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Antitrust Advisory

MAY 9, 2025

EC's First In-Depth FSR Merger Decision – Initial Takeaways for Dealmakers

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On 4 April 2025, the European Commission (EC) published its first Phase II conditional merger clearance under the Foreign Subsidies Regulation (FSR). The decision, adopted on 24 September 2024, concerns Emirates Telecommunications Group Company PJSC's (e&) proposed acquisition of PPF Telecom Group. e& is a telecommunications provider based in the United Arab Emirates (UAE) and controlled by UAE's sovereign investment fund, EIA. PPF is a telecommunications provider in Hungary, Bulgaria, and Slovakia. The decision, along with the EC Staff Working Document (SWD/2024/1 final), gives insights into the EC's assessment of foreign subsidies in an M&A context and what merging parties should be prepared for.

Background: The FSR Regime in M&A Deals

The FSR was adopted to close an enforcement gap: While subsidies granted to companies by EU Member States are subject to strict scrutiny under EU state aid rules, subsidies granted by non-EU governments to companies active in the EU went unchecked. The regulation also introduced a suspensory filing requirement for certain M&A deals to allow the EC to assess whether non-EU foreign subsidies (more precisely, foreign financial contributions, FFC) granted to the merging parties are liable to improve their competitive position in the internal market and, as a result, (potentially) negatively affect competition.

The EC's Assessment

The e&/PPF decision shows how the EC assesses an M&A FSR case.

First, the EC identifies the existence of FFC granted to the parties in the three years before the conclusion of the sale and purchase agreement. FFC include any financial contribution (such as (1) the transfer of funds or liabilities; (2) the forgoing of revenue that is otherwise due; and (3) the provision of goods or services or the purchase of goods or services) from a foreign public entity whose actions can be attributed to a non-EU country.

In e&/PPF, the EC found three types of FFC: (1) ordinary bankruptcy proceedings otherwise applicable in the UAE did not apply to e&, which constituted an unlimited guarantee; (2) direct grants, loans, and repayable advances provided to EIA by the UAE Ministry of Finance; and (3) a revolving credit facility loan to EIA by a consortium of mostly UAE-controlled banks.

Second, in its substantive assessment of distortive effects, the EC distinguishes between (1) distortions of the acquisition process – whether the FFC provide an advantage in the acquisition process, for example so that the acquirer could outbid or discourage potential competitors; and (2) distortions in the activities of the merged entity – whether the FFC give the merged entity a distortive competitive advantage post-closing.

Within these two categories, the EC distinguishes between (1) the FFC listed in the catalogue of Article 5(1) FSR as most likely distorting the internal market; and (2) other FFC. The former so-called 'hard core' FFC are presumed to distort the EU market (if they have a nexus to that market), and the burden of proof to rebut this presumption lies with the parties. In line with that, for such 'likely distortive' FFC, the EC explains that it will not have to perform a detailed appraisal of distortions but rather assess whether the parties rebutted the presumption. In e&/PPF, the EC still assessed distortive effects, presumably 'for good measure'.

To establish a distortion in the internal market for those FFC that are not presumed to be distortive, the EC assesses (1) whether the FFC will improve the position of the competitive position of the parties (in the acquisition or, post-closing, in the internal market); and (2) as a result will actually or potentially have negative effects on competition (in the acquisition or, post-closing, in the internal market).

Finally, the EC assesses whether the FFC (not the merger) would result in positive effects that would outweigh the distortion (balancing test). Such effects must be put forward by the parties and would be less likely to occur with 'likely distortive' FFC.

In e&/PPF, the EC concluded that – whilst the unlimited guarantee may have improved e&'s competitive position – the acquisition process was not distorted because the parties demonstrated that (1) PPF was not sold in a structured bidding process; (2) no other potential acquirors were involved; and (3) the consideration for PPF solely considered its enterprise value and comparable transactions so that the deal would have taken place at the same conditions absent any FFC.

Looking at distortions in the activities of the merged entity post-closing, the EC concluded that the FFC would enable the merged entity to conduct strategies (capital expenditures and other investments) in the competitive process which would potentially have negative effects on competition in the internal market. In particular, the 'likely distortive' unlimited guarantee would serve as an incentive because it would insulate the parties from risk and allow them financing at interest rates lower than market rates.

Remedies

Parties can offer commitments to 'fully and effectively' remedy the distortion in the internal market. The EC will assess the effectiveness of these commitments based on the outcome of a market test. The FSR explicitly allows behavioral remedies.

In e&/PPF, the parties committed for a period of 10 years to (1) remove the unlimited guarantee by changing e&'s articles of association to delete the exemption from UAE bankruptcy law; (2) not finance PPF's EU activities by EIA and e& (except in emergencies); (3) perform transactions between these companies on market terms; and (4) inform the EC of future acquisitions that are not notifiable under the FSR.

Takeaways

What can we learn from this precedent?

- The EC will assess distortions in the acquisition process and, what might be more complex, distortions in the activities of the parties post-closing. For the former, the valuation of the target and the sales process are important. For the latter, a thorough economic assessment of the market conditions and dynamics will be performed, particularly if investment is of high importance in the sector concerned, such as in telecoms or other infrastructure sectors.
- Obviously, likely distortive FFC, such as unlimited state guarantees, will be subject to very strict scrutiny. Parties should be prepared to present substantive economic evidence to rebut the presumption of distortive effects for such FFC and, as a fallback, propose effective commitments.
- Behavioral commitments will be accepted but may have a substantive impact on the financing of the target over a long period of time.
- Future transactions will have to be disclosed to the EC even if the target's EU activities will be below the €500 million threshold.
- In general, as goes for any merger filing situation, thorough preparation and comprehensive communication with the regulator will be required to get the deal over the finish line as swiftly as possible. It lies in the nature of things that the EC does not have a lot of information at its disposal about the FFC and the financing of the companies and will need the parties' input to understand the economic background. The decision shows that the EC will take a deep dive into the market dynamics and ecosystem based on substantive amounts of evidence it requires the parties to disclose.

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