#legal spotlight

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Foreign Subsidies Regulation – Q&A update by the European Commission

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What happened so far?

- The Foreign Subsidies Regulation ("**FSR**") aims to tackle impediments to effective competition by third country (= non-EU) subsidies.
- Companies might – provided certain turnover and subsidies thresholds are met – be obliged to notify transactions with the European Commission ("Commission") and refrain from their consummation until clearance (= standstill obligation).
- The information which must be provided to the Commission for the assessment is specified by the Form "FS-CO" of the Implementing Regulation (EU) 2023/1441.
- An important source of information on this new instrument is the – albeit non-binding – **Q&A catalogue** of the Commission. This has on 9 April 2024 been updated with further clarifications.

Lower burdens for dealmakers? (1/4)

- Clarifications on determining the relevant subsidy threshold pursuant to Art 20(3)(b) FSR reconfirm the regimes broad scope:
  - **All** (!) foreign financial contributions granted in the last three years prior to the transaction must be considered for the calculation of the thresholds, even if Form FS-CO does exceptionally not provide for an information obligation on the specific contributions (cf. question no. 3 Q&A).
  - Also, foreign financial contributions granted to a company or business which has in the meantime been divested or closed have to be taken into account (cf. question no. 8 Q&A).

Lower burdens for dealmakers? (2/4)

- While contributions to another investment fund managed by the same investment company have not to be considered if such fund is not part of the specific transaction, this exception only applies if the fund is subject to Directive 2011/61/EU or equivalent third country legislation (cf. point 7(a) of the instructions to Table 1 in Form FS-CO).
- To demonstrate equivalence (with Directive 2011/61/EU) companies should provide evidence that the third country legislation in question includes sufficient guarantees to prevent **cross-subsidization between funds** (cf. question no. 23 Q&A).

Lower burdens for dealmakers? (3/4)

- Equivalence comprises inter alia the following aspects (cf. question no. 23 Q&A):
  - Assurances concerning an adequate monitoring of cash flows and adequate internal control mechanisms;
  - Appropriate procedures for safe keeping and independent valuation of the funds' assets;
  - Transparency requirements;
  - Measures to prevent or minimize conflicts of interest;
  - An adequate risk management system;
  - Rules ensuring fair treatment of investors, and
  - Provisions ensuring the active supervision of those funds by competent authorities.

Lower burdens for dealmakers? (4/4)

- Clarification on foreign subsidies "directly facilitating **a concentration**" (cf. question no. 27 Q&A)
  - The assessment of whether a foreign subsidy distorts the internal market is limited to the concentration in question. A possible foreign subsidy that directly facilitates **another concentration** is therefore not included in the investigation of the notified concentration.

What is next?

- The FSR has an immediate impact: In the first few months after its coming into force, the Commission has already received dozens of notifications. The first in-depth FSR inquiries are also already underway.
- While the Commission's (updated) Q&A provide some important guidance, the recent clarifications also reinforce the broad scope of the regime and the narrow interpretation of exceptions.
- Companies should therefore put efficient processes into place to record foreign subsidies to be prepared for future deals.

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