NEWSLETTER

Understanding the Differences and Potential Overlaps: When Is It Antitrust, and When Is It Trade Law?

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Traditionally, EU competition and trade law have been treated as distinct legal disciplines. However, market openness combined with recent geopolitical developments and growing regulatory and enforcement activities by the European Commission ("***Commission***"), have increasingly **blurred the lines between competition and trade law**. A prime example of this convergence is the EU **Foreign Subsidies Regulation** ("***FSR***"), principally displaying a "cherry-picking approach". It merges principles from both legal regimes, mixing terminology and standards typically seen as exclusive to either competition or trade law.

The "mingling" of trade and competition law is also further exemplified by the EU's newest policies such as the **economic security strategy** and the **competitiveness compass**, clearly stating **that from now on trade and competition law no longer form "separate silos"**. As the distinction between the two areas is no longer clear in some cases, it is **important that companies identify which regulations (may) apply to them**. For that purpose, the following article offers a brief overview of the core tools of classical competition and trade law before it outlines how the FSR emerges as a new regulatory nexus between them.

1. A Brief Overview of the Key EU Competition and Trade Laws

(1) Competition Law

European primary law, in particular the Treaty on the Functioning of the European Union (TFEU) prohibits **anti-competitive agreements** (e.g., price-fixing or market-sharing cartels) both between competitors ("**horizontal**" agreements) and non-competitors (in particular between undertakings operating at different levels of the production or distribution chain, which are termed "**vertical**" agreements) **and the abuse of a dominant market position** (e.g., the refusal to supply or the tying of products). In addition, European secondary law – such as the Merger Regulation – also forms an integral part of the EU competition framework.

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Article 101 of the TFEU **prohibits the cooperation** (i.e., agreements, concerted parties, and decisions of trade associations) **between companies with the object or effect of restricting or distorting competition on the internal market**. Depending on the situation, this can be enforced by both the Commission or the National Competition Authorities of the Member States.

- ✓ **Scope of application?** Anti-competitive agreements on the same or at different levels of the supply chain.
- ✓ **Initiation of proceedings?** Leniency applications or *ex officio* investigations, e.g., triggered by cooperation with other competition authorities, sector inquiries, or the "whistleblower tool" – a mechanism that allows anonymous tip offs upon suspicion of anti-competitive conduct of suppliers, customers, or competitors.
- ✓ **Commission investigation powers?** Requests for information and dawn raids (including the entering of business premises, examination of the business records, the sealing of premises and records, as well as employee inquiries).
- ✓ **Remedies?** A commitment decision or a prohibition decision. As part of a prohibition decision the Commission may inter alia require the parties to end the violation and impose fines, based on the gravity and duration of the violation. Until the conclusion of the proceedings, the status quo can be safeguarded by interim measures.

Leniency applications are a very important tool for cartel participants, as the first participant that provides sufficient information to the Commission may receive **full immunity from the fine**. Notably**,** the Commission can also agree to **a settlement procedure,** which may lead to **the reduction of fines** as well.

Article 102 TFEU, **prohibiting the abuse of a dominant market position,** is **only relevant for companies** that can be classified as **"market leaders"** and who could **influence competition in the market without being affected by the conduct of their competitors**. Holding a dominant market position is not illicit, only the abuse thereof is.

- ✓ **Scope of application?** Abusive practices include predatory pricing, refusal to supply, exclusivity contracts, rebates as well as tying and bundling of products.
- ✓ **Initiation of proceedings?** A complaint, an *ex officio* investigation, or a sector inquiry.
- ✓ **Commission investigative powers?** Requests for information and dawn raids (see above).
- ✓ **Remedies?** The same as for Article 101 TFEU above.

The Merger Regulation regulates mergers and acquisitions.

