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Competition FSR Brief

The e&/PPF Telecom case – Interference on the foreign subsidies line to the EU

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First in-depth investigation under the FSR

On 24 September 2024, following an in-depth investigation, the European Commission conditionally approved (the 'Decision') the Emirates Telecommunications Group's ('e&') acquisition of sole control of PPF Telecom Group, except for its Czech business (the 'Target'), under the Foreign Subsidies Regulation ('FSR').

e& is a telecommunications operator based in the United Arab Emirates ('UAE') and controlled by the federal sovereign wealth fund of the UAE, the Emirates Investment Authority ('EIA'). **PPF Telecom Group** is a Netherlands-based telecommunications operator active in Czechia, Bulgaria, Hungary and Serbia (under the brand 'Yettel') as well as in Slovakia (as 'O2'). The **Target** serves more than 9 million customers in the European Union and its telecom activities include the provision of retail services and of underlying infrastructure.

The approval of the acquisition is conditional on full compliance with the commitments that were offered by e& and the EIA, and were made binding by the Commission in the Decision. In the interest of addressing concerns in a timely fashion, e& offered commitments early in the in-depth investigation. The Commission was therefore able to adopt the Decision well ahead of the legal deadline, without needing to formalise its concerns in a Statement of Grounds.

The Decision is the first that the Commission has taken after an in-depth investigation under the FSR. The Commission's investigation relied on the indications gathered during the preliminary review, as well as further investigative efforts, including further information collected from the parties, the Target's competitors and from national regulatory authorities.

The investigation led to the following findings.

Foreign subsidies to e& and the EIA

"Foreign subsidies" under the FSR are *financial contributions* in any form (such as capital injections, loans, grants or guarantees, tax exemptions, the granting of special or exclusive rights without adequate remuneration, or the provision or purchase of goods or services), provided by a third country to an undertaking engaging in an economic activity in the internal market, which could not have been obtained under normal market conditions by that undertaking and, as such, confer a *benefit* which is *limited*, in law or in fact, to one or more undertakings or industries.

The unlimited State guarantee to e&

The Commission found that the UAE Bankruptcy law allowed e& to unilaterally decide to what extent it was subject to the ordinary bankruptcy law, i.e. the general rules applicable to commercial companies in the UAE.

e&'s shareholders had previously made use of this possibility, and e& was thus subject to particular bankruptcy rules, which, combined with other relevant circumstances, revealed the existence of an unlimited guarantee by the UAE. Granting an unlimited guarantee, i.e. without any limitation as to the amount or the duration of such guarantee, constitutes by nature a subsidy because it can never be obtained under normal market conditions. Indeed, an unlimited guarantee could essentially cover any liability taken on by the benefitting entity, without a

In a nutshell

The Commission conditionally approved the acquisition by e& of PPF telecom's activities in Bulgaria, Hungary, and Slovakia, in what is the first decision with commitments under the FSR.

The acquirer offered commitments to comply with ordinary UAE bankruptcy rules and thus exclude any unlimited State guarantee, and to ensure that no subsidised financing will be channelled to the internal market through commercial or financial links between the acquirer and the Target.

The decision shows that effective solutions can be successfully proposed by the parties in a timely fashion to remedy distortive foreign subsidies.

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possibility for that guarantee to be remunerated in a way that would reflect an assessment of risk: no private market operator would rationally provide such a guarantee to another market operator. As such, the unlimited guarantee provided to e& constituted a foreign subsidy.[1]

The foreign subsidies to the EIA

Further, the Commission also found in the Decision that e&'s parent, the EIA, had also received foreign subsidies.

First, the EIA was found to also enjoy an unlimited State guarantee, resulting from a full exemption from the ordinary UAE bankruptcy rules.

Second, the Commission found that the EIA enjoyed other foreign subsidies in the form of grants, loans, and repayable advances by the UAE Government, as well as of a revolving credit facility loan underwritten by banks 'whose actions can be attributed' to the UAE in the meaning of the FSR.

On the latter, the Commission considered a set of indicators which allowed it to conclude that the UAE authorities were likely involved in the provision of that facility. Those indicators include, notably, organic links with the State such as the majority shareholding and control of lending banks by the UAE government – with UAE law mandating majority domestic ownership of banks – and their Boards and senior management being dominated by senior civil servants or members of government.

In order to conclude its assessment of whether those UAE banks provided their financial services under normal market conditions, the Commission addressed several requests for information to which no response was provided, neither was any explanation to justify the absence of such response. Therefore, the Commission made use of Article 16 of the FSR, which is designed to ensure that the Commission is not obstructed when carrying out its duties: where an undertaking under investigation fails to provide requested information, the Commission can rely on the facts available (paragraph 1), and where an undertaking fails to provide information necessary to determine whether it derives a benefit from a particular financial contribution, the Commission can presume the existence of such a benefit (paragraph 3). In this case, the Commission made use of the latter prerogative and concluded that the financial contributions from the UAE banks to the EIA could be deemed to confer a benefit on the EIA.

