



BRUSSELS À JOUR

La Rentrée 2022 – Things to Have on Your Radar after the Summer Break (Day 3)

Markus Roehrig, Laura Stoicescu and Joachim Burger report on the latest developments from the European capital of competition law.

Now, that the first post-Covid summer has come and gone, it's time to put up your surf board, pack the kids' lunch boxes and plan for the months ahead. Admittedly, we can't rival with the masters of bento boxes, but we can give you a short overview of "les must" of this fall in terms of antitrust, cartels, merger control, foreign subsidies and State aid. Sadly, it is already Day 3 and the end of our La Rentrée 2022 edition, concluding with our outlook on Foreign Subsidies and State aid:

Foreign Subsidies Regulation: A regulatory Storm and its Impact on Businesses

Most of our readers will already know it: Following a political agreement reached on 30 June 2022, another regulatory storm from Brussels called Foreign Subsidies Regulation ("FSR") is just miles away. Following the expected formal adoption in Q4/2022, the notification obligations for M&A transactions and public procurement bids falling in scope of the FSR will apply after a grace period of 9 months, i.e. at some point in the second half of 2023.

So what's to expect? It is certainly no stretch to say that this ground-breaking regulation will heavily impact M&A deals (timelines, closing conditions, interplay with simultaneous FDI / merger control proceedings) and public procurement. The first details how the FSR will pan out in practice will however only emerge in December, when the Commission aims to publish a Draft Implementing Regulation for public consultation. A welcome invitation for a #Brusselsajour edition on the most pressing questions right after – stay tuned for that! In the meantime, let's look at the key tools of the new FSR:

- **Mandatory notification of all M&A transactions** which are deemed as a concentration under the EUMR (meaning an acquisition of a non-controlling minority stake, maybe the prime example of foreign investment, does not trigger a review!). A concentration is notifiable if (1) the turnover of one the undertakings concerned



exceeds EUR 500m within the EU and (2) all of the undertakings concerned have received an aggregated (!) “*financial contribution*” exceeding EUR 50m in the last three calendar years before the notification in one or more non-EU countries.

Note that the term “financial contribution” is defined extremely broad and is more or less aligned with State aid law and Art. 107 (1) TFEU. Unfortunately, in practice, this will bring a number of state support measures in favour of companies (e.g. capital injections, tax rebates, direct grants, state guarantees, R&D support, COVID aid) in the scope of the FSR.

If an M&A transaction is notifiable, it may not be closed prior to Commission approval (standstill obligation). Otherwise, the Commission can, similar to the EUMR, impose fines of up to 10% of the parties’ annual global turnover. And also timing-wise the FSR’s deal review will follow the EUMR (Phase I: 25 WD, Phase II: 90 WD). But regardless of such similarities, one of the most relevant questions for practitioners is how the Commission intends to deal with simultaneous EUMR and FSR proceedings (e.g. regarding informal guidance, stop the clock, remedies). Hopefully, the Draft Implementing Regulation will provide further insights and also clears up the organisational set-up within DG COMP: Will companies have to deal with two separate case teams for parallel merger control and FSR reviews? How will such proceedings be aligned to avoid delays impacting the overall deal timeline?

- **Mandatory notification of public procurement bids**, where the estimated value of a (only EU) public tender exceeds EUR 250m and the participating economic operator, i.e. the bidding company, received aggregated foreign financial contributions in the three calendar years prior to notification of at least EUR 4m. Operators will have to report such contributions to the contracting authority, which will pass it on to the Commission for review whether this enabled an unduly advantageous offer.
- **Ex officio investigation tool** if a concentration or public tender does not meet the thresholds set out above (e.g. greenfield investments) and the Commission nonetheless suspects that foreign subsidies involved have distortive effects in the internal market. Provided these conditions are met, the Commission can order the parties to notify the transaction and otherwise impose redressive measures. And most noteworthy, it can investigate, e.g. on the basis of third-party complaints, foreign subsidies granted up to five years before the FSR entered into force (e.g. up to some point in 2018).

Since financial contributions are assessed on an aggregated basis (i.e. all non-EU financial contributions for all undertakings concerned added up) and with an extremely low threshold, a number of deals and procurement bids might be scrutinised. So the key question is: how do businesses best prepare before the FSR enters into force in mid to late 2023?

