EUROPEAN COMMISSION LAUNCHES FIRST IN-DEPTH MERGER INVESTIGATION UNDER FOREIGN SUBSIDIES REGULATION

On 10 June 2024, the European Commission (the Commission) announced that it had opened an in-depth investigation to assess, under the Foreign Subsidies Regulation (FSR), the proposed acquisition by UAE state-controlled Emirates Telecommunications Group Company PJSC (e&) of sole control of Czechia-based PPF Telecom Group B.V. (PPF), excluding its Czech business.[1]

This investigation will be of interest to any non-EU organisation seeking to make an acquisition in the EU where either party has received a non-EU subsidy in the previous three years.

1 European Commission. *Commission opens in-depth foreign subsidies investigation into e&'s acquisition of parts of PPF Telecom.* Available at: Foreign subsidies investigation (europa.eu)

The proposed acquisition would see e& take a stake of 50% plus one share in PPF's assets in Bulgaria, Hungary, Serbia, and Slovakia, in a deal valued at up to €2.5 billion.

The Commission has preliminary concerns that e& may have been granted foreign subsidies that could distort the EU internal market. This is the Commission's first in-depth merger investigation under the FSR since the new Regulation entered into force on 12 July 2023, and it may provide helpful guidance on what the Commission will look for in future FSR merger cases. We published a briefing in February 2023 setting out how the FSR would operate in practice, and what new powers it gave the Commission for enforcement.[2]

The Foreign Subsidies Regulation (FSR)

The FSR allows the EU to address subsidies granted by non-EU countries (**foreign subsidies**) which distort the EU internal market and fair competition. The rationale is that, by remedying the distortion caused by foreign subsidies, the Commission will level the playing field for all companies operating in the EU internal market.

The FSR created three new tools to allow the Commission to address the potentially distortive effect of foreign subsidies on the EU internal market:

1. a mandatory prior notification regime for certain concentrations;
2. a mandatory prior notification regime for certain public procurements; and
3. the right for the Commission to launch an investigation on its own initiative.

The mandatory notification regime for concentrations covers mergers, acquisitions and the creation of full function joint ventures where:

- any one of the undertakings involved in the concentration is established in the EU and has an EU turnover of €500 million or more; and
- the undertakings involved have received combined aggregate foreign subsidies of €50 million or more in the three preceding years.

The proposed acquisition by e& of PPF met the above criteria and was notified to the Commission in April 2024.

The alleged subsidies

The Commission has stated that after a preliminary investigation it believes that e& has received foreign subsidies distorting the EU internal market. The alleged subsidies take the form of:

- an unlimited guarantee from the UAE government; and
- a loan from banks controlled by the UAE government directly facilitating the transaction.

The Commission believes that these subsidies may have enhanced e&'s ability to perform the acquisition. It also has concerns that the subsidies will improve and distort the competitive position of the proposed merged entity in the EU moving forwards (for example, by improving its capacity to finance its EU activities at preferential terms).

The Commission's investigation

When completing its investigation, the Commission will consider whether the foreign subsidies have led or would lead to actual or potential negative effects on the acquisition process, particularly if they alter the outcome of that process by allowing (i) e& to deter or outbid other parties interested in the acquisition, and/or (ii) e& to perform the acquisition in the first place.

The Commission will also assess whether the foreign subsidies would lead to actual or potential negative effects in the EU internal market with respect to the proposed merged entity's activities.

Following its in-depth investigation, the Commission may:

- accept commitments proposed by e& if they fully and effectively remedy the distortion;
- prohibit the concentration; or
- issue a no-objection decision.

The Commission has 90 working days from notification to reach a decision, i.e. until 15 October 2024.

HFW comment

As we noted in our previous briefing, the general expectation was that the FSR was intended primarily to counteract the effect of Chinese government subsidies. Indeed, all of the Commission's FSR in-depth public procurement investigations so far have concerned Chinese companies. It was also suggested that the FSR could target companies receiving US government subsidies, after US Congress passed the Inflation Reduction Act in 2022.

With this backdrop, the fact that a UAE-based company is the subject of the Commission's first FSR merger review suggests that the pool of targets for FSR investigations is wider than initially thought.

The announcement of this investigation should make all non-EU potential acquirors of EU companies or assets which have received a subsidy in the previous three years, regardless of geographic location, consider how the FSR could impact them. This should include building into the transaction timetable the preparation of a notification and the Commission's review process. Particular note should be given to the definition of foreign subsidy, which is broadly drafted and covers many contributions which may not appear on the face of it to be subsidies in the usual meaning of the word. Under the FSR, a subsidy is any direct or indirect financial contribution conferring a benefit. This conceivably includes money received as part of Covid-19 support measures, private banks acting under state direction to provide financing, or even government supply contracts.

Additionally, the foreign subsidy does not even need to be received to be regarded as a foreign subsidy under the FSR, rather it "*should be considered granted from the moment the beneficiary obtains an entitlement to receive the foreign subsidy*".[3]

Next steps

This is something of a test case for the Commission, and the decision it reaches should provide useful guidance on how the FSR will be enforced in future merger investigations. The Commission has indicated that it expects to receive notification of approximately 30 concentrations per year under the FSR, so we should see more evidence soon of how it intends to use its powers.

2 HFW. *The EU's Foreign Subsidies Regulation.* Available at: The EU's Foreign Subsidies Regulation - HFW

3 Foreign Subsidies Regulation, Recital 15. Available at: Regulation - 2022/2560 - EN - EUR-Lex (europa.eu)

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