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Learnings from the first FSR Phase II merger decision: The Commission publishes a provisional public version of the commitment decision in e&/PPF

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On 24 September 2024, the European Commission (EC) issued the long-awaited first decision (under phase II of the concentration tool) of the new Foreign Subsidies Regulation (FSR). It took another long wait of seven months, but a provisional public version of the commitment decision in the e&/PPF transaction (Case FS.100011) was published on 4 April 2025. As a first of its kind and relating to the strategic area of telecoms, the decision does not fall short of its expectations and clarified crucial areas of the FSR relevant for future enforcement and counselling in FSR proceedings. In particular, (1) the notion of foreign subsidies, (2) the concept of distortions in the internal market, particularly in the concentration tool, (3) the balancing test, (4) the commitments, and (5) procedural aspects, were further clarified – and discussed in-depth in this blog.

The decision certainly underlines the wide understanding of the different aspects of the FSR, which has, with this decision, emerged as a full stand-alone assessment. The decision shows the different competition law (what does all of this has to do with competition on the merits?) and not-so-much-competition law (how to use the trade best-evidence available rule in FSR proceedings) related inspirations of the FSR. The Foreign Subsidies Regulation – a tool with surely an even bigger impact in the future!

Background and Overview

In April 2024, Emirates Telecommunications Group Company (e&), a company based in the United Arab Emirates (UAE) and controlled by the Emirates Investment Authority (EIA, the UAE's sovereign investment fund), notified the Commission of the proposed acquisition of part of the telecom business of PPF, a Czech company. In particular, e& planned to acquire sole control of PPF's activities in Hungary, Bulgaria, Serbia, and Slovakia for more than €2.15 billion. The concentration satisfied the thresholds set by Article 20(3) FSR (para 9).

In June 2024, the Commission opened an in-depth investigation into the transaction — the first under the concentrations procedure. During this phase, in response to a request for information

(RFI) from the Commission, e& clarified that it constitutes a single undertaking with the EIA. After approximately three months of engagement with e& and its competitors, the Commission adopted a decision with commitments in September 2024, clearing the e&/PPF deal and delivering the first final decision under the FSR.

Learnings on the notion of foreign subsidies

The EC decided to move to the in-depth phase of the investigation after the preliminary phase indicated that e& and the EIA may have received some foreign subsidies, granted by different entities (para 47):

- a term loan granted to e& by a consortium of banks (four government-controlled and one private institution);
- an unlimited guarantee to e& directly granted by the UAE government;
- direct grants, loans and repayable advances to the EIA from the UAE Ministry of Finance;
- a revolving credit facility loan to the EIA by a consortium of UAE banks (some of which, government-controlled);
- two 'foreign financial contributions' that were redacted from the Decision, which benefitted respectively e& and the EIA.

The EC had to test each of these financial contributions under the notion of foreign subsidy described in Article 3 FSR, which is 'deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries'.

e& disclosed to the EC that the **term loan** (1) would be used to finance the acquisition. Loans are one of the examples of financial contributions listed by Article 3(2) FSR. Due to the heavy involvement of State-owned banks, accounting for 90 or 95% of the financing (para 54), the EC considered the contribution as attributable to the UAE. When assessing the conferral of a potential benefit, however, the EC was not able to confirm its presence (para 71). The loan's conditions appeared comparable to other financing obtained by e& and similar transactions – even defining a 'benchmark' proved difficult due to the confidential nature of these agreements (para 60). With no benefit, the term loan does not constitute a foreign subsidy as it does not satisfy one of the requirements of the legal standard set by Article 3 FSR. Consequently, the EC did not proceed to assess the other requirements under the notion in Article 3 FSR (para 73) and reached a different conclusion than the one formulated in the Initial Decision that opened the in-depth investigation.

On the other hand, the **unlimited guarantee** (2) was confirmed as a foreign subsidy (para 139). Loan guarantees are also listed in Article 3(2)(a) FSR. The guarantee was 'attributable' to a foreign government as it stems from a legislative provision that exempts e& from ordinary UAE insolvency rules (para 119). In case of e&'s insolvency, EIA – a public authority under the UAE government – can also intervene to veto the bankruptcy proceedings, manage and purchase its critical assets, *de facto* safeguarding e&'s existence. Additionally, the guarantee provides a benefit, as it makes e& more reliable for creditors and may improve the conditions it can receive for its commercial and financial transactions (para 123). Finally, it was also considered selective, as it is 'limited, in law', to publicly-owned UAE companies (para 132) and, 'in fact', to e& since the

undertaking benefits from different insolvency rules via articles of association agreed by the UAE government via the EIA (para 133).