Unfortunately, tangible insights will be delivered only with the Commission’s Draft Implementing Regulation in December. Based on the Commission’s initial views, our #Brusselsajour edition coming right after (i.e. December or January) will dive into the most pressing questions, *inter alia*:



- How to identify and compile non-EU financial contributions (and since when).
 - Criteria when a financial contribution above the relevant thresholds has no distortive potential and will thus not fall in scope of the FSR.
 - If a financial contribution is however at risk of being classified as distortive, how to assess the impact on the internal market and the substantive assessment in future deals.
- WHEN?** Adoption end of 2022, entry into force after mid-2023. Draft Implementing Regulation in December 2022 – watch out for the #Brusselsajour edition following that publication for an in-depth guidance!

State aid: The best is yet to come

... was one of the headlines in a recent DG COMP presentation relating to the fitness check of State aid rules launched in 2019 and the Commission's ambitious 2012 State aid modernisation package. As part of these efforts to focus resources on the most pressing cases (go "big on big" as you might have heard), over the last years, the Commission was hard at work overhauling the vast majority of its State aid related regulations, guidelines and working papers (just to name a few: IPCEI, CEEAG, Risk Finance, Broadband guidelines set for adoption in 2022 and many more).

But as the headline said, maybe the best is yet to come: One of the underarching themes of this presentation – and the keynote speech of EVP Vestager at the EStALI Autumn Conference – was that State aid rules should foster and enable "good" and "transparent" aid. The Commission believes that the mere fact that Member States are providing increased support to companies is not a problem in itself, as long as such public support follows clear policy principles and complies with State aid rules. To that end, the Commission's representatives repeatedly pointed towards the Covid crisis, in which (see the recently published State aid scoreboard on approved State aid spending by Member States in 2020) huge amounts were disbursed under the Commission's supervision, ensuring that distortions of competition were limited and the level playing field remained intact.

That, in the Commission's view, proves that the revised and new rules should facilitate "good" aid related to certain policy objectives, in particular the so called "twin transition" (Green Deal & Digital Agenda). So as part of the fitness check and State aid modernisation, the "last of the mohicans" not yet overhauled will be revised in light of these principles. One of the most important will follow soon with the General Block Exemption Regulation ("**GBER**"), which is set for expiry at the end of 2023. The Commission in particular aims to align the GBER with other revised guidelines (e.g. the CEEAG to facilitate green investments or Risk Finance guidelines) and to simplify the increasingly complex legal text. As the GBER accounts for almost 95% of all aid measures by Member States, this will be of huge practical relevance for Member States and businesses alike. Other guidelines to be revised or evaluated in the short- to mid-term are the De-Minimis Regulation, the Rescue & Restructuring Guidelines, the Railway Guidelines, Guidelines on State aid to airports and airlines, the Banking Communication and several rules for agriculture and fishery. So a lot to come – some of it still expected this year and more in 2023.



State aid: Amendment of the Temporary Crisis Framework

The extensive and ongoing efforts on State aid modernisation were and are maybe somewhat overshadowed by the continuous crisis mode DG COMP finds itself in since 2.5 years: After the immense inflow of cases during the Covid crisis seemed to stop, it was topped off by the energy crisis following Russia's invasion of Ukraine. So the Commission is very aware that there is – unfortunately – no time to take a breather, as rising costs will require Member States to increasingly support struggling businesses and individual households alike.

The Commission is eager to play its part, with Commissioner Vestager just announcing last week that the key ingredient of any crisis response is flexibility. With that buzzword in mind, she announced a new Member State survey to see if the Temporary Crisis Framework is still “up-to-date and in line with needs” and announced “further amendments” in the months to come.

Since a number of businesses will need increased state support to survive the winter, the Commission will in particular need to look into the maximum aid amounts possible (per beneficiary), straighten eligibility criteria (so far, often undertakings in difficulty are excluded, even though their difficulties are not intrinsic and solely stem from the Covid crisis) and prolong the existing rules. In addition, in light of increasing rescue measures by national governments to important energy suppliers, some even considering nationalisations, the Commission will also face more and more requests to include a similar chapter as the Temporary Framework had on equity measures and recapitalisations.



WHEN? Amendment to the Temporary Crisis Framework expected still before year end (comparable amendments in Covid crisis often happened within weeks).

...and on that note, we end our three day tour of La Rentrée 2022. We hope you enjoyed – now time for you to enjoy your first pumpkin-spice latte of the season (or the drink of your choice). While at it, don't forget to follow us on LinkedIn for more of your favorite EU Competition Law topics!

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