

EU Commission announces first FSR ex officio investigation

On 9 April 2024, the Commission announced a new investigation under the Foreign Subsidies Regulation ('FSR') to examine whether foreign subsidies distort competition in the European wind power market. Although few details have been disclosed, this marks the first time that the Commission initiates an FSR investigation on its own initiative and independent of a notification, and is prepared to test its wide investigative and remedial powers under the FSR in the context of an ex officio investigation. Throughout the investigation, the Commission is likely to encounter several questions and challenges.

Why investigate subsidies in the wind power sector?

It does not come as a surprise that the FSR's ex officio tool debuts in the wind power sector. In its October 2023 European Wind Power Action Plan, the Commission has already pledged to closely monitor possible unfair trade practices that benefit foreign manufacturers, and made explicit reference to the possible use of trade defense (anti-subsidy and anti-dumping) measures, FSR investigations, and foreign direct investment screenings, depending on its findings. In line with these initial concerns, the Commission has now announced that it will investigate *"the conditions for the development of wind parks in Spain, Greece, France, Romania and Bulgaria."*

The choice of the wind power sector is likely the result of a combination of factors – green transition is a policy priority (unlike soccer, where an FSR complaint has been lingering for many months). And European producers, encouraged under the 2023 Plan to assist the Commission by coming forward with evidence, likely were able to produce sufficient indications that an investigation could produce tangible results. These two factors may well be indicative of other sectors that the Commission may prioritize for future FSR ex officio investigations.

Will the Commission run only an FSR investigation?

It remains unclear whether the Commission plans to rely only on the FSR. The Commission can request information about all foreign subsidies in an FSR investigation. But it could impose remedies concerning the importation of subsidized goods such as wind turbine parts only under traditional trade defense instruments, and not the FSR. Consequently, parallel FSR and anti-subsidy investigations remain possible. In this scenario, however, the Commission would face challenging questions about how to allocate foreign subsidies and their effects between imported goods and other activities of Chinese companies in connection with European wind power projects.

How will the Commission obtain relevant evidence on Chinese subsidies and their effects?

Experience to date suggests that Chinese companies find it challenging to comply with FSR information requirements. This will likely also occur in an ex officio investigation, even without the strict time limits imposed under the FSR notification tools. It may well be that the Commission will experiment with the FSR's "best available evidence" standard, which may encourage greater cooperation but would also add another complexity to the case.

What remedies could the Commission impose?

Even if the Commission finds evidence of subsidies with distortive effects, it cannot require the cancellation of already awarded contracts in the projects under investigation. The Commission therefore would have to dig deeper in the FSR's remedy toolbox. It could require, for example, notification of future participation in below-threshold procurement projects, thus triggering investigations before any future contracts can be awarded. In theory, it could require the repayment of subsidies, but such a remedy would not remove the prior distortion and, in any event, would be difficult to implement. Therefore, challenging issues are also likely to emerge at the back end of the investigation.

When will we know more?

Probably not for a while (except the investigated parties and actively involved third parties). The FSR sets no time limits for a preliminary investigation, and the Commission would have to publish a decision only when opening an in-depth investigation.

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