NEWSLETTER

NISHIMURA & ASAHI

The EU Foreign Subsidies Regulation Implementation: Insights and Next Steps

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I Introduction

The EU Foreign Subsidies Regulation ("**FSR**" or the "**Regulation**") is a critical addition to the EU's toolkit for ensuring fair competition. By addressing distortive foreign subsidies, the FSR completes the set of competition law and international trade law tools. As highlighted in previous newsletters,[1] the Regulation entered into force on 12 January 2023, with full application starting on 12 July 2023, enabling the Commission to launch *ex officio* investigations. Since 12 October 2023, the notification requirements have applied to mergers and public procurements above certain thresholds.

Now, more than a year after the notification requirements entered into force, this newsletter examines the European Commission's implementation of the FSR to date (Section II). We also analyze key statistics, the industries in focus, emerging trends, and case studies that provide a clearer picture of how the Regulation is reshaping the competitive landscape. We also present interesting opportunities for advocacy arising from the next legislative steps (Section III).

II Overview of the FSR Implementation

1. The FSR in numbers (as of 30 September 2024)

(1) 3 to 4 times more notifications than expected

Data released just before the one-year anniversary of the notification regime (on 30 September 2024)[2] allow us to compare the actual number of notifications received with the initial projections made by the Commission for the first year after the FSR entered into force.

– **Concentrations**: More than 120 pre-notification consultations were reported. The European Commission ultimately received **91 Notifications**, with most cases already closed at the time.

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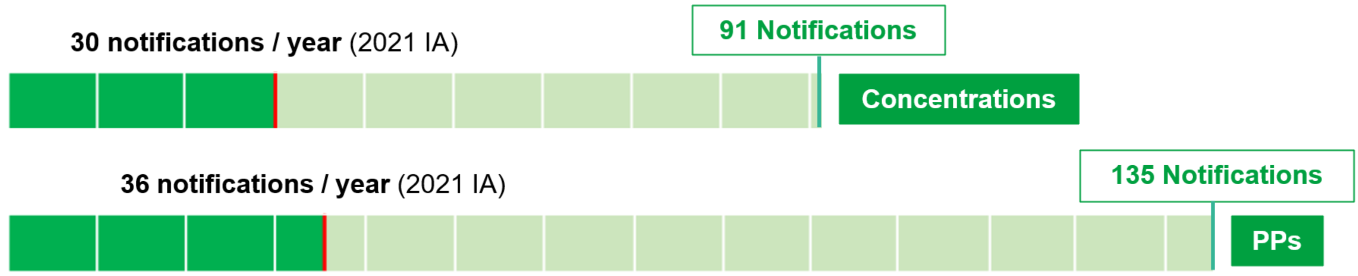
[1] See N&A Newsletters dated 15 May 2023, 14 August 2023, and 17 November 2023 for detailed explanations of the FSR.

[2] These numbers were provided by the Director of DG COMP.K (in charge of implementing the FSR) during a meeting of the European Parliament's International Trade Committee held on 30 September 2024 (see streaming of the session).

– **Public procurement (PP)**: The Commission received 1,108 submissions for 212 public procurement procedures, including: (1) **135 Notifications**; (2) **938 Declarations**;[3] and (3) 35 requests for pre-notification discussions.

These numbers far exceed the Commission's initial estimates. In its 2021 Impact Assessment (IA), the Commission only anticipated 30 notifications a year for concentrations and 36 notifications a year for public procurement bids.



This discrepancy can be partly attributed to recent inflationary pressures. Since the Impact Assessment was published in 2021, it could not account for the sharp increases in energy costs and ongoing supply chain disruptions, which were further exacerbated by the 2022 Russian invasion of Ukraine.

As of 31 October 2024, the number of notifications for concentrations increased to over 100 and to 1,300 submissions for public procurements.

