

LEGAL UPDATE ON THE NEW FOREIGN SUBSIDIES REGULATION (FSR)

On Monday 28 November, 2022, the European Council formally adopted the new **Foreign Subsidies Regulation** (“**FSR**”), aimed at tackling foreign subsidies which have the potential to distort the internal market. While the FSR also applies to public procurements / public bids, this update focuses on the impact of the regime on M&A transactions only.

The FSR introduces a **new mandatory and suspensory notification obligation** where a transaction results in a **concentration** and meets certain **thresholds**. This obligation will arise towards the end of 2023.

NOTIFIABLE TRANSACTIONS

Merger of two or more independent undertakings

OR

Acquisition of control

OR

Full function JV

ACQUISITION / MERGER THRESHOLDS

- At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates an aggregate turnover in the EU of €500m in the preceding financial year;

AND

- In aggregate, all undertakings concerned received **financial contributions** of more than €50m from **non-EU and non-EFTA countries** in the three financial years prior to notification.

FINANCIAL CONTRIBUTIONS

The transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; the foregoing of revenue that is otherwise due; or the provision of goods or services or the purchase of goods and services etc.

IMPACT ON TRANSACTION TIMING

Pre-notification

Initial review period
(25 working days)

Subsequent review period
(90 working days - subject to extensions)

THIS COULD RESULT IN A 3-4 MONTH PROCESS (OR LONGER).

IMPLICATIONS FOR FAILURE TO FILE

Fines of up to 1% of the aggregate turnover for process errors.

Fines of up to 10% of the aggregate turnover for non-compliance (e.g., with a Commission decision imposing commitments, interim or redressive measures, or for certain infringements relating to notifications of transactions).

Periodic penalty payments of up to 5% of the average daily aggregate turnover of the undertaking in the preceding financial year for each working day of delay or non-compliance.

HOW YOU CAN PREPARE

SPONSORS

- Start working with your financial advisors to identify and compile a record of financial contributions from non-EU and non-EFTA countries (or state-owned enterprises, such as sovereign wealth funds) to your entire controlled portfolio over the last three financial years and assess whether they were received on market terms.
- Put in place a tracking system and a reporting obligation for investments going forward to assess against the FSR.
- Where applicable, contractual provisions will need to reflect FSR conditionality including an appropriate long-stop date.

SOVEREIGN WEALTH FUNDS (SWFs)

- Where co-investing in a transaction where the lead sponsor triggers an FSR filing, sponsors and/or the EC may request information from you.
- Determine if financial contributions to investors were provided on market terms.
- Where applicable, contractual provisions will need to reflect FSR conditionality including an appropriate long-stop date.