Thought Leadership

January 2024

Merger control, Foreign Direct Investment and Foreign Subsidies Regulation:

A practical guide to making sure your deal is cleared in Europe

In this issue

Background

Introduction

Agreeing conditions precedent and deal timelines has always been a challenge for companies. From an EU perspective, companies previously only had to consider whether a deal led to an EU or member state merger control filing obligation. However, there are now three new layers of complexity for companies to consider in the EU, as follows:

1. **Article 22 and ex-post assessments**: a new approach to the EU's merger control referral mechanism together with the ex-post review of transactions has added complexity to consider when entering into a new deal.
2. **Foreign Direct Investment (FDI)**: 23 EU member states now have an FDI regime which, if the filing thresholds are met, give rise to a notification requirement and clearance prior to closing. Sweden is the most recent EU member state to adopt an FDI regime, which came into force on 1 December 2023.
3. **Foreign Subsidies Regulation (FSR)**: as of 12 July 2023, transactions in the EU may also be subject to a further pre-closing review of broadly defined financial contributions from non-EU member states.

Merger control shaped by Article 22 and ex-post assessments: In the past, companies could predict, with relative certainty, whether and in which jurisdictions their transactions would be subject to merger control approval. If their transaction was caught by the EU Merger Regulation (EUMR), the European Commission (EC) would review the transaction on the basis of the one-stop-shop principle for the entirety of Europe. However, recent policy and legal changes aimed at fixing perceived "gaps" in enforcement have significantly eroded this certainty.

- Significant policy changes relating to the use of Article 22 of the EUMR (**Article 22**) effectively gave the EC the power to review any transactions where the thresholds for EU merger control (or indeed member state level thresholds) are not met, including transactions that have already closed. Deals can be flagged to the EC by member states, other competition agencies or third parties (including customers or competitors), or be identified by the EC through their review of public sources.
- Competition agencies are reviving long-standing powers to assess mergers ex-post under the provisions of competition law regulating anti-competitive agreements and abuse of dominance (with the support of the EU courts).

- The Digital Markets Act (DMA) provisions require prior notification of all digital and data-collection-related M&A by designated "gatekeepers."[1]

Foreign Direct Investment and Foreign Subsidies Regulation: We have also seen a proliferation of controls targeting direct investment and government subsidies from non-EU member states.

- **FDI**: FDI reviews are conducted at the EU member state level, and there is no one-stop-shop at the EC. In the past 24 months, the number of EU member states with an FDI regime has increased significantly,[2] existing regimes have amended thresholds for notification resulting in more transactions requiring notification, and FDI regimes are increasingly requiring remedies to be agreed on before approving or prohibiting transactions.
- **FSR**: From 12 October 2023, transactions with an EU-established target or full-functioning joint venture that has an aggregate EU-wide turnover of at least EUR 500 million, and involves companies that have received over EUR 50 million in financial contributions (including subsidies, loans, exemptions and public purchases) in the last three years from non-EU member states will need to be notified to the EC for prior approval. The EC also has the power to review ex-officio any economic activity as of 12 July 2023.

As such, transactions may have to obtain a combination of merger control, FDI and FSR approvals prior to closing. This will have an impact on due diligence reviews, conditions precedent in the corporate documentation, and deal timelines.

The challenge that this new landscape brings is that while the three regimes run in parallel, they have different purposes and are used to assess different aspects of a transaction, as summarized in the table below.

Table 1: Overview of merger control, FDI and FSR regimes

Issue	Merger control	FDI	FSR
What is the stated regulatory focus?	Assess effects on competition and consumers	National security and public order	Prevent distortion of EU's internal market
What transactions are caught?	Transactions that give rise to a change of control (most jurisdictions follow this EUMR principle); minority shareholdings notifiable in a small number of EU member states e.g., Austria and Germany	Acquisitions and joint ventures, as well as minority shareholding acquisitions and intra-group transactions	Transactions that give rise to a change of control as defined in EUMR
What triggers need to file?	Parties above jurisdictional thresholds (turnover, assets and/or market shares)	Target's activities and location of the target	Parties above turnover and financial contributions thresholds
Drivers of risk of deal blocked?	High market shares; close competitors; block innovation, etc.	Nationality of the acquirer; and sensitivity of target's activities	Size of financial contributions and ability to distort the market; nationality of the acquirer; sensitivity of target's activities
Who will review this?	EC or individual EU member state authorities, with the option of referring the review to the EC	National competition authorities	EC
Timeline	25 working-day Phase I review period if EC; timelines vary if EU member states	Timeline varies by EU member state; the review process in some	25 working-day Phase I review period

[1] Having entered into force on 1 November 2022, the DMA applied as of 2 May 2023. Following discussions with potential gatekeepers regarding thresholds and designation, on 6 September 2023, the EC designated six companies as gatekeepers: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft. This list can be expanded by the EC in the future with further designations.

