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The new EU Foreign Subsidies Regulation

Luigi Gaetano Pezzotti Piccoli

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The new EU Foreign Subsidies Regulation

CEU *Ediciones*
Julián Romea 18, 28003 Madrid
Teléfono: 91 514 05 73, fax: 91 514 04 30
Correo electrónico: ceuediciones@ceu.es
www.ceuediciones.es

Real Instituto Universitario de Estudios Europeos
Avda. del Valle 21, 28003 Madrid
www.idee.ceu.es

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List of Abbreviations

Abbreviation	Definition
BRI	Belt and Road Initiative
BRIC	Brazil, Russia, India and China
CDP	Cassa Depositi e Prestiti
CJEU	Court of Justice of the European Union
COSCO	China Ocean Shipping Company
DSB	Dispute Settlement Body
EEC	European Economic Community
EC	European Commission
EUMR	European Union Merger Regulation
EMRC	European Merger Regulation Control
EUR	Euro
EU	European Union
FDI	Foreign Direct Investment
FR	Financial Regulation
FSR	Foreign Subsidies Regulation
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IPI	International Procurement Instrument
M&A	Mergers and Acquisitions
MNE	Multinational Enterprise
PPD	Public Procurement Directive
PPP	Public Procurement Procedure
PTAs	Preferential Trade Agreements
RPASI	Regulation on Protection Against Subsidized Imports
SCM	Agreement on Subsidies and Countervailing Measures
SEM	Single European Market
SOE	State-Owned Enterprise
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USA	United States of America
WTO	World Trade Organization

1. Introduction

In 1957, six European States strongly believed that the establishment of a Common Market within the continent could provide them with a new source of economic growth[1]. Accordingly, within the Treaty of Rome (TEC), these States agreed to create a European Economic Community (EEC), tasked with constantly ensuring the well-functioning of this newly established level playing field[2]. Europe has been accusing for a long time that "*the EU should not be a naïve open economy*," pointing out that current demands require the inclusion of a new block in European competition law[3]. The Covid crisis has exposed several areas where Europe must enhance its resilience to prevent and withstand future shocks. While remaining committed to open and fair trade, Europe must prioritize reducing its dependence and strengthening the security of its supply. To achieve this, Europe must focus on enhancing its strategic autonomy, economic security, and potential for job creation. To do so, EU institutions have realized that recently foreign subsidies have had a distorting impact, creating an uneven playing field for companies that compete in the EU internal market[4]. Unfortunately, there is no database that clearly exposes these concerns and can be consulted, such as the behavior of State aid. However, the number of incidents where foreign subsidies have facilitated M&A between undertakings, participation in public procurement procedures, or influenced any other market behavior is increasing[5]. The EU is concerned about the continuous entry of non-EU State-owned enterprises (SOEs) into its internal market, highlighting the detriment that this causes to competitors[6]. While EU competitors that receive financial aid from an EU Member State are subject to scrutiny under EU State aid rules, these rules do not have the scope to address cases of aid from non-EU States. The same applies to EU procurement law, where it is true that under EU procurement law a tender can be rejected if it is abnormally low. However, this is only part of an overall consideration and requires proof that the third-state subsidy alone made such a low bid possible[7]. An increasing number of non-EU companies benefit from the regulatory and financial support they receive from third countries, as they are undetectable and not enforceable according to existing EU rules. The forms in which foreign subsidies are presented are diverse, ranging from zero-interest loans, unlimited state guarantees, zero-tax agreements, tax breaks, or direct state funding[8]. It is important to remember that, except for exceptions, all these behaviors would be problematic if the benefactor were a Member State. This inequality of conditions has not taken long to raise criticism in Europe. Against this background, European companies and governments have complained about foreign subsidies in the context of merger investigations. In 2019, the French and German governments published a Joint Manifesto urging the Commission to consider foreign subsidies when assessing mergers. According to the Franco-German Manifesto, "*there is no regulatory global level playing field. And there won't be one any time soon. This puts European companies at a massive disadvantage. When some countries heavily subsidize their own companies, how can companies operating mainly in Europe compete fairly?*"[9]. In the beginning, a Dutch government proposal to the EU, highlighted the need to scrutinize economic operators in the internal market who behave differently from their peers under irregular market conditions[10]. Secondly, in February 2017, the three Economy

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1 The six countries were Belgium, France, the German Federal Republic, Italy, Luxembourg and the Netherlands. Establishing the European Economic Community 1957, Preamble.

2 Treaty Establishing the European Economic Community (TEC) 1957, Article 2.

3 Hornkohl 2022, p. 2.

4 Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021, pag. 3.

5 Data on foreign subsidies is not yet available on the Competition Policy website. If we select, for instance, Merger in the Policy Area, Regulation (EU) 2022/2560 is not available as Decision Type, since it is not yet applicable. See https://ec.europa. EU/competition/elojade/isef/index.cfm? clear=1&policy_area_id=1%2C2%2C3 ; last visited on 16 May 2023.

6 Hornkohl 2022, p. 2.

7 Directive 2014/24UE, art. 49.

8 Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021, pag.3.

9 Communication of the Ministère de l'Economie et des Finances and Bundesministerium der Finanzen to the European Commission 2019, pag. 3.

10 See Non-paper - Strengthening the level playing field on the internal market, available at https:// www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level- playing-field.

Ministers of Germany, France, and Italy, expressed their concern about the lack of reciprocity via a letter sent to the Commission[11]. In February 2020, the European Parliament stated: "invites the Commission to look at the recent proposal of the Dutch Government and investigate the option to add a pillar to EU competition law that gives the Commission appropriate investigative tools in cases where a company is deemed to have engaged in distortionary behavior due to government subsidies or to have made excessive profits based on a dominant market position in its home country (e.g., by introducing state-aid checks on companies from third countries in EU public procurement rules)"[12]. This dissertation precisely addresses the *ex-novo* creation of a new pillar that European Law requires to safeguard its internal market. The European Commission adopted a White Paper on foreign subsidies on June 17, 2020, in response to this worry, sparking a public discussion and putting up various remedies. The White Paper proposes several legal solutions and legal tools called "Modules", divided in:

1. The EU internal market generally (module 1);
2. Acquisitions of EU companies (module 2);
3. Public procurement procedures (module 3);

Under this proposal, foreign subsidies would be subject to action if they provide benefits to an undertaking established in the EU or an undertaking that is "active" in the EU, such as when it seeks to acquire a controlling interest in an EU company. This proposal paves the way for the new Regulation on foreign subsidies, which emulates the models outlined in the White Paper across seven chapters. The White Paper was followed by a Draft Regulation in May 2021. EU legislators reached a political agreement on June 30, 2022, and the final Regulation was released on 14 December 2022. The FSR introduces significant changes to regulate foreign subsidies at the EU level. It consists of seven chapters covering general provisions, subsidy review tools, procedures, remedies, and the relationship with other instruments and policies. The FSR combines elements of EU State aid, trade, and competition law, which poses challenges for interpretation due to the different regulatory models used.

2. Market analysis

Since it was founded, the EU has gradually evolved the protection of the SEM, the main stage of trade where principles such as free competition are being safeguarded through an *ad hoc* policy. In international trade, the European market is not the only scenario, but it is the most quoted, since 2020 Europe is the largest location of foreign direct investment (hereinafter, "FDI") stocks in the world[13]. Undoubtedly, FDI has been one of the factors that has rebounded more after the crisis of COVID-19, in 2021 it has registered an increase of 52% compared to 2020, reaching the quota of 1.5 trillion EUR[14]. Within this picture, the EU has received €117 billion of inward FDI alone, consolidating as the main destination for global direct investment.

Generally, FDI stocks held in the rest of the world by investors resident in the EU amounted to EUR 8.750 billion at the end of 2018. Meanwhile, FDI stocks held by third-country investors in the EU amounted to EUR 7.197 billion at the end of 2018[15]. All due not only to favorable economic conditions but thanks to active plans carried out by EU bodies and institutions to facilitate the arrival and settlement of investors, mainly financial ones, creating an ideal climate for the development of their businesses and investments. In consequence, it can be appreciated that openness towards trade and investment is one of the major sectors that boost Europe's economy, representing

11 See Letter to Commissioner Malmström, available at https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4

12 See the European Parliament annual report on competition policy 2019, available at https://www.europarl.europa.eu/doceo/document/A-9-2020-0022_EN.pdf

13 Eurostat, World Direct Investment Pattern 2020.

14 Report from the Commission to the European Parliament, the Council. Second Annual Report on the screening of foreign direct investments into the Union 2022.

15 European Commission 2020, Investment, available at https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en

35% of its GDP, with 35 million European jobs linked to it[16]. However, this liberality of the EU shows an existing degree of dependence or control by foreign actors, with 3% of European companies owned or controlled by non-EU investors, proportionally 35% of total assets, and around 16 million Jobs[17]. This market analysis also points out that most of the dominant foreign investors are from third countries with developed economies, such as the USA which, in 2020, ranked first in the EU's inward investment flows, both inward and outward[18]. Nowadays most FDI is attributed to Eastern countries, such as China, South Korea, Singapore, or the UAE. This is due to the rise of large emerging economies, including the block of BRIC countries (Brazil, Russia, India, and China), which have driven the dynamics of international trade relations towards their direction, interceding in the duopoly of the EU and USA. However, this shall not be taken as a long-term reference, as the composition of FDI securities and the scale of larger recipients are always subject to the volatility of money and capital markets.

The post-pandemic crisis recovery also points to an increase in the number of acquisitions and Greenfield Investments in the EU by +32% and +12%, respectively, compared to 2020, with an average rise of over 2.100 acquisitions and 3.200 greenfield investments per year in the past five years[19]. These data indicate a high level of openness to FDI attracting great opportunities for the European economy but also entails many risks, including foreign subsidies that need to be controlled to avoid undermining competitiveness and level playing field in the EU market[20]. To comprehend the rationale behind the establishment of a FSR by the EU, it is useful to briefly look back at the historical context and the existing legal void that impedes the EU from fully fostering a free market competition.

3. Current measures and legal framework

International trade rules are first based on the General Agreement on Tariffs and Trade (GATT 1947), this agreement sought to remove discriminatory barriers to trade, such as tariffs and quantitative restrictions. The Agreement on Subsidies and Countervailing Measures (SCM) complements and expands upon the provisions of the GATT by establishing rules and disciplines for the use of subsidies by member countries. The SCM sets out two possible categories of subsidies. The first category is "prohibited" subsidies, where export subsidies or local content subsidies are designed to directly impact trade and are therefore more likely to have adverse effects on the interests of other Members[21]. On the other hand, "actionable" subsidies are investigated by the WTO's Dispute Settlement Body (DSB) when they may produce three types of adverse effects: injury, serious prejudice, and nullification of the benefits[22]. Lastly, the SCM establishes certain substantive requirements that must be met to impose a countervailing measure, including both substantive and procedural rules, with the purpose of managing the relations between the agreement's members in the best possible way[23]. Drawing the current legal framework, WTO rules on the EU level are backed by Regulation 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidized imports from countries not members of the European Union, (hereinafter "RPASI"). However, to a certain extent is the WTO which imposes restrictions on the powers of the EU. The feasibility of the FSR depends on whether foreign subsidies covered by the FSR are also covered by the SCM Agreement[24]. If so, Art. 32.1 SCM Agreement can prevent such a regime or limit its range to maneuver: "No specific action against a subsidy of another Member can be taken except in accordance

16 White Paper on levelling the playing field as regards foreign subsidies, p.4.

17 Ibid., p.6.

18 Eurostat, Foreign Direct Investment Flows 2022.

19 Report from the Commission to the European Parliament, the Council. Second Annual Report on the screening of foreign direct investments into the Union 2022, p. 2.

