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From: General Secretariat of the Council  
To: Working Party on Competition

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Subject: Proposal for a Regulation on Foreign Subsidies distorting the Internal Market - Articles 33, 35, 40 and 47

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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.

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# 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, 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)			
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

# Thank you



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