[2] 23 of the 27 EU member states have FDI screening regimes in place (with Belgium, Estonia, Ireland, Luxembourg, the Netherlands, Slovakia and Sweden adding regimes in 2023, though Ireland's will only become operational in Q2 of 2024). European FDI regimes vary greatly in relation to whether they are mandatory or voluntary, provide ex officio intervention rights to the government, the scope of industries considered "critical" and therefore trigger a filing obligation, and whether they only cover investments by non-EU/EFTA-based investors or by any non-domestic investor.

Merger control

Use of Article 22 to review "below threshold" deals

Based on Article 22, the EC can review transactions that do not trigger a filing obligation under: (i) the EUMR thresholds; or (ii) any EU member states' merger control regimes.

This provision permits one or more member states to refer transactions to the EC, which threaten to significantly affect competition, either of their own interest in the transaction or at the request of the EC. Article 22 was originally designed to address the problem of some member states not having a national merger control regime, principally the Netherlands.

However, in a major policy shift, the EC announced in March 2021 that it would proactively encourage national competition authorities[3] to refer transactions, as a result of:

> A gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration. ("**Article 22 Guidance**").

According to the Article 22 Guidance, the EC intends to apply Article 22 to transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential, for example where the undertaking is as follows:

- A start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues
- An important innovator or is conducting potentially important research
- An actual or potential important competitive force
- Has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or
- Provides products or services that are key inputs/components for other industries.[4]

Following the interpretation by the European General Court on its review of Illumina's appeal of the EC's decision to review the Illumina/Grail transaction, an Article 22 candidate would be a transaction that affects trade between member states and threatens to significantly **affect competition within** the member state(s) making the request, slightly narrowing the scope of which member states can make an Article 22 referral.

Eight cases have been notified and reviewed since 2020 following an Article 22 referral. To date, referred transactions into which investigations have been opened have resulted in one prohibition, one termination,[5] one structural remedy, one behavioral remedy and two unconditional approvals. There are two ongoing investigations. As such, Article 22

[3] According to Article 6(3) of Protocol 24 of the EEA Agreement, which applies mutatis mutandis to the Article 22 Guidance, one or more EFTA countries may join a request for a referral made by a member state under Article 22 if the concentration affects trade between one or more member states and one or more EFTA countries, and threatens to significantly affect competition within th e territory of the EFTA country or countries joining the request.

[4] European Commission, Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases of 31 March 2021, paragraph 19 (available here).

[5] This transaction, which was under investigation by both the UK Competition and Markets Authority (CMA) and the EC after an Article 22 referral, was terminated after the parties determined they "no longer see a path toward regulatory approval" Figma blog, "Figma and Adobe are abandoning our proposed merger" published on 18 December 2023.

reviews give rise to a far higher risk of prohibition decisions or remedies when compared to the usual EC merger review process.

