Strelia

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FSR: What are the main practical lessons one year after its entry into force?

1. Introduction

In 2024, the European Commission (the '**Commission**') gave more clarifications, at several occasions, about the application in practice of Regulation (EU) No 2022/2560 on foreign subsidies distorting the internal market (the '**FSR**'), which started to apply on 12 July 2023. In February 2024, the Commission published a first "Competition FSR brief" which focused on **jurisdictional issues** such as the obligation to notify foreign financial contributions (how to properly categorize foreign financial contributions, the level of detail required to report those identified as most likely to distort the internal market and how to interpret some of the exceptions included in the notification of concentration). On 21 June 2024, the Commission published a summary notice concerning the first concentration for which it initiated an in-depth investigation under Article 10(3)(d) FSR into the acquisition of PPF Telecom Group by Emirates Telecommunications Group, shedding light on concepts like unlimited guarantees. In addition, on 26 July 2024, the Commission published a Staff Working Document (the '**SWD**') setting out some initial clarifications on the **substantive test** resulting from the application of Articles 4(1), 6 and 27(1) FSR, *i.e.*, (i) on the notion and assessment of distortion of competition in the internal market caused by a foreign subsidy, and (ii) on the application of the balancing test. Finally, on 12 August 2024, the EU General Court confirmed the extent of the investigation powers of the Commission in relation to an inspection ordered against the EU subsidiaries of a Chinese company (the '**Nuctech Case**').

This Newsflash will give the context of the application of the FSR, an account of the clarifications related to jurisdictional and substantive issues, as well as elaborate on the recent development of the investigative powers of the Commission.[1]

2. Context

The FSR introduces four procedures:

- A **notification**-based procedure to investigate **concentrations** involving financial contributions granted by non-EU governments (foreign financial contributions or '**FFCs**'), where:
    - the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least EUR 500 million; and
    - the acquirer or acquirers and the acquired undertaking (in the case of an acquisition), the merging undertakings (in the case of a merger) or the undertakings creating a joint venture and the joint venture (in the case of a joint venture) were granted foreign financial contributions of more than EUR 50

[1] For a more general overview of the FSR rules, see our Newsflash of July 2023.

million in the last three years.

- A **notification**-based procedure to investigate **bids in public procurement procedures** involving financial contributions by non-EU governments, where:
  - the estimated contract value is at least EUR 250 million; and
  - the bid involves a foreign financial contribution of at least EUR 4 million per third country in the last three years.
- An ***ex officio* procedure** to investigate other market situations, where the Commission can start a review of foreign subsidies distorting the internal market (even below the thresholds indicated above) on its own initiative.
- A **wider market investigation**, where there is a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market.

With respect to the two notification procedures, the parties must notify financial contributions above the relevant thresholds received from non-EU public authorities prior to concluding a concentration or prior to a public procurement award. The Commission can also request *ad-hoc* notifications for concentrations and public procurement procedures below the thresholds, if it suspects the existence of **distortive foreign subsidies**. Pending the Commission's review, the concentration in question cannot be completed and the investigated bidder cannot be awarded the contract.

The ***ex officio* procedure** allows the Commission to start investigations on its own initiative if information indicates the possibility that **a foreign subsidy distorting the internal market** exists.

If in an **in-depth investigation** the Commission establishes that a foreign subsidy exists and is distortive, it may **balance the negative effects of the subsidy in terms of distortion against the positive effects of the subsidy** to determine appropriate redressive measures, to accept commitments or to prohibit the concentration or the award of the public contract.

The FSR rules include a non-exhaustive and illustrative list of **structural or non-structural remedies**, such as the divestment of certain assets or providing access to infrastructure and the Commission can also prohibit the transaction.