The (3 and 4) **financial contributions received by the EIA** were also considered foreign subsidies. The EC sent 'several' requests for information to e& on the matter, yet it did not receive satisfactory answers on the contributions received by the EIA (paras 187 et seq.). This led the EC to assess the existence of the subsidies 'on the basis of the facts available' (para 193) – more on this below, when we will discuss the procedural aspects. Without sufficient information on the amount and conditions of the contributions, the EC assumed that the EIA obtained a benefit from them (para 199). The EC discussed how these subsidies received by the EIA may be linked to the transaction of e&. Although these financial contributions from the UAE government to the EIA were granted during the three years preceding the concentration, there were no financial flows or commercial transactions between e& and the EIA. So, the subsidies did not improve e&'s competitive position in the acquisition process (para 248). However, these subsidies may favour e& 'post-transaction', as the new combined entity could receive funding from the EIA (para 249). In conclusion, while conducting the legal test of Article 3 FSR, the EC already considers if a subsidy may produce effects on the acquisition process, the economic activity after the transaction or both. Then, the EC moves to assess the potential distortions.

Learnings on the concept of distortion of the internal market

Together with the first EC guidance on the notion of distortions and the running consultations on that concept (see also the ASCOLA comments to that consultation, to which we contributed), the decision contains important takeaways to assess distortions of the internal market by foreign subsidies, particularly in concentration procedures.

Aim of the distortion test: level the playing field

The decision, first of all, confirms the aim of the distortion test in the overall objective of the FSR: ensuring a level playing field. The concept of level playing field is often viewed as opaque, similarly to the concept of competition on the merits in core competition law.

The decision confirms a comparable, while ultimately – as it is the case with competition on the merits for, e.g. Article 102 TFEU enforcement – still blurry understanding of the concept from the viewpoint of the EC. Using a similar wording, the Commission states that 'notion of level playing field refers to the conditions in which undertakings compete with each other in the internal market based on merit' (para 260). Yet, the EC does not explain what level playing field actually means. Rather and typically, the Commission takes a negative recourse to the non-respect of the level playing field – when there is no competition on the merits – in cases 'when the chances of succeeding in the market are unduly altered, for instance, by support from a third country in favour of one or more market players' (para 260).

However, the EC later comes back to the concept of level playing field and competition on the merits when assessing the negative impacts on competition in the activities of the combined entity post transaction, which sheds a bit more light to both. The EC is stating that 'the competitive advantage obtained through foreign subsidies is that the combined entity gains the ability to expand

its activities in the internal market beyond what its own merits should result in' (para 367). Foreign subsidies could, for example, cover costs to aggressive commercial policy, e.g. undercutting competitors in auctions, without the need to generate the available funds to sustain such behaviour.

The different steps of the general distortion test

Second of all, the decision provides an important insight into conducting the general distortion test in different steps.

As Article 4(1) FSR itself shows, the distortion concept departs from the one we know from State aid law. In State aid law, State aid distorts of threatens to distort competition 'when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes'. The FSR concept goes beyond that and mandates a two-step approach for a distortion: the foreign subsidy must be (1) liable to improve the competitive position of an undertaking in the internal market – similar to State aid law –, and (2) in doing so, actually or potentially negatively affect competition in the internal market – fully departing from the State aid notion. The e&/PPF decision underlines this approach (paras 255) – and nuances it especially in the context of concentrations, more on this in a minute.

Before taking on these two steps of Article 4(1) FSR, however, the e&/PPF decision shows that the Commission assess two previous stages.

First, the decision highlights the necessity to first 'establish a relationship between the foreign subsidy and activities of the undertaking in the internal market which are open to competition' (para 256). The EC must therefore establish the activities likely to be affected by the foreign subsidies (para 294). This activity can be any activity where the beneficiary is already active or in which it will likely become active, such as investments or provision or purchase of goods and services (para 259). This approach illustrates the nuanced assessment under the FSR, which emphasises the economic impact of the foreign subsidy on different activities of the beneficiary in the EU internal market. Before examining the distortion, it is, thus, sensible and necessary to assess where, i.e. in relation to what activities and therefore markets, distortions could even arise.

