



The EU Foreign Subsidies Regulation: New procedural red tape for M&A deals

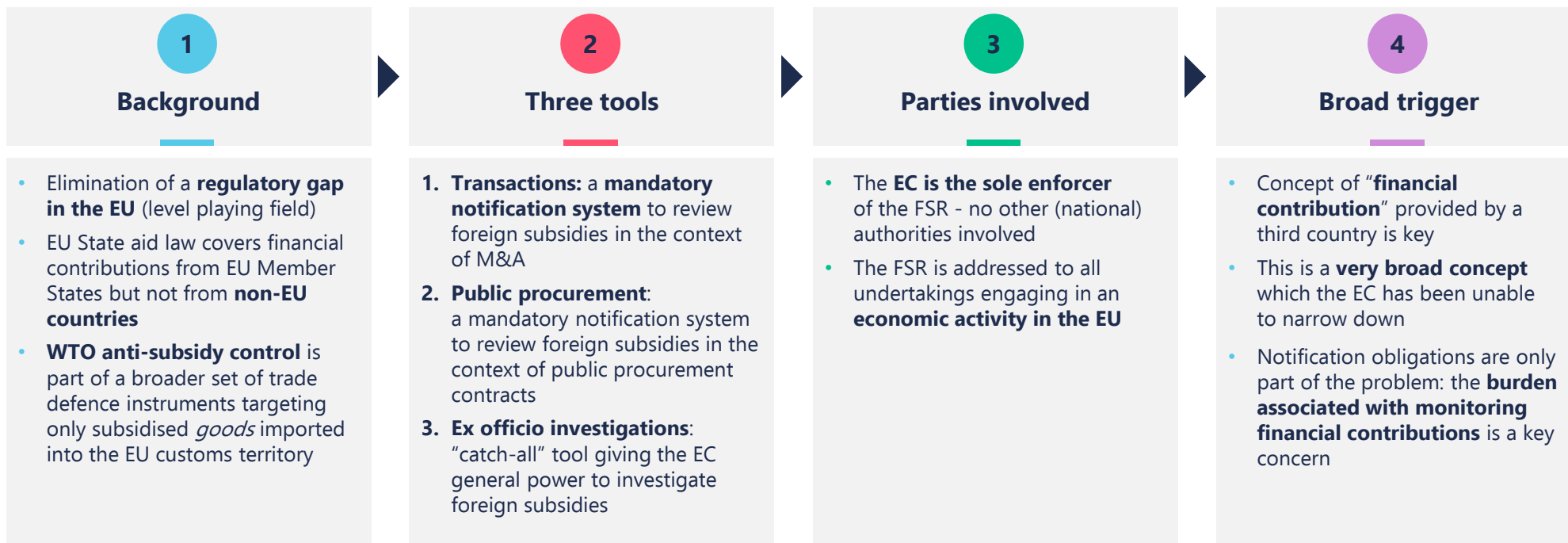
International Forum on EU Competition Law 2023

Vanessa van Weelden

25 May 2023

New procedural red tape for M&A deals

A third notification obligation requiring *ex ante* clearance, on top of merger control and FDI



Filing thresholds are not aligned with EUMR

FSR turnover threshold focused on target / JV / one merging party alone

FSR Thresholds

1. Turnover threshold:

Target (in case of acquisition) / **JV** (in case of JV) / **merging party** (in case of merger) is **established in the EU** and generates an **aggregate turnover** of at least **€500m** in the EU

+

2. Financial contribution threshold:

Undertakings concerned have received **combined financial contributions exceeding €50m** from third countries in the three previous years

=

**Mandatory
notification
requirement**



Comparison to EUMR Thresholds

- Many transactions will be notifiable under the EUMR but not under the FSR
- **However, the opposite is also possible:**
 - **Only the target** / the JV / one of the merging parties **has significant EU turnover;** or
 - Turnover of the target / the JV / the merging party is highly **concentrated within one Member State**

Uncertainty regarding transactions below thresholds

Do undertakings need to fear review of transactions which are presumably out of scope?



Call-in powers

Article 21(5) FSR enables the EC to call in non-notifiable transactions up until implementation of the transaction

Prior information on transactions below thresholds for offenders (Article 8 FSR)



Ex officio review

There needs to be certainty that after implementation of the transaction the EC cannot unwind transactions through the *ex officio* tool



Transitional provisions

Equally, *ex officio* investigations should not be possible into transactions signed before 12 July 2023

FSR set for many Phase 2 cases

Timelines under FSR and EUMR are theoretically aligned but for important deviations



⌚ Although the structure of the two procedures is **widely aligned**, it is possible that each procedure leads to **different decisions**, or that one procedure **takes longer than the other** as a consequence of (i) pre-notification length, (ii) different extensions due to referral, proposal of commitments or at the request of the Parties, or (iii) clock stoppage.

- Note that, unlike under the EUMR, under the FSR there is **no formal clearance decision** foreseen after **Phase 1**. Every case with **potential concerns** will be transferred to **Phase 2** and **commitments can only be offered in Phase 2**.

Substantive assessment may overlap with EUMR

The substantive test under the FSR remains unclear despite the approaching date of application

1 Is there a foreign subsidy? (Article 3 FSR)

2 Is this foreign subsidy distortive? (Article 4, 5 FSR)

3 Are the negative effects of the foreign subsidy balanced out by positive effects? (Article 6 FSR)

4 Do commitments offered fully and effectively remedy the distortion in the internal market? (Article 7 FSR)



Open questions

- Will known concepts from EU State aid law be applied to the FSR?
- Will distortions be assessed on the market for investments into the EU or on the markets on which the target is active? And what does this mean for a parallel EUMR investigation?
- Which positive effects can credibly be claimed? Can positive effects outside of the EU be taken into account?
- How shall a repayment of a foreign subsidy be monitored? Will concerns de facto always result in a prohibition?

Contact



Vanessa van Weelden

**Principal Associate, Antitrust, Competition & Trade
Brussels**

T +32 2 504 7038

E vanessa.vanweelden@freshfields.com