Table 2: Overview of Article 22 referrals since 2020

Sector[6]	Date of referral/decision	Total referring authorities	Theory of harm	Outcome
Payment services: account-to-account services	2 April 2020	Austria, Denmark, Finland, Norway, Sweden, United Kingdom	Strengthening of the leading player, impairment of prices and choice	Approved, subject to structural remedies
Healthcare: blood-based early cancer detection tests	19 April 2021	Belgium, France, Greece, Iceland, the Netherlands, Norway	Vertical foreclosure, impairment of innovation	Prohibited
Digital: customer relationship management software, online advertising	12 May 2021	Austria, Belgium, Bulgaria, France, Ireland, Italy, Netherlands, Portugal, Romania, Iceland	Vertical foreclosure, impairment of innovation	Approved, subject to behavioral remedies
Technology: "two-way" satellite-based communication services	26 July 2022	Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Ireland, Italy, the Netherlands, Norway, Romania, Spain, Sweden	Horizontal foreclosure	Approved unconditionally
Healthcare: implants	6 December 2022	Bulgaria, Denmark, Finland, France, Ireland, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Spain, Sweden	Horizontal foreclosure, combination of two biggest competitors	Approved unconditionally
Digital: interactive product design software	14 February 2023	Austria, Belgium, Bulgaria, Cyprus, Czechia, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden	Removal of an important competitive force, horizontal foreclosure, combination of two biggest competitors	Investigation pending
Technology: semiconductors	17 August 2023	Belgium, France, Italy, the Netherlands, Poland, Spain, Sweden, Czechia, Denmark, Finland, Ireland, Luxembourg, Portugal, Romania, Slovakia	Vertical /horizontal foreclosure, combination of two biggest competitors	Deal terminated
Utilities: power trading and clearing marketplace services	18 August 2023	Denmark, Finland, Sweden, Norway	Vertical /horizontal foreclosure, combination of the only two competitors	Investigation pending

These published decisions do not, however, reflect the number of transactions being considered by the EC for a potential Article 22 referral. As we have already seen in our practice, we expect that transactions involving digital, technology and pharmaceutical companies will continue to be the focus of Article 22 referrals, particularly those with an innovation or nascent market component.

[6] Italicized transactions are those in relation to which the EC investigations have been closed.

What this means for merging parties

Deal makers and their advisers need to be aware of the risks of an Article 22 referral, given the real risks of either the deal being prohibited or abandoned, or the need for remedies to ensure a clearance decision. This means considering whether there are substantive concerns or relevant theories of harm even in cases where the EU or national merger control thresholds are not met. This type of assessment is already familiar in relation to "voluntary" notification jurisdictions, where regulators have broad intervention powers, e.g., the UK CMA. The following points are particularly important to appreciate as part of this assessment:

The Article 22 referral process is no longer purely member-state driven. While national competition authorities, made aware of transactions through monitoring the media or receiving other regulatory notifications (i.e., FDI filings), may be motivated by these to make an Article 22 referral, the EC is now also actively monitoring transactions (similar to the UK CMA's merger intelligence unit), and as a result, the EC is more frequently sending standard form requests for information (RFIs) (not unlike those used by agencies with a voluntary regime, e.g., the UK CMA) to companies to ask for further information to determine if a transaction should be referred under Article 22. The EC also liaises with member states about transactions that may need to be referred under Article 22, even in cases where a member state has accepted jurisdiction and is reviewing a transaction. We may also see member states more willing to invoke Article 22 in relation to transactions where they have concerns but where they lack jurisdiction under their own national merger control laws to review.

A growing number of transactions are being considered for Article 22 referral. EC officials said publicly in June 2023 that in 2022, the EC considered over 30 cases that would be candidates for an Article 22 referral. This number is estimated to have more than doubled in 2023, though as noted in the table above, these reviews have only resulted in the opening of three investigations. 30% of these cases were notifiable in a member state, which led to a traditional Article 22 referral, or review by the member state authority. The other transactions were either abandoned, did not constitute a concentration under the EU and national merger control rules, or were ultimately not deemed to merit a referral under Article 22.

Article 22 referrals may be even more likely for transactions involving a designated gatekeeper under the DMA. The DMA introduced an obligation for gatekeepers to inform the EC of any intended mergers where the parties or the target provide core platform services, other services in the digital sector, or enable the collection of data. This obligation applies regardless of any filing obligations under the EUMR. Information about these transactions will be relayed to EU member states' national competition authorities, which may use it to request that the EC examine a transaction under Article 22. Hence, with respect to designated gatekeepers, the combination of the DMA and Article 22 may trigger many additional referrals.

Article 22 referrals expected across all sectors. While noting that the digital and pharmaceutical sectors will continue to be an area of focus for EU and national regulators, we expect the EC to scrutinize transactions in the broader economy, focusing on whether there are substantive concerns, and in particular whether conventional turnover thresholds underestimate the competitive importance of the target. This is reflected in recent practice. In August 2023, the EC accepted two referrals under Article 22 EUMR - Qualcomm/Autotalks and Nasdaq Power/EEX - to address concerns of the Nordic NCAs. The latter case demonstrates that not only digital and pharmaceutical sectors, but also other markets, including those related to energy and commodity products, can fall under the referral mechanism.

Clear-eyed assessment and early engagement with regulators. Early engagement will provide companies with greater clarity regarding the risk of an Article 22 referral.

