

# COMPETITION & REGULATORY NEWSLETTER

## QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

[General competition](#)

## European Commission launches first in-depth merger probe under Foreign Subsidies Regulation

On 10 June 2024, the European Commission [announced](#) that it has launched an in-depth investigation under the Foreign Subsidies Regulation (FSR) into the acquisition by Emirates Telecommunications Group Company PJSC (known as e&t) of sole control of PPF Telecom Group BV, excluding its Czech business. This is the first time an in-depth FSR investigation has been opened in respect of an M&A transaction.

### Background

On 12 January 2023, the FSR came into force in the EU with the aim of addressing concerns about distortions in the EU internal market caused by foreign subsidies. The FSR regime introduces a new mandatory and suspensory regime for M&A transactions and public tenders which exceed certain financial thresholds. It also gives the Commission a general market investigation tool to investigate lower-value concentrations and public procurement procedures, as well as all other market situations where a distortive foreign subsidy may be involved. For more detail on the regime, see our previous client briefings [here](#) and [here](#), as well as our [Top 10 Tips for M&A Transactions](#).

### First in-depth merger investigation under FSR

e&t reached an agreement with PPF in August 2023 to acquire PPF's telecom business in Bulgaria, Hungary, Slovakia and Serbia. e&t is a UAE-based State-controlled telecommunications operator and PPF is a European telecommunications operator. The acquisition was notified for FSR approval on 26 April 2024.

On 10 June 2024, the Commission announced it has opened an in-depth investigation into the proposed transaction. While the Commission has previously opened a number of in-depth investigations under the FSR in respect of public tenders (see previous newsletters [here](#) and [here](#)), this is the first time it has done so in relation to an M&A transaction.

The Commission's preliminary concerns relate to an unlimited guarantee from the UAE and a loan from UAE-controlled banks directly facilitating the transaction. The Commission explains that "*such subsidies are among the most likely to distort the internal market*". The Commission is concerned that such subsidies "*may have improved e&t's capacity to perform the acquisition as well as the competitive position of the merged entity in the EU going forward, notably by improving its ability to finance its EU activities at preferential terms*".

The Commission now has until 15 October 2024 (90 working days) to carry out its in-depth investigation and reach a decision. During this time, the Commission will assess whether:

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**Main Article****Other Developments**[Merger control](#)[Antitrust](#)[General competition](#)

- The foreign subsidies lead to actual or potential negative effects on the acquisition process, in particular, whether they have altered the outcome of that process by allowing e&t to deter or outbid other parties and/or by allowing e&t to perform the acquisition in the first place;
- The foreign subsidies lead to actual or potential negative effects in the internal market with respect to the merged entity's activities.

Following its in-depth investigation, the Commission may: (i) accept commitments proposed by e&t if they fully and effectively remedy any identified distortion(s); (ii) prohibit the concentration; or (iii) issue a no-objection decision.

**Conclusion**

Deal-makers will be watching this case with interest: it will provide the first opportunity to observe the Commission's approach to assessing the distortive effects of foreign subsidies in the realm of M&A transactions. It is also the first time the FSR is being used for an in-depth investigation into subsidies from a country other than China - the in-depth investigations conducted so far in respect of public tenders have all involved Chinese bidders, and have all been closed following the withdrawal of the bidders from the tender processes (see [here](#) and [here](#)).

**OTHER DEVELOPMENTS****MERGER CONTROL****SAMR fines Highly and Qingdao Haier RMB 3 million in total for gun-jumping**

On 28 May 2024, China's State Administration for Market Regulation (SAMR) [issued](#) its first gun-jumping decision since the Anti-Monopoly Law of the People's Republic of China (AML) was amended in 2022. Shanghai Highly (Group) Co., Ltd and Qingdao Haier Air Conditioner Gen Corp were each fined RMB 1.5 million (around £163,000) for establishing a joint venture without notifying SAMR. This is a significant increase from the maximum of RMB 500,000 (around £54,000) under the previous AML.

The joint venture in question was registered by the parties in January 2023 to manufacture and sell rotary compressors for air conditioners. SAMR found that the parties' turnover exceeded China's merger filing thresholds, and therefore their failure to notify SAMR prior to the transaction amounted to a breach of the AML. However, SAMR found that the transaction did not have the effect of eliminating or restricting competition.

SAMR noted that it had considered a number of mitigating factors in determining the penalties, such as the parties' prior clean records, their active cooperation during the investigation and their efforts in establishing an effective compliance system post-breach. This case provides a useful indication of the likely level of gun-jumping fines under the amended AML for transactions not involving competition concerns i.e. RMB 1.5 million against a maximum of RMB 5 million. However, in gun-jumping cases involving competition concerns, the AML provides for a penalty of up to 10% of the parties' turnover in the preceding year, which may be multiplied by up to 5 times (i.e. potentially 50% of turnover) in case of a particularly egregious violation.