3. Jurisdictional issues related to notifications: a few points of attention

3.1 FFCs versus foreign subsidies

Both the notification obligation and the information to be reported are based on foreign financial contributions (the '**FFCs**'), not on foreign subsidies. FFCs can be (i) any transfers of funds or liabilities, (ii) any foregoing of revenue or (iii) any provision or purchase of goods and services, provided by a third country through different levels of government, or by a foreign public entity or by a private entity whose actions can be attributed to the third country. In contrast, a foreign subsidy is a narrower concept which includes only FFCs which confer a benefit to their recipients and are limited to a certain undertaking or group of undertakings.[2]

The fact that some or even all of the relevant FFCs have been provided on market terms and thus do not confer a benefit, or that they are generally available and are thus not limited in nature, is irrelevant to determine whether a concentration needs to be notified.[3]

3.2 Necessity to properly qualify a concentration

The proper qualification of a concentration as an acquisition, a merger or creation of a joint venture is crucial for determining whether the notification thresholds are met. For example, if a transaction is inaccurately characterized as an acquisition of sole control instead of a merger, only the turnover of the target has been considered to determine whether the turnover threshold is met.[4]

The correct qualification of a concentration is also important in determining what type of FFCs needs to be reported for each party to the transaction. Generally, the notification should include the FFCs granted to all the parties to the transaction when they are deemed to be most likely to distort the internal market (*i.e.*, they may fall within one of the categories set out under Article 5(1)(a) to (d) FSR). By contrast, FFCs not falling under Article 5(1)(a) to (d) FSR should be included only if granted to the notifying parties. Therefore, an incorrect qualification of a concentration could turn out to lead to an incomplete notification (for example, if an acquisition of joint control was incorrectly characterized as an acquisition of sole control).[5]

In order to properly qualify the different concepts, it is recommended to the parties to refer to the EU merger control concepts as set out under Council Regulation (EC) No 139/2004 (the '**EUMR**') and the Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the

[2] Competition FSR brief, page 2.
[3] Competition FSR brief, page 2.
[4] Competition FSR brief, page 3.
[5] Competition FSR brief, page 3.

control of concentrations between undertakings (the '**Consolidated Jurisdictional Notice**').[6]

3.3 Differences between notification thresholds and thresholds to report information in the notification

The FSR sets out a notification threshold of EUR 50 million of FFCs granted to the parties to the transaction. At the same time, the Implementing Regulation (EU) 2023/1441, in its Instructions to provide information on FFCs not falling under Article 5 (the '**Instructions**'), introduces a threshold of EUR 45 million of FFCs per third country to report FFCs granted to the notifying party. All FFCs granted to the correctly identified undertakings in the three years preceding the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest must be taken into account to determine whether the notification threshold set out in that provision is met. This also includes FFCs excluded from reporting in accordance with points 6 and 7 of the Instructions. By contrast, for the purpose of determining whether the reporting threshold of EUR 45 million per third country is met, the FFCs included in points 6 and 7 of the Instructions do not need to be taken into account.[7]

3.4 Practical differences between the review of a notified concentration and a notified bid in a public procurement procedure

In practice, the review of notified concentrations differs from the review of notified bids in public procurement procedures, since they are managed by different teams within the Commission.

On the one hand, notified bids in public procurement procedures are reviewed by the Commission's internal market department ('**DG Grow'**), which consists of a small team of around 20 officials, not exclusively dedicated to FSR enforcement. Although contracting authorities could have little incentive to report bids, DG Grow has dealt with more than 800 bids notifications coming from all over the EU since the start of the notification system in October 2023. Contracting authorities merely act as "mailboxes" as they forward to DG Grow the notifications drafted by the bidders. However, contracting authorities can be sometimes required to submit additional documents (such as the preparatory documents including estimates of the budget available). So far, DG Grow has opened three in-depth investigations into tender bids by Chinese companies (see *e.g.* the Nuctech case under section 5 below), and, in all cases, the bidders withdrew their bid before the regulator could finish the investigation.