- If there is a risk, the parties may need to decide to approach the EC or NCAs on a pro-active basis with a briefing paper (similar to the briefing paper process used with the UK CMA) with the aim of mitigating this risk or obtaining guidance as to whether the transaction is a strong Article 22 candidate. The use of briefing papers to manage the Article 22 process is an increasingly common practice.
- Should parties decide not to approach the EC or NCAs, but recognize the risk of an Article 22 referral, an early, in-depth, internal risk analysis on the effects of the transaction is recommended. The EC is increasingly issuing detailed (but relatively standard) RFIs to assess whether a transaction is a candidate for referral under Article 22. If the risk of an Article 22 RFI is deemed high, it is advisable to prepare draft responses to the expected questions, and to respond in a prompt and complete manner, which is more likely to resolve the EC's concerns and limit the risk of an Article 22 referral.

Accurately reflect Article 22 risk in corporate documentation. A further advantage of an early assessment, or even early engagement with the EC, is that the risks of an Article 22 referral can be more carefully assessed, and that these risks can be reflected in the relevant corporate documentation. In practice, this means that merger control assessment, as part of the due diligence process, will need to reflect the current enforcement trends. In an acquisition scenario, deal teams will need to carefully consider, together with their antitrust counsel, whether any of the following are applicable:

- The turnover of the target does not accurately reflect its actual or future competitive potential, or whether the transaction may be at risk at being viewed as a "killer acquisition" i.e., the acquisition of an innovative target (often a start-up or nascent company) to remove a competitive threat (e.g., by discontinuing its R&D projects).
- The target has access to competitive significant assets or provides products and services that are key inputs for other industries.
- The deal value, as a multiple of turnover, is far higher than usual.

What this means for completed transactions

The EC can review transactions that do not meet merger control thresholds AND transactions that are already completed. In the *Towercast* decision on 16 March 2023, the Court of Justice of the EU (CJEU) held that a transaction that was not notifiable under either EC or national merger control law may be subject to an ex-post review on the basis of the abuse of EU dominance rules (**Article 102 of the TFEU**) even if the transaction has closed. The *Towercast* decision reaffirms the approach taken in *Continental Can*, which concluded that the EC or NCAs are able to review transactions that involve a dominant company acquiring another company, which may strengthen their existing dominant position and substantially impede competition. The *Towercast* decision confirms that the EC or NCAs can scrutinize transactions that escape merger control thresholds (including completed transactions) based on the direct effect of Article 102 of the TFEU due to its precedence as primary law.[7]

Additional risks for dominant companies. This additional merger control review only applies to transactions entered into by dominant companies and where the transaction is likely to result in a substantial impediment of competition.[8] In practical terms, this means that if a transaction is not notifiable, deal teams need to engage with antitrust counsel to consider whether the acquirer may be perceived as dominant in any given market by a regulator and whether the transaction would substantially impede competition, which requires a careful antitrust substantive and risk assessment. The risk compared to an Article 22 referral, or even Article 22 RFI request, is limited. Nevertheless, if a company is considered to be dominant in a relevant market, it can face the risk of having its acquisition reviewed at any time. One way to limit this risk is the submission of voluntary briefing notes to the EC, in addition to avoiding uncertainty related to the *Towercast* judgement.

Foreign Direct Investment

FDI is a pre-closing review, capturing transactions involving direct investments made by one company in another company usually situated outside the investor's country of origin.[9] These types of investments have been attracting increasing scrutiny by national authorities over the past few years.

[7] Following the decision in the *Towercast* case, the Belgian competition authority (BCA) opened an investigation into a completed acquisition by Proximus, the incumbent telecom operator in Belgium, of assets of Edpnet, an alternative telecom operator in Belgium. By acquiring Edpnet, Proximus allegedly strengthened its dominant position and prevented a new competitor from entering the market. In June 2023, the BCA imposed standstill and hold-separate obligations on Proximus for 15 months to enable a review of the deal under the abuse of dominance concerns, which led Proximus to deciding to sell Edpnet to Citymesh, a competitor of theirs.

[8] Substantial hindering of competition can be not only in the form of strengthening the dominant position but also preventing, or at the very least, considerably delaying the entry of a new competitor. A competition authority does not need to prove that the transaction eliminates all competition, but as the CJEU stated in its decision:

> The mere finding that an undertaking's position had been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market.