The distortive nature of the foreign subsidies

Foreign subsidies need only be redressed where it is established that they distort the internal market, and where that distortion is not outweighed by any potential positive effects of such subsidies. Such a distortion is deemed to exist (i) where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market, and (ii) where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market. Such a distortion is to be established on the basis of indicators, including those listed in Article 4 of the FSR.

Additionally, under Article 5 of the FSR, certain categories of foreign subsidies are considered "most likely to distort the internal market". For these categories, the Commission does not need to perform a detailed assessment based on indicators, but a company can provide information to rebut this conclusion.

In the context of concentrations, the assessment of a distortion is limited to the 'concentration concerned', which means a possible distortion in (i) the acquisition process leading to the concentration, and also in (ii) the activities of the resulting combined entity in the internal market post-transaction.

No distortion in the acquisition process

In reviewing whether a foreign subsidy distorts the acquisition process, the Commission considers whether the subsidy is liable to improve the competitive position of the acquiring company (i.e. improve the conditions under which it performs the acquisition), and whether, in doing so, the subsidy leads to a negative effect on that process.

That negative effect can take several forms, as described in part 2.2. of the FSR's Impact Assessment.[2] First, foreign subsidies could allow the beneficiary to outbid or deter other potential acquirors from bidding for the acquisition. Second, foreign subsidies could allow the beneficiary to perform an acquisition that it would not have been able to otherwise perform (or with a different perimeter). In both instances, a subsidised acquisition would crowd out potentially more efficient non-subsidised acquirors. Overall, as recalled in the Impact Assessment, '[t]*his crowding out effect is likely to outweigh any benefits for* [sellers] *associated with reaping acquisitions premiums … it can seriously harm the functioning of the internal market in the long run*.'[3]

In the present case, the Commission found that the identified foreign subsidies were not liable to distort the acquisition

[1] This assessment was made by analogy with State aid practice and case-law in relation to unlimited guarantees. The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, pp. 10-22) notably considers as '*aid in the form of a [unlimited] guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures*'. This approach formed the basis for the Commission to establish an unlimited guarantee in decision 2010/605/EU giving rise to the judgment of the Court of 3 April 2014 in case C-559/12 P, *France v Commission*, EU:C:2014:217, and decision 2012/26/EU giving rise to the judgment of the Court of 19 September 2018 in case C-438/16 P, *France and IFP Énergies nouvelles v Commission*, EU:C:2018:737.

[2] Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021.

[3] *Ibid*., p. 10.

process. In particular: e& was the sole bidder for the Target; the acquisition price appeared to reflect the Target's market value (taking into account comparable transactions), indicating that other potential acquirors had not been deterred from bidding based on price; and e& had sufficient own resources, meaning that the acquisition would have happened absent the foreign subsidies.

Distortion in the activities of the combined entity

In reviewing whether a foreign subsidy distorts the combined entity's EU economic activities post-transaction, the Commission considers whether the subsidy, through the transaction, is liable to improve the combined entity's competitive position in its EU economic activities and, in doing so, lead to actual or potential negative effects on competition in the internal market. Such can notably be the case when, as a result of the financial or commercial integration of the acquiring company and the target, the subsidy identified may be channelled towards their EU economic activities.

In the present case, the Commission found that the transaction as initially envisaged would potentially have had a negative impact on the internal market as a result of the financial integration of e& and the Target.

First, e&'s unlimited guarantee falls in the category of subsidies 'most likely to distort the internal market' within the meaning of Article 5(1)(b) of the FSR (and 'considered particularly harmful' in the FSR's Impact Assessment). Indeed, such unlimited guarantees, unrestricted in their scope or amount, are liable to improve the competitive position of any undertaking in its EU economic activities. Additionally, such unlimited guarantees are likely to lead to negative effects on competition, in particular because they shield their beneficiaries from the prospect of financial losses or possible market exit, making them less sensitive to risk and more likely to engage in strategies or investments that would not have been possible under normal market conditions, and, as such, harm competition.

In the present case, the unlimited guarantee would likely have allowed the combined entity to raise financing for its operations at preferential conditions, because of the creditors' increased expectations that it would remain solvent in any case, thus enabling it to engage in expansionist acquisitions and investments (deployment of infrastructure, spectrum auctions). As to the EIA's unlimited guarantee, its effects are identical to those of e&'s unlimited guarantee.

