

## Insights

# FIRST DECISION PUBLISHED BY THE COMMISSION UNDER THE FSR

Apr 30, 2025

The European Commission finally published, more than 6 months after its adoption, its first decision under the Foreign Subsidies Regulation ("FSR").

## WHAT DOES THE FSR PROVIDE?

The FSR, which started to apply on 12 July 2023, aims to address **distortions caused by subsidies granted to undertakings by non-EU States**.

Since **12 October 2023**, in addition to any notification under the merger control regime, undertakings must notify their concentrations to the Commission under the FSR if:

- at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates an aggregate turnover in the Union of at least **€500 million**; and,
- the parties were granted combined aggregate financial contributions of more than **€50 million** from third countries in the three years preceding the concentration.

Where a concentration meeting these conditions is notified, the Commission may initiate an in-depth investigation no later than **25 working days** after receipt of the complete notification and must issue its decision within **90 working days** after the opening of the in-depth investigation. At the end of its in-depth investigation, the Commission may:

- Issue a **no-objection** decision;
- **Authorise** the concentration subject to compliance with commitments;
- **Prohibit** the concentration.

## KEY TAKEAWAYS FROM THE DECISION

### CONTEXT OF THE DECISION

The operation concerned the proposed acquisition by e&, **an Emirati telecommunications operator** owned by a sovereign wealth fund controlled by the United Arab Emirates (“UAE”) - the Emirates Investment Authority (“EIA”) - of PPF Telecom Group (“PPF”), a Dutch telecommunications operator in the Czech Republic, Hungary, Serbia, Slovakia and Bulgaria. This project was notified on 26 April 2024.

Following an in-depth investigation and a relatively swift review process (with the decision issued before the 90-working-day deadline of October 15, 2024), the Commission **conditionally approved the transaction on September 24, 2024.**

A press release was issued on the same day and analysed by our Competition & Distribution team.

The long-awaited published text of the decision provides particularly useful additional information for businesses regarding the Commission’s analysis under the FSR.

## THE ASSESSMENT ON THE EXISTENCE OF FOREIGN SUBSIDIES

### **The assessment of the loan granted by a consortium of banks financing the acquisition**

The acquisition of PPF by e& was to be financed through a term loan consisting of three tranches in USD and AED (UAE Dirham), provided by four Emirati public banks and one private lender.

- The Commission's assessment focused on the AED tranches, which were predominantly provided by the public banks, as opposed to the USD tranche, which came exclusively from the private lender.
- Despite limited data on AED corporate bonds, e& successfully argued **that the loan was concluded on market terms** by providing an analysis comparing the conditions of the USD and AED tranches and demonstrating that the loan was agreed under similar terms as another loan where state-owned banks invested *pari passu* with private lenders.
- Consequently, the Commission concluded that the term loan did not qualify as a foreign subsidy.

### **The inapplicability of the ordinary bankruptcy law of the UAE to e& constitutes an unlimited guarantee**

According to UAE Federal Decree-Law No. 9 of 2016, state-owned companies like e& were subject to ordinary bankruptcy law only if they explicitly opted into it through their articles of association - which e& had not done.

- The Commission considered that this deviation from ordinary bankruptcy law suggested that e& was unlikely to default on its debts, as UAE authorities were expected to assist the company in case of insolvency. The Commission noted that this was reflected in e&’s

exceptionally high credit rating compared to other undertakings in the telecommunications sector.

- In the light of its State-Aid caselaw, the Commission concluded that the inapplicability of ordinary bankruptcy law **amounted to an unlimited state guarantee and thus to a foreign subsidy**.
- Regarding the date on which this subsidy was granted, the Commission considered that it indeed occurred within the three years preceding the acquisition, as e&'s shareholders never chose to opt for the application of general law. Consequently, the unlimited guarantee could be deemed renewed and granted at each shareholders' meeting.

## **Assessment of the other foreign financial contributions**

The Commission examined other foreign financial contributions, including (i) two contributions for which the developments are entirely confidential, and (ii) various loans, facilities, and subsidies granted to e&'s majority shareholder, the EIA, by the UAE Ministry of Finance and Emirati public banks.