Second, the EC also takes a previous look into Article 5(1) FSR and the question whether the foreign subsidy qualifies at one that is 'most likely to distort the internal market' (paras 267, 305). This is equally sensible, given the reversal of the burden of proof by Article 5(2) FSR according to which the undertaking under investigation can bring forward exonerating evidence. The e&/PPF decision further underlines that a foreign subsidy falling in the Article 5(1) FSR category is presumed to be distortive, while Article 5(2) FSR gives the undertakings under investigation the possibility to rebut that presumption (Is anyone else reminded of by-object restrictions as well?). Upon finding, e.g. an unlimited guarantee within the meaning of Article 5(1)(b) FSR (paras 77 – 115, 306 – 310), the Commission, in line with recital 20 FSR, did not perform a detailed assessment of distortions based on indicators (paras 311 – 314). Rather, it assesses, if the undertakings under investigation rebutted such a presumption (paras 315 – 319). Consequently, the ECs further detailed examination based on concrete evidence of the Article 4(1) FSR mandated test of improvement of the competitive position and negative effect on competition through the unlimited guarantee is technically not necessary – as the Commission highlights itself (para 320) – but done as a precaution (and likely to provide more guidance on FSR notions).

Even though the e&/PPF decision does not tackle this part, it is likely that equally to considering first if the foreign subsidy is 'most likely to distort the internal market' under Article 5(1) FSR, the Commission would also explore the unlikely or not distortive foreign subsidies according to Articles 4(2) – (4) FSR before going into a detailed distortion-examination based on concrete evidence. In these categories, the foreign subsidies are not distortive (Article 4(3) FSR) or unlikely distortive, i.e. presumed not distortive (Articles 4(2) and (4) FSR), which warrants a previous assessment.

Therefore, the e&/PPF decision provides for a detailed step-by-step approach for the overall distortion test, which amounts to four points. The Commission will consider:

- which activities are likely to be affected by the identified foreign subsidy, and
- whether the foreign subsidy is most likely (Article 5 FSR) or unlikely/not distortive (Article 4(2) – (4) FSR), and
- if the foreign subsidy liable to improve the competitive position of the undertaking in the internal market (Article 4(1) first part of first sentence FSR), and
- by doing so, if the foreign subsidy actually or potentially negatively affects competition in the internal market (Article 4(1) second part of first sentence FSR)

A deeper look into the general notion of distortion

Before delving into the special concentration test, a few further general findings on the notion of distortion that we can take from the e&/PPF decision.

First, the decision sheds light on the concept of 'unlimited guarantees' as most likely distortive foreign subsidies under Article 5(1)(b) FSR (paras 305 – 319). The EC does not simply find that the merged entity has access to unlimited guarantees but also assesses its general and specific effects in context of the case (paras 309 – 312). This provides a deeper understanding into why unlimited guarantees are seen to be most likely distortive. Unlimited guarantees allow the beneficiaries to 'to raise future financing for its operations in the internal market at preferential conditions'. Particularly, 'creditors are expected to take into account the existence of an unlimited guarantee' and have done so in the past. Because such guarantees are of an 'unlimited' amount, they 'are liable to improve the competitive position of any undertaking, regardless of its size or presence on the internal market', especially compared to competitors without such options. Distortive effects are not restricted, since unlimited guarantees are not restricted by 'purposes' or 'conditions'.

Second, for steps 3) and 4) of the distortion test, liable to improve the competitive position and negatively effecting competition, the Commission will take into account the list of indicators in Article 4(1) second sentence FSR. The e&/PPF decision stresses that the distortion test is an 'overall assessment relying on indicators', the latter list of Article 4(1) second sentence FSR is not conclusive or cumulative (paras 261, 262). Throughout the decision, the EC takes recourse to all indicators, such as amount (paras 272, 334), nature (paras 272, 337), situation of the undertakings (para 343), level and evolution of economic activity of the undertaking on the internal market (para 343), use (para 343) and conditions of the foreign subsidy (para 338).

Third, as mentioned above, step 3) of the distortion test – the question whether the foreign subsidy is liable to improve the competitive position of an undertaking in the internal market – is similar to

State aid law (only the second part of the FSR distortion test departs from State aid law). However, in State aid law, this is generally presumed 'when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.' This overlap would argue in favour of applying a similar presumption for the FSR as well. The e&/PPF decision initially seems to follow such an approach due to the lack of detailed assessment of step 3) at first (para 275). However, a more thorough examination of step 3) was only avoided at this point because step 4) was rejected later on for this activity, making a more thorough examination of step 3) unnecessary (para 276). For a different activity, step 3) was conducted in depth (paras 321 et seq.). The Commission speaks of a 'detailed assessment' (para 320).