On the other hand, the review of notified concentrations is conducted by the Directorate-General for Competition ('**DG Comp'**), which set up a new structured directorate (Directorate K) in March 2024, composed of 3 units and around 40 officials exclusively dedicated to ensuring the proper enforcement of the FSR. So far, DG Comp has dealt with about 100 notified concentrations. The

[6] Competition FSR brief, page 3 (footnote 7).
[7] Competition FSR brief, page 3.

only in-depth investigation concerned the acquisition of PPF Telecom Group by Emirates Telecommunications Group. The assessment of the substantive test in the context of concentrations requires a deeper analysis than its assessment in the context of public procurement procedures.

Finally, while DG Comp is more likely to request additional information and to engage in pre-notification discussions as regards notifications of concentrations, DG Grow is less eager to do so regarding notifications of bids in public procurement procedures.

4. Substantive test: distorsion of competition in the internal market and balancing test

After having received all the information related to FFCs in the notification and in response to its information requests, the Commission will start a preliminary review of the concentration or the bid. On the basis of this information, the Commission has a period of (i) 20 working days for public procurement procedures and (ii) 25 working days for concentration procedures to decide whether it has sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market in order to open an in-depth investigation. It is only the lapsing of the standstill period of 20-25 working days after the formal notification that allows the companies to implement the transaction (in case no in-depth investigation has been opened (see below)).

In other words, during this preliminary review, the Commission will preliminarily assess whether any of the reported FFCs constitutes a **foreign subsidy** within the meaning of Article 3 FSR and whether this foreign subsidy constitutes a "**distortion in the internal market**" (*i.e.*, whether it is distortive) within the meaning of Article 4 or 5 FSR. In case the Commission deems that it has sufficient indications to consider that both conditions are met, it will open an in-depth investigation where the Commission may balance the negative effects of the subsidy in terms of distortion against the positive effects of the subsidy (*i.e.*, the '**balancing test**') to take its final decision.

In the sub-sections below, we will specifically address the assessment of the second condition (*i.e.*, the existence of a distortion in the internal market) and the balancing test carried out by the Commission in the context of notifications of concentrations and bids in public procurement procedures.

4.1 The assessment of a "distortion in the internal market"

4.1.1 Two conditions to establish the existence of a "distortion in the internal market"

Article 4(1) FSR sets out two conditions for a foreign subsidy to constitute a distortion in the internal market.

First, the foreign subsidy is liable to improve the undertaking's competitive position in the internal market. In other words, a relationship between the foreign subsidy and the activities of the undertaking in the internal market must be established. In this regard, the SWD provides an example where there is *prima facie* an apparent relationship between the foreign subsidy and the activities of the undertaking in the internal market: the case of an interest-free loan provided by a third country directly to an EU entity active in the internal market. However, such a relationship is not apparent in the case of a foreign subsidy granted to a subsidiary which is not active in the EU and where that subsidy has been granted and effectively used in order to develop the local activity of the subsidiary in the third country. Nevertheless, the SWD specifies that the Commission could examine whether a subsidy with no apparent relationships with an activity in the internal market is used by the group to cross-subsidize activities in the internal market (such as an acquisition or the submission of a bid in public procurement procedures by a company belonging to the group).[8]

Secondly, in improving the competitive position of an undertaking in the internal market, that foreign subsidy actually or potentially negatively affects competition in the internal market. Distortions can either be actual (established with certainty) or potential.[9] The effects on competition could be assessed in relation to any of the activities in which the undertaking is, or will likely be, active in the internal market, be it investments (*e.g.*, acquisition of other undertakings or assets, or establishment of a production facility), or the provision or purchase of any goods or services, as long as competition in respect of that activity in the internal market is, or may be, negatively affected by the foreign subsidy.[10]

The satisfaction of these two conditions shall be determined on the basis of indicators. Article 4(1) FSR provides a list of indicators that may be used for this purpose, *i.e.*:

a) the amount of the foreign subsidy;

b) the nature of the foreign subsidy;

c) the situation of the undertaking, including its size and the markets or sectors concerned;

d) the level and evolution of economic activity of the undertaking on the internal market; and

e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

The indicators listed in Article 4(1) FSR are neither exhaustive nor mandatory. The Commission will assess each case on its merits and will use the relevant indicators as appropriate to assess the distortive effect of the subsidy.