The Commission that this second set of contributions constituted foreign subsidies, notably:

- By making use of the prerogative provided by Article 16§3 of the FSR, allowing her to consider that a financial contribution confers an advantage when the notifying party fails to provide sufficient information about it.
- By considering that loans granted by Emirati public banks could be attributed to the state, particularly in light of the connections between the banks' board members, the UAE's government administrations, and ruling families.

### **Key takeaways**

- The assessment of the existence of a foreign subsidy is strongly inspired by state aid caselaw.
- The Commission closely examines the financing of transactions. Companies must be prepared to provide evidence that funding obtained from public banks was granted under market conditions.
- Deviations from ordinary bankruptcy laws can be considered unlimited guarantees. Transactions conducted by companies benefiting from such guarantees are likely to be systematically subjected to in-depth investigations.

- In cases where the notifying party fails to provide sufficient information, contributions may, by default, be regarded as foreign subsidies by the Commission.

## THE ASSESSMENT OF THE DISTORTION ON THE INTERNAL MARKET AND THE APPLICATION OF THE “BALANCING TEST”

The Commission assessed the potential distortion of competition caused by foreign subsidies on two levels: (i) the evaluation of distortion in the acquisition process, and (ii) the evaluation of distortion in the activities of the new entity post-concentration.

### **The assessment of the distortion in the acquisition process**

- In its decision, the Commission concluded that the foreign subsidies received by e& did not actually or potentially distort the acquisition process.
- In its assessment, the Commission noted that the acquisition did not occur through a structured bidding process and that the target company was not approached by any other potential buyer. This indicates that the acquisition process was unlikely to have been distorted by foreign subsidies.
- Additionally, the Commission found no other interested parties and found that the valuation of the transaction aligned with comparable transactions.
- The Commission also emphasized e& could have acquired PPF without relying on the foreign subsidies in question, as it had access to other potential sources of funding.

### **The assessment of the distortion on the activities of the combined entity post-concentration**

- The Commission highlighted that unlimited guarantees are “*most likely to distort the internal market*” and notes that the value of other identified foreign subsidies is significant and far exceeds the investments planned in the target's business plan for the next 5 years.
- Thus, the Commission found that the identified foreign financial subsidies distort the internal market in the activities of the combined entity post-transaction. Specifically, they could enable the new entity to benefit from better investment conditions than its competitors in a sector where investments are “*of paramount importance*” particularly for acquiring spectrum, financing the mobile network, or supporting aggressive wholesale offers.
- Furthermore, the Commission considers, rather succinctly, that these distortions are not offset by potential positive effects, reasoning that the improvements cited by the notifying party

(enhanced customer service, network optimization) would result from the transaction itself rather than the foreign subsidies.

### **Key takeaways**

- The assessment of competition distortions is particularly broad. It can address both the acquisition process and the activities of the new entity, and it can be based on current or potential effects.
- The balancing test appears to be applied strictly by the Commission. It will likely be challenging for companies to demonstrate that the positive effects of a foreign subsidy outweigh its negative impacts.

## **THE ASSESSMENT OF THE PROPOSED COMMITMENTS**

To address the concerns raised, e& and the EIA initially proposed three sets of commitments for a duration of 10 years, with the possibility for the Commission to extend them for an additional 5 years and oversight by an independent Monitoring Trustee:

1. A commitment not to deviate e&'s articles of association from ordinary bankruptcy law of the UAE, thus eliminating the unlimited state guarantee;
2. A prohibition on any financing from the EIA and e& in support of PPF's activities in the EU internal market, along with an obligation to conduct other transactions between these entities under market conditions;
3. An obligation for e& to inform the Commission of future acquisitions that are not concentrations subject to notification requirements under the FSR.

The Commission found the proposed commitments satisfactory in principle but noted that the lack of definitions for certain terms, particularly the term "financing" could allow for circumvention of the commitments. This prompted the parties to submit a revised proposal to meet the Commission's requirements.

### **Key takeaways**

- The commitments are diverse and highly tailored to the specific foreign subsidies in question. As a result, each case could lead to different and less standardized measures compared to those in merger control.

- The Commission appears open to behavioural commitments, even for an extended duration.
- Certain mechanisms, such as the appointment of a trustee responsible for monitoring commitments, are inspired by merger control practices.

## RELATED PRACTICE AREAS

- Antitrust

## MEET THE TEAM



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