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Goodwin Antitrust Short

Practical Takeaways From the Recently Published EU Foreign Subsidies Decision in Case FS.100011 – e&/PPF

The European Commission has released the full, non-confidential text of its decision in Case FS.100011 – e&/PPF, marking a watershed moment under the EU Foreign Subsidies Regulation (FSR). This is the first case to be cleared with commitments, setting a precedent for how foreign subsidies will be scrutinized moving forward, particularly in transactions involving state-owned enterprises, sovereign wealth funds, and non-EU governmental entities.

1. Case Background

On August 1, 2023, e& (a UAE-based telecom operator majority-owned by the Emirates Investment Authority [EIA]) entered into a Share Purchase Agreement (SPA) to acquire control over PPF Group N.V.'s telecom businesses in Bulgaria, Hungary, Serbia, and Slovakia (Target).

Although the transaction did not trigger EU Merger Regulation (EUMR) thresholds, it fell under the FSR because:

- The Target's EU turnover exceeded €500 million.
- e& received more than €50 million in foreign financial contributions from the UAE in the three years prior to the SPA.

Key Milestones:

- April 26, 2024: e& formally notified the transaction under the FSR (Phase I)
- June 10, 2024: Commission opened a Phase II investigation
- Aug. 19, 2024: Final commitments submitted by e&
- Sept. 24, 2024: Commission conditionally approved transaction with commitments

2. Scrutiny of Foreign Subsidies

The Commission assessed various foreign financial contributions made to e& and its parent entity, EIA, concluding they constituted foreign subsidies. Key elements included:

- **Unlimited state guarantee:** Rooted in e&'s deviation from typical UAE bankruptcy protections
- **Financial instruments:** Grants, loans, and other forms of state-backed funding extended to the EIA

A notable procedural development was the Commission's application of Article 16 FSR, which allows it to presume a financial benefit when parties fail to provide sufficient information — used here as an alternative to imposing penalties under Article 17 FSR.

3. Alleged Distortion of Competition

The Commission's assessment focused on two potential areas of market distortion:

- During the acquisition process
  - Examined whether foreign subsidies distorted the bidding process
  - Found no competing bidders and that e& had sufficient own funds
  - Concluded the acquisition price reflected market value, ruling out distortion at this stage
- Post-transaction competitive impact
  - Emphasized the strategic importance of the telecommunications sector to EU sovereignty
  - Found that subsidies could unfairly enhance the merged entity's access to financing, giving it a competitive edge in:
    - Infrastructure deployment (e.g., 5G rollout)
    - Spectrum auctions
    - Future acquisitions
  - Concluded this could distort competition by allowing outsized investment capability relative to unsubsidized rivals

4. Remedies and Commitments

To address the Commission's concerns, e& and the Target offered a package of behavioral remedies, including:

- Amendment of e&'s articles of association:
  - Aligning with typical UAE bankruptcy norms
  - Eliminating the implicit state guarantee
- Restrictions on intra-group financing:
  - Prohibiting subsidized funds from supporting EU operations
  - Allowing limited exceptions for emergencies or non-EU activities, subject to Commission approval
- Market-based dealings:
  - Ensuring all transactions among e&, EIA, and PPF occur at arm's length
- Enhanced transparency:
  - Enforcing mandatory reporting of concentrations that do not meet FSR thresholds. Although the Commission has the power under Article 21(5) FSR to call in non-notifiable concentrations, it has now added reporting obligations through commitments
  - Establishing oversight by an independent monitoring trustee appointed under Commission supervision

These remedies will remain in force for 10 years, with the possibility of a five-year extension or longer if agreed upon.

5. Practical Takeaways for Future Transactions

This decision signals how the Commission will operationalize the FSR moving forward. Key lessons for dealmakers include:

- **Review funding sources:** Transactions involving state-backed financing from outside the EU will be subject to a detailed review.
- **Prepare for a bidding analysis:** The Commission will examine whether foreign subsidies skewed the competitive process.
- **Engage with the Commission early:** Proactive dialogue with the Commission can help streamline Phase II reviews.
- **Tailor behavioral commitments:** Remedies must be targeted and enforceable to be accepted.
- **Secure transparency from state-backed entities:** Ensure cooperation in disclosing financial contributions, even where sovereign institutions are involved.
- **Build in regulatory buffer time:** Factor potential FSR scrutiny into your transaction timetable, particularly when EUMR and FSR apply in tandem.

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