20 White Paper on levelling the playing field as regards foreign subsidies, page 6.

21 Agreement on Subsidies and Countervailing Measures 1994, part 2.

22 Ibid., part 3.

23 Ibid., part 5.

24 Agreement on Subsidies and Countervailing Measures (SCM) 1994, Art. 1.

with the provisions of GATT 1994, as interpreted by this Agreement". It is crucial to understand the relationship between the FSR and the SCM because the FSR itself, in Article 44.9, stipulates an exception to the application of the regulation. This exception applies when Article 32.1 of the SCM is applicable, stating that "this Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements". In this sense, the FSR contains provisions that limit its scope of application and investigation in order to align with the EU's international obligations. The proposed regime may only be feasible under the WTO's legal framework if it meets the exemption clause of Art. XX GATT or if it is proven to be outside the scope of the SCM Agreement[25]. However, the WTO legal framework lacks effective remedies against foreign subsidies in services. On the other hand, FTAs signed by the EU often address subsidies and their legality, leading to a fragmented enforcement regime and uncertainty in M&A and public procurement procedures. However, if the focus is solely placed on the differences between the new FSR and the RPASI, understood as the singular European instrument against subsidies, it becomes apparent that the evaluation criteria for foreign subsidies differ noticeably. While the FSR encompasses all sectors of the economy that receive subsidies, the RPASI specifically focuses on the subsidization of goods. The RPASI relies on an investigation procedure to find subsidies, whereas the FSR gives the EC the ability to bar subsidized undertakings from taking part in M&A and public procurement procedures, targeting all subsidies, including non-actionable ones[26]. Additionally, there are differences in how detrimental consequences of subsidies are assessed, with the RPASI demanding objective analysis and positive evidence whereas the FSR uses a set of indicators[27]. Hence, following a thorough examination the FSR enters the international trade landscape without providing clear clarification on the evaluation standards and concepts not clearly explained by previous decision-making practices or case law[28].

4. Legal gaps

This chapter will analyze the legal gaps that existed prior to the implementation of the FSR and how it impacted the EU's ability to provide for a level playing field. It is useful to start by describing the identity of those third countries that grant foreign subsidies. After the Euro crisis, developed and developing countries have devoted part of their national budgets to the adoption of subsidy measures, which have grown exponentially in recent years[29]. Subsidies are usually not casual but are part of elaborate market plans such as China's Made in China 2025, and the Belt and Road Initiative, which allows Chinese companies to undercut their rivals[30][31]. The China Development Bank provided $12.6 billion in funds for Belt and Road Initiative (BRI) projects in 2016, and China has established the Silk Road Fund to invest in BRI ventures. Subsidies are usually granted for the control of strategic points, an example of which are the Mediterranean ports in Europe. Chinese SOEs have acquired stakes in eight EU ports, threatening the competitiveness of EU private port companies. China's flagship investment is the 35-year lease of the port of Piraeus from Greece by the China Ocean Shipping Company (COSCO), which is part of China's plans to establish the Land-Based Route Maritime Express, a network of rail connections from the port to the western Balkans and northern Europe. One of the frequently used tactics by China, as outlined in this subparagraph, is to establish ties with European companies through various means such as concentrations

25 Article XX of the GATT outlines the general exceptions that contracting parties can adopt or enforce without violating the agreement. These exceptions include measures to protect public morals, human, animal, or plant life or health, importations or exportations of gold or silver, compliance with non-inconsistent laws or regulations, products of prison labor, national treasures of artistic, historic, or archaeological value, conservation of exhaustible natural resources in conjunction with domestic production or consumption restrictions, obligations under approved intergovernmental commodity agreements, restrictions on exports of domestic materials during governmental stabilization plans, and measures to acquire or distribute products in general or local short supply. However, these measures should not discriminate between countries under the same conditions or act as disguised trade restrictions.

26 Blažo 2021, p. 142.

27 Regulation (EU) 2022/2560, art. 4.

28 Blažo 2021, p. 142.

29 Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021.

30 Sire 2022, p.2.

31 The Bealt and Road Transport is a global infrastructure development economic plan of 2013, created to invest in more than 150 countries and international organizations. With a railway line, oil pipeline, gas pipeline, port, and power plant.

or public procurement procedures. This allows China to quickly gain access to European markets for its products and services, opening the path to Chinese services and products[32]. Historically these transactions have been possible thanks to the fact that they are being channeled through offshore financial centers (OFCs) or due to round tripping, notably, the 10.9% of foreign investors are controlling EU companies established in offshore financial centers[33]. After this brief introduction, this chapter will explore the alignment and interdependencies of the new instrument with existing EU screening instruments, with a focus on merger and FDI control tools. Several EU and international instruments only address distortions caused by foreign distortions to a certain extent, but they cannot fully cover the regulatory gap.

The initial gap that will be analyzed is the EU Competition Rules in the M&A team, which in the FSR would be included in the chapter on concentrations[34]. Prior to the FSR coming into effect and being implemented in the future, the EU only had Regulation (EU) 139/2004 (EUMR), which could lead to an analysis of subsidies to measure the strength of the merged entity and the obstacle to effective competition that this entailed[35]. This was not designed to study either the existence or the effects of a foreign subsidy to merging undertaking, but to protect the above, along with other legitimate interests of Member States such as public security or the plurality of the media[36]. Beyond requiring a regulation of foreign subsidies in the field of concentrations, European companies viewed the EUMR as excessively limiting when it came to mergers or acquisitions of control, as it could impede significant economic transactions, such as *Siemens/Alstom*, banned by the European Commission on 6 February 2019[37]. In this case, while the proceedings were taking place, the two companies argued that the merger was necessary to preserve European competitiveness, mainly against China, by creating a "European champion"[38]. One could argue that the EC is overly inflexible, but it demonstrated sensitivity in recognizing the invalidity of this argument, given that Siemens' property rights were owned by foreign investors[39]. Something similar happened to the failed, due to COVID-19, proposed acquisition of Chantiers de l'Atlantique by Fincantieri, where they attempted to play the "European champion" card for the imminent Chinese competition[40]. In this instance, the clarity is even more apparent, that the threat disguised the strategy of the market of the companies in order to avoid the EC, as the global cruise-ship industry is not China's strong suit; this knowledge is even more significant given the existence of a joint venture with Fincantieri in China which will introduce the first-ever locally-built cruises to the market. Secondly, because most of the capital of Fincantieri is owned by Cassa Depositi e Prestiti (CDP) which is majority owned by the Italian State, although, since 2014, the State Grid Corporation of China has owned 35% of the CDP's share capital, granting it governance rights[41]. Therefore, the conclusion that can be drawn is that there is no point in challenging the existing rules which guarantee competitiveness in the internal market with the sole aim of promoting self-economic interest through mergers that could lead to a monopoly and abuse of a dominant position in an economic field. The European Union's case law provides detailed elaboration on the evolution of matters related to mergers, as demonstrated in *RJB*

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32 See Casburi 2016: "The EU is a key destination for investment by Chine- se firms. According to official data from China's MOFCOM, 2,000 Chinese firms currently have establishments in the EU; these employ 47,000 people and amass a cumulative investment of USD 40,097 million, i.e. 4 out of every 10 USD invested in developed countries. Over the past two years, there have been marked trends in Chinese investment in Europe. A larger number of tran- sactions were carried out by privately-owned companies, with a greater proportion of purchases of minority inte- rests rather than acquisitions, and increased sector diver- sification, with more real estate, hotel and agri-business fir- ms in relative terms. Chinese investment in the EU reached an all-time high in 2014, at USD 20,170 million, indicating growth of 117% compared to 2013 according to the Esade China Europe database. Notable transactions include the purchase of 35% of the Italian bank Cassa Depositi e Prestiti (CDP) Reti by State Grid in the electricity sector; the acquisition of 80% of the Por- tuguese financial institution Caixa Xeral by the Fosun Group; the purchase of the Dutch-based agricultural conglomerate Nidera by the food group COFCO; and the automotive firm Dongfeng buying into the French enterprise Peugeot".

33 White Paper on levelling the playing field as regards foreign subsidies, p. 9.

34 Regulation (EU) 2022/2560, chapter 3.

35 White Paper on levelling the playing field as regards foreign subsidies, p. 40.

36 Jones & Davies 2014, p. 13.

37 Sire 2022, p.2.

38 Position Paper on National and European Champions in Merger Control 2019, p.2

39 Siemenes Shareholder Structure & Voting Rights Announcements

40 McNelis 2019.

41 Cassa depositi e prestiti Spa (CDP) 2014.

Mining plc v Commission of the European Communities, where the Court of First Instance (CFI) noted that the EC did not analyze the alleged aid declared by the German administration on the financial strength of the merged entity[42]. The EC could solely employ the EUMR for this objective, as mentioned in Article 2.1. (a) where it is noted that "*the structure of all affected markets and the actual or potential competition of undertakings located within or outside the Community*"; therefore, this Article only involves the examination of the market position of the undertakings concerned, without any chance of including foreign subsidies granted to undertakings in the investigation. It can only be considered foreign subsidies in the light of art. 2.1(a) if a firm, alone and exclusively, thanks to subsidies increases its financial resources, and given its financial strength, decides to participate in a fierce competition to exclude competitors, known as the "deep pocket" predation[43]. Although the real call for the creation of *ad hoc* regulation for foreign subsidies in the context of mergers can be seen in the *STX/Aker Yards*, case COMP/M.4956, in which a competitor claimed that STX had benefited from state subsidies in South Korea, which would enable it to undercut prices after the transaction and drive existing competitors out of the market. In short, European competitors were left unassisted, as they were required to bear too high a burden of proof and the results of those pseudo-investigations merely pointed out the need to have a dedicated tool for foreign subsidies, that sets a specific threshold and benchmarks for this type of subsidies[44].

The second gap concerns the instruments available in EU trade policy, namely the SCM Agreement and the FDI Screening Regulation. Starting with the SCM Agreement, a historic WTO agreement, Article 1 prohibits governments from granting subsidies. However, this agreement only covers subsidies for the importation of goods, leaving the trade of services, especially in the establishment of undertakings in the EU, uncovered[45]. To understand this gap, it is important to note that Article 1 of the SCM Agreement only covers "*financial contribution*" given by governments "*within the territory of a Member*", which does not contemplate the idea of an intermediary actor, typical of transnational subsidies.

This is clearer in the *GFF* case, which involved the importation of glass fiber fabrics from China and Egypt, funded by Chinese banks for sale in the European market at lower prices. The EC believed these payments fell under EU Regulation (EU) 2016/1037 against subsidized imports, while China argued the funds were not attributable to the government due to the territoriality concept in the SCM Agreement. The EC contended that Egypt and China were responsible for recognizing and adopting foreign subsidies, broadening the notion of "government" beyond direct actions to those attributable to it. The discrepancy intensified regarding subsidy notification under the SCM Agreement's Article 25.2 if the beneficiary is in the same subsidizing WTO Member's territory.

In short, the German jurist Friedrich Karl Von Savigny would have said that China pursues the grammatical element of the Art norm. 1.1(a) of SCM, while without founded argumentation the EC pursues the teleological element without success. In short, the EC makes clear that the concept of subsidy is linked to a territory of the country where it is granted by the government and includes cases where national governments acknowledge and adopt foreign subsidies as their own. Having said that, it can be outlined that the breach occurring in the WTO system exited in the provisions of services and establishments. As there isn't even a proper anti-subsidy mechanism in the General Agreement on Trade in Services (hereinafter "GATS"), Art. XV of the General Agreement on Trade in Services (GATS) lacks a specific measure against subsidies[46]. In this regard, the EU has designed the FSR, where to avoid any risk of overlap (*ne bis in idem*) with already existing instruments such as the anti-dumping Regulation or the anti-subsidy Regulation, the FSR will apply to undertakings "engaging in any economic activity" financed by foreign subsidies[47].