(2) Commission is ready to use *ex officio* powers

On the other hand, only **two *ex officio* investigations** have been initiated since last year, far fewer than the 30 to 45 cases the Commission originally anticipated in 2021. Although this figure may seem low, it still underscores the Commission's commitment to make use of its *ex officio* discretionary power. These investigations are often very politically sensitive, demand significant resources, and come as the Commission is still refining its investigative methods, just one year after the FSR fully entered into force. A higher volume of *ex officio* probes should be expected in the coming years, as the Commission gains experience and starts building a track record under the Regulation.

2. Overview of relevant investigations

(1) In-depth investigations & *ex officio* investigations

Since the notification obligations came into effect on 12 October 2023, the Commission has initiated several in-depth investigations into notified concentrations and public procurement bids. Additionally, the Commission has launched two *ex officio* investigations targeting potentially distortive subsidies in the wind turbine and security

[3] Economic operators must submit 'declarations' (instead of formal notifications) when FFCs received during the past 3 years per third country are below €4 million. The reporting requirements are simpler than the requirements for notifications. The Commission can require further information if it suspects the FFCs could cause distortions, but a full investigation is not automatic.

equipment industries.

One of the concentration notifications submitted has resulted in an in-depth investigation. The relevant case involved the telecommunications sector, and is analyzed in more detail below.

To date, the Commission has conducted three in-depth investigations involving public procurements. The first, in Bulgaria's train manufacturing sector, prompted the bidder to withdraw its proposal after the investigation was announced. The other two investigations targeted bids in Bulgaria's renewable energy sector, specifically involving Chinese companies that submitted tenders for the design, construction, and operation of photovoltaic parks. These cases underscore the Commission's focus on critical infrastructure and strategic industries, particularly those involving clean energy and transportation.

In addition, the Commission has launched two *ex officio* investigations to address potential distortions caused by foreign subsidies without relying on notifications. One case involves Chinese wind turbine manufacturers; wind turbines are a key sector for Europe's renewable energy transition. The second case involves a Chinese security equipment supplier, and highlights the Commission's broader mandate to examine subsidies that may impact not only economic competition but also strategic interests.

(2) In-Depth Investigation: Emirates Telecommunications Group Acquisition of PPF Telecom Group

On 26 April 2024, the European Commission received a notification under the FSR for a proposed concentration wherein Emirates Telecommunications Group Company PJSC ("**e&**"), a State-controlled telecommunications operator in the United Arab Emirates ("**UAE**"), would acquire sole control of PPF Telecom Group B.V. ("**PPF Telecom**"), which operates in Bulgaria, Hungary, Serbia, and Slovakia.

The Commission identified that e& had received foreign subsidies, as defined in Article 3 of the FSR, prompting an in-depth investigation.[4]

During the investigation, the Commission determined that:

- e& and its affiliated entity, Emirates Investment Authority ("**EIA**"), had received foreign subsidies from the UAE, including an unlimited state guarantee for e& and financial support (e.g., grants, loans, and debt instruments) for EIA.

- The foreign subsidies did not distort competition in the acquisition process itself. e& was the sole bidder for PPF Telecom, and the acquisition reflected the market value of the target and was financed through e&'s own resources.

- However, the foreign subsidies could distort post-transaction competition in the EU internal market, and the unlimited state guarantee was deemed likely to distort the market under the FSR. The guarantee could artificially enhance the merged entity's ability to finance EU operations, engage in risk-indifferent investments (e.g., spectrum auctions, infrastructure deployment), or pursue acquisitions, disadvantaging

4 European Commission press release of 10 June 2024 (see document).

competitors.

To address the Commission's concerns, the parties proposed the following commitments to mitigate the potential distortions:

- Removal of the unlimited state guarantee: an amendment to e&'s articles of association to align with standard UAE bankruptcy law.

- Prohibition of intra-group subsidies in the EU market: restricting financing from EIA and e& to the merged entity's EU operations, with exceptions for non-EU activities and emergency funding (subject to Commission review).

- Notification of non-notifiable acquisitions: a commitment to notify the Commission of any future acquisitions by e& that otherwise would fall below FSR thresholds.

