M&A Takeaways From 1st EU Foreign Subsidies Merger Ruling

By **François-Charles Laprévote, Wanjie Lin and Thomas Harbor** (November 7, 2024)

Following the European commission's decision in Emirates Telecommunications Group/PPF Telecom Group on Sept. 24,[1] it is critical for companies to evaluate if their transaction could face detailed scrutiny under the Foreign Subsidies Regulation, or FSR, or whether it might raise substantive issues, given the risk that commitments proposed by the parties are deemed insufficient by the European commission.

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Companies should plan for remedies if they anticipate possible concerns and the commission's ruling serves as a helpful guide.

The case confirms that the commission will assess the effects non-European Union 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.

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In this article, we will examine the commission's first decision approving a transaction subject to commitments under the FSR, highlighting the practical implications for companies with ties to a non-EU state or state-linked bodies.

Transaction Background

The Emirates Telecommunications Group, or e&, is based in the United Arab Emirates and is owned by the Emirates Investment Authority, a sovereign wealth fund.

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PPF is headquartered in the Netherlands and has telecom operations across Europe, in particular in Bulgaria, Hungary, Serbia and Slovakia.

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 ($535 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.

On June 10, the commission decided to open an in-depth, Phase 2, investigation into the transaction, the first of its kind under the recently adopted FSR. On Sept. 24, the commission cleared the transaction subject to commitments.

Key Findings

The commission considered that e& received potential foreign subsidies from the UAE in the form of:

- An unlimited state guarantee via exemptions from the applicable bankruptcy laws; and

- 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.

The commission found that these 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.[2]

e&'s Commitments

e& and the Emirates Investment Authority offered commitments for 10 years, consisting of the following:

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

- The prohibition of financing by e& and the Emirates Investment Authority 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; and

- The obligation for e& to inform the commission of any future acquisitions that are not notifiable under the FSR.

Lessons

The decision confirms the commission is willing to accept behavioral measures that ring-fence EU activities from the potential effect of subsidies granted outside the EU.

The extent to which such behavioral 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.

It remains to be seen if implementation of the commitment hits any major obstacles, which could push the commission to change course in future transactions.

e&/PPF is the only FSR Phase 2 merger investigation opened to date. The commission continues to review and unconditionally approve most notified concentrations, although a number of transactions have also been abandoned at the prenotification stage.

From October 2023, when the filing obligation began to apply, to the end of July this year, the commission engaged in prenotification talks with parties in 106 cases.

Seventy-six cases proceeded to formal notifications, 63 of which were unconditionally approved after the preliminary review phase.[3] 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.

Practical Tips for Businesses

As the FSR applies a novel legal framework, businesses face significant uncertainty in assessing when non-EU subsidies could be problematic.

Acquisitive companies should front load the collection of internal information and documents on foreign financial contributions to identify potential concerns with the filing.

Based on the e&/PPF precedent, companies should also start to plan for possible remedies in advance when they identify potentially problematic subsidies.

Pending further guidance, certain case features are more likely to draw detailed questions or a lengthier review.

While ex officio investigations to date have targeted Chinese companies that might have received potential subsidies from China, the e& case shows that notifications of transactions involving state-linked companies from the Persian Gulf can also be subject to thorough evaluation.

The commission is particularly focused on acquirers with state connections, e.g., state-owned enterprises, sovereign wealth funds and government-owned investment funds. Bidders should also expect increased scrutiny where the target is active in a strategic sector.

Following the case of e&, the commission may seek to request, by way of commitments, that certain categories of companies provide details of all future merger and acquisition activity in the EU, including for below-threshold transactions.

The commission is expected to inquire about relationships with state bodies, focusing on aspects such as ownership and governance interests, involvement in management and business decisions, as well as any financial connections or preferential legal treatment.

When private investment funds are the acquirers in a transaction, investments from state-linked investors in the fund are nominally regarded as foreign financial contributions related to the acquisition.

Therefore, the fund should be ready to clarify whether these investments were made under the same terms as those from private investors.

The FSR process evaluates M&A deals to determine if the acquirer's offer is backed by foreign subsidies. Involved parties are required to submit comprehensive details regarding the financing sources for their transactions.

The commission has indicated that the predominant type of foreign financial contributions examined thus far pertains to the financing sources for transactions. These contributions can encompass capital injections, equity contributions or loans from banks associated with state entities.

To minimize scrutiny, parties should demonstrate that these contributions are offered on arm's length terms.

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[1] Commission Decision FS.10011 of 24 September 2024, Emirates Telecommunications Group/PPF Telecom Group, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4842.

[2] 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.

[3] EU Competition Policy, LinkedIn Post in September, available at: https://www.linkedin.com/posts/eucompetitionpolicy_the-foreign-subsidies-regulation-activity-7226497306030678017-WRjT.