Fourth, when conducting step 3), the e&/PPF decision clarifies what can be taken into account to examine whether the foreign subsidy is liable to improve the competitive position of an undertaking in the internal market. In that context, the EC assess if the subsidy is improving the conditions at which the beneficiary can conduct activities in the internal market (paras 281, 322). The Commission specifically considers the access to subsidised financial capacity (paras 322 et seq.) and subsidised assets and services (para 340 et seq.). The EC underlines, firstly, the role of the ability and incentive to provide subsidised financial capacity (or subsidised assets and services) (para 332). Beyond that, secondly, the EC analyses 'a concrete risk' that the foreign subsidies will actually 'be used to improve the competitive position of the economic activities' of the beneficiary (para 333). Consequently, a foreign subsidy can, e.g., result in preferential credit ratings (paras 326, 327), or further beneficial unconditional funding (paras 338, 249, 250).

Fifth, for step 4) – whether the foreign subsidy actually or potentially negatively affects competition in the internal market – the EC considers 'the extent to which the outcome of that [affected activity] has been altered by the foreign subsidy' (para 278), factoring in the situations of the beneficiary's competitors. Consequently, step 4) consists of a counterfactual (but for) analysis (is anyone else reminded of by-effect restrictions here as well?). the EC highlights particularly for 4), the possibility to recognize 'potential distortions that are liable to occur as a result of the foreign subsidies' (para 258). As this refers to the temporal dimension of an analysis, the EC underlines the prospective nature the distortion test can maintain: distortions do not actually have to occur, they can also potentially materialise in the future. Consequently, the EC takes future capital expenditures, future investments, future auctions into account (para 360 et seq.). Generally, the EC recognised the following aspects in step 4): outbidding of competitors (para 279), preventing competitors from participating in that economic activity (para 280), necessity of the foreign subsidy to conduct the activity (paras 281 et seq., paras 344 et seq.), ability and incentive for risks (para 354), already weakened competition (para 356), financial constraints of competitors (para 359), rationale of transaction (para 365), ability to discipline competitors (para 366) or possibilities to recoup aggressive commercial strategies (para 367).

Adding complexity: special test for concentrations (and public procurement?)

In the FSR concentration procedure, however, the decision shows that the previously described general four-step distortion test is even more complex. The complexity relates to the importance of establishing the mentioned 'relationship between the foreign subsidy and activities of the undertaking in the internal market which are open to competition' (para 256).

For concentrations we have two activities, or rather markets, concerned: the market for M&A

transaction itself and the operational markets. The effect on the acquisition process therefore warrants a distinct distortion examination. This is further stressed by Article 19 FSR, according to which '[w]hen assessing whether a foreign subsidy in a concentration distorts the internal market within the meaning of Article 4 or 5, that assessment shall be limited to the concentration concerned' (para 263). The Commission underlines this two-perspective merger test straightforward in e&/PPF: 'In notified concentrations, the Commission thus assesses whether foreign subsidies distort the internal market in the economic activities affected by the concentration, including (i) in the context of the acquisition process of the Target and (ii) in the activities of the combined entity in the internal market post-Transaction' (para 264). The EC highlights the further overall prospective nature of the assessment of the existence of distortive foreign subsidies in a concentration (para 265).

Consequently, this amounts to the following two-prong test for the concentration procedure, each consisting of the four steps.

First, the Commission considers for distortions of the acquisition process:

- the acquisition process as the activity of the undertaking under investigation, and
- whether the foreign subsidy is most likely (Article 5 FSR), in particularly, whether it is directly facilitating a concentration under Article 5(1)(d) FSR, or unlikely/not distortive (Article 4(2) – (4) FSR), and
- if the foreign subsidy is liable to improve the competitive position of the undertaking in the acquisition process (Article 4(1) first part of first sentence FSR), and
- by doing so, if the foreign subsidy actually or potentially negatively affects competition in acquisition process (Article 4(1) second part of first sentence FSR)

Second, the Commission considers for distortions in the activities of the combined entity post-concentration:

- which activities are likely to be affected by the identified foreign subsidy, and
- whether the foreign subsidy is most likely (Article 5 FSR) or unlikely/not distortive (Article 4(2) – (4) FSR), and
- if the foreign subsidy is liable to improve the position of the combined entity's economic activities in the internal market (Article 4(1) first part of first sentence FSR), and
- by doing so, if the foreign subsidy actually or potentially negatively affects competition for the combined entity's economic activities in the internal market (Article 4(1) second part of first sentence FSR)

