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# A Sign of Things to Come? The Commission's First FSR Merger Tool Phase II Decision

Markus Röhrig, Christoph Wilken and Christian Dankerl report on the latest developments from the European capital of competition law.

**Good things come to those who wait. On 4 April 2025, the Commission published the first-of-its-kind phase 2 decision on *e&/PPF* under the FSR's merger tool. This sets the stage for a follow up to our October 2024 edition of Brussels à Jour. In essence, the decision brings about clarifications on the notion of "foreign subsidy", the EC's step-by-step approach to the assessment whether a subsidy has a distortive effect on competition in the internal market and the approach towards commitments to eliminate those concerns.**

## Recap of our October edition's insights

On 24 September 2024, the Commission conditionally approved the acquisition of PPF Telecom Group B.V.'s telecommunication operations in Hungary, Bulgaria, Serbia and Slovakia ("PPF") by Emirates Telecommunications Group Company PSJC ("e&"). The buyer, based in the UAE and controlled by the country's sovereign wealth fund ("EIA"), in April 2024 notified to the Commission its proposed acquisition of PPF. With its decision of September 2024, the Commission closed its first in-depth investigation under the FSR's merger tool. Since then, the publication of the full decision has been eagerly awaited by practitioners of competition law all around the EU – let's see what it has to offer!

## Foreign subsidies everywhere?

The provisional public version of the decision underlines the Commission's extensive interpretation of the "foreign subsidy" concept. Pursuant to Article 3 FSR "*a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertaking or industries.*"

In its decision, the Commission states that a foreign subsidy essentially requires a financial contribution which is (i) attributable to a third country, (ii) beneficial for the recipient and finally, (iii) specific to certain undertakings or industries. In *e&/PPF*, the Commission reviewed the following financial contributions:

- ***Term loan***. The term loan granted to e& by a syndicate of five banks, four of which are UAE state-controlled institutions, had the purpose of financing the transaction. The EC's in-depth investigation confirmed that the loans were granted on market terms and, thus, did not provide a benefit for the recipient. Thus, the EC's preliminary assessment set out in the decision to open the in-depth investigation that the term loan constituted a foreign subsidy was not confirmed.
- ***Unlimited guarantee***. The Commission took the view that a provision exempting e& from the UAE's ordinary insolvency rules was tantamount to a state guarantee. The exemption exists because e& is partially owned by the federal government of the UAE. In this context, even though the Commission acknowledged that no explicit provision existed that prescribed a rescue of e& in case of insolvency, it was considered unlikely to default on its debts. This finding was based on the possibility and expectation that the UAE would, in case of e&'s insolvency, step in to ensure the continuity of its telecommunications network, the expectation that UAE authorities will provide additional liquidity to e&, and creditor's expectation that e& will be able satisfy its debt. In the absence of restriction akin to EU State Aid rules in UAE, the Commission further found that the provision of state aid to e& in case of financial distress was not restricted. The Commission found that the unrestricted guarantee (i) was attributable to a public authority of the UAE (the EIA), (ii) conferred a benefit on e& and (iii) was limited to certain undertakings, namely wholly or partially state-owned entities.
- ***Grants, loans and repayable advances provided to the EIA***. e& failed to provide additional information on various financial contributions, including the specific amount, the remuneration, the duration, and the terms and conditions of individual financial contributions, even after several requests for information from the Commission. This led the Commission to rely on Article 16(3) FSR, according to which the Commission can a presume that a financial contribution conferred a benefit to its recipient if the undertaking concerned failed to provide information necessary for the Commission's assessment.
- ***Revolving credit facility***. The revolving credit facility loan from UAE banks to the EIA also qualified as a foreign subsidy. The Commisssion attributed the financial contribution associated with the facility to the UAE government on the ground that the ownership

structure of the bank and the personal linkage of the bank's board members to public offices in the UAE allow for influence on the bank's decision-making process. The revolving credit facility was therefore attributable to the UAE. Again, the Commission presumed pursuant to Article 16(3) FSR that the revolving credit facility provided a benefit for EIA and that it therefore constituted a foreign subsidy.

- ***Foregoing of revenue that is otherwise due in the form of special rights without adequate remuneration***: In its in-depth investigation, the Commission considered whether "special rights" were granted to e& without adequate remuneration by e& but concluded that this was not the case as there was no sufficient indication that the remuneration was inadequate. Unfortunately, much of the Commission's reasoning on this financial contribution has been redacted in the published decision.