[9] In certain jurisdictions such as the Netherlands and Sweden, FDI regimes apply to absolutely all investors including locally established investors.

The EC continues to reiterate its expectation that all member states will adopt a comprehensive national FDI mechanism. With the exception of Bulgaria, Croatia, Cyprus and Greece,[10] which are expected to introduce a foreign screening mechanism, all EU member states now have FDI regimes.

This expansion of FDI regimes in Europe has resulted in 1,444 notifications either at the parties' initiative or through an ex officio intervention in 2022, more than half of which resulted in a formal review. This is almost double compared to 2021.

A challenge for companies and their external advisers is the lack of harmonization between the national FDI regimes, which have different thresholds, the scope of sensitive sectors and length of review timelines. Most regimes are relatively new, and their rules are still subject to interpretation and administrative discretion, leading to an inconsistent and unpredictable application.

What this means for merging parties

Companies need to undertake a complete FDI assessment, covering jurisdictions where they have activities and are not just restricted to the locations of their assets. While the relevant considerations are similar to those of merger control (e.g., conditions precedent language, timing, "hell or high water" provisions), it is crucial to note that the failure to comply with FDI rules can result in administrative, civil or criminal fines, or in certain jurisdictions, imprisonment.

No one-stop-shop for FDI. Companies cannot rely on a one-stop-shop system for the assessment of their transaction in relation to FDI. Both non-EU and EU companies will need to consider notifying under different national regimes, each with its own scope, powers and political agenda. As the thresholds are not revenue based, companies risk misinterpreting their position.

Longer review times. Deal timetables for FDI review need to be carefully considered alongside merger control, as the FDI review period may be significantly longer, delaying closing. The EC also has the right to review, but not block, deals that are notified to member states, request additional information and issue non-binding opinions to the relevant EU member state.[11] The addressee member state should take "utmost account" of the opinion and provide an explanation to the EC if the opinion is not followed.[12]

Additional due diligence. In most instances, the information provided as part of the merger control due diligence process is not sufficient for a complete FIR-risk assessment due to rather wide range of concerns that competent authorities might have. The latter shall be factored in by legal counsel when preparing tailored requests for information. Depending on a particular transaction and jurisdiction, such requests may include information on a number of local employees, manufacturing plot capacities or counteragents of the target et al.

Companies cannot self-assess the need for FDI notification. Coupled with the introduction of new national regimes, limited precedents and significant amendments to existing regimes, companies will increasingly face more complexity, legal uncertainty, and therefore additional costs.

Limited case law. European courts have had limited opportunities to form opinions on national regimes and whether their rules and enforcement are compatible with EU rules. Coupled with the confidential nature of most FDI regimes, it is difficult to assess risks of negative decisions, challenge decisions and appreciate the likely remedies.[13]

---

[10] However, this does not preclude existing notification requirements where parties are active in regulated industries (e.g., energy sector).

[11] See EU Regulation 2019/452 dated 19 March 2019 (EU Foreign Direct Investment Regulation).

[12] There have been cases where the member states did not follow the EC's opinion. For example, in November 2022, the German government issued a partial FDI approval for COSCO's proposed acquisition of one of Hamburg port's container terminals despite the EC's recommendation to block the transaction.

[13] In the Case C-106/22 (Xella), the European Court of Justice delivered its decision in relation to a preliminary reference submitted by the Budapest High Court, where it held that that national screening regimes, including their decisions, must respect EU internal market rules, namely the right of establishment. The implication is that governments that restrict EU companies' right of establishment under their foreign screening regime will need to consider more critically their justification of a decision and whether the transaction would lead to a "genuine and sufficiently serious threat to a fundamental interest of society.".

Possibility of an ex officio investigation. In certain jurisdictions, the retroactive application of recently-enacted FDI regimes[14] may require notification even if a transaction was completed before the regime came into force. However, the risk of retrospective application may be lower, as it is often limited to certain concerns and timeframes, and some authorities are now clarifying that it will only be applied in exceptional circumstances.

Foreign Subsidies Regulation

Under the FSR, the EC will be able to review transactions in which the purchaser has benefited from foreign subsidies in an effort to tackle foreign subsidies that cause distortions and undermine the level playing field in the internal market. The FSR is based on a far-reaching concept of "foreign financial contribution" and requires notifying companies to identify and report all foreign financial contributions (with some limited exceptions), regardless of whether such contributions constitute a foreign subsidy liable for distorting competition.