Following the e&/PPF decision, the question arises if a similar two prong test applies also for the procurement procedure. Such an approach would be supported by the fact that that Article 27 FSR is comparable to Article 19 FSR, which the Commission used to support the two-prong test in the case at hand (para 263). Furthermore, when considering that the 'relationship between the foreign subsidy and activities of the undertaking in the internal market which are open to competition' are decisive, the EC only mentions acquisitions as an example of activities in which the beneficiary is, or will likely be, active ('for instance acquisition of other undertakings', para 259). Consequently, for the procurement procedure, the two-prong test could amount to an assessment if (i) the foreign subsidy enables an economic operator to submit a tender that is unduly advantageous in relation to the works, and (2) the foreign subsidy leads to distortions in the activities of the beneficiary in the internal market after (or beyond) the procurement bid.

If we consider that DG GROW opened the very first in-depth investigation under the FSR towards Chinese train manufacturer CRRC – leading the company to withdraw its bid –, it comes naturally to remember the debate that followed the 2019 Siemens-Alstom decision. The failure to account for CRRC's rise was sometimes cited as an example of the limits of the decision and the need for a new instrument to address foreign subsidies. Today, with the FSR, the EC could look at the distortions a subsidy may cause following a concentration or a tender award and ensure that competition in the internal market does not deteriorate even some time after the decision. This type of forward looking assessment appears well-aligned with the type of assessment traditionally carried out in merger reviews. Yet, it may appear less familiar in the context of public procurement procedures, where the competitive position of bidders or the market structure post-tender are not part of the assessment – even if procurement rules are there to ensure fair competition *lato sensu*. It will be interesting to see whether DG GROW will follow DG COMP on the matter or whether the two specialised procedures will require different methodologies.

On the contrary, regarding the *ex officio* procedure, it seems unlikely that the Commission would apply a special distortion test. Rather, the above-mentioned general distortion test applies. The decision indicates that this is even the case for below-threshold mergers falling under the catch-all *ex officio* procedure, as the Commission states that the two-prong test only applies to 'notified concentrations' (para 264). On the contrary, a call-in concentration according to Article 21(5) FSR (and Article 29(8) FSR for public procurement) are 'notified concentrations', and, thus, subject to the special two-prong distortion test for concentrations.

A deeper look into distortions of the acquisition process

In the e&/PPF case, the EC did not find a distortion of the acquisition process. Nevertheless, the decision highlights important aspects, which can be taken into account for future cases.

The EC discussed the concept of subsidies directly facilitating a concentration under Article 5(1)(d) FSR (next to the unlimited guarantees under Article 5(1)(b) FSR). Since the Commission ultimately decided that there is no distortion, it did not reach a definitive view on whether any subsidies fall in the Article 5(1)(d) FSR category (para 271). Consequently, it does not seem crystal clear just now, how 'directly facilitating a concentration' can be distinguished from later points in the assessment of distortion in the acquisition process, such as improving the competitive position in the acquisition process (para 272) or the necessity of the subsidy to financing the transaction (para 281). For Article 5(1)(d) FSR category, the decision seems to point to the fact that the subsidy must be 'is liable to improve the conditions at which e& raised financing for the acquisition of the Target' and if the foreign subsidy 'will be used to finance the Transaction' (para 269), which at least entails relevant considerations for future assessments.

Similarly, the decision did not reach a final position on step 3), whether the foreign subsidies improved the buyer's competitive position in the acquisition process (para 276). The EC presents arguments of the parties relating to the necessity of foreign subsidies for the transaction to take place, including other financing options, but did not further elaborate on whether these are the relevant points to be examined at this stage (para 273). Still, the EC notes that the foreign subsidy needs to play a role in the acquisition process (para 274) or can improve 'the conditions at which the acquirer is carrying out the acquisition' (para 281), but does not go further again – see already above on the financial contributions received by the EIA.

The e&/PPF allows a deeper understanding of whether the foreign subsidy actually or potentially negatively affects competition in acquisition process (step 4)). The EC stresses the counterfactual nature of the test, i.e. the 'outcome of that acquisition process' must be 'altered' by the foreign subsidy (para 278). At this stage, it considers (1) if the foreign subsidy has allowed an acquirer to outbid competitors (para 279), (2) deter other potential competitors from submitting an offer, for instance by making an offer above market value (para 280), or (3) whether the foreign subsidy was necessary to finance the acquisition – either at all or at the same parameters (para 281). For the e&/PPT transaction, (1) no other parties were interested in the target (para 282), (2) the transaction was at market price (para 283), and (3) the buyer could have performed the transaction without the subsidy (para 284).

