CLEARY GOTTLIEB

ALERT MEMORANDUM

First Merger Commitments Adopted Under the EU Foreign Subsidies Regulation

October 4, 2024

On September 24, 2024, the European Commission (**EC**) conditionally approved, under the Foreign Subsidies Regulation (**FSR**), the acquisition of PPF Telecom Group (**PPF**) by Emirates Telecommunications Group Company PJSC (**e&**).[1] The EC's clearance is subject to commitments valid for 10 years, which may be extended by another 5 years. This is the EC's first Phase II conditional clearance decision under the FSR, which started to apply on July 12, 2023.[2].

The case confirms the EC will assess the effects non-EU subsidies may have on the single market post-merger. The commitments provide a useful indication of the safeguards the Commission considers appropriate to address potentially distortive foreign subsidies.

Transaction background and alleged subsidies. e& is based in the UAE and owned by the Emirates Investment Authority (**EIA**), a sovereign wealth fund. PPF is headquartered in the Netherlands and has telecom operations across Europe. The transaction met the FSR thresholds as at least one of the parties was established in the EU and generated an EU turnover of at least €500 million, and the parties were granted at least €50 million in combined aggregate foreign financial contributions from third countries in the three years prior to the concentration.

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[1] "Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation", European Commission Press Release (September 24, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4842.

[2] Unlike in EU merger control review where commitments may be adopted during Phase 1 review, the Commission may only accept commitments during Phase II in FSR proceedings (FSR, Articles 11(3) and 25(3)).

e& received potential foreign subsidies from the UAE in the form of:

(i) An unlimited state guarantee via exemptions from the applicable bankruptcy laws.

(ii) A term loan to e& used to finance the transaction from five banks whose actions could be attributed to the UAE, with indications it was not obtained at market conditions.

Potential distortions from subsidies. The EC found that foreign subsidies did not have negative effects on the acquisition process itself as e& was the sole bidder for the target and could have financed the transaction with its own resources. However, it concluded there was a risk of potential distortions in the EU internal market post-transaction, as the potential subsidies – and the unlimited guarantee in particular – would give the merged entity the capacity to engage in investments or acquisitions without the same constraints as a market operator. Under the FSR, unlimited state guarantees are among the forms of subsidies deemed "most likely to distort the internal market" and thus "*will normally be considered distortive*" unless there are specific facts indicating otherwise.[3]

e&'s commitments. e& and EIA offered commitments for 10 years consisting of:

(i) The removal of the unlimited state guarantee, by ensuring e&'s articles of association do not deviate from ordinary UAE bankruptcy law.

(ii) The prohibition of financing by e& and EIA of PPF's activities in the EU, subject to exceptions (*e.g.* emergency funding), and a requirement that other transactions should also be on market terms.

(iii) The obligation for e& to inform the EC of any future acquisitions that are not notifiable under the FSR.

Lessons for future cases. The decision confirms the EC is willing to accept behavioural measures that "ringfence" EU activities from the potential effect of subsidies granted outside the EU. The extent to which such behavioural measures can be replicated for other businesses and transactions will depend on how these measures are implemented and monitored, which remains to be seen in the full decision yet to be published.

e&/PPF is the only FSR Phase II merger investigation opened to date. The EC continues to review and unconditionally approve most notified concentrations, although a number of transactions have also been abandoned at the pre-notification stage. From October 2023 (when the filing obligation started to apply) to the end of July 2024, the EC engaged in pre-notification talks with parties in 106 cases. 76 cases proceeded to formal notifications, 63 of which were unconditionally approved after the preliminary review phase.[4] Based on recent experience, FSR merger review may take on average 3.5 to 5.5 months from the initial draft filing to clearance, depending on the sensitivity of the case, level of preparation of the parties, and the amount of information included in the initial filing.

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[3] 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, p.3

[4] EU Competition Policy, LinkedIn Post in September.