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QUICK LINKS

e&/PPF Telecom deal receives conditional clearance following first in-depth merger review under Foreign Subsidies Regulation

On 24 September 2024, the European Commission announced that it has conditionally approved the acquisition by Emirates Telecommunications Group Company PJSC (known as e&) of PPF Telecom Group B.V., excluding its Czech business. This decision followed the first in-depth investigation of an M&A transaction under the Foreign Subsidies Regulation (FSR).

Background

PPF is a European telecommunications operator, headquartered in the Netherlands and operating in Czechia, Bulgaria, Hungary, Serbia (Yettel) and Slovakia (O2). e& is a UAE-headquartered telecommunications operator, controlled by the Emirates Investment Authority (EIA), a sovereign wealth fund controlled by the UAE.

On 10 June 2024, the Commission launched an in-depth investigation into the transaction due to concerns that e& may have received foreign subsidies that could distort the EU internal market. The Commission's preliminary concerns related to an unlimited guarantee from the UAE and a loan from UAE-controlled banks directly facilitating the transaction. For more detail about the investigation and background to the transaction, see our previous newsletter here.

The Commission's findings

Following its in-depth investigation, the Commission found that both e& and EIA received foreign subsidies from the UAE, including an unlimited State guarantee to e& and grants, loans and other debt instruments to EIA.

It nevertheless found that the foreign subsidies received by e& did not lead to actual or potential negative effects on competition during the acquisition process. This is because e& was the sole bidder and had sufficient resources to carry out the transaction.

In respect of the foreign subsidies received by e& and the EIA, the Commission found that they could have led to a distortion of competition in the EU internal market post-transaction. Under the FSR an unlimited guarantee is one of the "*categories of foreign subsidies most likely to distort the internal market*". The Commission concluded that the foreign subsidies received by e& and the EIA would have "*artificially improved the capacity of the merged entity to finance its activities in the EU internal market and increased its indifference to risk*". The Commission specifically pointed to the potential for the foreign subsidies to distort the playing field by, for example, enabling the merged entity to invest in spectrum auctions, infrastructure or acquisitions.

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The remedies

The clearance is therefore subject to a set of commitments offered by e& and EIA and approved by the Commission following a consultation. Under these commitments:

- e&'s articles of association will not diverge from ordinary UAE bankruptcy law - as a result, the unlimited State guarantee will be removed.
- EIA and e& will not fund PPF's activities in the EU internal market (subject to certain exceptions, which will be subject to review by the Commission, concerning non-EU activities and emergency funding). Any commercial deals between the companies must take place on market terms.
- e& will inform the Commission of future acquisitions that are not notifiable under the FSR.

The Commission found that the commitments offered remove the potential distortion to the EU internal market post-transaction and include an appropriate monitoring mechanism, as they will be monitored by an independent trustee under the Commission's supervision. The commitments are valid for a period of ten years and can be extended unilaterally by the Commission for five years, or further if agreed by the Commission and e&.

Conclusions

Dealmakers have been following the Commission's review of this deal closely, keen to see how the first in-depth merger review under the FSR unfolds. There was concern when the regime was introduced that it would add considerably to the already complex European regulatory and investment landscape. Dealmakers will therefore be reassured somewhat by the pragmatic approach the Commission appears to have taken, at least in this case - they will be encouraged not only by the clearance, but also by the fact that the review was completed well before the deadline of 4 December 2024. e& itself has referred to its "*extensive and fruitful dialogue with the Commission's Foreign Subsidies Directorate*" which it credits with enabling the Commission to grant its approval "*on an accelerated basis, almost three months ahead of the applicable legal deadline*". It has also said it regards the commitments, which are behavioural rather than structural, as "*proportionate and workable*".

Nevertheless, each case is specific to its facts and the fact that this one seems to have gone relatively smoothly, while encouraging, is no guarantee for future deals. The full decision, when published, will provide further insights into this particular case. But dealmakers will no doubt be watching future deals reviewed under the FSR with interest to see whether they encounter such smooth sailing.

OTHER DEVELOPMENTS

MERGER CONTROL

Tereos fined in UK over failure to comply with information request

On 25 September 2024, the UK Competition and Markets Authority (CMA) issued a penalty notice imposing a penalty of £25,000 on Tereos United Kingdom and Ireland Limited and Tereos SCA (together Tereos) under section 110 of the Enterprise Act 2002 (the Act) for failing to provide certain information in connection with the CMA's recent phase 2 investigation into the Tereos/T&L Sugars merger (for details on this case see our previous newsletter).

