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How to Factor in the New EU Foreign Subsidies Regulation in the Transactional Process. Paul Hastings' FAQs and Toolbox

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The recently enacted EU Foreign Subsidies Regulation (FSR)¹ grants the European Commission investigative powers on foreign subsidies that may distort competition in the EU internal market. The FSR imposes suspensory filing requirements on parties to reportable transactions, potentially leading to lengthy reviews and remedial actions on top of existing competition law and national security review processes.

The FSR Implementing Regulation (FSRIR)² was published on July 10, 2023, and provides detailed rules on the procedure for notifications of concentrations to the Commission, including regarding the information that must be reported.³

Paul Hastings has prepared FAQs and a Toolbox to help clients navigate this new burdensome European regulatory constraint.

An FSR Filing Requirement is Triggered Where

- At least one of the merging companies, the target, or a JV (i) is established in the EU and (ii) generates an aggregate EU-wide turnover of at least EUR 500 million; and
- The parties to the transaction were granted combined aggregate financial contributions of more than EUR **50 million** from non-EU governments in the previous three years.

FSRIR in a Nutshell

The FSRIR sets out the information on foreign financial contributions (FFCs) to be reported as part of a notification.

- The FSRIR identifies **high-risk FFCs** that any party to the transaction must report if above €1m, and granted in the past 3 years.
- For **other FFCs**, the notifying party(ies) (buyer in an acquisition; merging parties in a merger; parent companies in a JV) must report all individual financial contributions above €1m if granted by a non-EU country that granted financial contributions of at least €45m in the aggregate in the past 3 years.
- The FSRIR **excludes** certain FFCs from reporting: (a) deferred taxes and social security contributions, tax amnesties, tax holidays, and normal depreciation and loss-carry forward rules, to the extent they are of general application and not limited to certain sectors, regions, or undertakings; (b) tax reliefs for avoidance of double taxation; (c) provision /

purchase of goods / services (except financial services) at market terms in the ordinary course of business; and (d) financial contributions below €1 million.

FAQs

Question	Answer
Is the seller turnover included in the €500m thresholds?	No, only acquiring party / merging parties / target / JV.
Does the FSR apply to a non-EU acquirer?	The issue is not whether the acquirer itself is non-EU; it is whether it receives FFCs from non-EU entities. An EU acquirer that has received non-EU FFCs can be caught. A non-EU acquirer that has received non-EU FFCs and that invests in the EU can be caught as well.
What should be included in the calculation of the €50m threshold?	All FFCs (of any amount and type) should be taken into account (irrespective of whether they are presumably distortive or not), unless they are excluded (parties will need to self-assess the applicability of exclusions provided for in the FSRIR).
So if the thresholds are not met, I am safe?	Be careful. Unlike EU merger control, ⁴ the Commission will have the power to "call in" deals below the thresholds.
What happens if the acquirer fails to notify?	Failing to notify / early implementation can lead to penalties of up to 10% of turnover. Like EU merger control proceedings.
What FFCs should be reported in the notification form?	Only those that are presumed to be distortive.
What is a distortive FFC?	High-risk FFCs are those that amount to subsidies (a) granted to an ailing undertaking; (b) in the form of an unlimited guarantee for the debts or liabilities of the undertaking; (c) in the form of an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; or (d) directly facilitating the M&A transaction.
How will the Commission apply the distortion test?	It is still unclear, but EU (State aid) precedents will provide valuable guidance.
Can I use the Form CO (merger control) to disclose FFCs?	The FSRIR provides a separate notification form called Form FS-CO. FSCs review will run in parallel to FDI and merger control reviews.
Can I file before EU Member States competition authorities?	No. Contrary to EU merger control, the EU Commission is the only authority competent to review FSCs.
Is the calendar the same as for EU merger control?	Yes, it is broadly similar, with potentially two phases: a First Phase of up to 25 business days; and a Second Phase (identification of concerns and possible remedies) up to 90 business days (subject to extensions).
Is it recommended to pre-notify?	Yes, like EU merger control, it is highly recommended.

Will this new regime increase deal uncertainty / execution?	We expect that, like EU merger control in the past, the vast majority of cases will be approved in the first phase without remedies. Still, FSR notification should be factored in deal timeline with sufficient margin, in particular in its infancy, where a lot of uncertainty remains.
Will the Commission apply the same reasoning as in EU merger control when assessing FFCs?	No, the Commission will likely rely on its many years of EU State-aid practice and precedents.
Who should report high-risk FFCs ?	All parties to a notifiable deal (including the buyer and target groups).
Are PE firms / investment companies treated similarly to other acquirers?	The FSRIR provides certain exclusions for PE houses (however, they do not apply to high-risk FFCs).
What are the reporting exclusions?	FFCs granted to other (uninvolved) funds managed by the same PE company will not need to be included under certain conditions.
Are foreign-to-foreign deals caught?	Yes, as long as at least one of the merging parties, the target or the JV is "established in the EU," a notion which is broadly interpreted (representative, branch, subsidiary, etc.).

PH Toolbox

- A scorecard that helps our clients map FFCs across their groups. Initial mapping exercise is very burdensome and should be prepared early;
- A table categorizing FFCs that are distortive;
- A due diligence request list that includes specific FSR requests on top of merger control requests;
- FSR-tailored CP clauses for deal documentation; springing conditions for FSR call-in risks; FSR HOHW clauses, etc.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Paris lawyers:

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- ¹ See our previous [PH STAYCURRENT](#).
 - ² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1441>
 - ³ The FSRIR also includes requirements for public procurement procedures and ad hoc cases, which will be dealt with in another alert.
 - ⁴ Although new usage of Article 22 has increased uncertainty recently, see here: <https://www.paulhastings.com/en-GB/insights/client-alerts/european-commissions-position-on-merger-control-referrals-a-small-revolution>