42 Rodrigues 2021, p. 207.

43 Sire 2022, p. 2.

44 Sire 2022, p. 9.

45 Ibid., pp. 40–41.

46 Blažo 2021, p. 138.

47 Regulation (EU) 2022/2560, art 3 .

The third instrument is the FDI Screening Regulation, an instrument that enables the EC to adopt restrictive measures when a FDI constitutes a danger to security and public order[48]. This Regulation allows cooperation between Member States and the EC and provides a control mechanism for Member States to safeguard the national public interest, as stated in art. 4(2) Regulation (EU) 2019/452. Thus, the EC could not act unilaterally but rather shares the role of regulatory authority with the Member States, who will also need to provide explanations if they do not follow the decisions made by the EC[49]. This Regulation sets a precedent in EU law, as a Regulation that could limit the free movement of capital as outlined in Art. 63 of the TFEU. This is paradoxical, as the EU aims to be the only territory in the world where there is control of public aid and subsidies to maintain a level playing field[50]. Much debate has centered around whether such Regulation, which is merely an advance of the FSR, can be compatible with Union law since prior to the entry into force of the Regulation cases such as C-54/99, *Eglise de scientolog*ie, had already called into question whether "*to take measures which are justified on grounds of public policy or public security*"[51].

However, since these demands infringe the fundamental principles of the free flow of capital, they must be interpreted strictly, and their scope cannot be decided "*unilaterally*" by each Member State "*without supervision by the Community institutions*"[52]. Therefore "*measures restricting the free movement of capital may be justified on public policy and public security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be achieved through less restrictive measures*"[53]. In the current context, the justifications for possible measures are found in the 2020 FDI Communication, where predatory buying by foreign investors, can threaten the security of supply, provision of essential services, public health, and financial stability[54]. The latter is particularly interesting, as FDI has been prophetic, as future times could result in a scenario where the EU over-relies on foreign investors, causing a loss in its credit and financing power, such as to fund projects like NextGenerationEU. However, this Regulation compared to other foreign FDI policies, shall not be considered protectionist in nature[55]. In short, although the FDI capture mechanism is able to anticipate potential risks from FDI, providing the EU with an effective response, there is still a need for a concrete policy to provide a common perspective on strategic assets and ecosystems[56].

Fourthly, the following gap deals with the public procurement procedure (hereinafter, "PPP"), where the EU Public Procurement Directives, as a single market instrument, do not provide specific rules on foreign subsidies' effect on EU procurement markets[57]. Moreover, the EU does not address the phenomena of offers subsidized by foreign capital in PPP, either in the Agreement on Government Procurement or in the various PTAs[58]. These directives serve mainly for two purposes: first, to establish certain thresholds that if exceeded, will submit the procedure, preparation, award, execution, and resolution to harmonized provisions (within the articles of the Directive)[59]; and second, through Article 69 of Directive 2014/24/EU, to reject abnormally low bids, when the economic operator is unable to give significant explanations due to State Aid[60]. Therefore, the gap can be observed as there is no express mention of abnormally low bids financed by a foreign subsidy. Consequently, public authorities have the discretion to design tender procedures and evaluate tenders without considering

48 Regulation (EU) 2019/452.

49 Ibid., art. 8.2(c).

50 Rodrigues 2021, p. 209.

51 Case C-54/99, no 13.

52 Case C-54/99, no 17.

53 Ibid., no 18; Case C-388/01, no 22; Case C-109/04, no. 34; Case C-141/07, no 60.

54 2020/C 99 I/01.

55 Foreign Investment Law of the People's Republic of China 2019.

56 Feport, Position Paper on the White Paper on Foreign Subsidies 2020., p.1.

57 See Directive 2014/23/EU on the award of concession contracts Text with EEA relevance See Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

58 Agreement on Government Procurement (GPA) and bilateral Free Trade Agreements with Procurement Chapters (FTAs).

59 Directive 2014/24UE, art. 19/23.

60 White Paper on levelling the playing field as regards foreign subsidies, p. 11.

foreign subsidies, and their existence has no legal consequences. The EU encourages the contracting authorities to demand high environmental and social standards in their contracts and to ensure that EU and third-country tenderers meet the same standards. However, these requirements do not address the potential distortive effect of foreign subsidies. In practice, the contracting entities do not have the information necessary to investigate the extent of the distortive effect of foreign subsidies on public procurement markets[61]. Similarly, the International Procurement Instrument (IPI) aims to encourage trading partners to open procurement markets to EU companies, but will not address foreign subsidies affecting procurement processes in the EU[62].

5. Comparison between the PPD and FSR

It is important to explain the rationale behind the concept of "abnormally low tender" to avoid confusion with the concept of "unduly advantageous tenders" under the FSR. This concept was introduced as stated in Recital 103 of the Public Procurement Directive (hereinafter "PPD"). If tenders appear to be abnormally low in comparison to the works, supplies, or services, it is possible that they are based on unsound assumptions or practices from a technical, economic, or legal standpoint. In cases where the tenderer fails to provide an adequate explanation, the contracting authority has the right to reject the tender. Rejection should be mandatory when the contracting authority determines that the abnormally low price or costs proposed are a result of non-compliance with mandatory Union law or national law that aligns with it in the areas of social, labor, or environmental law, or international labor law provisions. However, the rejection of abnormally low tenders is not only intended to safeguard Union law but also to safeguard the execution of the contract[63]. On the other hand, it is acknowledged that the Directive does not provide a definition of an abnormally low tender, *a fortiori*, it does not prescribe the methodology for determining an anomaly threshold. Therefore, it becomes the responsibility of each Member State to undertake this task[64]. From this it can be observed that the EU has never truly intended to define this concept, which has been a subject of discussion since Council Directive 93/37/EEC, repealed by Directive 2004/18/EC, which in turn was replaced by the currently applicable PPD. Perhaps it has not been defined yet because the concept of "abnormally low tender" is *prima facie* non-discriminatory, requiring a subsequent evaluation/calculation for it to be objectively considered discriminatory.[65] The reality is that there is no applicability of Art. 69 PPD on foreign subsidies, Art. 69(4) PPD is silent on the impact of foreign subsidies on abnormally low tender evaluation[66]. Moreover, the Commission categorically dismissed the notion that the issue of foreign subsidies could be addressed through the PPD or any future amendments to it. The EC emphasized that the evaluation of foreign subsidies should not be subject to the discretion of contracting authorities or the national legislation of individual Member States[67]. On the other hand, it should be highlighted that in many cases tenders do not have to be abnormally low. In the eyes of foreign governments, it is evident that an excessive low offer can be susceptible to being *prima facie* discriminatory, therefore, some systems for investigating non-abnormally low tenders supported by foreign government subsidies may be seen as discriminatory. This is because tenders originating from within the EU, which are not initially considered abnormally low, are not screened for the receipt of potential (even illegal) state aid. As a result, these tenders may have an advantage and could potentially be awarded contract[68]. Comparing the FSR and the PPD it is worth noting that the FSR addresses distortions in the internal market caused by third countries, while the PPD aims to remove obstacles

61 Ibid.

62 Regulation (EU) 2022/1031.

63 See C-367/19, para. 32: "The Court is called upon to determine whether and, if so, to what extent a transaction by which a tenderer undertakes to supply the service for an amount of EUR 0.00 is capable of giving rise to the conclusion of a contract 'for pecuniary interest' within the meaning of Article 2(1)(5) of that directive and of thus being characterised as a 'public service contract".

64 C-258/99, para 67.

65 Ibid., para. 69.

66 Blažo 2021, p. 154.

67 Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021, para. 5.2.

68 Sánchez Graells 2021.

to the free circulation of goods and services within the internal market. Focusing on the concepts, “abnormally low” refers to economic abnormality, while “unduly advantageous” implies illicit or unjustified behavior. Both concepts deviate from the normal circumstances assumed by the contracting authority. Evaluating an abnormally low tender involves identifying such tenders and assessing the legality of State aid received by the economic operator. This evaluation considers the overall impact of State aid on the internal market, not just its benefits for the specific tender. Evaluating an unduly advantageous tender begins with verifying if prior notification of foreign financial contributions was submitted. In conclusion, this comparison is essential to understand the direction the European Commission is taking. However, there is no applicability of the PPD in foreign subsidies matters, as stated in Recital 5 of the FSR: “No existing Union instruments address distortions caused by foreign subsidies.”

6. The rationale for EU action

Considering the TFEU, it is relevant to explain why the EU should act regarding foreign subsidies and their impact on the internal market, considering the economic reasons behind the creation of the FSR. Firstly, the question arises as to whether the EU has exclusive competence to legislate in this area, as it has done with the FSR. Indeed, the EU has exclusive competence according to Article 3(1) TFEU, specifically under (b) for establishing competition rules necessary for the functioning of the internal market, and (e) for common commercial policy. This directly connects to Article 207, which allows for the adoption of measures defining the framework for implementing the common commercial policy, including trade in services, foreign direct investment, and protection of trade in the event of subsidies. It can be argued that the FSR was also created based on Article 207, as its objective is to protect the internal market from subsidies of foreign nature. Furthermore, Article 114 TFEU serves the purpose of providing the EU with the legal foundation to implement harmonization measures for establishing and upholding the internal market. It enables the harmonization of national laws in areas where divergent regulations might hinder the functioning of the internal market, ensuring a level playing field. The creation of this provision was driven by the concern that some Member States might enact their own national legislation in the absence of EU action. Implementing a unified EU-wide solution under Article 114 TFEU is considered more efficient. While subsidiarity does not apply to Article 207 TFEU, it may be relevant to Article 114 TFEU, since the exclusiveness of competence is not as clear as in Article 207. Considering the subsidiarity of Article 114 would mean placing in the hands of the MS governments the creation of measures to counteract foreign subsidies in the internal market. However, due to the distortions affecting the internal market and the transnational nature of foreign subsidies, EU-level legislation is deemed necessary. The EU’s exclusive competence in trade defense instruments and State aid, as outlined in the TFEU, further supports the argument for EU legislation on foreign subsidies, aligning with the objectives of State aid control[69].

7. FSR and EU State aid law

One aspect that has generated considerable discussion regarding the FSR is its similarity to EU State aid law. This chapter will analyze some of the more general similarities and essential differences to confirm that these two mechanisms are compatible. Nevertheless, the more specific similarities will be examined in the development of the FSR’s content. The extensive network of agreements established between the EU and its trading partners has led to significant convergence. This convergence is particularly evident when considering the alignment with Articles 107 and 108 TFEU, as demonstrated by the criteria used to determine whether a measure qualifies as a subsidy or State aid[70]. Under Article 107 TFEU, aid shall be granted “by the State or through State resources”, this

69 Commission’s staff working document on the impact assessment accompanying the Draft Regulation 2021.

70 Colomo & Neven 2023, p. 28.

has been developed by case law adding the use of MS resources and the imputability to the MS[71]. The similarity between the notion of aid and the concept of subsidy had found its way specially in national legislation. For instance, The Subsidies Act 2022 in the United Kingdom consolidates EU case law, including the landmark judgment in *Stardust Marine*, where if a public body provides financial assistance, it will be considered a subsidy if the public body's level of involvement is such that the decision is ultimately under its control[72]. Therefore, it can be appreciated that these two concepts (aid and subsidy) can be connected, especially if they are used to define the same behavior. The most important difference to note is that the EU State aid rules do not apply to a subsidy given by a non-EU Member State, whereas they apply across all Member States regardless of their origin. This means that any subsidy received from outside the EU must be assessed considering the new FSR. The second difference is that once the existence of a foreign subsidy is established, the Commission should assess on a case-by-case basis whether it distorts the internal market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited[73]. This is because, under the FSR, the Commission generally applies the balancing test to determine whether the negative effects on the internal market outweigh the positive effects[74]. In EU State aid law, the closest equivalent would be the exceptions provided under Article 107(3), where, similar to the balancing test, this "may" be used as a justification for the aid/subsidy. Another obstacle arises when considering whether third countries or undertakings could utilize exceptions applicable to EU State aid law[75]. However, this idea must be discarded, as the FSR establishes a specific regime for the control of foreign subsidies, without relying on frameworks such as the EU State aid law. Under the FSR, undertakings can only rely on the possibility of justification outlined in Article 5(2). Moreover, there is no mention of the justifications in this Article for the State aid exemptions (Articles 107(2) and 107(3)). Consequently, these provisions cannot be invoked as justifications in relation to foreign subsidies under the new FSR. The third difference relates to the outcome process. In State Aid, the procedure consists of two stages: a preliminary stage outlined in Article 108(3), followed by the formal investigation procedure stated in Article 108(2). In the new FSR, there are also two phases: the preliminary review and the in-depth investigation. The difference here lies in the fact that if the outcome is negative in a State Aid procedure, "the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (recovery decision)"[76]. On the other hand, if the outcome is negative under the FSR procedure, the Commission, does not have the power to claim a recovery aid from a third country. Therefore, the Regulation employs alternative mechanisms to address competition distortions[77]. The regime offers various options in this regard, such as mandated shared access to infrastructure or assets, reducing capacity or market presence, and so on. Alternatively, the Commission can also adopt an implementing act in the form of a decision imposing redressive measures (only under the general review of foreign subsidies), a decision that is not foreseen under the Council Regulation (EU) 2015/158 in EU State aid law. In conclusion, although there may be instances of overlap between the State aid rules and the FSR, it is important to recognize that these two regimes are distinct and operate under separate legal frameworks, procedures, and criteria. For instance, if a company receives a foreign subsidy that is also subject to the State aid rules due to being granted by an EU Member State, both regimes could potentially be applicable, and the company may be required to adhere to the obligations of both. In such cases, the authorities responsible for enforcing these regimes will coordinate their efforts to ensure consistency and prevent duplicative regulation.