A deeper look into distortions in the activities of the combined entity post-concentration

In e&/PPF, the EC establishes a distortion in the activities of the combined entity post-concentration. Thus, the decision gives ample insights into this second prong of the test for future application.

On step 1), it highlights that need to in-depth examine which activities are likely to be affected by the identified foreign subsidy. The EC underscores 'activities that were previously subject to competitive constraints' (para 295). In this context, the Commission focuses on activities of the target prior to the concentration (para 295) but also those of 'all parties to the concentration' (para 296). Even though the Commission does not tackle it in the e&/PPF case, not only previous activities but also the expansion to new activities and markets through the concentration could lead to a situation where activities previously subject to competitive constraints, i.e. not undertaken at all, could benefit from foreign subsidies (para 295).

In the case at hand, the Commission concentrates its examination on the provision of retail mobile telecommunications services by the target due to its higher likelihood of distortions relating to that activity (para 298) and where the targets plans significant investments (paras 301, 302). In contrast, other telecommunications services where the target is only marginally active are not taken into account in the distortion assessment, since the distortive effects from the foreign subsidies are 'less likely to materialise – or likely to be less significant –' and there is no 'indication that such distortion would be of a different nature' compared to the retail telecommunications services (para 298). A classic case of priority setting by the EC.

On step 2), when assessing the rebuttal of the merging parties regarding the unlimited guarantee, the EC dismisses the arguments brought forward. In particular, there would need to be an agreement to 'exclude' debt or equity financing, not just 'limiting' it or the compulsion of financing pro rata and not just the possibility (para 318). The EC further finds 'no restrictions whatsoever on the possibility' of the buyer and to provide financing on the target (para 319).

On step 3), the Commission applies the above-mentioned test but only explores the access to subsidised financial capacity to find an improvement of the position of the combined entity's economic activities post transaction (para 322 et seq.); access to subsidised assets and services are not relevant in this case (para 340 – 342). It finds that the unlimited guarantee 'and its combination with the other identified foreign subsidies to the EIA will likely provide the combined entity with preferential financing conditions for its operations in the internal market and make it more

indifferent to risks', in particular re credit ratings of the target (para 326) or other financial capacities (para 331 et seq.). Regarding the latter, the Commission compares the amount of the foreign subsidies in terms of significance with the turnover of the target in the internal market and overall and takes into account business plans for the coming years (para 336). The EC also considers the nature, i.e. indefinite grants and temporary measures, i.e. loans or repayable advances (para 337) as well as the unconditionality of the subsidies (para 338).

On step 4), the actual or potential negative effects on competition, the Commission first generally zeros in on the importance of future investments and therefore financing for the provision of retail mobile telecommunications services (para 344 et seq.). It is worth noting that the EC relies on its own White Paper in that context (para 346) as well as a report from the European Telecommunications Network Operators' Association (para 347). Second, the EC takes these general findings and brings it into context to the case at hand. The Commission finds that, given the high investment needs of paramount importance in the provision of retail mobile telecommunications services, the transaction and access to foreign subsidies will 'fundamentally alter the position of the Target in that respect' (para 353). The target will have more access to financing (paras 354, 355) and the competitors are in a comparatively weaker financial position (para 356). The EC establishes further that the financial capacity of the merged entity could 'distort the outcome of future spectrum auctions', taking into account past activities of the target to already pay over market price, which will be further incentivised by foreign subsidies (para 361). Moreover, the EC assess possible aggressive business strategies, the merged parties could only venture on due to the financial backing of the subsidy (para 367).

In the future, it will be interesting to monitor the development of the notion of distortions in the activities of the combined entity post transaction. In particular, how it differs from the SIEC test in merger control. Specifically, Article 2(1)(b) EUMR allows the EC to take the 'economic and financial power' of the merging undertaking into account – the deep pockets theory of harm, which at least used to involve foreign subsidies. Still, the second prong of the FSR concentration tool distortion test focuses solely on how the foreign subsidies alone lead to a distortion in the activities of the merging parties post transaction – it is, thus, limited to the distortive effect of the foreign subsidies. In Article 2(1)(b) EUMR, the economic and financial power, through subsidies or other deep pockets, is just one consideration. It can lead to a significant impediment of effective competition together with other factors, but also alone. Yet, one might ask if foreign subsidies should continue to play a role in the SIEC test – as they did, e.g. in the famous German CRRC/Vossloh decision – now that we have the special FSR, including its *ex officio* tool useable to screen below-threshold mergers. Here might be another opportunity to streamline both procedures in the future.

