Tax Policy Alert

European Commission policy brief explores first 100 days of Foreign Subsidies Regulation reporting

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In brief

What happened?

The European Commission's Directorate-General for Competition (DG COMP) has published a policy brief that provides comments on the Foreign Subsidies Regulation (FSR) requirements and first cases the Directorate has addressed in the 100 days since the reporting regime began.

Why is it relevant?

The brief provides statistics on the 53 notifications received in that period, as well as clarifications on some recurring issues that have arisen in the context of notifications, such as how to properly categorise relevant advantages provided by non-EU countries, i.e., Foreign Financial Contributions (FFCs), how to report those identified as most likely to distort the internal market, and how to interpret some of the exceptions to the obligation to report certain FFCs.

Action to consider

Multinationals are encouraged to perform an in-depth strategic review and develop a compliance roadmap promptly. The FSR gives the European Commission (Commission) far-reaching powers to potentially delay or block M&A transactions and public procurement bids or impose significant redressive measures. In addition, the FSR gives the Commission wide ex-officio investigative powers in all other situations and the same ability to impose redressive measures.

In detail

Overview

The FSR is a new EU legal framework that aims to address the distortive effects of subsidies granted by non-EU, so-called third countries to undertakings active in the EU internal market. It entered into force on 12 July 2023 and introduced an obligation to notify certain large concentrations involving FFCs from 12 October 2023 onwards.

The FSR allows the Commission to scrutinise FFCs through different types of procedures relating to concentrations/M&A transactions and public procurement bids, ex officio investigations and wider market investigations.

Once they meet group EU turnover and FFC thresholds, including the nuances set out in the Implementing Regulations, multinationals must report detailed global data generally looking back three years, and may be surprised to find that they have a large number of FFCs that contribute to the thresholds and/or are reportable.

PwC Observations: FFCs would potentially include, for example:

- s*ubsidies of any kind:* guarantees; exclusive rights without proper remuneration; grants
- *financial assistance:* such as loans, financing, and repayable advances; risk capital instruments; equity intervention; and debt write-offs
- *tax advantages:* a wide range of benefits where tax has been foregone, from differences in the general tax base or rate through to specific incentives (such as environmental sustainability incentives, or credits utilised under the US Inflation Reduction Act or the OECD's Pillar Two global minimum tax initiative).

Initial case statistics

In the first 100 days of the notification obligation, the Commission received case team allocation requests for, and engaged in pre-notification talks with, the notifying parties in 53 cases. These covered a broad range of sectors, from basic industries to high-tech and digital services. Of these 53 cases, 14 have been formally notified, and of these 14, 9 have been fully assessed and cleared by the Commission. In one case, the notifying parties decided not to proceed with the transaction and abandoned the case in pre-notification. Most of the notified cases have also been subject to parallel assessment under the EU Merger Regulation (EUMR) or a national merger procedure.

Difference between FFCs and subsidies

The policy brief also explains the difference between FFCs and foreign subsidies, as the former is a broader concept that includes any transfers of funds or liabilities, any foregoing of revenue, or any provision or purchase of goods and services by a third country. In contrast, the latter is a narrower concept that includes only FFCs that confer a benefit and are limited to a certain undertaking or group of undertakings.

The presence of FFCs (and not foreign subsidies) is relevant for determining the obligation to notify, whereas the existence and the distortive effects of foreign subsidies are relevant for the Commission's assessment of the concentration.

Practical guidance

The policy brief provides some practical guidance for notifying parties "to ensure a timely and smooth assessment" of their transactions under the FSR. These are in addition to the Q&A document published by DG COMP on its

website, which contains clarifications and practical information related to procedural, implementation and practical application of the FSR.

PwC Observation: It is not just tax advantages that are reportable or that count toward various thresholds set out in the FSR, but they are the most difficult to assess. Multinationals may need to develop new processes and resource plans to gather data from systems such as enterprise-wide systems, particularly given that this new data may be difficult to collect. The increasing reporting obligations may also make it worthwhile considering an integrated approach to tax data reporting and compliance (see our Connected Tax Compliance approach). Cross-functional coordination between, for example, Tax, Legal, Business Development, Finance, Supply Chain, and M&A teams will likely also be needed for FSR data collection, analysis, and reporting.

See also

- Cross-border Tax Talks: EU's Foreign Subsidies Regulation: State Aid goes global
- Tax Policy Alert: EU Foreign Subsidies Regulation (FSR): new guidance on notification procedures offers some streamlining

Let's talk

For a deeper discussion of how the EU FSR might affect your business, please contact:

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