Paul | Weiss

CLIENT MEMORANDUM

1 October 2024

Constructive Remedies Accepted in the EU's First In-depth FSR Decision

Introduction

A non-EU state-controlled purchaser supported by an unlimited guarantee has been cleared to acquire EU-based businesses under the foreign subsidies regime but must remove post-merger financial support for the merged business in the European Union (the "EU").

The European Commission (the "Commission") has announced its decision in the first in-depth investigation into a merger notified under the EU's Foreign Subsidies Regulation ("FSR"). The decision concerns the acquisition by Emirates Telecommunications Group (known as e&), a telecoms operator based in the United Arab Emirates ("UAE"), of telecoms businesses of PPF Telecom Group BV. e& is controlled by an Emirati sovereign wealth fund, the Emirates Investment Authority ("EIA"). The foreign subsidies under scrutiny comprised an unlimited state guarantee from the UAE to e&, as well as grants, loans and other debt instruments to EIA.

The Commission's concerns

- The Commission was not concerned that the subsidies had distorted the acquisition process, finding that e& had sufficient resources of its own to fund the acquisition, which was made at market value.
- However, it concluded that the subsidies could distort competition in the EU internal market after the acquisition, in particular, by increasing "*its indifference to risk*" and enabling it to invest and expand its activities "*beyond what an equivalent economic operator would engage in absent the subsidies.*"

© 2024 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

The remedies package

- The unlimited state guarantee will be removed from e&'s articles of association.
- e& and EIA will not finance the target's activities in the EU, with exceptions for non-EU activities and emergency funding (subject to review by the Commission).
- Transactions between EIA, e& and the target businesses shall take place on market terms.
- e& will notify the Commission of future non-FSR-notifiable acquisitions.
- A monitoring trustee will be appointed.
- The commitments will be in place for 10 years, with the possible extension of a further five years at the Commission's discretion or for longer with the agreement of e&.

Takeaways

- This case illustrates clearly the two-stage analysis which the Commission previously signalled for FSR merger cases: the impact of the subsidies on the transaction itself and also on the conditions of post-merger competition.
- The focus of the remedies is on removing the potentially distortive effect of the unlimited guarantee and wider financial support within the EU, not on removing it outright. Under intra-EU state aid rules, unlimited state guarantees are prohibited, and the FSR legislation identifies them as prima facie distortive. This decision confirms that a state-backed acquirer may be able to reshape the terms of its financial support so that its involvement in an acquisition in the EU is acceptable under the FSR regime.
- Notwithstanding the Commission's experience from the state aid regime of the difficulties of monitoring financial flows within an integrated state-backed business, it is notable that the remedies in this case are essentially behavioural. The Commission is relying on commitments from the purchaser, with a monitoring trustee in place.
- The duration of the remedies is not linked to the duration of the unlimited guarantee but will last for 10 years with an optional extension of a further five years.
- This case emphasises the balancing act which the Commission plays under the FSR regime. It is not uncommon for sovereign wealth funds to invest in the EU, and the Commission will not have wanted to create a chilling effect on welcome flows of foreign direct investment ("FDI") with an early prohibition.

The e&/PPF decision is a welcome first insight into how the Commission will deal with problematic foreign subsidies in the M&A context and a positive example of its willingness to find solutions other than the outright ban of a transaction.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Ross Ferguson
+44-20-7601-8646
rferguson@paulweiss.com

Annie Herdman
+44-20-7601-8602
aherdman@paulweiss.com

Nicole Kar
+44-20-7601-8657
nkar@paulweiss.com

Henrik Morch
+32-2-884-0802
hmorch@paulweiss.com

Richard Pepper
+44-20-7601-8660
rpepper@paulweiss.com

Senior Knowledge & Innovation Lawyer Catherine Hammon contributed to this Client Memorandum.