Learnings on the balancing test

While the learnings on distortions from the e&/PPF case are substantial, the learnings on the balancing test under Article 6 FSR are more limited but still important. In the decision, the Commission conducts a balancing test but does not find 'positive effects that should be balanced against the distortion identified, nor taken into account when deciding to accept commitments and the nature and level of commitments' (para 377).

The Commission pays attention to the seemingly non-mandatory nature of the balancing test

('may' in Article 6(1) FSR, para 370). It largely reiterates recital 21 FSR (paras 371, 372): positive effects on the development of the relevant subsidised economic activity or broader policy objectives and negative effects can be weighed against each other. Most likely distortive subsidies are unlikely to be outweigh. This is further stressed in the case at hand, given the most likely distortive unlimited guarantee (para 374).

The decision stresses, in line with the first sentence of recital 21 FSR, that 'Member States, as well as any natural or legal persons are able to submit information on the positive effects of a foreign subsidy, of which the Commission should take due account when carrying out the balancing test' (para 371). Together with Article 6(1) FSR ('on the basis of information received') and the second sentence of recital 21 FSR ('The Commission should consider the positive effects of the foreign subsidy on the basis of the evidence about such positive effects submitted during the investigation.') that the undertakings under investigations but also other natural and legal persons and Member States should bring forward the positive effects – the Commission will not look for it on its own. This approach is further highlighted by the fact that in the assessment of the balancing test itself, the Commission states that 'the notifying party did not bring forward any elements demonstrating that the foreign subsidies played a role in the occurrence of the positive effects' (para 375) and 'that the Commission has not received any other information pertaining to the existence of positive effects of the foreign subsidies' (para 376).

Furthermore, the decision centres on the relationship between the positive effects and the foreign subsidies. The wording of Article 6(1) FSR is a bit ambiguous on that relationship. On the one hand the 'positive effects' need to be on the development of the relevant subsidised 'economic activity' on the internal market'. This part of the sentence in Article 6(1) FSR pinpoints to a relationship between the economic activity (here, both the transaction and the activities of the combined entity post-Transaction) and the positive effects. On the other hand, Article 6(1) FSR also mentions the 'positive effects of the foreign subsidy.' The latter is emphasised in this case: the positive effects need to relate to the 'foreign subsidies' in the transaction (para 375), so there must be a causal link between the positive effects and the foreign subsidies. In fact, the foreign subsidies must not only 'contribute' to the positive effects 'in any way', there must be 'necessary for the positive effects to occur' (para 375).

In the e&/PPF decision, neither is the case. The parties have brought forward 'certain positive effects in the internal market, notably as a result of the synergies that e& intends to realise through the concentration, and which may improve the Target's services, in particular in respect of (i) customer value management and improve customer service, (ii) network optimisation, (iii) fraud detection, and (iv) improved roaming services' (para 373). The Commission establishes that 'those positive effects, if substantiated, are to be brought about by the Transaction itself, and the subsequent commercial integration' of the merging parties, not the foreign subsidies (para 375).

Therefore, the EC found no positive effects 'that should be balanced against the distortion identified […] nor taken into account when deciding' on the commitments (para 377). This confirms that the balancing test is necessarily conducted 'on the basis of information received': if the parties do not submit positive effects produced by the foreign subsidies, the Commission has no obligation to look for them on its own. We may wonder whether the EC could go beyond the information received when considering 'relevant policy objectives […] of the Union'. Additionally, the Commission found that the commitments proposed by e& are appropriate to address the distortions produced by the foreign subsidies and 'do not prevent, nor have any influence on, the occurrence of the positive effects alleged by the Notifying Party' (para 378) – the

EC means here the positive effects of the concentration, since, as mentioned, no positive effect of the foreign subsidies was demonstrated. In conclusion, the Commission did not conduct a full balancing test since no positive effects were identified and the proposed commitments are already adequate.

Learnings on commitments

The final step for the EC before adopting the decision is to assess whether the commitments 'fully and effectively remedy the distortion in the internal market' (Article 7(2) FSR) and are 'proportionate' (Article 7(3) FSR). If no commitments had been offered, the Commission would have elaborated on which redressive measures to take. e& first offered commitments in July 2024 (the decision refers to them as the 'Initial Commitments') to ensure that 'the Transaction does not create a conduit that would permit foreign subsidies to be channelled into the internal market' in a distortive way (para 386). In other words, that distortive financing would not flow from the EIA or e& to PPF after the transaction – as mentioned, no distortion was found in the transaction process.

e& committed to align its articles of association with the EIA with the UAE Bankruptcy Law and provide financing to or engage in commercial transactions with the acquired entities on market terms, for the business conducted in the EU (para 387). Additionally, the implementation of these commitments was to be monitored and supervised by a trustee and, ultimately, by the Commission (para 388). Based on these Initial Commitments, the EC conducted a 'market test', i.e. it sent requests for information to third parties active in the telecom sector on the basis of Article 13(3) FSR – a procedure quite well-known from merger control. Competitors generally agreed that these commitments were sufficient to address the distortions.

