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The FSR Frontier: Foreign Subsidy Scrutiny on Both Sides of the Atlantic

By [Jade-Alexandra Fearn](#), [Camille Paulhac](#), [Catherine Kordestani](#), [Miliac Antic](#) & [Annalie Grogan](#)

View From the U.S.

Regulators around the world are concerned with foreign subsidies. In the United States, on 10 October 2024, the Federal Trade Commission voted 5-0 to adopt new rules under the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act, as amended. The Department of Justice immediately announced its support. The request for foreign subsidy information is applicable to transacting parties on both the buy-side and the sell-side. The forms specifically focus on contributions from China, Russia, North Korea, and Iran, defining subsidies as financial contributions such as grants, tax credits, and direct cash payments. Filing parties will need to disclose any subsidy (or commitment to receive a future subsidy) within the two years prior to filing. Parties making a filing will also need to provide information on countervailing duties, too.

For more information on the new HSR notification forms, including other additions to the rules, please see our [client alert](#).

View From Europe

Meanwhile, in Europe, businesses have been busy leveraging the (just over one year old) EU Foreign Subsidy Regulation ("FSR") to contest the award of public tenders to non-EU businesses. In brief, South Korean energy company, Korea Hydro & Nuclear Power ("KHNP"), won a tender to construct two nuclear reactors in the Czech Republic. Consequently, French group EDF filed an appeal against the public procurement award.¹ In response, KHNP firmly denied that it had received any subsidies from the South Korean Government. The dispute highlights the competitive tension that can arise across international markets, such as nuclear energy. The development serves as a healthy reminder to bidders of public contracts that could fall in scope of the EU FSR: not only does the usual due diligence need to take place, but bidders need to prepare for potential challenges from third parties.

The procurement dispute follows two significant FSR developments from the last month, specifically in relation to (1) the Commission's first conditional FSR decision following the in-depth review of a transaction, and (2) the unconditional clearance under the FSR with respect to a Chinese business acquiring a U.S. business.

The Commission's First Conditional FSR Decision

Recent caselaw this year considers the types of commitments the Commission may seek from transacting parties (e.g. on an acquisition) that are in receipt of non-EU financial contributions where those financial contributions are considered by the Commission to be "distortive" to competition on the EU internal market. The commitments noted by the Commission included, inter alia, (i) ensuring unlimited guarantees to which the business was previously entitled from a non-EU state were no longer available; (ii) a prohibition on funding relating to the business' trading in the EU internal

market; and (iii) an ongoing obligation to report further transactions by the parties to the Commission (including transactions that fall below the FSR thresholds), along with associated monitoring by a designated trustee.

The Commission's Unconditional FSR Clearance Decision (Haier/Carrier)

In another significant FSR decision, on 3 October 2024, the Commission granted approval to home-appliances supplier Haier Smart Home ("Haier") in relation to its acquisition of Carrier's Commercial Refrigeration business ("Carrier"). Haier is the first known Chinese company to receive FSR approval in the context of a transaction. The decision is a welcome signal to international investors seeking to continue or increase M&A activity in Europe.

Increased Transparency at EU Level

For more than a year, the Commission did not publish FSR notifications, except for transactions requiring an in-depth investigation. Since mid-October 2024, the Commission started to publish the FSR notifications it has received.²

For more information on the EU FSR, please see our client alerts [here](#) and [here](#).

Key Takeaways

Businesses need to be aware that the foreign subsidy regulatory landscape is by no means settled: in a move towards its counterparts in Europe, HSR notification forms now require details on foreign subsidies. In Europe, the EU FSR is in full swing and is being used not only by the Commission, but by third parties as a stick with respect to public procurement contracts. Parties to transactions that receive foreign subsidies should (if they have not already) undertake a comprehensive foreign subsidy analysis, a process which can be both burdensome and time consuming as, for both EU and U.S. transactions, a considerable amount of data will be required. In the context of a tight deal timeline, an FSR analysis should be undertaken early in the deal cycle.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

London

Jade-Alexandra Fearn
44.020.3321.1096

jadefearnspaulhastings.com

Annalie Grogan
44.020.3986.1225

annaliegroganpaulhastings.com

Brussels/Paris

Camille Paulhac
33.1.42.99.04.10

camillepaulhacpaulhastings.com

Milic Antic
33.1.42.99.04.43

milicaanticpaulhastings.com

Washington D.C.

Catherine Kordestani
202.551.1710

catherinekordestanipaulhastings.com

¹ See Bloomberg press article [here](#).

² Available on its website, [here](#).