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71 C-482/99.

72 UK Subsidy Control Act 2022, section 2.(3).

73 Regulation (EU) 2022/2560, recital 17.

74 Ibid., art. 6.

75 Rodrigues 2021, p.222.

76 Council Regulation (EU) 2015/1589, art. 16.

77 Colomo and Neven 2023, p. 41.

8. Definition and scope of foreign subsidies

From Article 1 to Article 5, the FSR provides Europe and the world with the necessary language to understand the concept of foreign subsidy. Article 1 begins by stating that the purpose of this Regulation, is to achieve a level playing field in the internal market, is to address any distortion caused directly or indirectly by foreign subsidies. This Article already divides the areas where these distortions can occur into three modules: any economic activity, in particular concentrations, and public procurement procedures[78]. It is interesting to see how it uses the phrase "in particular," as there are two chapters out of seven where these two types of economic activities are regulated. Following Article 2, it further elaborates on what has been previously discussed, stating that the scope of this Regulation applies to economic activities that always take place within the Union, such as M&A of control over already established companies within the EU or public procurement procedures offered in any EU Member State.

As stated in Art. 2 the recipient of the subsidy should be a business entity. In the context of public procurement processes, the term "undertaking" refers to an "economic operator" as defined by the EU Public Procurement Directives[79]. The nationality of the business entity is insignificant. Although the main target for the FSR are the foreign SOEs that receive preferential treatment from their respective governments, the Regulation also extends to EU companies that receive subsidies from non-EU countries[80]. In its sense, any governmental activity without an economic purpose falls outside the FSR's scope. A foreign subsidy meets four requirements in total: it must be from a third country, involve a financial contribution, entail a benefit, and be restricted, either in law or in fact, to one or more undertakings or industries. A non-exhaustive list of potential financial contributions is found in Article 3(1) of the FSR, clarifying the extent of the concept of financial contributions. It can be observed that a broad range of financial contributions is mentioned, such as capital injections, grants, loans, and guarantees, as fiscal incentives and setting off operating losses, compensation for financial burdens imposed by public authorities, forgiving or rescheduling debt, or swapping debt into equity. The foregoing of revenue, such as tax exemptions, that would otherwise be payable is also included. However, the provision of goods and services to an entity or their procurement from an entity is somewhat more ambiguous, since the FSR does not extensively elaborate on this last type of financial contribution[81]. Article 3(2) of the FSR deals with the third country's imputability, an essential requirement, which includes, among other things, the activities of private entities that can be attributed to the third country[82]. In the White Paper on foreign subsidies, it was already indicated the possibility of a third State granting a subsidy to a parent company located outside the EU, which then finances the subsidiary located in the EU through intragroup transactions, given that they all belong to the same economic group. Typically, these types of subsidies occur through selective incentives offered through corporate tax regimes, allowing foreign States to gain a competitive advantage by attracting multinational enterprises (MNEs)[83]. To carry out their commercial activities within their jurisdiction and encourage them to establish subsidiaries within the EU. It is important to note that under European law, the concept of a private entity can also be extended to private banks or financial institutions that receive assistance from governments. This leads banks to allocate capital to selected sectors, companies, or groups of companies as directed by the State through indirect intervention[84]. Although the latter is quite contradictory when equating the concepts of subsidies and State aid, as private entities do not provide State aid since it contradicts the essence of State aid, which involves

78 This division is not coincidental, as it is also used in the modules outlined in the White Paper on levelling the playing field as regards foreign subsidies 2020.

79 Regulation (EU) 2022/2560, art. 2(1).

80 See the White Paper on levelling the playing field as regards foreign subsidies 2020: "*subsidies that cause distortions in the internal market and are provided to a beneficiary that is established or, in some instances, active in the EU".*

81 Luja 2021, p. 188.

82 Regulation (EU) 2022/2560, art. 3.2.(c).

83 Cases T755/15 and T759/15, para. 21.

84 C224/12 P, para. 12.

granting benefits without any reciprocal consideration, a *do* without a *ut des*[85]. Returning to the central matter, these first provisions align with the EU Anti-Subsidy Regulation, emphasizing a comprehensive understanding of foreign subsidies and a determination to prevent any form of circumvention of the Regulation. The term "financial contribution" holds particular significance as the notification thresholds for special concentration and public procurement procedures are more based on this notion than referring to a foreign subsidy[86].

8.1. Distortions in the Internal Market

Once the foreign subsidy is observed, it cannot be deemed *ipso facto* illegal. For it to be considered illegal, it must result in a distortion within the domestic market, which translates to enhancing the market position of the subsidy recipient while adversely affecting competition. In this case, it can be observed that the fundamental reason is identical to that of State aid. The Commission will assess the position of the pertinent beneficiary prior to the receipt of the aid to determine whether there has been a genuine improvement[87]. Subsidies are prone to causing distortions in certain circumstances, particularly when they are granted to financially distressed companies (unless part of a restructuring plan), when they involve unlimited guarantees in terms of amount or duration, resembling blank checks, or when they are directly linked to promoting monopolies or securing a public contract through an excessively favorable tender process. Lastly, the most scrutinized subsidies by the FSR are those that have been directly granted to facilitate concentration or the submission of an unduly advantageous tender in a public procurement procedure[88].

8.2. General thresholds

The FSR provides us with two general thresholds that the European Commission must consider when classifying something as a distortion. It is important to note that in the case of concentrations or public procurement procedures, we would need to refer to the *ad hoc* thresholds explained later in this dissertation. The first general threshold states that "where the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over any consecutive period of three years, that foreign subsidy shall be considered unlikely to distort the internal market"[89]. This high threshold can be justified as it mitigates the burden for both companies and the Commission, allowing them to focus on foreign subsidies that are truly problematic[90]. Secondly, another threshold is mentioned, which would correspond to the amount established for de minimis aid, in relation to the foreign subsidy per third country over any consecutive period of three years[91]. In short, foreign subsidies that do not exceed €200,000 are not considered capable of distorting the internal market. The significant difference between the first and second threshold, apart from the amount, is that in the *de minimis* threshold if the threshold is not exceeded, there is no possibility for the EC to proceed with an investigation, whereas in the first threshold with the term "unlikely", there are still possibilities that even if the threshold is not exceeded, the total amount of a foreign subsidy may cause internal distortions. It is also worth noting that Article 4(3) specifies "over any consecutive period of three years," while the *de minimis* provision refers to three fiscal years[92]. Possibly an explanation could be the fact that dealing with foreign companies, it would be hard to determine the concept

85 Nicolaides 2021, p. 1.

86 Regulation (EU) 2022/2560, art. 20.3.(b) and art. 28.1.

87 Case 173/73.

88 Regulation (EU) 2022/2560, art. 5.1 (d) (e).

89 Regulation (EU) 2022/2560, art. 4.2

90 Hornkohl 2022, p. 8.

91 Regulation (EU) No 1407/2013, art. 3.2.

92 The European Union does not yet have a common fiscal policy; therefore, the period of three fiscal years shall be determined based on the fiscal years employed by the undertaking in the respective Member State.

of fiscal year. Lastly, Article 4(3) presents what could be considered the general exceptions for a foreign subsidy that "may" not distort under circumstances where it is directed towards doing good in cases of natural disasters or exceptional occurrences.

9. The exclusive role of the European Commission

So far, only the European Commission has been mentioned as the competent authority to enforce the FSR, and this will remain the case throughout this dissertation, as it is the sole competent authority. It is necessary to include this chapter because to analyze why the EU has chosen to exclusively attribute the competencies to the Commission. During the lengthy process of creating an instrument to achieve a level playing field, it remained unclear how coherence would be maintained across the EC and all the Member States involved, as some Member States could choose to opt out of the instrument in order to maintain its attractiveness for national FDI[93]. The truth is that the White Paper does not provide a clear clarification on the matter, as depending on the paragraph being studied, it no longer refers to national authorities explicitly. Instead, it simply mentions the supervisory authority, leaving us to understand that it refers to either the MS authority or the EC, depending on the module, and both can act accordingly[94]. In reality, European Law has always sought to share the management of Competition law concerns, but it has consistently recognized that "the Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets)"[95]. This latter aspect may be the primary reason for the exclusive attribution of enforcement power to the EC. Additionally, it should be noted that the EC serves as the guardian of the Community interests. Therefore, when a new competition matter arises or to ensure effective enforcement, the adoption of a Commission decision is necessary if it serves the interests of the European community in developing its competition policy[96]. Member States generally agree that contracting authorities should not be tasked with assessing whether a foreign subsidy distorts the public procurement procedure. Instead, they believe that this responsibility should rest with the national supervisory authority or the Commission. Respondents from other EU stakeholders also emphasized that the competent supervisory authority should be responsible for the entire investigation while contracting authorities should focus on enforcing redressive measures within the respective tender procedure. Many contributors argued that the assessment should therefore be conducted by the national supervisory authority[97]. In conclusion, the proposal put forth by the EU in 2021 was that, although the White Paper initially contemplated involving Member States in reviewing public procurement procedures, the current proposal now emphasizes enforcing all aspects at the EU level. This approach aims to address the concerns raised by stakeholders, who expressed apprehension about the potential uneven application of a new instrument on foreign subsidies across Member States and the burden it may place on national authorities. As for the expected outcomes, it is anticipated that "the Commission will be the most affected public authority by the Regulation, as the Commission will become the sole enforcer of the investigative tools"[98].

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93 Rodrigues 2019, p. 219.

94 White Paper on levelling the playing field as regards foreign subsidies 2020, p. 33.

95 Commission Notice on cooperation within the Network of Competition Authorities 2004, para. 14.

96 Ibid.

97 Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies 2020.

98 Ibid.

10. Balancing test, commitments, and redressive measures

Even if the undertaking falls within the defined categories, this does not preclude it from arguing the positive effects of the subsidy, as there is nothing preventing the EC from considering those positive effects[99]. This directly connects with Article 6, which allows the EC to conduct a balancing test between the negative effects of the foreign subsidy and the positive effects. This procedure, already mentioned in the White Paper under the name of "interest test" has received different opinions. While it received support from numerous Member States and non-EU stakeholders, other EU stakeholders appeared to be more divided in their views[100]. However, there is nothing preventing this from being the most appropriate mechanism for empirically verifying whether the behavior does or does not cause distortions in the internal market. To do so, it is necessary to consider the positive aspects that such behaviors may entail. Therefore, it can be included the development of the relevant subsidized economic activity and policy objectives such as a high level of environmental protection and social standards, as well as the promotion of research and development[101]. The EC is not obliged to always carry out this test, as the regime allows for it but does not require it[102]. However, if the negative effects still outweigh the positive effects, the EC may impose commitments or redressive measures[103]. Before addressing the three screening tools, it is important to note that Article 7 of the FSR establishes general provisions regarding commitments and redressive measures. The Commission has the authority to impose redressive measures to address the distortion caused unless it has accepted the commitments proposed by the undertaking under investigation. However, it should be noted that commitments and redressive measures essentially refer to the same actions, with the only difference being that redressive measures are imposed *ex officio* by the Commission. These measures may include, among others: offering access to subsidized infrastructure under fair and non-discriminatory conditions; reducing production or service capacity or market presence; refraining from particular investments or divestments of certain assets already acquired; licensing certain assets acquired; dissolving a concentration (such as a merger, controlling acquisition or joint venture); publication of results of subsidized research and development (R&D); and the repayment of the foreign subsidy (plus interest).

