

## European Commission Opens First M&A In-Depth Investigation Under the Foreign Subsidies Regulation

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The European Commission (EC) announced on 10 June 2024 that it has opened an in-depth investigation under the Foreign Subsidies Regulation (FSR) into the acquisition by Emirates Telecommunications Group Company PJSC (e&) of PPF Telecom Group B.V. e& is a state-controlled telecommunication operator based in the United Arab Emirates (UAE). PPF is a European telecommunication operator active in Bulgaria, Hungary, Serbia, and Slovakia.

The EC is concerned that e& may have received governmental support, in the form of loans from UAE-controlled banks and with an unlimited guarantee from the UAE, which may have improved e&'s capacity to execute the deal and may improve the competitive position of the target company in the EU post-closing by financing its activities at preferential terms.

### FSR in M&A Transactions

The FSR went live in October 2023. Its purpose is to close the perceived enforcement gap between non-EU governmental subsidies that may give companies unfair advantages when competing in the EU and EU Member States' subsidies that are closely monitored under the EU state-aid rules.

With the FSR, the EC has introduced another suspensory filing requirement for M&A deals (in addition to merger control and national foreign direct investment screening).<sup>1</sup>

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<sup>1</sup> The FSR also introduced a filing requirement before involvement in public procurement bids in the EU:

- The procurement must have a net value of €250 million, and if it's divided into lots, the value of the lot or the aggregate value of all the lots to which the tenderer applies is €125 million or more.
- The group of the bidder (including any of its subcontractors) must have received FFC in the three years before the notification of at least €4 million per third non-EU country.

Finally, the FSR gives the EC an ex officio review power under which the authority can pick up any deal or commercial conduct below the thresholds.

The FSR notification regime applies to mergers or to acquisitions of (joint) control, regardless of whether the acquirer is foreign or European, if:

- The target company has a subsidiary or permanent establishment in the EU and in total (including controlled foreign subsidiaries) generated at least €500 million of revenue in the EU.
- The group of the acquirer/s and the target *together* had been granted foreign (non-EU) governmental financial contributions (FFC) of more than €50 million during the three years preceding the signing of the deal.

The crux is that the definition of FFC is very broad, covering practically any pecuniary advantage granted from a non-EU public authority or entity, including capital injections, loans, loan guarantees, fiscal incentives, tax advantages, and even payments for the provision of goods and services. Parties to deals of sufficient size to get caught under the first test often exceed the low combined FFC value test.

With the new regime, the EC is looking to assess whether FFC granted to companies have a distorting effect when the beneficiary acquires another company with substantive activities in the EU. In simple terms, the EC is concerned that foreign state money helps companies acquire targets in the EU and conduct business here post-closing.

The FSR review procedure is largely modelled after the EU merger control procedure: The EC will review a draft filing in a pre-notification phase before assessing the deal in Phase I (25 business days) and more complex deals in Phase II (plus up to additional 105 business days, that can be extended). Deals must not close before clearance or they will be subject to severe fines. The EC can clear a deal unconditionally or subject to commitments offered by the parties and – what is new – can even impose on the parties redressive measures to alleviate substantive concerns. The authority can also block a deal.

## **First-Ever In-Depth Investigation of an M&A deal**

The e&/PPF case is the first in-depth investigation of an M&A deal under the FSR regime. The EC had already opened in-depth investigations into public procurement bids and launched ex-officio investigations (see also footnote 1).

The case shows that the M&A FSR regime is active and that the EC is assessing M&A deals very thoroughly and is ready to jump in if it has concerns.

According to recent data, the EC has held pre-notification discussions in 95 M&A deals; 59 of those deals required a formal filing, while 52 of those were closed during a preliminary investigation.

As the regime is relatively new, there are no decisions available and it is questionable whether any published non-confidential version of decisions will reveal a lot of details given the sensitivity of the issues at stake.

According to our experience with the new regime, when assessing deals, the EC has shown particular interest in details of bidding processes (including who was contacted, who expressed interest, who withdrew, who submitted offers, and under what conditions) and in the sellers' considerations.

With respect to the buy-side, the EC has shown particular interest in details about the financing of the deal, and in the case of private equity transactions, in details on investors and co-investors, including the relationship between investors and co-investors, the terms of the co-investments, the means of financing and profit sharing, and any links to public financing.

The EC is expected to review these and other aspects by way of issuing extensive internal document requests.



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