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I Background

This Newsletter is a follow up to our Newsletter dated May 15, 2023 regarding EU Regulation (EU) 2022/2560¹ on foreign subsidies distorting the internal market (**FSR**) [[EU Foreign Subsidies Regulation: A new control regime for M&A transactions in the EU](#)].

The FSR came into force on July 12, 2023, as planned. Just two days prior, on July 10, 2023, the EU Commission, following a public consultation process, finally adopted the long-awaited Implementing Regulation (EU) 2023/1441 (**IR**)² intended to specify details of the FSR and reduce some of the uncertainty it created. In this Newsletter, we provide a high-level overview of the newly adopted IR.

As of **October 12, 2023**,³ the FSR introduces a new merger review regime, separate from and in addition to existing merger control and foreign direct investment (**FDI**) control regimes. It requires prior notification to and approval from the EU Commission of concentrations and public procurement transactions meeting certain turnover and contribution thresholds that (i) were signed on or after July 12, 2023 and did not close before October 12, 2023 or (ii) are signed after October 12, 2023. In contrast, the notification obligation will not apply to transactions that (iii) were signed on or after July 12, 2023 and closed before October 12, 2023 or (iv) were signed prior to July 12, 2023.

While the relevant turnover thresholds for M&A transactions were already included in the FSR,⁴ the IR now provides, amongst others, details on (i) notification procedures and content of the respective filings, (ii) rules for calculating deadlines, and (iii) procedural rules regarding Phase One and Phase Two of the EU Commission's review.⁵

¹ <http://data.europa.eu/eli/reg/2022/2560/oj>

² http://data.europa.eu/eli/reg_impl/2023/1441/oj

³ Art. 54 para. 4 FSR.

⁴ Please refer to our previous Newsletter for details [[EU Foreign Subsidies Regulation: A new control regime for M&A transactions in the EU](#)].

⁵ Art. 1 IR.

II Reporting Obligations Clarified under the Implementing Regulation

The IR distinguishes between foreign financial contributions (**FFC**), which are likely to distort the internal market within the meaning of Art. 5 para. 1 FSR (**distortive FFC**), and FFC which are not likely to distort the internal market (**non-distortive FFC**).

(i) Distortive FFC include FFC which (a) are granted to ailing undertakings; (b) take the form of an unlimited guarantee; (c) qualify as export financing measures that are not in line with the OECD Arrangement on officially supported export credits; (d) directly facilitate a concentration; or (e) enable an undertaking to submit an unduly advantageous tender.

The IR clarifies that for **distortive FFC**, line-by-line reporting is required for FFC equal to or in excess of **EUR 1 million**, granted individually to the notifying party or the target in the three years prior to signing.

(ii) For **non-distortive FFC**, an overview of FFC granted to the notifying party (not the target or the sellers), in the three years prior to signing, that are individually equal to or in excess of **EUR 1 million**, must be reported. In this case, only an overview and no line-by-line reporting is required. The information should be provided in accordance with the template and instructions in Table 1 Form FS-CO, Annex I IR.

For non-distortive FFC, only certain FFC need to be reported (see Table 1 FORM FS-CO). More specifically, FFC need to be listed for countries where the estimated total amount of all financial contributions granted in the three years prior to the signing is **EUR 45 million** or more (so-called *de minimis* threshold).⁶ Table 1 Form FS-CO furthermore lists some cases where FFC do not have to be listed in the application. This is the case for certain generally applicable tax incentives or exemptions.⁷ Moreover, FFC do not have to be listed if they constitute provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business.⁸ Another exception concerns the case of transactions involving investment companies. Subject to certain limitations, FFC do not have to be listed if they are granted to other investment funds which are managed by the same investment company.⁹ The last exemption especially benefits private equity companies, which will not be required to report FFC granted to other funds unrelated to the transaction.

Please note, however, that the above exceptions do not apply for the assessment of the EUR 50 million contribution threshold under Art. 20 para. 3 (b) FSR triggering the notification obligation. When calculating such contribution threshold, all FFC (also those below EUR 1 million and including FFC granted at market terms, granted to another investment fund by the same investment company, etc.) must be taken into consideration.

III What to do now

Companies should immediately establish procedures to continually collect and screen information on obtained financial contributions. The screening system should be established in a way that relevant information will be readily available in order to not unnecessarily delay future transactions.

⁶ No. 3 Table 1 Form FS-CO, Annex I IR.

⁷ No. 6 (a), (b) Table 1 Form FS-CO, Annex I IR.

⁸ No. 6 (c) Table 1 Form FS-CO, Annex I IR.

⁹ No. 7 Table 1 Form FS-CO, Annex I IR.

Furthermore, the IR explicitly encourages notifying parties to engage in pre-notification discussions with the EU Commission and make waiver requests where applicable.¹⁰ Such pre-notification discussions can help companies provide the correct required information, and in certain cases the EU Commission may even waive certain information required under the IR.

Further relevant information on the FSR and the IR are provided by the EU Commission in its FSR Q&A under ([Questions and Answers \(europa.eu\)](#)).

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¹⁰ Introduction No. 5 “Pre-notification contacts and waiver requests” Annex I IR.