Either with redressive measures or with commitments the Commission as stated in Article 11(3) may impose an implementing act in the form of a decision[104]. Possibly the repayment is the less obvious course of action. The question at stake would be to whom the repayment should be made. Ideally, the undertaking should be allowed to repay the subsidy to the granting authority, especially if there has been no significant distortion of the internal market yet. However, the granting foreign authority may perceive this as an offense and deny having granted any distortive subsidy in the first place. To address this potential situation, the proposal suggests that the Commission should accept any repayment if the undertaking commits to making it while considering the risk of circumvention[105]. It remains unclear if the repayment will remain with the Commission, but it emphasizes the need for transparency in the repayment process[106].

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99 Regulation (EU) 2022/2560, art. 5.2.

100 Certain organizations such as the ESF, Confederation of Swedish Enterprise, International Bar Association, and Bundesarbeitskammer Österreich find an EU interest test to be pertinent. Conversely, opposing viewpoints are expressed by other contributors, including ERT and Fédération nationale de travaux publics.

101 Ibid., recital 21.

102 In accordance with the literal interpretation of Article 6, the European Commission "may" assess and consider both the negative and positive effects.

103 Regulation (EU) 2022/2560, art. 7.

104 Treaty on the Functioning of the European Union (TFEU) 1957, art. 291.

105 Regulation (EU) 2022/2560, art. 7.6.

106 Luja 2021, p. 5.

11. The three screening tools

The FSR provides three screening tools to examine foreign subsidies within the internal market. The first tool is the *ex officio review*, which allows for the analysis of any economic activity or small concentrations or procurement procedures that do not meet the thresholds of the dedicated tools. The *ex officio* review tool corresponds to Module 1 of the White Paper. On the other hand, there are screening tools for high-value concentrations and public procurement procedures, which were the main reason for the creation of the FSR. These latter two tools correspond, instead, to Modules 2 and 3 of the White Paper.

11.1. The relationship between the three tools

The *ex officio* review tool is described in Chapter 2 of the FSR. However, before delving into its description, it is important to differentiate this tool from the *ad hoc* notification request in relation to concentrations and public procurement procedures. Concerning the *ad hoc* notification request, Article 21(5) for concentrations and Article 29(8) of the FSR for public procurement procedures confers upon the Commission the authority to request prior notification of any concentration or procurement tender that does not meet the notification thresholds. In case of concentration if the Commission suspects that the undertaking has received foreign subsidies within the three years preceding the implementation (of the concentration). Secondly, in cases of public procurement procedures where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, before the award of the contract. In such cases, the concentration or tender will be considered notifiable under the FSR and will be subject to the relevant procedures and timelines[107]. On the other hand, the general *ex officio* tool, outlined in Chapter 2, applies to all other concentrations and public procurement procedures that fall below the notification thresholds. Unlike the *ad hoc* notification tool, the general *ex officio* tool can be used for transactions that have already been implemented or contracts that have already been awarded. Regarding public procurement, Articles 9(2) FSR explicitly state that *ex officio* review is limited to awarded contracts, while *ad hoc* notification is limited to situations prior to contract award[108]. In summary, before implementation of the concentration or contract award, the *ad hoc* notification tools take precedence as *lex specialis*, with specific procedural rules and timelines. After implementation, the Commission retains the power to assess the concentration or tender on its own initiative *ex officio*. If a concentration or public procurement procedure has already been notified and assessed through the specific procedures prescribed by the FSR, either because it was inherently notifiable under Article 20(3) or Article 28(1), or because the Commission requested the notification of a non-notifiable transaction or tender under Article 21(5) of the FSR and Article 29(8) of the FSR, it cannot be reexamined by the Commission using the *ex officio* review tool. This limitation is explicitly stated in Article 29(8) of the FSR, which includes the phrase "without prejudice"[109]. Now, the question that arises is whether these two tools can be combined. Article 34(1) provides insight into the relationship between procedures, stating that a financial contribution that has been notified under the concentration and procurement review tools can be reassessed in relation to another economic activity. This means that a concentration or public procurement bid that has been reviewed under specialized tools can only be reevaluated in the context of a different economic activity.

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107 The Commission's recent decision to encourage Member States to refer concentrations to the Commission under Article 22 of the EU Merger Regulation, irrespective of national merger review thresholds, has likely influenced the inclusion of Article 21.5 and Article 29.6 in the Foreign Subsidies Regulation (FSR).

108 It is opportune to make this small differentiation, although for all intents and purposes, it is merely linguistic, as Article 21.5 does not explicitly mention "*ex officio*".

109 Hornkohl 2022, p. 19.

11.2. The general ex officio review tool

The objective of this initial tool is to minimize the negative effects caused by subsidies, including inefficient allocation of resources, disparities in growth between subsidized and non-subsidized enterprises, and the accumulation of market power by subsidized companies through the provision of goods and services at low prices. The General Review Tool is a two-step procedure. First, a preliminary review is conducted, followed by an in-depth investigation[110]. The objective of the preliminary review is to gather all the necessary information to determine whether the financial contribution being examined constitutes a foreign subsidy that distorts the internal market. The fact that Article 10 does not specifically refer to the concept of internal distortion provided in Article 4, entails that this is a preparatory phase where no balancing test will be applied either. Firstly, it is necessary to explain the mechanisms available to the Commission in this phase. The first mechanism is the possibility to request information (Article 13) from the undertaking under investigation or the association of undertakings, even concerning the tender submitted in the public procurement procedure[111]. A request for information is not a simple communication between the parties, but a formalized document that includes the legal basis, the purpose, the time limit, a statement that in the absence of cooperation fines or periodic penalty payments may be imposed, and a notice that the Commission, in the absence of information, will make a decision based on the facts[112]. The concept of non-cooperation is specifically elaborated in Article 16, which demonstrates that there is no benefit in failing to cooperate, as it would be a self-limitation of the defense rights that both countries and undertakings possess[113]. The Commission can request information from Member States and third countries. However, it is evident that this is not a binding obligation for the third country, as it will maintain its autonomy[114]. This translates to the fact that paragraph 4 of Article 13 cannot be fully applied *mutatis mutandis* to the third country. In the request for information addressed to the third country, a statement indicating that fines or periodic penalty payments may be imposed for incorrect, incomplete, or misleading information cannot be included. The Commission relies on bilateral or multilateral agreements that provide assistance from the third state, facilitate information exchange, or utilize diplomatic channels. The same scenario arises if someone were to be interviewed to provide information for the procedure. In the case of an interview in a Member State, it would suffice to inform the respective state. However, in the case of an interview in a third country, Commission agents would need to obtain a prior agreement with the third country[115]. The second instrument entails inspections within the Union, where officials of the Union will be able to carry out investigations under a Commission decision. An investigation must be notified in advance to the Member State, especially regarding the possibility for the Member State to actively assist the EC officials. Third and lastly, there might happen inspections outside the Union, where clearly, since third countries are not under the jurisdiction of the EU, the provisions of the previous article cannot be fully applied *mutatis mutandis*. They cannot be conditioned by the fact that, in the absence of cooperation, they would incur fines or periodic penalty payments. Nor can any type of assistance or active cooperation be demanded from them unless it arises from an *inter partes* agreement. Before proceeding to explain the second step of the general review tool, it is important to note that the FSR enables the implementation of interim measures[116]. Once the preliminary review has been duly conducted and it is determined that there are "sufficient indicators that an undertaking has been granted a foreign subsidy that distorts the internal market," a decision to initiate an in-depth investigation will be adopted. Like a statement of objections in competition law investigations, the Commission prepares a preliminary assessment, notifies the concerned undertaking, and publishes a notice for public consultation involving interested parties, Member

110 Regulation (EU) 2022/2560, arts. 10 and 11.

111 It is crucial to understand that when an undertaking is requested for information, even during the preliminary phase, that undertaking will be deemed under investigation.

112 Regulation (EU) 2022/2560, art. 13.4.

113 See art. 28 of Regulation (EU) 2016/1037 and art. 18 of Regulation (EU) 2016/1037.

114 Hornkhol 2022, p. 15.

115 Regulation (EU) 2022/2560, art. 13.5.

116 Regulation (EU) 2022/2560, art. 12.

States, and third states concerned. If not, the Commission concludes the preliminary review and informs the concerned undertaking. In this second phase, the Commission has the same three mechanisms available as in the preliminary review (Article 13, 14, and 15). The only difference is that here the Commission may further use the balancing test to verify if there are indeed no positive effects that outweigh the negative effects. The in-depth investigation concludes with an implementing act in the form of a decision imposing redressive measures (Article 11(2)) if the undertaking does not offer commitments that could lead the Commission to issue a decision with commitments[117]. The third and final option is the adoption of a decision to raise no objection. There is no fixed deadline for this investigation, but it is reminded to the concerned undertakings that the Commission will strive to adopt a decision within 18 months from the opening of the in-depth investigation.

11.3. Fines and periodic penalty payments

The general review tool concludes with the pecuniary measures that the Commission can impose. In the case of State aid, if Member States provide aid to European companies, the EC cannot impose fines or periodic penalty payments when the Member State is not complying with a notification and stand-still obligation. The Commission must generally limit itself to the recovery of the aid[118]. However, under the FSR, the undertaking or association of undertakings becomes the recipient of any decision, which significantly changes the circumstances[119]. Fines or periodic penalties can be imposed in cases where the undertaking intentionally or negligently fails to cooperate with the EC in its obligation to provide correct information or submits incomplete documentation (e.g., books or records). The second scenario is when the undertaking fails to cooperate in providing explanations of facts or documents during inspections. In these cases, fines should not exceed 1% of their aggregate turnover in the preceding financial year. Periodic penalty payments should not exceed 5% of the average daily aggregate turnover for each working day of delay, calculated from the established date until the submission of complete and correct information or compliance with an inspection[120]. Before reaching a decision, the Commission establishes a definitive deadline of two weeks for the undertaking or association of undertakings to submit the required information that is currently missing[121]. In the event of non-compliance with a decision on commitments, interim measures, or redressive measures, the Commission has the authority to levy fines up to 10% of the undertaking's total turnover or impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover for each day of non-compliance. Additionally, fines or periodic penalty payments may be imposed if an undertaking fails to adhere to a decision requiring the disclosure of its future involvement in concentrations or public procurement procedures. The amount of the fine or penalty payment is determined based on the severity, duration, and nature of the violation, while also considering the principles of proportionality and appropriateness. However, nothing prevents the Commission from exercising its authority to reduce the fines if it deems it appropriate[122].

12. Second tool: Concentrations

Chapter 3 introduces the concentration tool, which covers notifiable concentrations. It is evident that the FSR cannot have absolute retroactivity as it would, quoting criminal law, contradict the principle of *nullum crimen, nulla poena sine lege praevia*. However, given the significant economic value of these transactions, the FSR has a three-year retroactivity period. This means that "only foreign subsidies granted in the three years prior to the

117 Regulation (EU) 2022/2560, art. 7.4

118 Council Regulation (EU) 2015/1589, art. 16.

119 Luja 2021, p. 194.

120 Regulation (EU) 2022/2560, art. 17.

121 Ibid., art. 17.4.

122 Ibid., art. 17.7.

conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest shall be considered in the assessment"[123]. The retroactivity of three years, before 12 July 2023, in practice could mean that transacting companies would have to identify foreign financial contributions back from 2021. Generally, the concentration tool exhibits significant similarities with EU Merger law, taking into account that the FSR itself indicates that it must be interpreted in light of the relevant Union legislation[124]. The only difference worth noting is that, on one hand, Council Regulation (EC) 139/2004, which deals with concentrations with a community dimension, specifies that the notification is communicated following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (always before the concentration is implemented). On the other hand, in the FSR, as the central focus is on foreign subsidies that distort the internal market, it is not a requirement that the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest have taken place.