**ANTITRUST****Court of Justice rules European Commission must pay interest on antitrust fines unduly imposed**

On 11 June 2024, the European Court of Justice (CJ) [ruled](#) that the European Commission must pay Deutsche Telekom €1.75 million in interest on a partially annulled antitrust fine, dismissing the Commission's challenge against a 2022 General Court (GC) judgment.

This ruling relates to a fine of approximately €31 million imposed by the Commission on Deutsche Telekom in October 2014 for abuse of its dominant position on the Slovak market for broadband telecommunications

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

services. The telecoms company provisionally paid the fine in January 2015, at the same time as seeking an annulment of the decision before the GC. The GC upheld the action in part and reduced the amount of the fine by circa €12 million, which was repaid by the Commission in February 2019. Subsequently, Deutsche Telekom asked the Commission to pay default interest on that amount for the four year period running from the date of payment of the fine to the date of repayment of the portion of the fine held not to be due. However, the Commission refused to pay this, which prompted Deutsche Telekom to bring another action before the GC. On 19 January 2022, the GC awarded Deutsche Telekom compensation in the amount of approximately €1.75 million for the harm which it suffered as a result of the Commission's refusal to pay it default interest on the amount of the fine which it had unduly paid. The Commission appealed this judgment before the CJ. In its ruling, the CJ dismisses the appeal and thus upholds the GC's judgment.

The present ruling confirms that where the European courts cancel or reduce a fine imposed by the Commission for breach of the competition rules, the Commission must - in addition to repaying the amount - also pay interest on that amount for the period from the date of provisional payment of that fine to the date of repayment. This obligation to pay interest applies even where the Commission has made zero or negative financial returns on the investment of the amount of the fine. The CJ confirms the GC's ruling that this does not concern default interest, but interest intended to compensate the undertaking at a standard rate for loss of enjoyment of the amount at issue. It further concluded that the GC was correct to hold that the rate applicable to the interest which the Commission must pay Deutsche Telekom is at the European Central Bank refinancing rate (of January 2015, which is 0.05%) plus an additional 3.5%. Interestingly, the ruling does not follow the opinion of the Advocate General issued on 23 November 2023, which suggested that default interest should only apply if the Commission had missed its deadline to compensate Deutsche Telekom.

This ruling may have implications for other pending cases, such as Intel's claim for €593 million in interest after its €1.06 billion fine was overturned by the CJ, and a number of claims brought by airline operators for interest to be paid on repaid fines in the air cargo case.

## GENERAL COMPETITION

### CMA provides update on emerging thinking in cloud services market investigation

On 6 June 2024, the UK Competition and Markets Authority (CMA) issued an [updated issues statement](#) in its market investigation into the supply of public cloud infrastructure services in the UK, launched on 5 October 2023 (for details, see our [blog post](#)). The updated issues statement provides an update on the CMA's emerging thinking and on the theories of harm that it has been investigating, based on evidence it has received to date, as well as its initial analysis. The CMA makes clear that it has not yet reached any provisional conclusions. However, based on the evidence it has seen to date, its emerging view is that there are indicators of significant market power being held by the largest two providers, AWS and Microsoft. This is because: they both have high market shares whilst the collective share of all other providers in the markets is falling; potential rivals face significant barriers to entry and expansion; and the CMA's profitability assessment suggests that these two companies have been generating returns above their cost of capital.

Alongside its updated issues statement, the CMA also [published](#) in total six working papers of which three were published on 6 June, and three were published at the end of May. These cover, *inter alia*, the CMA's emerging views on the four theories of harm the CMA is investigating. In particular, the papers are focussing on technical barriers, egress fees (i.e. fees charged by providers to customers to move their data out of a cloud network), committed spend discounts (i.e. discounts offered to customers provided they spend a minimum amount with a particular cloud provider over a certain period), and software licensing practices. In its new working paper on remedies, the CMA sets out the potential remedies currently under consideration by reference to the four theories of harm under investigation. In doing so, it is focussing primarily on potential behavioural remedies. Significantly, the CMA states that if competition has been harmed, it is "*not currently minded to prioritise further consideration of structural or operational separation remedies*" because of the risks involved - for instance, structural remedies could introduce inefficiencies.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

The CMA is inviting feedback on its updated issues statement and the working papers by 27 June. The CMA is expected to issue its provisional findings in September or October 2024, with a view to making its final decision by the statutory deadline of 4 April 2025.

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