- ✓ **Scope of application?** Mergers and acquisitions, creation of full-function joint ventures, even outside of the EU if the turnover thresholds (in particular the EU turnover threshold) are met.
- ✓ **Notification Thresholds?** The notification thresholds are purely based on turnover. The market shares or the deal value are not relevant for establishing jurisdiction.
- ✓ **Duration of the proceedings?** 25 working days for phase I and 90 working days for phase II (with possible extensions).

- ✓ **Outcome of the proceedings?** Clearance of the merger, approval with commitments, or prohibition of the merger.
- ✓ **Standstill obligation?** Yes.

The general investigation process is divided into **phase I and phase II.** During phase I, **the Commission may request information from the merging companies, as well as send questionnaires to competitors or consumers**. If after phase I, the merger does not raise significant concerns, it can be cleared unconditionally or subject to remedies. Otherwise, the proceedings will move into phase II, which comprises more extensive information gathering and an in-depth analysis of the merger's effects on competition. The Commission also assesses claimed efficiencies for consumers and whether their positive effects can outweigh the mergers' negative effects. Following the phase II investigation, the Commission can either issue a prohibition or unconditionally clear the transaction or approve it subject to remedies.

(2) Trade Law

The most important EU trade instruments, pertaining to the regulation of goods coming into the EU from a third country, include the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation. When it comes to these instruments, it is important to understand that **they solely apply to the import of goods (not to services and investment flows)**.

"Dumping" refers to the practice of **non-EU manufacturers exporting their goods into the EU at prices below their normal value (that is the prices at which those goods are sold domestically)**, thereby causing injury to Union producers. To remedy this injury, the Basic Anti-Dumping Regulation authorises the Commission to **impose "anti-dumping measures"**, which are basically extra import duties. In order to do so, the Commission must prove the existence of **dumping**, **a material injury to the Union industry, a causal link between the two,** and that **anti-dumping measures are in the Union interest**.

- ✓ **Application scope?** All goods imported into the EU.
- ✓ **Calculation of the level of the anti-dumping duties?** Based on a comparison between the export prices to the EU and the domestic prices in the exporting country or on a comparison between the export prices to the EU and the prices of the Union producers (also known as the "injury margin").
- ✓ **Duration of an investigation?** No longer than 14 months.
- ✓ **Application of duties?** Provisional duties for up to nine months followed by definitive duties for a period of five years which can be renewed indefinitely.

An investigation is opened within 45 days of the lodging of a complaint with the Commission. Once the "notice of initiation" for an investigation is published, the Commission selects sampled Union and exporting producers which will form part of the investigation. Although it is not mandatory to cooperate, the Commission might base its decision in case of non-cooperation on facts available which usually results in a less favourable decision. **Thus, it is in the interest of the investigated party to actively cooperate**. Moreover, the Commission conducts so-called "verifications" **visits at the premises of the producer (also in third countries) and verifies the information**.

"Subsidisation" refers to the provision of financial contributions by a government, a public body or a private body acting on behalf of the government, which confers a benefit to the recipient. To counteract the effects of subsidised imports and to restore fair competition, the Basic Anti-Subsidy Regulation authorises the Commission to **impose so-called "countervailing measures"**. Similar to anti-dumping duties, for countervailing measures to be imposed, the Commission must prove **subsidisation**, **a material injury to the Union industry, a causal link between the two,** and that **countervailing measures are in the Union interest.**

- ✓ **Application scope?** All goods imported into the EU.
- ✓ **Calculation of countervailing measures?** Total amount of the benefits (difference between the financial contribution from the government and what a company would have obtained on the market) divided by the recipient's turnover.
- ✓ **Duration of an investigation?** Must be concluded within 13 months.
- ✓ **Application of duties?** Provisional measures can only be valid for a maximum period of four months with no possibility of extension, whilst definitive measures remain in force for five years and can be renewed indefinitely.

The procedure for anti-subsidy investigations is broadly similar to that for anti-dumping investigations described above. However, given that subsidisation is a government practice, the government of the exporting country also plays a role. **The Commission must inform the respective foreign government** and invite it for consultations before initiation of the investigation.

