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“Anti-Subsidy” Regulation – A New Big Stick in the EU Regulatory Arsenal

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On May 5, 2021, the European Commission (the Commission) adopted a proposal for a regulation (the Anti-Subsidy Regulation) to combat distortions of competition in the European Union (EU) caused by subsidies granted by non-EU Member States to companies doing business in the EU. The Anti-Subsidy Regulation is an important part of the von der Leyen Commission’s industrial strategy, which was also updated on May 5.

The Anti-Subsidy Regulation will create a unique hybrid of trade and antitrust tools, filling a hole in the EU’s current toolkit. The Commission’s trade defense rules offer no protection when non-EU subsidies distort investment decisions, market operations or pricing policies in beneficiaries’ European operations, facilitate the acquisition of EU companies, or distort bidding in European public procurement. Conversely, the Commission’s powers to review and approve State aid do not apply to State aid granted outside the EU.

Although concerns about non-EU State-owned enterprises (SOEs) are important drivers for the proposal, the new legislation could apply more broadly to companies benefiting from special tax or other incentives that arguably increase their profitability and thereby affect their competitive behavior in the EU. Examples could include the energy, food and agriculture, healthcare and transport sectors, which benefit from special incentives and legal regimes in many jurisdictions.

The Anti-Subsidy Regulation includes all three **“**Modules**”** outlined in a June 2020 white paper on levelling the playing field as regards foreign subsidies (the White Paper): empowering the Commission to investigate and remedy the distortive effects of foreign subsidies in the EU internal market, creating a new mandatory notification and review regime for certain mergers, and supplementing EU rules on public procurement. The Anti-Subsidy Regulation reflects some, but not all of the comments the Commission received on the White Paper and published late last year.

The Anti-Subsidy Regulation joins a crowded EU legislative docket, including the Data Governance Act, Digital Services Act, Digital Market Act and AI Regulation. But the Anti-Subsidy Regulation may prove less controversial among EU stakeholders than some of these other measures and may be approved as soon as 2022, in which case it would apply as from 2024.

Scope – Financial contributions and subsidies

The Anti-Subsidy Regulation distinguishes between three related concepts: "financial contributions," "foreign subsidies" and "distortions on the internal market." The broadest term is "financial contribution," which may or may not qualify as a "foreign subsidy;" a "foreign subsidy" may or may not be deemed to distort the EU internal market. More specifically,

- "Financial contributions" are defined as "(i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; (ii) the foregoing of revenue that is otherwise due; or (iii) the provision of goods or services or the purchase of goods and services," whether provided by government authorities or public or private entities whose actions can be attributed to a non-EU country.
- A "foreign subsidy" arises where "a third country provides a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries."
- A "distortion on the internal market" arises "where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market."

Whether there is a distortion on the internal market depends on factors such as the amount and nature of the subsidy, the situation of the beneficiary and the markets concerned, the beneficiary's level of economic activity in the EU, and the purpose and conditions attached to the subsidy, all subject to a de minimis threshold of €5 million (significantly higher than proposed in the White Paper). The foreign subsidies considered most likely to cause a distortion include subsidies granted to companies that would otherwise have been likely to go out of business (unless there is a viable restructuring plan including a significant own contribution by the beneficiary); subsidies in the form of unlimited guarantees for debts or liabilities; subsidies directly facilitating a concentration; and subsidies enabling the beneficiary to submit an unduly advantageous tender for a public contract.

As discussed in more detail below, the Commission's ex officio powers are triggered by a finding of a foreign subsidy, while the new notification requirements for acquisitions and public procurement are triggered by the existence of a financial contribution. It is then up to the Commission to determine whether the financial contribution constituted a foreign subsidy and distorted the EU internal market.

Chapter 2 — Ex officio review of foreign subsidies

The Anti-Subsidy Regulation creates a new power for the Commission to conduct ex officio reviews of alleged distortive foreign subsidies. Although the White Paper mooted the possibility of the Commission sharing powers with Member State authorities, the Anti-Subsidy Regulation confers exclusive jurisdiction for such investigations on the Commission. However, the Commission could decide to create a mechanism to coordinate its investigations with Member State authorities, along the lines of the European Competition Network (ECN) for enforcement of EU competition law.

The Commission's reviews will be divided into two phases, a preliminary review to assess whether a "financial contribution" constitutes a foreign subsidy that appears to distort the EU internal market, followed by an in-depth review when needed. For this purpose, the Commission will have powers, familiar from its antitrust toolkit, to impose interim measures, issue requests for information, conduct inspections both inside and (with the relevant company's and government's consent) outside the EU, take action against non-cooperation and impose fines and periodic penalty payments.

Where the Commission finds that a foreign subsidy distorts the internal market, the Commission may impose redressive measures or, if the company concerned offers satisfactory commitments, adopt a decision making those commitments binding. The Commission may adopt a no-objection decision even if it concludes that a foreign subsidy distorts the internal market if it finds that the distortion is outweighed by positive effects on the "development of the relevant economic activity." Possible positive impacts could include creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience.

The Anti-Subsidy Regulation does not detail the types of remedies that may be imposed, but according to the White Paper these could include structural or behavioural remedies (assuming that repayment to the non-EU country is not suitable or feasible) such as mandated third party access, for example to mobility apps for providers of transportation services; mandatory licensing on fair, reasonable and non-discriminatory (FRAND) terms (e.g., if an undertaking receives subsidies and obtains telecom frequencies or provides access to networks using such frequencies); prohibition of specific market conduct linked to the foreign subsidy; or publication of R&D results so other companies can reproduce them.