The Commission concluded that these commitments would (1) eliminate the unlimited guarantee, (2) prevent subsidized financing from distorting competition in the EU, and (3) enable effective monitoring through transparency requirements.

As a result, the Commission conditionally approved the transaction, subject to full compliance with the aforementioned commitments.[5]

3. Policy considerations

Though the FSR has been in effect for just over a year, these investigations already provide valuable insights into how the Commission is applying the new Regulation. Three main enforcement trends are emerging:

(1) Focus (primarily) on Chinese subsidies

Most *ex officio* and in-depth investigations have targeted Chinese companies. Even if the FSR is designed to be "country-neutral", tackling distortive Chinese subsidies has long been a top priority for the EU. Coincidentally, the first *ex officio* case was announced one day before the 10 April 2024 publication of a very thorough, 712-page report on "significant distortions" occurring within the Chinese economy, highlighting the Commission's extensive knowledge about China's use of industrial subsidies. The emphasis on China in the context of the FSR also was evident as early as the 2021 Impact Assessment, which referred to the country frequently.

A dawn raid conducted at the offices of Nuctech shows that the Commission is willing to use the full extent of its investigative powers, even if doing so may conflict with Chinese laws or cause serious reputational or financial damage to a company. The Commission is likely to continue to leverage the Regulation against Chinese subsidies as it continues to pursue its economic security agenda.

5 European Commission press release of 24 September 2024 (see document).

(2) Focus on strategic sectors

To date, all of the cases involve companies in sectors the EU considers essential to its green and digital transition, as well as to protect its defense interests. While some in-depth investigations may be due in part to incomplete information from bidders or to subsidies deemed "most likely to distort the internal market" (such as unlimited state guarantees), the two *ex officio* probes specifically targeted firms operating in sectors of high concern to the EU: wind energy and security infrastructure.

The Commission actively encourages economic actors to submit information on their competitors, to support its investigations (including in the text of the Regulation itself).[6] This is notably the case for wind turbine manufacturers. In its 2023 Wind Power Action Plan, the Commission urged the European wind industry to submit further evidence of distortive foreign subsidies.[7] It later was confirmed that this investigation was prompted by information received from the industry.[8] When the European Commissioner for Competition, Margrethe Vestager, announced the first *ex officio* inquiry in April 2024, she insisted that the EU could not "afford to see what happened on solar panels, happening again on electric vehicles, wind or essential chips". We can expect the Commission to continue to rely on affected stakeholders to drive its investigations and maintain a more responsive approach to justify its political economic agenda.

How stakeholders in key industries report distortive subsidies received by competitors will likely shape the Commission's resource allocation and investigation priorities. Some of these complaints are made public, encouraging other actors to follow suit – and not only against Chinese entities. For example, in early October 2024, French energy giant EDF submitted a complaint to the Commission over a Czech decision to pick a South Korean state-owned group for the construction of two nuclear reactors. At a recent conference, the European Commission's DG COMP (in charge of concentrations cases) shared that it is receiving substantial market information to support its investigations. In contrast, DG GROW (in charge public procurement cases) appears to have received relatively less input from competitors to date.

(3) Enforcement capabilities: Does the Commission have enough manpower?

The exceptionally high volume of notifications raises the question of whether the Commission has sufficient resources to enforce the Regulation effectively. The 2021 Impact Assessment estimated that 145 full-time employees would be needed. A new Directorate within DG COMP was created in March 2024 to handle concentration cases, with an initial team of 40 people. The team within DG GROW dealing with public procurements under the FSR was last known to have around 20 officials. Since then, the Commission has been hiring more staff members, for example, seconded national experts, on a temporary basis. However, the number of officials now working on the FSR is currently unknown. When asked by the European Parliament's International Trade Committee if he will "*ensure a substantial increase in the number of staff responsible for the*

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6 For public procurement bids, Article 29(7) states that "*other legal or natural persons may report to the Commission any information relating to foreign subsidies distorting the internal market and may communicate any suspicions that a false declaration has possibly been made*".

