

New EU foreign subsidy regulation approved

November 29, 2022 | Client Update | 2-minute read

On 28 November 2022, the EU formally adopted its foreign subsidies regulation. This gives the European Commission new powers to examine whether companies benefiting from non-EU state financial support have an unfair competitive advantage over European businesses that do not enjoy comparable state backing, due to the limitations imposed by EU State Aid rules. Mandatory filing obligations will attach to a range of transactions and tenders.

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The Regulation introduces three new mechanisms to allow the Commission to examine non-EU subsidies:

1. **Merger control:** mandatory filing requirements for deals involving: (i) an EU-established party that has €500 million or more in EU turnover; and (ii) a company that has received financial contributions of €50 million or more from non-EU states over the previous three years.
2. **Public procurement:** mandatory filing requirements for tenders with a contract value of €250 million or more and involving a company that received at least €4 million from non-EU states over the previous three years.
3. **General market scrutiny power:** Commission has discretion to investigate any other market situations where it suspects non-EU subsidies are distorting competition.

Sanctions for non-compliance may result in fines of up to 10% of a corporate group's global turnover. In instances where the Commission identifies concerns, notifying parties may also need to offer remedies to secure conditional clearance. In instances where remedy offers are deemed insufficient, the Commission may prohibit the transaction or tender.

Set against the backdrop of the recent spread of foreign direct investment screening regimes across Europe as well as moves by antitrust regulators to adapt jurisdictional tests to allow for discretionary 'call-in' of deals that would previously have avoided scrutiny, the Regulation adds further complexity to a rapidly evolving regulatory landscape. Merging parties will need to take account of potential filing obligations at an early stage in deal planning, to mitigate adverse timing and other execution risks.

The Regulation will enter into force on the 20th day following its publication in the Official Journal of the EU, with the notification regimes described above expected to become fully operational by mid-2023.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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