Second, the combined entity would likely have had access to the EIA's financial capacity, as subsidised by grants, loans, and repayable advances attributable to the UAE. The EIA, as the owner of e&, has both the incentive and the ability to provide funding to e&'s EU economic activities. Therefore, these subsidies were also liable to place the combined entity in a financially advantageous position, by improving its capacity to finance its activities, beyond what its own competitive merits would have enabled under normal market conditions.

As a result, in the specific context of the telecommunications sector, the foreign subsidies to e& and the EIA were liable to provide the combined entity with the ability (through increased financial capacity) and incentive (through a decreased sensitivity to risk) to expand its activities beyond what its own merits would have allowed, i.e. absent the subsidies, and thus distort the level-playing field.

Such distortions were precisely envisaged in the preparatory works that led to the adoption of the FSR. The FSR's Impact Assessment considered that '[s]*ubsidies may for example lead to an inefficient overall allocation of resources and cause growth differentials between subsidised and non-subsidised undertakings.* (…) *Hence, in the long term, undertakings not receiving third country subsidies would become less competitive which negatively affects the EU's overall economic competitiveness*.'[4]

These concerns prompted e& to propose, early in the in-depth investigation, a commitments package aimed at ensuring that the transaction would not create a conduit allowing distortive foreign subsidies to be channelled into the internal market.

The commitments offered by e& and the EIA

The Commission assessed the draft commitments offered by e& and the EIA, including by consulting competitors of the Target. On that basis, the Commission provided feedback to the parties, which was incorporated into the final commitments.

Further, e& undertook to appoint a Monitoring Trustee, subject to the Commission's approval, in charge of monitoring the parties' compliance with the final commitments.

Removing the unlimited State guarantee to e&

e& committed that, as of the adoption of the Decision, its constitutive documents would not contain provisions which conflict with, disapply or override any provision of ordinary UAE bankruptcy law. Also, the EIA committed not to endorse any future modifications of e&'s constitutive documents that would have the same effect. As a consequence, e& would no longer benefit from an unlimited guarantee from the UAE government.

No financing to the EU economic activities of the Target

Pursuant to the commitments, neither e& nor the EIA will be able to provide any type of financing to the combined entity's EU economic activities, so as to ensure that foreign subsidies are not channelled to those activities. As a result, the combined entity will operate in the internal market under normal market conditions, thus levelling the playing field.

[4] *Ibid.*, p. 21.

The commitments offered by the parties however foresee an exception in the form of 'emergency funding', to be provided by e& when the combined entity's EU activities would undergo an acute liquidity crisis. Making use of this possibility will be subject to strict conditions – including the obligation to repay the funding within six months – and a scrutiny mechanism under which any proposed emergency funding will be reviewed *ex ante* by both the Monitoring Trustee (appointed by e& but approved by the Commission) and by the Commission. Concretely, the Monitoring Trustee and Commission will consider (i) why the funding is required, (ii) how it is financed, (iii) whether it gives rise to a risk of channelling any foreign subsidies into the internal market in a way that would distort competition, and (iv) whether there are positive effects to be taken into account. The Monitoring Trustee and the Commission may require amendments to the emergency funding to remove any raised concerns, potentially including a restructuring of the combined entity's activities.

e& also took the commitment that commercial transactions between the EU businesses of the Target and other companies controlled by e& or the EIA would take place on market - meaning unsubsidised – terms.

Finally, e& committed to inform the Commission of future acquisitions that would not be notifiable concentrations under the FSR. This will allow the Commission to verify that no foreign subsidies are channelled to the internal market through below-threshold acquisitions, and, if such a risk should arise, to either request their prior notification, in line with Article 21(5) of the FSR, or to launch an *ex officio* procedure.

The Commission found that those commitments fully and effectively remedy the distortion in the internal market, as they (i) remove the unlimited guarantee to e&; (ii) ensure that e& and the EIA cannot channel foreign subsidies to the combined entity's EU economic activities post-transaction, and (iii) provide the Commission with appropriate monitoring mechanisms. Under the supervision of the Commission, an independent Monitoring Trustee will supervise the commitments' implementation.

The commitments are valid for a period of 10 years and can be extended by the Commission for another 5 years, and even further if the Commission and e& agree.

Conclusion

This case illustrates the Commission's ability to reach a Decision significantly earlier than the legal deadline, despite the complexity and novelty of the questions at hand. This was possible due to the parties' readiness to engage early and constructively with the Commission's concerns with a view to reaching an effective and comprehensive remedies package.

The Commission resorted to different tools available under the FSR for its investigation, showing that it is well-equipped to efficiently enforce it in the specific factual circumstances of each case. As a result, this decision contributes to the Commission's overarching objective of ensuring a level playing field for all companies operating in an internal market that remains open to trade and investment.