However, a detailed assessment of both conditions based on indicators is not required in the case of subsidies falling under one of the categories of the foreign subsidies "*most likely to distort*

[8] SWD, question 1, page 1.
[9] SWD, question 1, page 2.
[10] SWD, question 1, page 2.

the internal market" set out under Article 5(1) FSR, *i.e.*:

a) a foreign subsidy granted to an ailing undertaking;

b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee;

c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;

d) a foreign subsidy directly facilitating a concentration;

e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.

As regards Article 5(1)(b) FSR, unlimited guarantees may go beyond an explicit statement or legal act referring to the undertaking concerned. For example, if an undertaking is able to obtain more favorable funding terms because, rather than being subject to standard bankruptcy laws,[11] there are indications that the State might intervene in the case of illiquidity, this could indicate the existence of an unlimited guarantee as it might increase the chances of creditors recovering sums owed to them than would otherwise be the case. In this case, an undertaking benefitting from an unlimited guarantee may receive a loan from a private bank, the conditions of which actually reflect the existence of that guarantee.

In practice, foreign subsidies that fall under Article 5(1) FSR will normally be considered distortive, unless the facts specific to the case show that there is unlikely to be a negative effect on competition in the internal market.[12] In particular, pursuant to Article 5(2) FSR, the undertaking will always have the opportunity to show that the foreign subsidy in question, even if falling under one of the categories of Article 5(1) FSR, would not distort the internal market in the specific circumstances of the case.

In any case, it is worth underlining that even if a subsidy falls under one of the categories of Article 5(1) FSR and is considered distortive, the balancing test under Article 6 may still play a role (see below).[13]

[11] SWD, question 8, page 5. See also the Summary notice concerning the initiation of an in-depth investigation in case FS.100011, *Emirates Telecommunications Group / PPF Telecom Group*, pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560 (O.J.E.U., C/2024/3970).
[12] SWD, question 5, page 3.
[13] SWD, question 5, page 3.

4.1.2 "Distortion in the internal market": an autonomous notion

The SWD specifies that, in defining the notion of "distortion in the internal market" in its future case practice, the Commission will take into account the aim of the FSR, which is "*to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field*". According to the Commission, the notion of level playing field refers to the conditions in which undertakings compete with each other in the internal market based on the merits.[14] Therefore, the level-playing field is not respected when the chances of succeeding in the market are unduly altered, for instance, by support from a third country in favor of one or more market players.[15]

Nevertheless, the Commission already clearly distinguishes the notion of "distortion in the internal market" under the FSR from the notion of "distortion of competition" under State aid rules (Article 107(1) TFEU) and from the notion of "significant impediment to effective competition" under the EUMR.

First, under State aids rules, a "distortion of competition" is found to exist as soon as the aid granted by the State provides a financial advantage to an undertaking, active in a liberalized sector where there is, or could be, competition. In other words, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations. By contrast, under FSR rules, a foreign subsidy cannot be presumed to constitute a "distortion in the internal market" market just because its beneficiary is engaged in an economic activity in a liberalized sector in the internal market. Indeed, the Commission will need to determine whether a distortion exists on the basis of indicators such as those listed in Article 4(1) FSR (see above).

Secondly, the notion of "significant impediment to effective competition" under the EUMR is different in two respects. In the first place, the assessment of the market does not have the same perspective, given that the Commission assesses the effects of a concentration in the relevant markets under the EUMR, while it analyses distortion in the internal market caused by foreign subsidies under the FSR. In the second place, the objectives sought by the two set of rules are different, so that a concentration which would be considered as problematic under the EUMR will not necessarily be deemed to distort the internal market under the FSR (and vice versa).[16] As a result, in the preliminary phases of the deal, the undertaking must assess the FSR risks and merger control risks separately.

[14] SWD, question 1, page 2. See also FSR, recital 6.
[15] SWD, question 1, page 2. See also FSR, recital 6.
[16] SWD, question 4, page 3.