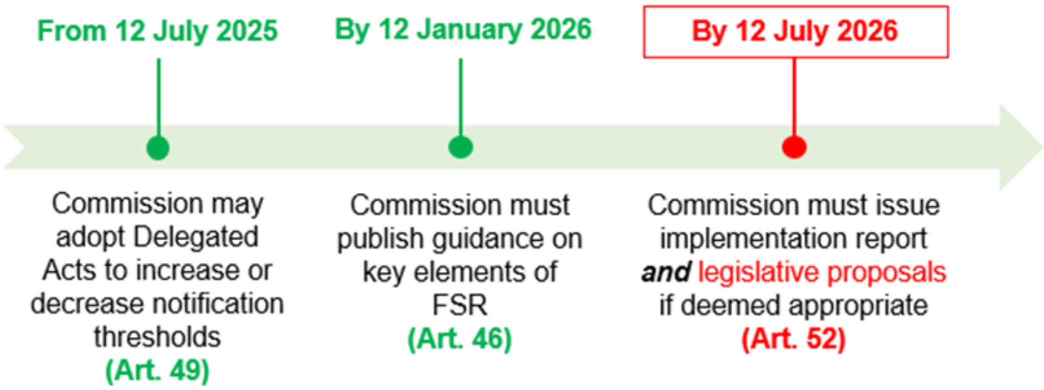
7 European Commission, *Wind Power Action Plan*, COM (2023) 669 final, 24 October 2023, p. 17 (see document)

8 By the Director of DG COMP.K (in charge of implementing the FSR) during a meeting of the European Parliament's International Trade Committee, held on 30 September 2024 (see streaming of the session).

implementation of the FSR",[9] Stéphane Séjourné, the incoming Commissioner who will supervise DG GROW, avoided the question. The way the Commission allocates personnel in the future will indirectly reveal how much effort it is willing to put into enforcement.

III What comes next?

By 13 July 2026, the European Commission must present a report reviewing the implementation of the FSR, alongside new legislative proposals to update the Regulation (if considered appropriate). This will give an opportunity to address some of the shortcomings and challenges associated with the Regulation.



1. Likely revision of the notification thresholds?

Overall, the high number of notifications and declarations received by the Commission – coupled with the few in-depth investigations conducted so far – suggests that the current notification thresholds may be too low and contribute to unnecessary bureaucracy.

Starting 12 July 2025, the Commission will be empowered to increase the thresholds by up to 20% if a large percentage of the notifications received result in the closing of the preliminary review or in a no-objection decision. While this would result in a decrease in notifications, it would still subject companies within the relevant scope to high disclosure requirements. In particular, the disclosure of foreign financial contributions (FFCs) exceeding €1 million is often viewed as particularly low and cumbersome. Furthermore, FFCs between €200,000 and €1 million – while simplified and aggregated[10] – still require reporting for public procurements, adding to the administrative burden.

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9 *Questionnaire to the Commissioner designate Stéphane Séjourné, Executive Vice President for Prosperity and Industrial Strategy*, 22 October 2024, p. 18-19 (see document).

10 FSR Implementing Regulation (EU) 2023/1441, Article 5(2) and Annex II, Section 7(3 & 4).

Transaction	Thresholds for FFC disclosure	Notifying parties
Concentration	≥ €1 million[11]	Parties to merger, joint venture, or acquisition
Public Procurement	≥ €1 million[12]	All economic operators (incl. groups), main subcontractors & main suppliers
	Between €200,000 and €1 million[13]	

Coordinating information-gathering among multiple parties can be challenging, especially in joint ventures or when bidders are required to report on subsidies received by their "main" subcontractors and suppliers.[14] This process may create additional legal uncertainties for Japanese and Southeast Asian companies, as they tend to rely more heavily on Chinese subcontractors or suppliers due to geographic proximity, historical ties, or other geopolitical factors. This complex reporting exercise also can delay the notification process, potentially leading to negative and discriminatory outcomes for non-EU notifiers. The threshold issue is likely to take centre stage during the Commission-led review of implementation of the FSR.

