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COMMISSION'S FIRST DECISION UNDER THE FOREIGN SUBSIDIES REGULATION AUTHORISING A CONCENTRATION SUBJECT TO CONDITIONS

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On 24 September 2024, the European Commission adopted its first decision under the Foreign Subsidies Regulation ("FSR").

1- THE FSR

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
- **Prohibit** the concentration.
- **Authorise** the concentration subject to compliance with commitments.

2- THE FIRST IN-DEPTH INVESTIGATION UNDER THE FSR

The investigation 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.

On 10 June 2024, the Commission opened an in-depth investigation, considering that there were sufficient indications that e& had received foreign subsidies distorting the internal market and in particular:

- **An unlimited guarantee** granted by the UAE, resulting from the benefit of a preferential bankruptcy regime likely to enable e& to obtain more favourable financial terms in its negotiations with financial institutions.
- A **term loan**, granted by a syndicate of 5 banks, whose actions can be attributed to the UAE, which would not have been obtained under normal market conditions.

3- THE FIRST DECISION UNDER THE FSR

On **24 September 2024**, the Commission **conditionally approved the transaction**.

The existence of foreign subsidies likely to distort competition in the internal market

- Taking into account the information provided by the parties and by competitors as part of market tests, the Commission found that the purchaser received foreign subsidies: an unlimited State guarantee to e&, as well as grants, loans and other debt instruments to EIA.
- According to the Commission, these foreign subsidies did not result in e& being favoured in the acquisition process, as it was the sole bidder and had sufficient own resources to perform the acquisition.
- However, the Commission considered that these foreign subsidies could have led to a distortion of competition in the EU internal market **post-transaction**, in particular by artificially enabling PPF to finance its activities in the EU internal market and by increasing its indifference to risk.

The commitments accepted and takeaways

To address the Commission's concerns, the parties proposed three sets of commitments, valid for 10 years with the possibility to be further extended by the Commission to another 5 years, which were accepted by the Commission:

1. A commitment that e&'s articles of association do not deviate from ordinary UAE bankruptcy law, thereby removing the unlimited State guarantee.

2. A prohibition of any financing from the EIA and e& to PPF's activities in the EU internal market, and the requirement that other transactions between those companies take place at market terms.

3. The obligation for e& to inform the Commission of future acquisitions that are not notifiable concentrations under the FSR. This commitment should enable the Commission to implement, where appropriate, its right conferred by the FSR to request prior notification of any non-notifiable concentration at any time prior to its implementation, where it suspects that foreign subsidies may have been granted to the undertakings concerned over the last three years.

The decision was adopted relatively quickly, well before the 90 working day deadline of 15 October 2024, reflecting the Commission's willingness to examine this first case quickly.

First precedent in merger control under the FSR, the full text of the decision, which will be published shortly, will provide important details, in particular on how the Commission analysed:

- The risk of a distortion of competition in the internal market resulting from the unlimited State guarantee, considered by the FSR to be one of the subsidies "*most likely to distort the internal market*".

- The appropriateness and sufficiency of the proposed commitments.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM

Julie Catala Marty

Co-Author, Paris

julie.catalamarty@bclplaw.com
+33 (0) 1 44 17 77 95

Rémi Beydon

Co-Author, Paris

remi.beydon@bclplaw.com
+33 (0) 1 44 17 77 21