Additionally, the EC can examine, on its own initiative, any economic activity in the EU that has benefited from a third-country subsidy that may have distortive effects, including in relation to concentrations and public tenders that do not meet the notification thresholds.

What this means for merging parties

The FSR[15] and its Implementing Regulation[16] impose reporting obligations that are burdensome, but with careful planning and advice, they can be effectively managed. The notification thresholds for foreign financial contributions are set at a low level, and the information to be reported is not always readily available.

Assessing whether a notification is required. Notification of transactions is required where the following circumstances are applicable:

- The target, a full-function joint venture, or one of the merging parties is established in the EU (i.e., has a subsidiary or "permanent establishment" in an EU member state) and generated more than EUR 500 million in revenue in the EU in the prior financial year
- The aggregate foreign financial contributions (from non-EU countries) received by all undertakings concerned are above EUR 50 million in the three years prior to the conclusion of the transaction, the announcement of the public bid or the acquisition of a controlling interest.

Collecting the right information on foreign financial contributions. The FSR defines a foreign subsidy as any direct or indirect financial contribution made by a third country[17] that confers a benefit on one or more undertakings engaging in an economic activity in the EU. A third country would consist of either the government or public authorities, or a foreign public or private entity whose actions can be attributed to the third country.

What is a financial contribution?

The FSR provides a broad, non-exhaustive list of what is considered a "financial contribution," which includes the following:

---

[14] E.g., in Belgium and the Netherlands.

[15] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1 (available here).

[16] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, OJ L 177, 12.7.2023, p. 1–44 (available here).

[17] Countries other than the 27 EU member states i.e., all third countries including EEA countries (Norway, Liechtenstein and Iceland), the UK, US, Switzerland, etc.

- Transfers of funds and liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, debt forgiveness, etc.
- Tax exemptions or benefits
- The provision or purchase of goods and services

What financial contributions have to be reported?

Most financial contributions count towards the EUR 50 million notification thresholds, including the following:

- Financial contributions below EUR 1 million
- Sales/purchase of goods/services (except financial services) to public bodies at market terms in the ordinary course of business
- Tax/social security deferrals, tax amnesties and tax holidays, as well as normal depreciation and loss-carry forwards that are of general application
- Tax reliefs to avoid double taxation in line with bilateral or multilateral agreements, as well as unilateral tax reliefs for the avoidance of double taxation following the same logic and conditions that are provided under national law

However, these four carve-out categories of financial contributions are not reportable. Detailed reporting[18] will be required for financial contributions that are not subject to the specific carve-outs (above), and that have the following circumstances:

- Individually exceed EUR 1 million
- Qualify as one of the "most likely distortive" categories of subsidies,[19] including the following:
  - Subsidies granted to ailing firms with no viable restructuring plan that are otherwise likely to go out of business in the short or medium term
  - An unlimited guarantee for debts or liabilities
  - Export credits that are not compliant with the OECD arrangement on officially supported export credits
  - Subsidies directly facilitating a specific merger or enabling the submission of unduly advantageous tender

Simplified reporting will be required for all "other"[20] financial contributions over EUR 1 million that, in aggregate and per country, amount to the following:

- EUR 45 million or more in the context of a concentration
- EUR 4 million or more in the context of a large public tender

How does the FSR apply to PE funds?

Special relief has been considered for deals involving PE funds. Reporting is limited to financial contributions received by the fund (or portfolio company) involved in the transaction and its portfolio companies, unless any fund managed by the same

---

[18] Detailed reporting requirements entail the provision of details on the form, amount, purpose and economic rationale of the foreign financial contribution, as well as any conditions attached to the foreign financial contribution, the main elements and characteristics (e.g., interest rates and duration in the case of a loan), and any supporting documentation. The requirements also entail an explanation of whether the contribution confers a benefit and whether the contribution is limited in law or in fact. In public procurement cases, there must be an explanation of whether the contribution has been granted only for operating costs exclusively limited to the tender at stake, and a justification for the absence of an unduly advantageous tender.

[19] Article 5(1) of Regulation (EU) 2022/2560.