2. A Little Bit of Both? – The EU Foreign Subsidies Regulation

Technically, the FSR embodies a **competition tool** that addresses distortions in the EU market caused by foreign subsidies. However, the FSR also contains many elements inherent to EU trade law, such as the Commission's ability to adopt a decision based on facts available. **Before the FSR entered into force, subsidisation within the internal market was solely subject to the EU's State aid regime**. However, State aid law does not apply to subsidies granted by non-EU public authorities to companies already operating on the internal market. **This means that, prior to the FSR, the non-regulation of these subsidies created a regulatory gap**.

The FSR **consists of three distinct pillars: a "merger tool," a "public procurement tool," and an "*ex officio* tool"**. The merger and public procurement tools are notification based, providing that a certain threshold is met, and allow the Commission to investigate concentrations and bids involving financial contributions by non-EU governments. The Commission can also request an *ad hoc* notification if it suspects foreign subsidisation in the three years prior to a merger/tender. Finally, and for all other market situations, the EU Commission has the power to **open an investigation on its own initiative under the *ex officio* tool** (it may do so retrospectively, even before the FSR entered into force, with a limitation of 10 years from the date of the granting of the foreign subsidy).

- ✓ **Application?**
  - All companies (including public ones which are directly or indirectly controlled by a State), that have received a financial contribution from a non-EU public entity, are economically active on the internal market (in the production of goods, provision of services, or financial flows), and are involved in a merger, acquisition or public procurement procedure within the EU (notably, participating in a public procurement procedure is sufficient to be considered "economically active" on the internal market).
- ✓ **Notification thresholds?**
  - **Merger tool**: The threshold depends on the turnover of at least one company in the Union (at least EUR 500 million) and the amount of the financial contribution received (above EUR 50 million).
  - **Public procurement tool**: The threshold depends on the contract value (equal to or above EUR 250 million) and the amount of the financial contribution received (equal to or above EUR 4 million).
- ✓ **Duration of an investigation?**
  - **Merger tool**: 25 working days for phase I and 90 working days for phase II (excluding pre-notification). An extension of phase II by 15 and / or 20 working days is possible.
  - **Public procurement tool**: 20 working days for phase I and 110 working days for phase II. In contrast to the merger tool, phase I can be extended by 10 working days and phase II by 20 working days. Special rules apply for multi-stage procedures.
  - Under both the merger and public procurement tool, pre-notification consultations take place, allowing the parties and the Commission to clarify issues or discuss complex cases before the formal notification of the case. While there is no fixed deadline for these consultations, they usually last around two months, depending on the specifics of each case.
- ✓ **Outcome of the investigation?**
  - For all three tools, a no-objection decision, commitments proposed by the company, fully and effectively remedying the distortion, or an imposition of remedies (prohibition of the concentration / the award of the contract / the imposition of redressive measures). Redressive measures consist of structural and behavioural remedies and include, i.e., reducing market presence, divesting assets, publishing the results of R&D, repaying the foreign subsidy, etc.
- ✓ **Standstill obligation?** Yes, for both the merger and procurement tool (not during an *ex officio* investigation).

FSR investigations usually commence with a preliminary investigation phase (phase I), during which the Commission conducts the necessary "fact-finding". If the Commission finds sufficient indication that a distortive foreign subsidy indeed exists, it opens an in-depth investigation (phase II). During this phase, the Commission will thoroughly scrutinize these foreign subsidies in order to verify whether they are distortive. As part of this exercise, the Commission assesses the distortive effects of the foreign subsidy through a substantive test and can also carry out a "balancing exercise". In this exercise, the Commission weighs the potential positive effects of a subsidy, including its impact on the EU's broader policy objectives (i.e., environmental protection or the promotion of R&D) against the anti-competitive effects of a subsidy.

Finally, how **does the FSR differ from the Anti-Subsidy Regulation**?