12.1. Scope and definition of concentration

The challenge with this notification lies in determining which subsidies should be linked or associated with the proposed concentration, as Article 20.3(b) does not explicitly state that the foreign subsidy has been granted in virtue of or with the purpose of carrying out the concentration, but simply that it must have been granted preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Additionally, the most important requirement is that concentrations covered by the FSR involve a change of control on a lasting basis. The FSR does not provide us with any new information in this regard, as this Article is identical, for all intents and purposes, to that of EU Merger law[125]. Indeed, this equivalence was not originally intended in the development of the FSR, as stated in the White Paper, the concept of acquisition also encompassed the acquisition of a percentage of shares, voting rights, or material influence[126]. Enabling the first two individuals to participate in the decision-making process, the concept of "material influence" was introduced to address the acquisition of ownership interests that could provide significant influence over a company, without necessitating a determination of control. However, the concept of "material influence" would prove challenging to apply in all respects, as it could give rise to confusion.

12.2. Notifiable concentrations

As previously mentioned, there are thresholds that, if exceeded, require undertakings to notify to the Commission the concentration. These cumulative requirements are the turnover threshold and the foreign contribution threshold. These requirements state that: (a) "at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and (b) the following undertakings were granted combined aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest: (i) in the case of an acquisition, the acquirer or acquirers and the acquired undertaking; (ii) in the case of a merger, the merging undertakings; (iii) in the case of a joint venture, the undertakings creating a joint venture and the joint venture"[127]. Two conclusions can be drawn from this article. The first one is that only acquisitions of decisive influence trigger a notification obligation. This can be observed due to the high economic value required of the aggregate turnover and financial contribution. It is not a coincidence that in the Commission Staff Working Document Impact Assessment

123 Regulation (EU) 2022/2560, art. 19.

124 Ibid., recital 9.

125 Council Regulation (EC) 139/2004 arts. 3 and 4.

126 White Paper on levelling the playing field as regards foreign subsidies, para. 4.2.2.1.

127 Regulation (EU) 2022/2560, art. 20.3.

Accompanying the Proposal for the Regulation, only significant cases are assessed[128]. The turnover threshold of EUR 500 million exceeds the turnover requirement under EU Merger law, where at least two undertakings are considered, while here the minimum is one. The amount is high because the Commission expects to review no more than 30 concentrations per year[129]. The second conclusion is that the second threshold is based on the notion of financial contribution, which is broader than the notion of subsidy. The concept of financial contribution includes a broad range of support measures which are not limited to monetary transfers, for instance, granting special or exclusive rights to an undertaking without adequate remuneration. What is more, this would mean, for example, to trigger notification obligations even when the undertaking concerned simply carries out public contracts, awarded by foreign State under market terms not having the consideration of subsidy[130]. Thus, the notion of financial contribution does not seem to require selectivity or the existence of a benefit/advantage for the recipient. This may have been done to grant the Commission the discretion to determine which measures are considered financial contributions and which are not. From my perspective, this puts the Commission in a position of superiority compared to foreign governments, as it has the discretion to consider, for instance, the general lowering of corporate taxation rates as a financial contribution that triggers the threshold[131].

12.3. Notification obligation

The undertaking or undertakings are required to notify notifiable concentrations to the Commission before their implementation, following the conclusion of an agreement, announcement of a public bid, or acquisition of a controlling interest. The undertakings concerned may also notify the proposed concentration if they demonstrate a good faith intention to conclude an agreement or public bid. In the case of a concentration involving a merger or acquisition of joint control, the parties to the merger or those acquiring joint control must submit a joint notification. Lastly, and most importantly, there is the *ad hoc* notification request, where the Commission has the authority to request prior notification of any concentration that does not meet the criteria of a notifiable concentration as defined in Article 20. The Commission may make this request at any time before the implementation of the concentration if it suspects that foreign subsidies may have been granted to the undertakings concerned within the three years preceding the concentration.

13. Procedure in concentrations

First, it must be noted that concentrations that have already been awarded prior to 12 July 2023 shall not be subject to investigation. The *ex officio* procedure will not apply if the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023[132]. Returned to the subject at hand, the investigation procedure regarding concentrations bears a strong resemblance to Tool 1. The first thing to understand is that the investigation mechanisms applied in the general review (Tool 1) are the same, therefore there will be two phases: the preliminary review and the in-depth investigation[133]. However, thanks

128 See Case C-611/18 P. In 2015, China National Chemical Corporation (ChemChina) acquired Pirelli through its subsidiary, China National Tyre and Rubber Company (CNRC). The European Commission conducted an anti-subsidy investigation in 2018 and found that CNRC had received various forms of support from the Chinese government for the acquisition. These included a grant of RMB 500m (around EUR 66m) from the Central SASAC, an EUR 800m preferential loan from a bank consortium, a refund of RMB 17m (around EUR 2.13m) on loan interest, and equity participation worth EUR 533m provided by the Government of China through the Silk Road Fund (SRF). The SRF investment allowed CNRC to gain majority ownership in the Pirelli Group. Due to the absence of an appropriate EU instrument, no further investigation into the subsidy or its impact was conducted.

129 See the Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021, II. Overview of costs – Preferred option.

130 See Herbert Smith Freehills 2021, available at https://www.herbertsmithfreehills.com/latest-thinking/eu-proposal-to-address-foreign-subsidies

131 Blockx 2021, p. 7.

132 Ibid., art. 53.3.

133 Ibid., art. 25.1: "Articles 10, 11(1), (3) and (4), Articles 12 to 16 and 18 shall apply to notified concentrations".

to the notification obligation, the Commission will have another starting point for the assessment. A starting point is that it can design itself in terms of the form, content, and procedural details of notifications, and the FSR allows it to create a simplified procedure under Article 47.1. The Commission has 25 working days, which cannot be extended, before making the decision to initiate the in-depth investigation. During these 25 days, the undertakings concerned cannot implement the concentration. This corresponds to the standstill obligation observed in EU merger control[134]. Once the in-depth investigation has started, the Commission has 90 working days, which can be extended by 15 days, and a maximum of 20 days, if the undertakings propose and implement commitments that balance the actual or potential distortion[135]; Therefore, a second standstill obligation can be appreciated here. The FSR also considers situations in which the transaction can proceed, disregarding the standstill obligations. For this purpose, Article 24(3) states that the Commission, in a balancing exercise, will consider the consequences of suspending the transaction for the undertaking and third parties, compared to the distortion that would occur if it were implemented. Furthermore, the Commission is allowed to disregard the time limits when the concentration has been implemented in breach of commitments or when the decision has been revoked, enabling the Commission to make an early decision.

13.1. Decisions

After the in-depth investigation, the Commission has three possible implementing acts in the form of decisions:

- A decision with commitments;
- A no objection; or
- A decision prohibiting a concentration, where the Commission finds that a foreign subsidy distorts the internal market.

In contrast to these three types of decisions, the possibility of imposing a decision with redressive measures, as in Article 7(4), is not included, being replaced by the "decision prohibiting the concentration." Once again, the concentration review tool is similar to merger control, allowing the Commission to make commitments binding but not impose redressive measures not proposed by the undertakings. Finally, it is possible that the Commission may find that a concentration notifiable under Article 21(1) or notified upon request of the Commission under Article 21(5) has already been implemented, causing internal market distortion. In such cases, the Commission can make two decisions, either individually or in conjunction with the prohibition of the concentration (Art. 25.3(c)): order the undertakings concerned to dissolve the concentration, restoring the situation to its state prior to the implementation, or take other measures for the dissolution of the concentration[136].

13.2. Fines and periodic penalty payments on concentrations

Finally, Article 26 stipulates the financial penalties and periodic penalty payments that apply to concentrations, which to some extent do not differ from those found in the general review. Therefore, it can be observed that supplying incorrect or misleading information would result in a fine of up to 1% of the total turnover of the undertaking in the preceding fiscal year. On the other hand, failure to notify, implementation of a notified concentration not respecting time limits or implementation of a prohibited concentration may result in a fine of 10%. This latter scenario occurs when these actions are done intentionally or negligently. Regarding this, I would like to point out that it is interesting that intentional and negligent actions are placed on the same level. It

134 Council Regulation (EC) 139/2004 arts. 7.1.

135 Regulation (EU) 2022/2560, art. 25.4: "The total duration of any extension or extensions pursuant to this paragraph shall not exceed 20 working days".

136 Ibid., art. 25.6.

is possible that undertakings, even if they do not want to cooperate with the Commission by supplying incorrect or misleading information, may prefer to avoid a fine that is up to nine times higher.

14. Third tool: Public Procurement Procedures

14.1. Reasons behind the third tool

The final instrument which addresses foreign subsidies entails legal actions in public procurement procedures. This provision has generated significant controversy since its introduction in the White Paper. As indicated in the summary of responses to the public consultation on the White Paper on leveling the playing field as regards foreign subsidies, some Member States believed that the provision correctly identifies and addresses the problem. However, other Member States and EU stakeholders were skeptical about having a dedicated tool to tackle the distortive effects of foreign subsidies in public procurement. Nevertheless, the reality is that the EU needs this instrument, as the available data has shown a constant increase in the share of cross-border awards to non-EU companies[137]. Although it may seem that the short-term effects of foreign subsidies are beneficial, the long-term effects would lead to a multitude of negative consequences that would be difficult to control. Contract awards to subsidized bidders in procurement directly result in short-term advantages. Opening the procurement market without restricting subsidized bids will attract a high number of interested parties and lead to a decrease in tender prices offered. However, this competitiveness would not be based on the price-quality ratio but rather on choosing the cheapest offer, regardless of the quality of work, supplies, or services provided. This would contradict the idea that the chosen award criteria should not grant unrestricted freedom of choice to the contracting authority, as they should ensure the possibility of effective and fair competition[138]. On the other hand, there might be more negative effects, as the losses of specific contracts may result in circumstances where unsubsidized competitors are unable to compete for contracts on an equal basis at all, missing out on business prospects and permanently losing revenue. Therefore, a short-term positive aspect can lead to an ongoing market failure for both public and private investors. The resulting unequal playing field may eventually discourage unsubsidized bidders from participating[139]. Another aspect that is not considered is that a subsidized economic operator may not guarantee optimal contract performance. If the subsidies cease or are postponed, the execution of the contract would be jeopardized. This would not be the case if there were total transparency, as with European economic operators who do not receive foreign aid and are subject to State aid control.

14.2. Scope and definition of public procurement procedures

Article 27 states that: "Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies, or services concerned." In this case, the requirement is that the foreign subsidies have been granted during the three years prior to the notification. It is interesting to note that in this *ad hoc* mechanism, reference is made only to the granting of the subsidy, subject to notification. However, by aligning this procedure with the *ad hoc* notification mechanism (Article 29(8)), it is necessary that the public contract has not yet been awarded. Chapter 4 presents the definition of notifiable public procurement procedures

137 See Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021: "The share of non-EU companies in indirect cross-border awards amounted to 39.7 % over the period from 2009 to 2015. Specific investigations for contract awards above EUR 250 million recorded in the TED database between 2015 and 2017 75 have shown that 21 of the 435 awardees 76 or 4.8% had an ultimate owner outside the EU."