[20] Other refers to financial contributions not subject to specific reporting exemptions or detailed reporting requirements.

investment company has received financial contributions of more than EUR 1 million in the "most likely distortive" category, and provided that the following is applicable:

- The fund involved in the concentration is regulated under the EU Alternative Investment Fund Managers Directive or equivalent third-country prudential legislation
- The majority of the investors in the fund involved in the concentration and any other funds managed by the same investment company are different
- There have been no (or limited) economic and commercial transactions between these various funds in the last three years, including but not limited to the sale of assets (including ownership in companies), loans, credit lines or guarantees.

Uncertainty still remains as to how the FSR will work in practice

Notably, the provided carve-outs do not apply to the determination of whether the notification thresholds are met. In practice, this means that companies will have to spend resources mapping all the foreign financial contributions received in the last three years to establish whether the notification threshold is reached. This stage will likely result in gathering excess information for the detailed reporting stage of the notification process, since, as an example, some companies will have sold products to foreign public bodies, but these financial contributions may not have to be included in detail in the notification form because the products were sold at market terms. Additionally, in line with what we are seeing in merger control, even if the notification thresholds of the FSR are not met, ex-officio investigations by the EC into economic activities are possible, adding to the legal uncertainty companies face.

Preparing for the FSR

Deal teams need to prepare their clients and manage expectations, as the preparation and the FSR notification process may be as long as (or longer than) any parallel merger control/FDI approval process.

Pre-emptively, companies should start building processes to track foreign financial contributions so as not to delay transactions or participation in large public tenders. Unless the EC provides for broad upfront waivers of general application, it will not be feasible to rely solely on pre-notification discussions to manage a timely process. Therefore, it is important for companies to create a repository to keep track of all third-country financial contributions and their risk profile.

- Companies should keep a record of those foreign financial contributions that can be identified as "most likely distortive."
- Second, for all other foreign financial contributions (i.e., financial contributions over EUR 1 million that are not caught by the reporting exemptions or that do not fall within the categories of "most likely distortive contributions"), information will need to be collected to complete the summary information table in Annex I of the Form FS-CO. This information includes country of origin of the contribution, granting date, amount, and a description of the contribution.

Pre-notification discussions with the EC. The Implementing Regulation strongly encourages notifying parties to engage in pre-notification discussions with the EC to seek waivers from the reporting obligations in relation to information that is either (1) irrelevant for the assessment of the concentration or public procurement procedure in question, or (2) not reasonably available to them.

Understanding FSR risk. Transactional documentation must include provisions on the allocation of risk for FSR purposes, and the setting of the long-stop date should factor in the time required and the risks associated with a possible in-depth investigation by the EC of an FSR filing. Based on the individual transaction, deal teams will need to consider which financial contributions the EC may reasonably want to focus its FSR assessment on, and prepare arguments addressing any concerns or explaining the appropriateness of a waiver.

Conclusions on merger control, FDI and FSR

Transactions are facing a multifaceted review process, which needs to be understood early on, pre-empted where possible and carefully managed throughout the M&A process. The below step-guide gives an illustrative overview of how one can mitigate the risk arising from the discussed developments in merger control, FDI and FSR enforcement:

- Early engagement with antitrust and regulatory counsel for risk assessment, closely coordinated with M&A and other deal teams to ensure a holistic approach to the three different layers of regulation that will impact a transaction to ensure minimal burden on the transaction parties
- Reflecting the potential risk in corporate documentation by including conditionality clauses that will address all three layers of regulation, as well as factoring in relevant review periods and their impact on the long-stop date
- Managing deal expectations by preparing off-the-shelf alternative plans to tackle unexpected challenges with potential remedies to avoid deal withdrawal

Contact Us

Paul Johnson
Partner
Brussels
paul.johnson
@bakermckenzie.com

Tom Jenkins
Partner
Brussels
tom.jenkins
@bakermckenzie.com

Dimitrios Stefanou
Associate
Amsterdam
dimitrios.stefanou
@bakermckenzie.com

Ola McLees
Associate
Brussels
ola.mclees
@bakermckenzie.com

Alexandra Gracia de Torres
Associate
Brussels
alexandra.graciadetorres
@bakermckenzie.com

Beau Maes
Associate
Brussels
beau.maes
@bakermckenzie.com

Katia Dehon
Associate
Brussels
katia.dehon
@bakermckenzie.com

Pavlo Prokhorov
Junior Associate
Kyiv
pavlo.prokhorov
@bakermckenzie.com

Baker McKenzie.