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FSR Watch #1

This first issue looks at recent developments in the enforcement of Regulation (EU) 2022/2560 (“**FSR**”) from the perspective of transparency.

The first good news in terms of transparency is that, starting from summer 2024, DG COMP set up a public case register for notifications concerning concentrations. This is a welcome development. Further (equally welcome) steps along the same path could lead to the publication of so-called “Phase 1” decisions, helping with the interpretation of thresholds. For example, this could help clarify why a transaction involving operators of energy transport networks in a single Member State required an FSR notification.

The second good news is the publication of a Commission Staff Working Document, providing clarifications (albeit “initial”) on certain key notions. This publication mitigates the absence (so far) of a case register for notifications concerning public procurement (perhaps due to the extremely high number - around 1,000 - of notifications).

Finally, we briefly discuss the only (so far) Phase 2 decision, hoping that, besides the (very informative) press release, the full decision might be published soon.

1. What is the basis for the Commission’s jurisdiction?

Recently the public case register for notifications concerning concentrations showed that leading Italian natural gas distributor Italgas has submitted an FSR notification for the acquisition of 2i Rete Gas, an Italian distributor of natural gas. The case has been registered under number FS.100169, with a Phase 1 deadline set for February 13.

The obligation to notify under the FSR regulation is based not only on the turnover of the target company but also on the receipt of at least €50 million in foreign financial contributions over the three years preceding the notification. However, neither Italgas nor 2i Rete Gas appear to have significant non-EU activities.

One could think that the purchase of gas from non-EU public entities was interpreted as a foreign financial contribution, exceeding the thresholds. Alternatively, one could consider that the mere presence in the equity of a significant non-EU shareholder, linked to a state (in this case, China State Grid, with an indirect significant stake in Italgas), could satisfy the requirement for the provision of such contributions.

The publication of a decision (even a Phase 1 decision) could provide useful guidance on the interpretation of this requirement.

2. The Application of FSR Legislation to Public Procurement

In contrast to concentrations, a public case register for notifications concerning public procurement does not yet exist. This lack of transparency can be explained by the extremely high number of notifications—over 1,000 in the first year of FSR implementation. Nevertheless, operators and contracting authorities would benefit from a greater degree of information.

Thus, the publication of the Commission Staff Working Document, “Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market” is especially valuable. Specifically, the Commission has provided the following clarifications:

- The qualification of an offer as "unduly advantageous" must be determined through a comparison of the offers, as well as an estimation by the contracting authority. If such an advantage is identified, the Commission will examine whether the advantage is justified by factors unrelated to the subsidy, based also on additional information (such as market analysis).
- It is necessary to demonstrate a link between the subsidy and the offer, establishing with a high degree of probability that the subsidy enabled the economic operator to submit an unduly advantageous offer.
- In public procurement procedures, the balancing test between the potential positive effects of the subsidy and the distortion caused in the internal market may also involve the availability of alternative supply sources for the goods and services concerned.

3. First Case of Remedies in the Context of a Concentration in the telecoms sector

The Commission has adopted a Phase 2 decision regarding the acquisition of PPF, a telecommunications operator in Central and Eastern Europe, by e&, a UAE-based operator.

The text of the decision is not public yet (although the decision was adopted in September 2024). However, based on the press release, this decision remains a point of reference for operators, including those in sectors other than telecommunications. Essentially, to address the Commission's concerns, the acquirer (e&) and the Emirates Investment Authority ("EIA") have made commitments, including:

1. ensuring that the articles of association of e& comply with the bankruptcy laws of the United Arab Emirates, thereby eliminating the unlimited state guarantee,
2. prohibiting financing from e& and EIA to PPF's activities in the EU internal market (except in certain cases) and ensuring that intra-group transactions occur at market conditions,
3. requiring e& to notify to the Commission of any acquisitions, even if below the FSR thresholds.

The remedies in this case can be transposed to other cases. For example, the commitment to notify transactions below the threshold could be replicated in other contexts. Similarly, the commitment to eliminate unlimited state guarantees is also replicable (and is a well-established element of European state aid practice).

Conclusion

The control of foreign financial contributions, particularly in the field of public procurement, is becoming increasingly important. As with merger control, greater publicity of decisions contributes to more effective application of the legislation by all interested parties.

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