Relying on the market test and its own considerations, the Commission provided feedback to e&, identifying some unclear and improvable provisions. In response, the parties submitted their 'Final Commitments' in August 2024 – around one month after the initial ones. The EC assessed these commitments favourably, as they '(i) ensure that e& does not benefit from an unlimited guarantee, (ii) prohibit e& to finance the EU businesses of the Target […] and (iii) require that transactions between the EU businesses of the Target and e& and its affiliates can only take place on market terms' (para 412). The distortions produced by each distortive subsidy are neutralised and, where some residual risk remains, the Commission retains its supervisory powers. The commitments are valid for a (renewable) period of ten years (para 419).

Learnings on procedure

Lastly, the e&/PPF decision contains a lot of important insights on how the EC handles the FSR merger proceedings.

Many times, the Commission in-depth explores the different legal conditions under its burden of proof and takes recourse to evidentiary measures obtained through the wide enforcement toolbox of the FSR. In multiple stages of the assessment, for example, it cites answers to RFIs (e.g. paras 282, 301, 350, 355, 362) or the market test (e.g. paras 391, 397, 398, 401, 402) to establish the findings. Here we are still very much reminded of merger control (phase II) proceedings. Actually, the wide involvement of competitors, banks, special regulators insights as third parties and also

industry association reports is noticeable. The EC seems to make sure to understand the market, the subsidisation process and degree of subsidisation, the competitors and other affected parties concerned. Here, the FSR serves its purpose as a primary procedural tool: receive information on foreign subsidies and its distortions.

However, most striking is the evidence standard, which at times differs considerably from traditional competition and state aid assessment when it comes to the application of the best evidence available rule in Article 16 FSR. As a traditional trade law tool, it allows decisions based on the basis of the best facts available in cases of non-cooperation. The Commission takes recourse to that tool on multiple occasions.

First, on finding a foreign subsidy. As mentioned above, the EC concludes, based on the best evidence available and without sufficient information on the amount and conditions of the contributions, that the EIA obtained a benefit (para 192). Here the Commission uses the specific Article 16(3) FSR according to which, 'where an undertaking, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit on it, that undertaking may be deemed to have received such benefit.' The EC tried to engage with the parties on the matter via a back-and-forth of RFIs, even warning that it was going to 'take a decision on the basis of the facts available' otherwise (paras 190, 191).

Later, the Commission also uses the general best evidence available rule under Article 16(1) FSR to find a distortion (see paras 333, 338, 356). For example, when establishing that the identified foreign subsidies to the EIA will likely provide the combined entity with preferential financing conditions so that post-merger, the competitive position of the merged entity is improved, the EC uses the best evidence available rule (paras 333 et seq.). Noticeable, it still argues why it thinks – based on the characteristics of the foreign subsidy to its understanding – the competitive position will be improved. There is no simple presumption at this stage. Furthermore, the Commission makes sure to refer that it had send (multiple) RFIs that remained unanswered, so relying on Article 16 FSR does not come out of nowhere. Still, the quite vast application multiple times shows that with Article 16 FSR the FSR does not remain a toothless tiger. Parties and third states are reminded that, according to Article 16(4) FSR 'when applying facts available, the result of the procedure may be less favourable to the undertaking than if it had cooperated.' Cooperation is key!

Conclusion

The e&/PPF decision provided a deep and insightful look into how DG COMP enforces the concentrations procedure under the FSR. On the one hand, some theoretical aspects of the Regulation were finally seen 'in action' and in detail – such as the notions of foreign subsidy and the two-pronged distortion test. Companies (and their lawyers) can now gain a clearer understanding of how an FSR procedure unfolds step by step: between the notification in April and the final decision in September 2024, it took five months (and several exchanges of documents and RFIs) to clear the transaction.

On the other hand, some aspects of the FSR procedure remain to be further explored – in particular, the balancing test and how the assessment might differ in *ex officio* or public procurement procedures. The next decisions, and the Guidelines to be published in 2026, will

surely provide more food for thought.

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