Chapter 3 – Merger review

The Anti-Subsidy Regulation further creates a new, mandatory ex-ante notification system analogous to the EU Merger Regulation. The scope of the regime is significantly narrower than proposed in the White Paper, applying only to "acquisitions of control on a lasting basis," similarly to the EU Merger Regulation. By contrast, the White Paper suggested that the new regime could apply to acquisitions of a specific percentage of the shares or voting rights or a "material influence" in EU companies. As with the ex officio review powers, the Anti-Subsidy Regulation confers exclusive jurisdiction on the Commission, while the White Paper left open the possibility that authority could be shared with Member State authorities.

The notification requirement would in principle apply only where the target's EU turnover is at least €500 million, much higher than the €100 million threshold proposed in the White Paper and double the €250 million basic threshold under the EU Merger Regulation. If that target turnover threshold is met, an acquirer would be required to notify the Commission if it received an aggregate "financial contribution" from non-EU countries of at least €50 million. Given the broad definition of "financial contribution," the €50 million threshold seems quite low.

In an expansion of the proposed regime compared to the White Paper proposals, the Commission would have the right to require notification of any transaction not meeting the thresholds if the Commission suspects that the acquirers may have benefitted from foreign subsidies in the three

years prior to the concentration, so long as it does so before the transaction is implemented. This addition may be inspired by the Commission's recent decision to accept (and even encourage) Member State referrals of transactions under Article 22 of the EU Merger Regulation, regardless of whether the transaction in question meets Member State review thresholds. The EU's new approach to such referrals, discussed here, is even broader than the Anti-Subsidy Regulation since it can apply even to transactions that have already been implemented.

Although many multinational groups (potentially including European-based groups) may determine that they benefit from over €50 million in financial contributions, the €500 million EU target turnover threshold will exclude many transactions from a filing obligation. On the other hand, it is impossible to predict how many sub-threshold transactions the Commission will review. In total, Commission officials have said that they expect to receive 30-50 notifications per year under the new system.

The notification process and timetable closely resembles the EU Merger Regulation process, with an initial 25 working day review period followed by an in-depth 90 working day review period starting from the date of formal notification. The Commission abandoned the White Paper proposal to start the process with a short "information notice" as opposed to formal notification.

Notified transactions cannot be closed while the review is pending. Should the Commission find that the acquisition is facilitated by the foreign subsidy and distorts the Single Market, it could either accept commitments by the notifying party that effectively remedy the distortion or prohibit the acquisition. In contrast to the White Paper proposal and its powers in an ex officio review, the Commission could not allow a transaction that would otherwise be prohibited based on a balancing of negative and positive effects. The Commission would also have specific remedial powers where it finds that a notifiable transaction has already been implemented and distorts the EU internal market.

Chapter 4 — EU public procurement procedures

Chapter 4 supplements existing EU public procurement rules for contracts over €250 million by requiring companies participating in public procurement procedures to notify the contracting authority of any financial contribution they have received in the preceding three years. The contracting authority must transfer the file to the Commission without delay. The Commission can also require notification where it suspects that a participant in a public procurement process has benefitted from foreign subsidies in the previous three years. Again, the Anti-Subsidy Regulation confers exclusive authority to review the distortive effect of financial contributions in public procurement procedures on the Commission, while the White Paper mooted the possibility that contracting authorities would share this power.

Key Takeaways

Notwithstanding doubts expressed in some of the White Paper comments, the Anti-Subsidy Regulation includes all three main elements of the original White Paper proposal. In each case, the Anti-Subsidy Regulation confers exclusive jurisdiction on the Commission to determine whether foreign financial contributions amount to subsidies and distort the internal market and impose

remedies. By contrast, the White Paper suggested that at least some such powers could be shared with Member State authorities. This centralization of power may lead to disputes in the legislative process.

For most companies, the new merger control regime will likely have the greatest impact. The Commission has narrowed the regime's scope by aligning with the EU Merger Regulation definitions of notifiable transactions (and otherwise closely following EU Merger Regulation procedures). The Commission has also proposed a high target turnover threshold to limit the number of transactions requiring notification. However, the Commission wants broad discretion to require notification of transactions even where those thresholds are not met.

As a result, companies that may benefit from financial contributions will need to assess the risk of the Commission requiring notification even when acquiring businesses below the €500 million EU turnover threshold. The Commission may be expected to be especially interested in reviewing transactions that also trigger review under foreign direct investment screening regimes or involve products the Commission's industrial strategy update identified as strategic dependencies, in particular in the energy and healthcare sectors. In such cases, the same transaction could be subject to multiple EU- and Member State-level reviews.

The broad definitions in the Anti-Subsidy Regulation and the discretion of the Commission are liable to create significant legal uncertainty, at least in the early years. The Commission can help address this problem by providing further guidance on key aspects of the system, such as the criteria for determining whether sector-specific legal, tax or incentive schemes may constitute a "financial contribution," the criteria that it will consider in deciding whether to request notification of a sub-threshold transaction and how it will manage potential parallel reviews of the same transaction. Hopefully, the Commission will also explore possibilities to streamline its review processes, for example by combining Anti-Subsidy and EU Merger Regulation reviews where both are triggered.

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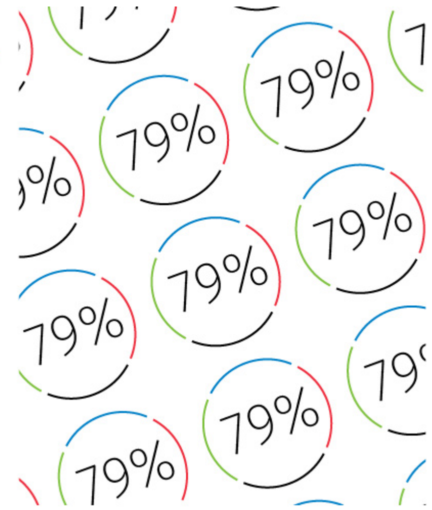

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