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EU Foreign Subsidies Regulation Comes into Force

by **Marco Hickey**

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Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (FSR) introduced various measures designed to tackle the grant of subsidies by third countries (non-EU governments).

This would include the UK since Brexit. The FSR introduces three procedures:

- A notification-based procedure to investigate certain merger transactions (concentrations in EU terminology) involving financial contributions granted by non-EU governments provided certain criteria are satisfied;
- A notification-based procedure to investigate bids in public procurement procedures involving financial contributions by non-EU governments where certain tests are met; and
- An ex officio procedure to investigate all other market situations, where the Commission can start a review on its own initiative.

Mergers

The FSR contains specific provisions on notification of mergers that exceed given thresholds. The mergers provisions applied as of 12 October 2023.

Mergers which exceed given thresholds need to be notified to, and cleared by, the Commission in Brussels. The notification requirements apply in parallel to the EU Merger Control Regulation and the national systems of merger control. A notifiable merger (a concentration in EU terminology) is deemed to arise where:

(a) at least one of the parties is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and

(b) one of the parties was granted combined aggregate financial contributions of more than EUR 50 million from third countries in the last three years.

A financial contribution is broadly defined. It includes:

- transfers of funds or liabilities such as capital injections, grants, loans, loan guarantees, fiscal incentives,
- the setting off of operating losses,
- compensation for financial burdens imposed by public authorities,
- debt forgiveness, debt to equity swaps or rescheduling,
- the foregoing of revenue that is otherwise due such as tax exemptions or the granting of special or exclusive rights without adequate remuneration,
- and the provision of goods or services or the purchase of goods or services.

A foreign contribution is regarded as having been made by a third country in a broad range of circumstances, including where it is made by a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

The substantive test applied to a notified concentration is whether or not the foreign subsidy distorts the internal market.

The merger procedure is similar to that applicable under the Council Regulation 139/2004 on the control of concentrations between undertakings (EU Merger Control Regulation).

Dr Marco Hickey is Head of the EU, Competition and Regulated Markets team at LK Shields. He is author of Merger Control, published by Round Hall (part of the Thomson Reuters group), which is the only book exclusively devoted to merger control in Ireland.

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