4.1.3 Assessment of "distortion in the internal market" in the context of concentrations

When assessing whether a foreign subsidy in a concentration distorts the internal market within the meaning of Article 4 or 5, the SWD first clarifies that Article 19 FSR requires that the assessment of the Commission shall be limited to the concentration concerned and that the internal market shall be distorted by the foreign subsidy through the concentration.[17]

Then, the SWD provides helpful indications on the different ways in which foreign subsidies can distort the internal market with respect to concentrations. First, foreign subsidies received by the acquirer (such as direct grants, unlimited state guarantees or loans below market terms to the acquirer) can provide an advantage to the beneficiary in the acquisition process, and therefore lead to negative effects on this acquisition process itself. The acquirer could use this subsidy to outbid or discourage potential competitors.[18] Secondly, in case a pre-existing unlimited guarantee also extends to the merged entity, this could also potentially distort competition in the internal market if it is liable to improve the competitive position of the merged entity in the internal market and, in doing so, actually or potentially negatively affects competition in the internal market.[19] Finally, according to the Commission, foreign subsidies granted to the target or to the seller may also be relevant in certain circumstances, although the SWD does not provide examples of such situation.[20]

The Commission's review under the concentration module does not concern foreign subsidies granted after the concentration.[21] The assessment is indeed limited to the subsidies granted three years prior to the event triggering the notification of the concentration (*i.e.*, the conclusion of the agreement, the announcement of the public bid or the acquisition of the controlling interest). Considering that the distortion may materialize only after the implementation of the concentration, the Commission adopts a forward-looking approach allowing the assessment of potential distortions which would materialize after the completion of the concentration with respect to the merged entity's activities.[22]

4.1.4 Assessment of "distortion in the internal market" in the context of bids in public procurement procedures

When assessing whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the works, supplies or services pursuant to Article 4 FSR, Article 27 FSR provides that foreign subsidies that cause or risk causing a distortion in a public procurement

[17] SWD, question 7, page 5.
[18] SWD, question 7, page 5.
[19] SWD, question 8, page 7. See also the Summary notice concerning the initiation of an in-depth investigation in case FS.100011, *Emirates Telecommunications Group / PPF Telecom Group*, pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560 (O.J.E.U., C/2024/3970).
[20] SWD, question 7, page 5.
[21] SWD, question 8, page 7.
[22] SWD, question 7, page 5.

procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. Moreover, Article 27 FSR provides that this assessment shall be limited to the public procurement procedure in question. The SWD clarifies the test of Article 27 FSR by indicating that foreign subsidies will only distort competition in public procurement procedures if two conditions are met cumulatively.[23]

First, the tender submitted by the subsidized economic operator must be *unduly advantageous*. As regards the "advantageous nature" of the tender, the SWD specifies that the Commission will compare the tender of the beneficiary (i) to other bids submitted in the tender procedure and (ii) to the contracting authority's own estimate, based on the documents used by the contracting authority in preparing the procurement documents (including any research and the internal budget for the procurement). Regarding the undue nature of the advantage,[24] which is more difficult to identify, the SWD indicates that the Commission will examine whether the advantage can be justified by other factors[25] that are not related to the subsidy itself. These factors can, among others, consist in the elements listed in Directives No 2014/24/EU and 2014/25/EU related to EU procurement procedures, which allow to justify abnormally low tenders. These elements notably include the particular cost-effectiveness of a production process, innovations or novel technical solutions, or exceptionally favorable conditions from which the economic operator benefits in the supply of goods or services.[26] In this respect, the SWD clarifies that the principles developed by the Union Courts regarding the explanation of prices in the context of analyzing abnormally low tenders will be applied accordingly.[27] By drawing this parallel, the SWD seems to suggest that "abnormally low tenders" and "unduly advantageous tenders" are similar concepts. In its assessment, the Commission can take into consideration, *inter alia*, general market information, information provided by competitors or the results of its own investigations.

