages. On the remedies front, the draft Implementing Regulation provides that companies will be able to submit commitments to the Commission 65 days (or 50 days for public procurement processes) at the latest from the date when an in-depth investigation has been initiated by the Commission.

OTHER PROVISIONS

The draft Implementing Regulation also contains detailed rules in relation to:

- rights of defence and access to file;
- the Commission's use of confidential information; and
- the Commission's powers in respect of interviews and inspections.

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KEY TAKEAWAYS AND NEXT STEPS

The FSR regime will likely generate practical difficulties for notifying parties, who will be expected to gather and submit potentially sensitive information that goes beyond what is required under the established EU merger review process. The Commission's willingness to grant waiver requests will likely play a key part in agreeing a practical approach with the Commission - whether this will be impacted by the Commission's resourcing constraints remains to be seen.

Interested parties have until 6 March 2023 to [provide their feedback](#) on the draft version of the Implementing Regulation. This feedback will then be considered by the Commission when shaping the final version of the text, with a view to formally adopting the rules in the second quarter of 2023 before the FSR comes into effect.

OTHER DEVELOPMENTS

ANTITRUST

BMW AG WINS APPEAL OVER CMA INFORMATION REQUEST

On 8 February 2023, BMW AG [won an appeal](#) in the UK Competition Appeal Tribunal (CAT) over the Competition and Market Authority's (CMA) powers to obtain information from companies not having a UK territorial connection. The CMA is investigating BMW, and several other vehicle manufacturers and trade associations, for suspected anti-competitive conduct relating to recycling end-of-life vehicles. As part of its investigation, the CMA requested information both from BMW UK and BMW AG which is the company's main corporate entity based in Germany. This request was issued under Section 26 of the UK's Competition Act, granting the CMA the power to require any person to respond to requests for information. BMW AG refused to comply with this information request on the basis that the CMA had no power to obtain information from a foreign-domiciled company with no UK presence.

On 6 December 2022, the CMA fined BMW AG £30,000 for non-compliance with the information request and imposed a £15,000 daily penalty for every day the request was not complied with. This was the first daily fine imposed by the CMA for failure to respond to a request for information. BMW AG appealed this penalty decision.

The CAT ruled that the decision to issue a Section 26 notice and the decision to impose a penalty in respect of foreign-domiciled companies with no presence in the UK in relation to the production of specified documents and information held by those companies outside the jurisdiction was *ultra vires* Section 26. It said the CMA's construction renders Section 26 "*aggressively extraterritorial*" and is "*obviously wrong*".

BMW AG's application before the CAT was case managed and heard together with a claim for judicial review before the High Court brought by Volkswagen AG against a CMA decision of 29 April 2022 to also issue Volkswagen AG with a Section 26 notice. In light of the common issues, the CAT and the High Court handed down a single judgment in which both the appeal and the judicial review succeeded.

The CMA announced that it will seek permission to appeal the judgment, and in the ruling itself, the CAT indicated that it was minded to grant such permission. For now, the ruling is a clear signal of the limits of the CMA's investigatory powers and the difficulty it faces in investigating multi-national companies in the post-Brexit era. (For further details, see also our [blog post](#) on this ruling.)

REGULATORY

FINANCIAL CONDUCT AUTHORITY SENDS PRICE-FIXING STATEMENT OF OBJECTIONS TO MONEY-TRANSFER FIRMS

On 25 January 2023, the UK Financial Conduct Authority (FCA) [announced](#) that it has sent a Statement of Objections (SO) to three Glasgow-based money-transfer companies provisionally alleging that these companies

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colluded to fix exchange rates offered to consumers for converting UK Pounds into Pakistani Rupees between 18 February and 31 May 2017.

The FCA also provisionally alleged that during the same timeframe, the companies colluded to set the flat rate transaction fee which customers were charged for sending money to Pakistan. The FCA outlined its concerns that consumers in Glasgow may have been overcharged for such transactions as a result of this action. The FCA further noted that it provisionally considers that the alleged infringement relates to the provision of in-store services only - so not affecting online services offered by the parties.

The FCA stated that it would not make its SO public and will only announce further details once the final decision is made. The companies now have the opportunity to respond to the SO through written and oral representations. The FCA did not set out an expected timeline for its final decision.

The FCA has had the power to enforce competition law in the regulated financial services sector alongside the CMA since 2015. Thus far, it has only publicly announced that it has sent one other SO. That [investigation](#) led to the FCA, in 2019, issuing fines against two asset management groups for sharing strategic information during a placing and an IPO. The new SO signals that the FCA will continue to monitor firms for competition law compliance.

STATE AID

EUROPEAN COMMISSION CONSULTS ON DRAFT TO AMEND THE STATE AID TEMPORARY CRISIS FRAMEWORK

The European Commission [announced](#) on 1 February 2023 that it is consulting EU Member States on a draft proposal to amend the State aid Temporary Crisis Framework to accelerate Europe's green transition.

The Temporary Crisis Framework was adopted in March 2022 in response to the Russian war against Ukraine and has been amended since to address the energy crisis. The Framework currently provides for the following types of aid: (i) limited amounts of aid for companies affected by Russia's war in Ukraine; (ii) liquidity support through State guarantees and subsidised loans; (iii) aid to compensate companies for high energy prices, particularly energy intensive companies; (iv) measures accelerating the roll-out of renewable energy; (v) measures facilitating the decarbonisation of industrial processes; and (vi) measures aimed at supporting electricity demand reduction. These measures are in place until 31 December 2023.

The new consultation, which is part of the Green Deal Industrial Plan, is aimed at boosting investments for a rapid roll-out of renewable energies. It also envisages supporting the decarbonisation of industry and production of equipment which is vital for the net-zero transition. In particular, it proposes the following amendments:

- further facilitating the roll-out of renewable energy and decarbonising the industry by including the possibility for Member States to (i) support the deployment of all renewable energy sources; (ii) grant aid for less mature technologies e.g. renewable hydrogen without competitive bidding, provided safeguards are in place; and (iii) incentivise investment leading to a reduction in emission by including higher aid ceilings and simplified aid calculations; and
- addressing investment gaps in sectors strategic for the green transition by allowing support for the production of batteries, solar panels, wind turbines, heat-pumps, electrolysers and carbon capture usage and storage.

These new provisions would be in place until 31 December 2025. Member States are now invited to comment on the Commission's proposal and the Commission expects to be able to adopt the amended Framework in the coming weeks.

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