On 12 April 2024, during the phase 2 investigation into the merger, the CMA sent a notice to Tereos under section 109 of the Act requiring Tereos to produce, among other things, certain minutes and internal documents in relation to its Board and corporate governance by 26 April 2024. Tereos responded to the notice on 26 April, providing 242 documents in total. However, following a main party hearing on 5 June, the CMA became aware that some relevant information responsive to the questions in the notice had not been provided by Tereos. Throughout the iterative process that followed, Tereos missed certain deadlines for document production imposed by the CMA and ultimately only provided all of the required documents by 21 June 2024 (seven weeks after the original deadline of 26 April 2024).

On this basis, the CMA found that Tereos had failed, without reasonable excuse, to fully comply with the notice. The CMA viewed Tereos' failure to produce all required documents as "*serious*" and "*flagrant*" and expressed that the failure to comply was capable of having an adverse impact on the CMA's investigation. It considered that Tereos had adopted an "*unjustifiably narrow*" definition when identifying the relevant documents which was not only unreasonable in the context of the background and purpose of the investigation but also, in some instances, even contradicted the way in which Tereos had referred to certain documents in previous representations to the CMA.

SAMR publishes revised notification forms for simplified merger reviews

On 14 September 2024, China's State Administration for Market Regulation (SAMR) revised its notification form for transactions eligible for the simplified merger review procedure. The revised form is applicable for all transactions notified on or after 12 October 2024. The key changes include:

- *Fewer forms for submission*: Notifying parties will only be required to submit a confidential version of the notification form together with the public notice form. A non-confidential version of the notification form will no longer be required.
- *No requirement to submit research, analysis or reports prepared by the merging parties or third parties*: The previous notification form asked notifying parties to submit relevant research, analysis or reports prepared by the merging parties and/or third parties for the purpose of the transaction on a voluntary basis. The new notification form no longer requests such information.
- *Simplified competitive analysis in certain circumstances*: Merging parties are also no longer required to provide the estimated market share data of major competitors, provided that the merging parties' estimated market share is below 5% and there is difficulty obtaining such data from a reliable source in the relevant industry.

While SAMR's revised simplified form reduces the information requested for the initial filing, SAMR nevertheless retains a discretion to require notifying parties to supplement or request additional information (e.g. on the competitive landscape) during the review process.

Overall, it is expected that the revised notification form will reduce the administrative burden on businesses whose transactions qualify for the simplified merger review procedure and potentially expedite transactions that will have no or limited impact on competition in China.

ANTITRUST

AG Kokott delivers opinion on jurisdiction in antitrust damages case where breach was committed by subsidiary in another jurisdiction

On 26 September 2024, Advocate General (AG) Kokott delivered her opinion in relation to a request by the Dutch Supreme Court for the European Court of Justice (CJ) to rule on a question relating to jurisdiction in an antitrust damages action brought by Macedonian Thrace Brewery against Heineken and its Greek subsidiary, Athenian Brewery. In particular, the Dutch Court asked the CJ whether the presumption of "decisive influence" should be used when assessing if a court has jurisdiction over a civil case.

The concept of "decisive influence" is already applied to EU antitrust proceedings: where a parent company exercises decisive influence over its subsidiary, it can be held liable for the conduct of that subsidiary. The *presumption* of decisive influence is applied when a parent company owns all or almost all of the subsidiary's shares.

According to the AG opinion, courts may use the "*presumption of decisive influence*" to determine whether they have jurisdiction to hear private antitrust claims. Under the Recast Brussels Regulation - which sets out the rules for EU courts to determine jurisdiction in cases involving more than one EU country - a person domiciled in one

Member State may be sued in another Member State where another defendant is domiciled, provided that there is a "*close connection*" between the claims.

According to the AG, where a parent company holds all or almost all of its subsidiary's shares (and the presumption of decisive influence therefore applies), this is a "*strong indication*" of a "*close connection*". In these circumstances, AG Kokott advises that courts need not examine any further evidence in relation to the existence of such a connection. In addition, AG Kokott said that it is "*highly likely*" that the parent company and the subsidiary would be jointly and severally liable for the infringement committed by the latter.

The referral by the Dutch Court goes back to the Greek Competition Commission's decision in 2015 fining Athenian Brewery €31.5 million for infringing Greek competition law by abusing its dominant position in the Greek beer market. Heineken is not mentioned in this decision. However, a Greek competitor, Macedonian Thrace Brewery, filed a claim in the Netherlands (where Heineken is based) targeting both Heineken and its subsidiary for damages worth over €100 million. Heineken and Athenian Brewery have been disputing the Dutch courts' jurisdiction to hear the case. At the time of the infringing conduct, Heineken held approximately 98.8% of the shares in Athenian Brewery (i.e. Heineken had decisive influence over its subsidiary). Therefore, if the CJ follows the AG opinion, the Dutch Court will have jurisdiction to hear the case.

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