2. More guidance, as legal uncertainties remain

The Commission has issued a certain amount of guidance since the legislation came out: (1) two Q&As for concentrations and for public procurements; (2) a short brief on the first 100 days after the notification system entered into force; and (3) a Staff Working Document clarifying the concept of distortion and the balancing test. However, a general lack of transparency around the notification process leaves a lot of questions unanswered, including the criteria used for the balancing test, the treatment of certain foreign subsidies (e.g. certain forms of tax relief), or the conditions to the granting of disclosure waivers. To increase transparency, the Commission recently made accessible some information on the concentration cases it is reviewing. However, DG GROW already made clear that it will not disclose similar information on ongoing review of public procurement cases.[15]

Stakeholders are likely to push for more clarity, as the Commission is expected to issue more guidelines by 12 January 2026. DG COMP will soon publish **a short brief on its 1st in-depth investigation**, which could further clarify how it deals with such cases. It also announced that **statistics on notification cases** will be published on its website by the end of this year. For public procurement procedures, **a new batch of Q&As** is expected to be published soon by DG GROW.

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[11] FSR Implementing Regulation (EU) 2023/1441, Annex I, Section 5 & Annex II, Section 3.

[12] FSR Implementing Regulation (EU) 2023/1441, Annex I, Section 5 & Annex II, Section 3.

[13] FSR Implementing Regulation (EU) 2023/1441, Annex II, Section 7.

[14] A subcontractor or supplier is deemed to be "main" when its participation ensures key elements of contract performance and where the economic share of its contribution exceeds 20% of the value of the submitted tender. FSR, Article 29(5).

[15] This is because ongoing public procurement procedures in Member-States are not always disclosed to the general public.

3. What has the incoming Commission said so far?

European Commission President Ursula von der Leyen has identified competitiveness as a top priority. In her 18 July 2024 Political Guidelines for the Next European Commission (2024-2029), she announced that each Commissioner will be tasked with cutting through the red tape, including by reducing reporting requirements for businesses. Meanwhile, Executive Vice-President-designate for a Clean, Just and Competitive Transition, Teresa Ribera Rodríguez, was asked in her Mission Letter to "vigorously enforce the Foreign Subsidies Regulation". While it is too early to make definitive predictions, we can expect the next Commission to adopt a two-pronged approach consisting of: (1) streamlining the notification regime under the FSR, and (2) increasing the number of *ex officio* investigations into the most problematic foreign subsidies. The European Parliament's confirmation process for the next Commission offered early signs pointing in that direction:

– Stéphane Séjourné promised a "thorough assessment" of the FSR with an emphasis on the "appropriateness of the level of the notification thresholds."[16] This suggests a possible increase to the current thresholds, although the issue is likely to spark intense discussions in the coming years.

– Teresa Ribera declared that she will "focus our *ex officio* efforts on the sectors most affected and types of foreign subsidies that are most harmful to fair competition in the Single Market."[17] With European companies increasingly using the FSR to lodge complaints against competitors, the Commission is likely to face pressure to tackle cases that slip through the gaps in the notification regime.

That said, the Commission's resource allocation – such as staffing – and its approach to managing reactions from other nations, particularly China, will be crucial in shaping these outcomes. Beijing is formulating a response to the use of the FSR against Chinese companies, which may prompt retaliatory actions and/or a formal complaint to the World Trade Organization (WTO). The EU's response to these challenges will signal how it intends to use and refine this new legal instrument.

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[16] *Questionnaire to the Commissioner-designate Stéphane Séjourné, Executive Vice-President for Prosperity and Industrial Strategy*, 22 October 2024, p. 18-19 (see document).

[17] *Questionnaire to the Commissioner-designate Teresa Ribera, Executive Vice-President for the Clean, Just and Competitive Transition*, 22 October 2024, p. 14 (see document).