Secondly, there must be a *link between the subsidy and the tender*, showing that the foreign subsidy enabled or likely enabled the economic operator to submit the unduly advantageous bid. The Commission can deduce such link from various indicators, namely (i) the information provided by the economic operator itself, (ii) the circumstances of the individual case (and notably the aim of the foreign subsidy) and (iii) the information obtained during the investigation.[28]

In its assessment of both conditions, the Commission will take into account the indicators listed under Article 4(1) FSR. In particular, according to the Commission, foreign subsidies covering a substantial part of the estimated value of a contract to be awarded in a public procurement procedure are likely to cause distortions.[29]

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[23] SWD, question 6, pages 3-4.
[24] The undue nature of the advantage will only be examined if the tender has been found to be advantageous.
[25] These justifications can be adduced by the economic operator.
[26] SWD, question 6, pages 3-4.
[27] SWD, question 6, pages 3-4.
[28] SWD, question 6, pages 3-4.
[29] SWD, question 6, pages 4-5.

4.2 Balancing test

Under Article 6(1) FSR, when conducting a balancing test, the Commission needs to take into account (i) the positive effects that distortive foreign subsidies can have on the development of the relevant subsidized economic activity in the internal market, and (ii) any broader positive effects in relation to the relevant policy objectives, in particular those of the Union.[30]

Although the SWD states from the outset that the Commission has not yet gathered substantial experience on the application and interpretation of the balancing test,[31] it provides a welcomed guidance on the kinds of positive effects that a foreign subsidy may have. Those related to policy objectives can include, for instance, considerations relating to a high level of environmental protection, social standards, or the promotion of research and development. In addition, the Commission can also consider positive effects which have been acknowledged under State aids rules.[32] In the context of public procurement procedures, the availability of alternative sources of supply for the goods and services concerned should also be considered by the Commission.[33]

Concerning the assessment of the balance between the distortive effects and the positive effects of foreign subsidies, the Commission will assess whether and to what extent the positive effects offset the negative effects caused by the foreign subsidies. In this respect, the Commission considers that the distortive effect of foreign subsidies falling under Article 5(1) FSR are less likely to be balanced by potential positive effects.[34]

The burden of proof of the potential positive effects of the foreign subsidies primarily lies with the undertaking concerned, although Member States and other third parties may also bring information in this sense. The SWD specifies that such information may be submitted at any point during the investigation, but at the latest in due time to enable the Commission to adopt a decision closing an in-depth investigation in line with the procedural time limits.[35] In this respect, it is important to note that the notification forms for concentrations and for bids in public procurement procedures both allow the notifying parties to submit information on the existence of these positive effects.[36]

As the application of the balancing test cannot lead to a less favorable outcome, the SWD indicates that its application may lead to the following outcomes. First, the Commission can adopt a "no objection decision" when the positive effects identified fully outweigh the negative effects of the foreign subsidies. Secondly, if the negative effects outweigh the positive effects identified, the Commission can use the results of the balancing test to adapt (reduce) the nature and scope of redressive measures or commitments from the undertaking to effectively take account of the positive effects and correct the negative effects. Thirdly, when the Commission

[30] SWD, question 9, page 6.
[31] SWD, question 9, page 6.
[32] SWD, question 9, page 6.
[33] SWD, question 9, page 6.
[34] SWD, question 9, page 6.
[35] SWD, question 9, pages 6-7.
[36] SWD, question 9, page 7.

finds out that the foreign subsidies do not have any, or only insignificant positive effects, it can conclude that remedies or commitments need not be adapted or that either the concentration or the award of the public contract should be prohibited.[37]

5. The nuctech case

On 12 August 2024, for the first time, the General Court ruled on the application of the FSR, and more specifically on the extent of the powers of investigation of the Commission.[38]

On 23 April 2024, the Commission initiated unannounced *ex officio* inspections under the FSR. It was the first unannounced inspection of the Commission under the FSR. The dawn raid was carried out at the Polish and Dutch premises of two subsidiaries of the Chinese security scanner supplier Nuctech (namely Nuctech Warsaw Company Limited sp. z o.o. and Nuctech Netherlands BV). The investigations were based on the allegation that Nuctech received foreign subsidies that could distort competition in the internal market in the context of public procurement procedures. During its inspections, the Commission requested access to the content of a number of employees' mailboxes, which were not stored on the servers of the Polish and Dutch subsidiaries under investigation, but on the servers of their parent company established in China.