## Distortion & balancing – the Commission's assessment of the effects of foreign subsidies

Article 4(1) FSR stipulates that a foreign subsidy is distortive if it is "*liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market.*"

The Commission found that the foreign subsidies did not distort the acquisition process, i.e., the pre-transaction competition. In particular, it found that the foreign subsidies did not actually or potentially negatively affect the pre-transaction competition in the internal market as e& was the sole bidder for PPF, the target's valuation met market terms, and e& was able to finance the transaction absent the unlimited guarantee.

However, the Commission confirmed that its assessment regarding the subsidies' distortive effects on competition is not limited to the acquisition process but extends to the respective subsidy's effects on the merged entity's market behaviour post-transaction.

The Commission conducts its assessment of anticompetitive effects of a foreign subsidy based on the following steps:

In a first step, the Commission identifies activities of the parties likely to be affected by the foreign subsidies. This serves as a framework of proof for the assessment of the subsidy's effect on competition post-transaction.

Subsequently, the Commission examines whether the foreign subsidy falls within the categories of Article 5(1) FSR – so-called "most likely distortive" foreign subsidies. If this is the case, the Commission does not have to further assess whether the specific foreign subsidy distorts competition in the internal market. Instead, the burden of proof is on the parties to demonstrate that the foreign subsidy will not distort competition in the internal market.

If a foreign subsidy does not fall within any of the categories of "most likely distortive" foreign subsidies, the Commission conducts its "general distortion test". Under this test, the Commission examines (i) whether the foreign subsidy is liable to improve the competitive position of the merged entity and (ii) the foreign subsidy's actual or potential effects on competition in the internal market.

If the parties are either unable to rebut the legal presumption of the subsidy's distortive effects or the Commission finds a distortive effect of a foreign subsidy following the "general distortion test", the parties or any other third party may demonstrate advantages of the foreign subsidy – not of the transaction itself – such as, e.g., positive effects on environmental protection, social standards, and/or the promotion of R&D in the internal market. This balancing of the effects of a foreign subsidy does not eliminate distortive effect, but the Commission assesses whether the positive effects outweigh the distortive effects. For "most likely distortive" foreign subsidies, the Commission considers it less likely that positive effects will outweigh the negative effects.

## The role of behavioural remedies

The clearance decision for e&'s acquisition of PPF came at a price. To secure the Commission's approval, e& had to accept a set of commitments to ensure that any foreign subsidies granted to e& and EIA cannot be channelled into the internal market in a way that distorts competition. In particular, e& committed to:

- Ensure that its articles of association do not conflict with, disapply or override any provision of UAE bankruptcy law (thereby effectively removing the unlimited guarantee);
- Refrain from financing, whether equity or debt, PPF's activities in the EU internal market (subject to certain exceptions), and PPF's EU business not accepting financing from EIA;
- Not enter into commercial transactions (neither directly nor through EIA or any company affiliated with EIA) with the EU business of PPF which is not on market terms;
- Inform the Commission about any future transactions not notifiable under Article 20(3) FSR.

These commitments are undertaken for a 10-years period, with a possible extension for up to another five years upon notice from the Commission. They are also subject to independent monitoring.

The analytical framework for the assessment of commitments proposed by the undertaking under investigation requires the commitments to be "*proportionate and fully and effectively remedy the distortion actually or potentially caused by the foreign subsidy in the internal market*". Article 7(4) to (6) FSR provides a non-exhaustive list of potential commitments. However, all of these exemplary commitments are *structural* rather than *behavioural* in nature. In contrast, the remedies proposed by e&, and accepted by the Commission, are merely behavioural in nature.

It remains to be seen whether the Commission will take a more lenient approach to behavioural remedies in FSR cases as opposed to EU merger control cases (for which the Commission's notice on remedies states in paragraph 17 that "*Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances.*"), or whether the Commission's acceptance of the behavioural remedies in *e&/PPF* was indeed based on the very specific circumstances of the case.

## Takeaways

*e&/PPF* confirms the FSR's wide scope of application and clarifies some key aspects:

- The scrutiny of actual or potential effects on the internal market can not only relate to the acquisition process itself, but also the post-transaction conduct of the parties involved in the internal market.
- Cooperation with the Commission is essential to preventing detrimental assumptions: The Commission does not shy away from attaching negative consequences in case of failure to provide sufficient information when assessing whether financial contributions provide a benefit for its recipient.
- The Commission shows an unusual but welcome openness towards behavioural commitments.

What's next? The Commission's has initiated another in-depth review of a transaction under the FSR - Abu Dhabi National Oil Company's acquisition of sole control over Covestro AG. The provisional deadline is 2 December 2025. Additionally, the Commission has published draft guidelines on the application of certain provisions of the FSR and is currently conducting a consultation process with the final guidelines due on 12 January 2026 at the latest.

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