138 Directive 2014/24/EU recital 92.

139 Ibid.

according to the FSR[140]. In order to do so, two thresholds must be met or exceeded: the estimated value of a procurement of EUR 250 million. The calculation should be based on the total amount payable, excluding VAT, as estimated by the contracting authority. This calculation should include any options and contract renewals explicitly specified in the procurement documents. If the contracting authority includes prizes or payments for candidates or tenderers, these should also be considered when calculating the estimated value of the procurement[141]. The second threshold requires that the economic operator and its main sub-contractors and suppliers have received at least EUR 4 million in financial contributions over the prior three financial years per third country. If the procurement procedure is divided into lots, a third cumulative requirement would be added, which is the value of the lot or aggregate value of the lot equal to or greater than EUR 125 million. The FSR also provides exceptions to procurement procedures that will not be subject to the provisions of the chapter, such as in the case of situations of extreme urgency caused by unforeseeable events beyond the control of the contracting entity. In such cases, where it is necessary, the prescribed time limits for open procedures, restricted procedures, and negotiated procedures with prior call for competition may be deviated from. The contracting entity shall not be responsible for the circumstances invoked to justify the extreme urgency under any circumstances[142]. The same happens when the public procurement procedure is called and awarded in matters of defense and security field[143]. In addition to the exceptions, there are also situations where the notification, required by the thresholds, does not imply that the undertaking is considered under investigation. These situations occur when the works, supplies, or services can only be provided by a particular economic operator. In such cases, there is no need to publish a concession of the contract because: (a) the specific economic operator is the one who will create or acquire a unique piece of art; or (b) there is a lack of competition due to factual reasons; or (c) the economic operator is the beneficiary of an exclusive right[144]. Lastly, it is important to remember that in public procurement procedures, it is not a relationship between two parties, but between three. This is because the contracting authority is the one who has direct contact with the Commission. Therefore, whenever the economic operator is obligated to notify, it is the contracting authority who will explicitly include such obligation in writing among the procurement documents[145].

14.3. Prior notification of foreign financial contributions

If the conditions for notification under art. 28(1) and (2) are met the economic operators will have to notify the received financial contribution (≥ EUR 4 million per third country) to the contracting authority. Although it should be note that economic operators shall list in a declaration all foreign financial contributions received, therefore, those even below EUR 4 million. Professor Raymond Luja raises that if the intention is indeed to report any non-selective foreign financial contribution received by a tendering entity, this would be extremely challenging to accomplish. This could raise concerns about proportionality within the context of free movement provisions entailing a significant administrative burden. The complexity stems from the lead tenderer being obligated to disclose not only subsidies received by its main contractors and suppliers but also subsidies granted to other entities within the same economic group, even though the focus is on "foreign subsidies." Accessing all the necessary information may pose challenges for the entity leading the tender, especially when it comes from foreign governments. On a second instance, Member States' action is required under this tool, since the contracting authority will transfer the notification/declaration to the European Commission[146]. Economic operators have a period of 10 working days to submit the relevant documentation; otherwise, their tender

140 Regulation (EU) 2022/2560, art. 28.

141 Directive 2014/23/EU art. 8; Directive 2014/24/EU art. 5; Directive 2014/25/EU art. 16.

142 Directive 2014/24/EU art. 32(2) point (c); Directive 2014/25/EU art. 50 point (d).

143 Directive 2009/81/EC, recital 4.

144 Directive 2014/23/EU art. 31(4); Directive 2014/24/EU art. 32(2) point (b); Directive 2014/25/EU art. 50 point (c).

145 Regulation (EU) 2022/2560, art. 28.6.

146 Ibid., art. 29.1.

will be deemed irregular and rejected, with the decision being communicated to the Commission. The same applies if the Commission receives an incomplete notification, whereby a period of 10 working days is given to submit the relevant documentation. A subcontractor or supplier is considered main when their involvement is crucial to contract performance, or their contribution exceeds 20% of the tender's value. The main contractor or main concessionaire, as defined in the relevant Directives[147], is responsible for submitting the notification or declaration on behalf of groups, subcontractors, and suppliers. Now, before explaining the *ad hoc* notification request, Article 29(7) states that if the contracting authority or entity reviewing tenders suspects the existence of foreign subsidies, despite the submission of a declaration, it must notify the Commission of such suspicions without delay. However, this does not allow the contracting authority to make a judgment on whether the tender is abnormally low, pursuant to the PPD, as it will be the Commission that analyzes the case based on possible foreign subsidies. This latter idea indicates that it is not necessary to rely on already existing law, which does not adequately assess the matter, but rather the FSR must be applied in its entirety. Finally, prior to the contract being awarded and if the Commission suspects that an economic operator may have benefited from foreign subsidies within the three years preceding the submission of the tender or request to participate in the public procurement procedure, the Commission may require notification of the alleged subsidies received through an *ex officio* procedure.

15. Procedure in public procurement procedures

In all respects, the procedure used in concentrations is essentially the same here, consisting of two phases. First, it is important to note that public procurement contracts that have already been awarded prior to 12 July 2023 shall not be subject to investigation[148]. The *ex officio* review of public contracts already awarded, as stated in Article 9(2) will not apply if the contract has been awarded prior to 12 July 2023. Regarding the procedure, under Article 30(2) The Commission is required to conduct a preliminary review within 20 working days upon receiving a complete notification. The time limits mentioned in this Chapter will start on the working day following the receipt of the notification or the adoption of the relevant decision by the Commission.[149] The previous timeframe may be extended by 10 working days only in justified cases. Based on the preliminary review, the Commission will decide whether to initiate an in-depth investigation and inform the relevant economic operator and contracting authority without delay. If new information indicates incomplete notification or raises suspicions, the Commission may request additional information and reopen the preliminary review. The in-depth investigation should be concluded within 110 working days from receiving the complete notification, with a one-time extension of 20 working days allowed in exceptional circumstances[150]. It may happen that procedure studies multi-stage procurement procedures, in those cases, the Commission will examine the complete notification submitted with the request to participate within 20 working days and suspend the preliminary review until the submission of the final tender. After the final tender is submitted, the preliminary review will be resumed, and the Commission has 20 working days to finalize it, considering any additional information. A decision closing the in-depth investigation should be made within 90 working days from the submission of the completed and updated notification. During the preliminary review and the in-depth investigation, all procedural steps in the public procurement procedure may continue, except for the award of the contract. During the duration of an in-depth investigation the contract cannot be awarded to an economic operator who has submitted a notification under Article 29 until the Commission decides under Article 31(3), or until the time limits specified have expired. In the event that the Commission has not reached a decision within the specified time limit, the contract may be awarded to any economic operator, including the one who submitted the notification. If the contracting authority or contracting entity determines that the most economically advantageous tender was submitted by

147 Directive 2014/23/EU art. 26(2); Directive 2014/24/EU art. 19(2); Directive 2014/25/EU art. 37(2).

148 Regulation (EU) 2022/2560, art. 32..

149 Ibid., art. 53.4.

150 Ibid., art. 30.5.

an economic operator who provided a declaration under Article 29 and the Commission has not initiated a review according to the *ad hoc* review possibility or by the two step procedure, the contract may be awarded to the economic operator who submitted such a tender before the Commission takes any decisions referred to in Article 31 or before the time limits expire.

16. The exclusion of EU funding

The White Paper on leveling the playing field in relation to foreign subsidies introduced to Europe the hypothesis that the same distorting effect, which occurs in mergers or public procurement procedures, can also occur when companies benefiting from foreign subsidies seek access to funding from the EU budget. The Financial Regulation (FR) contains the principles and procedures that govern the establishment, implementation, and control of the EU budget[151]. Until now, the call for tenders has been conducted through the Funding and Tender Opportunities Portal (F&T Portal). The reality is that this proposal has been well received, as all respondents who addressed this matter expressed their support for acting on foreign subsidies in relation to accessing EU funding[152]. Some Member States had proposed an "EU interest test" to assess the eligibility of companies that have received foreign subsidies for EU funding. However, the current EU funding section does not address subsidies, necessitating the need for reciprocity. It is suggested that foreign companies should not receive EU funding if their procurement markets are not open to European companies. Additionally, the majority agrees that companies benefiting from distorting foreign subsidies should be barred from accessing EU funding for a specific period. Despite the enthusiasm surrounding these proposals, the EU has decided not to include the concept of the EU budget in the provisions of the FSR. This may be attributed to two reasons. Firstly, while the EU's 2021-2027 long-term budget, along with the Next Generation EU recovery instrument, amounts to €2.018 trillion, there are different methods of EU budget management as outlined in Article 62 of the Financial Regulation (FR). These methods include direct management, shared management, and indirect management by partner organizations or authorities within or outside the EU.

Consequently, although the EU provides funding for specific programs or projects, it is not directly involved in their day-to-day management. Delegating powers to institutions other than the European Commission, as implied by shared and indirect management, would complicate administratively the few cases that the Commission should analyze. Another reason for the exclusion of EU funding from the FSR is that its scope and focus are not considered essential for the proper functioning of the internal market and achieving a level playing field. The exclusion ensures clarity and coherence within the regulation, allowing the Commission to focus on more targeted matters.

17. Communication of information and third country dialogue

Until now, the role of the Member States regarding the FSR had been limited to facilitating investigations conducted by the Commission within the Union, pursuant to Article 14. However, according to Article 35, the proper implementation of the FSR requires that when a Member State suspects the presence of a foreign subsidy that could distort the internal market, it is obligated to share relevant information with the Commission. This implies that Member States themselves do not have any authority to study these matters, and their role is limited to being informants/collaborators of the Commission. The same role can be attributed to individuals

151 Regulation (EU, Euratom) 2018/1046, art. 176(1): "participation in procurement procedures shall be open on equal terms to all natural and legal persons within the scope of the Treaties and to all natural and legal persons established in a third country which has a special agreement with the Union in the field of public procurement under the conditions laid down in such an agreement. It shall also be open to international organizations".

152 Commission's staff working document on the impact assessment accompanying the Draft Regulation 2021.

or legal entities who, upon noticing blatant foreign subsidies, decide to contact and inform the Commission (e.g., an association of undertakings). On the other hand, it can be appreciated the instrument that signifies the limited authority the Commission holds with respect to third-country actors. The third-country dialogue indicates that in cases where, because of a market investigation conducted under Article 36, the Commission harbors suspicions of repeated foreign subsidies distorting the internal market, or when multiple enforcement actions under this Regulation reveal foreign subsidies granted by the same third country that distort the internal market, the Commission is authorized to initiate a dialogue with the concerned third country. The objective of this dialogue is to explore potential options that aim to achieve the cessation or modification of these subsidies, thereby eliminating their distorting impact on the internal market. Therefore, it can be observed once again how the Commission engages in "diplomatic" relations to safeguard its internal market. Bounded under Article 44.9, which can be understood as a "WTO concern", the EU is obliged to fulfill its international obligations. This is evident in the distinct approach to inspections within the Union compared to those conducted outside the Union, where the EU must seek "permission" from the third country to investigate the granting of the foreign subsidy. Ultimately, it is even more evident in the case of imposing decisions on non-European companies, where it remains to be seen whether foreign companies will accept, on a voluntary basis, to transfer technology or make payments to the EU, as proposed. These remedies may potentially lead to distortions in the relations between EU and non-EU companies within the internal market[153]. The reality of the matter indicates that demanding payments or fines from foreign companies is highly complicated in most cases. This can be observed in the instance when, in 2014, the Lithuanian Competition Authority had to undo the merger involving Gazprom, as it hindered the application of conditions enabling the freedom to purchase natural gas from other suppliers. As a result, the Russian State-owned company was fined EUR 36 million, but to date, it has been impossible to locate assets for confiscation, prompting the council to seek assistance from EU member states where Gazprom might have assets[154]. In summary, the course of action that the EU would take in the event of non-cooperation by a third country remains uncertain, particularly considering that the potential response from the EU may be influenced by geopolitical factors.

18. Implementing and delegated acts

In accordance with Article 291(2) of the Treaty on the Functioning of the European Union (TFEU), which states that "Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission," the FSR empowers the Commission to issue implementing acts in order to achieve uniform conditions. By 12 July 2023, the date on which the majority of the FSR is applicable, the Commission must have adopted implementing acts pertaining to:

(a) the form, content and procedural details of notifications of concentrations.

(b) the form, content and procedural details of notifications of foreign financial contributions and declaration of no foreign financial contribution in public procurement procedures.

(c) procedural details for oral statements pursuant.

(d) details of the disclosure and professional secrecy.

(e) the form, content and procedural details of transparency requirements;

(f) detailed rules on the calculation of time limits.

(g) the procedural details and time limits for proposing commitments under Articles 25 and 31.

(h) detailed rules on the procedural step concerning investigations regarding public procurement procedures.