Distinguishing between the FSR and the Anti-Subsidy Regulation often leads to confusion, especially in cases where it is not clear which of the two instruments applies. As both instruments aim at addressing foreign subsidisation and the negative impact on the EU industry resulting therefrom, companies may find it difficult to determine whether a specific situation can be subjected to an *ex officio* investigation pursuant to the FSR or the proceedings governed by the Anti-Subsidy Regulation. While both instruments serve to curb the negative effects of foreign subsidies, they differ significantly in **scope**, **application**, and **legal consequences**:

- ✓ Article 44(2) of the FSR explicitly states that it applies without prejudice to the Anti-Subsidy Regulation. In other words, the FSR does not "override" or "interfere" with the application of the Anti-Subsidy Regulation.
- ✓ The **Anti-Subsidy Regulation** applies **exclusively to subsidised goods exported to the EU**, with the objective of protecting the Union industry from injury. However, it **does not apply to subsidised services or financial flows**. The **FSR**, by contrast, has a **broader scope**, covering **any foreign financial contribution** that distorts competition in the context of **economic activity within the EU.**
- ✓ The **FSR grants the Commission broader investigative powers**. Whilst the Commission merely requests information and conducts formal visits to verify the received information under the Anti-Subsidy Regulation, it can carry out **unannounced dawn raids in the EU, leading to the confiscation and sealing off of sensitive business information under the FSR**.
- ✓ The **FSR can have more far-reaching legal consequences**. Whilst the **Anti-Subsidy Regulation is limited** to imposing **countervailing measures**, the Commission may impose **both structural and behavioural remedies under the FSR. These can be far more restrictive, have long-lasting or permanent consequences (i.e., the divestiture of assets), and a longer application period than countervailing measures.**
- ✓ An anti-subsidy investigation allows the Commission to **target entire industries or sectors**. The **FSR's *ex officio* procedure** however is company specific.

3. Conclusion

Overall, the EU's recent legislative activities showcase its endeavour to protect the internal market and its economic security. However, as the division between competition and trade law diminishes, staying compliant with the EU's various regulatory instruments becomes more and more difficult. Therefore, **it is important that prior to engaging in business within the EU, companies identify which laws apply to them**. With the FSR being a relatively new tool, where the intricacies of both its competition and trade elements have not fully been established yet**, companies might become subject to a regulatory overlap – i.e. being scrutinised through various instruments**. Also, with the upcoming revision of the Merger Guidelines, **trade elements could play a more significant role in competition law in the future in general**.

4. Comparative Table

	Scope	Application	Commission Investigative Powers	Duration of proceedings	Measures
Anti-dumping	Products sold for exports below domestic price	Imported goods	Information requests, verification visits	Max. 14 months	Anti-dumping measures (additional import duties)
Anti-subsidy	Exported products benefitting from government contributions	Imported goods	Information requests, verification visits	Max. 13 months	Countervailing measures (additional import duties)
Antitrust (Art. 101 and102 TFEU)	Anti-competitive agreements & abuse of dominance	Must affect trade between Member States	Information requests, dawn raids (in the EU)	No fixed duration; can last many years depending on complexity of the case	Commitment decision or prohibition decision
FSR	Economic activities (including mergers, public procurement) involving a foreign financial contribution	Transactions, bids in public procurement procedures and all other market situations	Information requests, dawn raids (EU and abroad)	M&A tool: Without extensions maximum of 115 working days Public procurement tool: Without extensions maximum of 130 working days (unless multi-stage procedure) No fixed review period for *ex officio* procedures	Approval / prohibition, structural or behavioural commitments
Merger Control	Mergers and Acquisitions all around the world	Community dimension (strict turnover thresholds) and a change in control	Information requests, questionnaire to competitors and consumers	25 working days for phase I, 90 working days for phase II (extensions are possible)	Approval / prohibition, structural or behavioral remedies

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