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WORKING PAPER

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From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Proposal for a Regulation on Foreign Subsidies distorting the Internal Market - Articles 33, 35, 40 and 47

Delegations will find in annex a presentation given by the European Commission during the informal videoconference of the Working Party meeting on Competition on 11 November 2021, agenda item 2.



Articles 33, 35, 47 and 40

Proposal for a Regulation on foreign subsidies distorting the internal market

*Competition Council Working Party
Brussels, 11 November 2021*

Overview

Relation between procedures (Art. 33)

Limitation periods, transitional provisions (Art. 35 and 47)

Relationship to other instruments (Art. 40)

- Compliance with international obligations (Art. 40(7))
- EU antitrust Regulation (Art. 40(2))
- Antitrust, State aid and merger rules (Art. 40(1))
- EU FDI screening Regulation (Art. 40(3))
- Shipbuilding and shipping (Art. 40(4) and (5))
- Air transport (Art. 40(6))

Article 33 | Relation between procedures

- Financial contribution notified
 - in context of concentration under Art. 19 or
 - in context of public procurement procedure under Art. 28
- may be relevant and assessed again in relation to another economic activity

Article 35 | Limitation periods (1/3)

Powers of Commission to investigate a foreign subsidy and adopt a final decision – Art. 35(1)

- Limitation period of 10 years
- Starts on day of granting
- Interrupted by action of Commission
- After interruption, limitation period start to run afresh

Article 35 | Limitation periods (2/3)

Powers of Commission to impose fines and periodic penalty payments – Art. 35(2)

- Limitation period of three years
- Start on day of infringement (unless continuing or repeated infringements)
- Interrupted by action of Commission
- After interruption, limitation period starts to run afresh

Article 35 | Limitation periods (3/3)

Powers of Commission to enforce decisions imposing fines and periodic penalty payments – Art. 35(3)

- Limitation period of five years
- Start on day when decision was taken
- Interrupted by action of Commission, or MS at request of Commission
- After interruption, limitation period starts to run afresh

Article 47 | Transitional provisions (1/2)

FS Foreign subsidy granted to an undertaking

X Distortive effect occurs on the IM

↔ Time between the 2 events (max. 10 years)

FSR applies?	Years prior to the start of application										FSR starts to apply		
		-10	-9	-8	-7	-6	-5	-4	-3	-2	-1		
YES		FS			(X)	(X)	(X)	(X)	(X)	(X)	(X)	X	
NO	FS											X	
NO				FS						(X)			

Timelines – Art. 47(1) – general rule

Article 47 | Transitional provisions (2/2)

FC

Foreign financial contribution granted to an undertaking

C/P

Agreement on concentration concluded / controlling interest acquired / public bid announced / public procurement procedure initiated



Time between the 2 events (max. 3 years)

FSR applies?	Years prior to the start of application											FSR starts to apply		
		-10	-9	-8	-7	-6	-5	-4	-3	-2	-1			
YES									FC	←	→	C/P		
NO							FC	←	→			C/P		
NO									FC	←	→	C/P		

Timelines – Article 47(2-4) – special rules for concentrations and PP procedures

Article 40(7) | Compliance with international obligations (1/2)

- EU obliged not to discriminate – national treatment and most favoured nation principle as set out in WTO rules, but also in investment chapters of FTAs
- FSR does not discriminate:
 - EU and foreign undertakings;
 - Country of origin of foreign subsidy;
- Similar assessment for foreign subsidies and State aid.

Article 40(7) | Compliance with international obligations (2/2)

- No action under FSR “which would amount to a specific action against a subsidy with the meaning of Art. 32.1 SCM Agreement”
- Art. 32.1 SCM Agreement: *“No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”*
- FSR complements existing rules (e.g. services)
- FSR is without prejudice to the application of EU antisubsidy Regulation (Art. 40(2))

Article 40(1) | Antitrust, State aid and merger rules

Regulation without prejudice to the application of antitrust, merger and State aid rules:

- Application of EU antitrust and merger rules independent and separate from application of FSR
- Complementary application of FSR and EU State aid rules

Article 40(3) | EU FDI screening Regulation

Regulation without prejudice to the application of the EU FDI screening Regulation:

- FDI screening Regulation allows EU Member States to take mitigating measures on certain third-country investments *on grounds of security or public order*; assessment independent and separate of FSR
- Under FDI Screening Regulation, subsidies can be one factor to determine the extent to which a foreign investor is under state influence but it does not allow to investigate economic distortions caused by foreign subsidies

Article 40(4) and (5) | Shipbuilding and shipping

Regulation 2016/1035 on protection against injurious pricing:

- Regulation 2016/1035 not yet applicable
- If and when Regulation 2016/1035 becomes applicable, it takes precedence except for PP and concentrations

Regulation 4057/86 on unfair pricing in the maritime transport:

- The FSR takes precedence

Article 40(6) | Air transport

FS Regulation without prejudice to the application of Regulation 2019/712 on safeguarding competition in air transport:

- Complementary application as regards actors active in the aviation sector that are not air carriers
- Notifiable concentrations and PP procedures in air transport are subject to the provisions in Chapters 3 and 4 of this Regulation

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Thank you



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