One month later, Nuctech, which objected to this request, brought (i) an action before the General Court to challenge the Commission's inspection decision, including the information request concerning data stored in China, and (ii) applied for interim measures to suspend the investigations of the Commission. The arguments of Nuctech were based on the following pleas:[39]

- The Commission infringed EU law and public international law by requesting Nuctech to place a legal hold on the mailboxes of the employees whose data are on the servers located in China and by compelling Nuctech to produce documents stored on servers located outside the EU;

- The Commission infringed Chinese law, including criminal law, by placing Nuctech under the threat of fines and periodic penalty payments;

- The Commission infringed Nuctech's right to inviolability of business premises and to privacy;

[37] SWD, question 10, page 7.
[38] Case T-284/24 of 12 August 1024, *Nuctech v. Commission*, EU:T:2024:564 (accessible here).
[39] Case T-284/24 of 12 August 1024, *Nuctech v. Commission*, EU:T:2024:564, para. 20-27.

- The Commission's inspection decision is arbitrary because the Commission did not have sufficient evidence to suspect Nuctech of having received foreign subsidies leading to a distortion of competition in the internal market; and

- The Commission failed to comply with its procedural obligations, notably to state reasons and to respect Nutech's rights of defence.

In its decision of 12 August 2024, the President of the General Court dismissed Nuctetch's pleas and request for interim measures.

According to the President of the General Court, the Commission is entitled to request information from undertakings located outside the EU in order to assess whether their conduct infringes EU law and is likely to produce a substantial effect on the internal market, particularly in respect of distortions of the internal market caused by foreign subsidies. This is justified by the necessity to enable the Commission to carry out its investigation effectively, without jeopardizing its ability to hold non-EU entities liable for conducts distorting the internal market (notably if they store their data outside the EU).[40]

Moreover, the decision of the President of the General Court highlights that Nuctech' subsidiaries have not proven that they have not access to the data stored on the servers located in China. More precisely, the applicants "*have not only failed to state the reason why they have no access to the requested information, but they also do not explain how Chinese law could prevent them, as entities established in the European Union, from responding to the Commission's requests and why the provisions of Chinese law are relevant to them*".[41]

Regarding Nuctech's argument relating to the Commission's alleged infringement of Chinese law, including criminal law, the President of the General Court considered that the applicants neither established that the relevant Chinese provisions apply to the requested information, nor that they have sought to obtain the necessary authorizations for the purpose of transferring it to the Commission. In any event, the President of the General Court ruled that "*the validity of the contested decision and any measure taken pursuant to that decision must be assessed in the light of EU law and not Chinese law*".[42]

6. Conclusion

One year after its entry into force, more clarity has been brought on the application of this new piece of legislation concerning several jurisdictional and substantive issues. It is also apparent that certain actors (especially contracting authorities from the EU Member States) need to apply FSR rules more systematically. Finally, given the opening of several in-depth investigations in the

[40] Case T-284/24 of 12 August 1024, *Nuctech v. Commission*, EU:T:2024:564, para. 40-41.
[41] Case T-284/24 of 12 August 1024, *Nuctech v. Commission*, EU:T:2024:564, para. 42-44.
[42] Case T-284/24 of 12 August 1024, *Nuctech v. Commission*, EU:T:2024:564, para. 46-47.

context of both concentration and public procurement procedures as well as the court validation of inspection measures despite extraterritorial elements, it is very likely that the EU Commission (be it DG Grow or DG Comp) will enforce FSR rules vigorously and will not be merely satisfied with receiving formal notifications.

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If you have any question or if you want to discuss any aspect of foreign subsidies, please do not hesitate to contact your usual Strelia contact person or one of the key contacts below:

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