153 Rodrigues 2021, p. 220.

154 The Baltic Times 2019, available at: https://www.baltictimes.com/lithuanian_anti-trust_body_says_recovering_fine_from_gazprom_is_difficult/

The Regulation grants the Commission authority to enact delegated acts, specifically delegated acts based on Article 290(1). This includes adjusting aggregate turnover thresholds in concentrations by up to 20% in either direction, contingent upon an assessment of the Regulation's implementation and the necessity for threshold modification. The objective is to better detect foreign subsidies with reasonable administrative burden while enhancing Regulation effectiveness. The Commission is obligated to justify this decision and conduct a minimum two-year assessment under Article 49(2). This assessment aims to analyze notifications, closures, objections, commitments, and redressive measures to determine threshold adjustments. Likewise, public procurement thresholds (EUR 250 million) can also be adjusted by 20% via delegated acts, subject to a similar rationale and assessment process as concentrations. Additionally, delegated acts outlined in Article 50 target reducing timelines for reviews and investigations in concentrations and financial contributions in public procurement procedures as specified in Articles 25(2), (4), 30(2), (5), and (6). Notably, Article 49(9) allows only for timeline reduction without the option of extension.

19. Conclusions

First. The EU does not aim to combat Foreign Direct Investment (FDI); it understands that FDI represents a significant portion of its GDP. However, the complete lack of transparency and the legal gaps resulting from the absence of specific regulations on foreign subsidies prevented the European Commission from addressing this issue. This was particularly problematic because there was an unequal situation between European companies, subject to State aid control and EU Merger control, and non-European companies that were not subject to State aid law. The long-term effects, had it not been for the FSR, would have led to a gradual exclusion of European operators from the internal market, with foreign companies increasing their market share and presence, eventually creating a situation of complete dependence on external resources.

Second. Regarding the alignment with already existing provision, it can be concluded that an additional review mechanism has been introduced in relation to corporate mergers and acquisitions. This mechanism will be implemented alongside merger and FDI control, resulting in an increased administrative burden for M&A transactions. On the other hand, in public procurement procedures, the FSR (Foreign Subsidies Regulation) is also established as an additional review mechanism, along with the Public Procurement Directives (PPD), aiming to prevent public entities from awarding contracts to subsidized tenderers.

Third. The concept of a foreign subsidy, as addressed in Article 3(1), pertains to a situation in which a third country, either directly or indirectly, provides a financial contribution that confers an advantage on a specific undertaking or multiple undertakings in their economic activities within the internal market. In order to address this issue, the FSR proposes three mechanisms of action: the *ex officio* general review, the assessment of notifiable concentrations and public procurement procedures, and the *ad hoc* notification assessments. As can be observed, these three types of mechanisms do not adhere to a single inspiration but rather combine different approaches within distinct concepts. This translates into the Commission having ample to act against third-country subsidies that create uncertainty for companies operating in the internal market.

Fourth. The final conclusion that can be drawn is that although it can be argued that the FSR will lead to future claims regarding WTO rules violations or FTAs, it cannot be conceived as a "house built on sand." In all respects, the FSR is not an instrument that aims to grant more rights to Member States, which would contradict the principle of non-discrimination of the WTO, but rather to level the playing field. This instrument, being a vivid example of European competition law and its open strategic autonomy, could encourage third countries to adopt their own State aid control system. This could possibly be the new starting point for third countries to attempt to emulate the EU and not merely perceive the FSR as a trade barrier, as it does not seek to hinder competition in favor of the EU but rather to enhance competitiveness, with the associated benefits. Lastly, the significant change would involve curbing foreign policies that harbor strategic plans in favor of engaging in discussions within the WTO to improve international trade conditions.

20. Bibliography

Primary sources

International Legislation

General Agreement on Tariffs and Trade 1947

"General Agreement on Tariffs and Trade". Not published in the Official Journal of the European Union.

Agreement on Subsidies and Countervailing Measures 1994

"Agreement on Subsidies and Countervailing Measures". Published on the Official Journal of the European Union, L 336/156, 23rd December 2023.

Agreement on Government Procurement 2012

"Agreement on Government Procurement". Published in 2012.

European Primary Legislation

Treaty of Rome 1957

"*Treaty of Rome"* or "*Treaty establishing the European Economic Community*". Not published in the Official Journal of the European Union.

Treaty on the European Union 2012

"*Consolidated version of the Treaty on the European Union*". Published on the Official Journal of the European Union, C 326, Volume 55 of 26th October 2012.

Treaty on the Functioning of the European Union 2012

"*Consolidated version of the Treaty on the Functioning of the European Union*". Published on the Official Journal of the European Union, C 326, Volume 55 on 26th October 2012.

European Secondary Legislation

Council Regulation 139/2004/EC

Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Published on the Official Journal of the European Union, on 29th January 2004.

Council Regulation 2015/1589/EU

Council Regulation 2015/1589/EU of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. Published on the Official Journal of the European Union, L 248/9, on 24th September 2015.

Council and European Parliament Regulation 2016/1037/EU

Council and European Parliament Regulation 2016/1037/EU of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification). Published on the Official Journal of the European Union, L 176/55, on 30th June 2016.

Council and European Parliament Regulation 2018/1046/EU

Council and European Parliament Regulation 2018/1046/EU of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No

1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. Published on the Official Journal of the European Union, L 193, on 30th July 2018.

Council and European Parliament Regulation 2019/452/EU

Council and European Parliament Regulation 2019/452/EU of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. Published on the Official Journal of the European Union, LI 79, on 21st March 2019.

Commission Implementing Regulation 2020/776/EU

Commission Implementing Regulation 2020/776/EU of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt. Published on the Official Journal of the European Union, L 189, on 15th June 2020.

Council and European Parliament Regulation 2022/2560/EU

Council and European Parliament Directive 2022/2560/EU of 14 December 2022 on foreign subsidies distorting the internal market. Published on the Official Journal of the European Union, L 330, on 23rd December 2022.

Council and European Parliament Directive 2009/81/EC

Council and European Parliament Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. Published on the Official Journal of the European Union, L 216/76, on 20th August 2009.

Council and European Parliament Directive 2014/23/EU

Council and European Parliament Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance. Published on the Official Journal of the European Union, L 94, on 28th March 2014.

Council and European Parliament Directive 2014/24/EU

Council and European Parliament Directive 2014/24/EU of 16 February 2014 on public procurement and repealing Directive 2004/18/EC. Published on the Official Journal of the European Union, L 94, on 28th March 2014.

Council and European Parliament Directive 2014/25/EU

Council and European Parliament Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance. Published on the Official Journal of the European Union, L 94/243, on 28th March 2014.

Foreign Legislation

Foreign Investment Law of the People's Republic of China 2019

National People's Congress Foreign Investment Law of the People's Republic of China 2019. **Published on** 15th March 2019.

Subsidy Control Act 2022

United Kingdom's Subsidy Control Act, Published on 15th March 2019.

European Case Law

Case 173/73

Case 173/73, *Italian Republic v Commission of the European Communities,* [1974], ECR-00709. ECLI:EU:C:1974:71.

Case C-76/81

Case C-76/81, *SA Transporoute et travaux v Minister of Public Works,* [1982], ECR-*00417*. ECLI:EU:C:1982:49.

Case T-156/98

Case T-156/98, *RJB Mining v Commission of the European Communities,* [2001], ECRII-00337**.** ECLI:EU:T:2001:29.

Case C-258/99

Case C-258/99, *BASF AG v Bureau voor de Industriële Eigendom (BIE)*, [2001], ECR*I-03643.* ECLI:EU:C:2001:261.

Case C-482/99

Case C-482/99, French Republic v Commission of the European Communities, [2002], ECRI-04397. ECLI:EU:C:2002:294.

Case C-388/01

Case C-388/01, *Commission of the European Communities v Italian Republic*, [2003], ECR*I-00721.* ECLI:EU:C:2003:30.

Case C-109/04

Case C-109/04, *Karl Robert Kranemann v Land Nordrhein-Westfalen,* [2005], ECR*I-02421.* ECLI:EU:C:2005:187.

Case C-141/07

Case C-141/07, *Commission of the European Communities v Federal Republic of Germany*, [2008], ECRI-06935. ECLI:EU:C:2008:492.

Case C-54/99

Case C-54/99**,** *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister***,** [2020], ECR I-01335. ECLI:EU:C:2000:124.

Case C-611/18 P

Case C-611/18 P, *Pirelli & C. SpA v European Commission*, [2020], Not yet published. ECLI:EU:C:2020:868.

Case C-367/19

Case C-367/19, *Tax-Fin-Lex d.o.o. v Ministrstvo za notranje zadeve,* [2020], Court Reports General. ECLI:EU:C:2020:685.

Case T-540/20

Case T-540/20, *Jushi Egypt for Fiberglass Industry v Commission*, [2023], Court Reports General. ECLI:EU:T:2023:91.

Commission's Decisions

COMP/M.4956

Case No COMP/M.4956, *STX/ Aker Yards*, [2008], C1693 final.

Other official sources

European Commission, COM(2020) 456 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Committe of the Regions Empty; "Europe's moment: Repair and Prepare for the Next Generation". Published on 27-5-2020, in Brussels by European Commission. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:456:FIN ; last visited on 8th June 2023.

European Commission, COM(2020) 253 final

White Paper on levelling the playing field as regards foreign subsidies. ". Published on 17-6-2020, in Brussels by European Commission. Retrieved from: https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf ; last visited on 8th June 2023.

European Commission, COM(2021) 350 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions; "*Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery*". Published on 5-5-2021, in Brussels by European Commission. Retrieved from: https://commission.europa.eu/system/files/2021-05/communication-industrial-strategy-update-2020_en.pdf ; last visited on 8th June 2023.

European Commission, COM(2021) 223 final

Commission's staff working document on the impact assessment; "*Accompanying the* Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market". Published on 5-5-2021, in Brussels by European Commission. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:99:FIN ; last visited on 8th June 2023.

European Commission, COM(2022) 433 final

Report from the Commission to the European Parliament, the Council. *"Second Annual Report on the screening of foreign direct investments into the Union"*. Published on 1-9-2022, in Brussels by European Commission. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0433 ; last visited on 8th June 2023.

European Commission, 2004/C 101/03

Commission Notice on cooperation within the Network of Competition Authorities. Published on 27-2-2004. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0427%2802%29 ; last visited on 8th June 2023.

Ministère de l'Economie et des Finances and Bundesministerium für Wirtschaft und Klimaschutz 2019

Communication of Ministère de l'Economie et des Finances and Bundesministerium der Finanzen to the European Commission 2019; *"A Franco-German Manifesto for a European industrial policy fit for the 21st Century"*. Retrieved from: https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2, ; last visited on 8th June 2023.

Kingdom of the Netherlands 2019

Paper of the Kingdom of the Netherlands to the Euroepan Comission 2019; *"Non-paper - Strengthening the level playing field on the internal market"*. Retrieved from: https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field : last visited on 8th June 2023.

European Parliament, (2019/2131(INI))

European Parliament resolution of 18 June 2020 on competition policy — annual report 2019. Published on 25-2-2020, in Brussels by European Parliament. Retrieved from: https://www.europarl.europa.eu/doceo/document/A-9-2020-0022_EN.pdf ; last visited on 8th May 2023.

European Commission 2020

European Commission; “*The European Fund for Strategic Investment”;* Retrieved from: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/economy-works-people/european-fund-strategic-investments_en ; last visited on 8th June 2023.

Eurostat statistic 2022

Eurostat statistic explained 2022; “*World direct investment pattern”.* Published on 5-8-2022. Retrieved from: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=World_direct_investment_patterns ; last visited on 8th May 2023.

European Commission 2022

European Commission; “Investment”; Retrieved from: https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en ; last visited on 8th June 2023.

European Commission, Summary 2020

Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies 2020.. Published in 2020. Retrieved from: https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf ; last visited on 8th June 2023.

Danish Government 2020

The Danish Government's response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies. Published on 23-9-2020. Retrieved from: https://www.eu.dk/samling/20191/kommissionsforslag/kom(2020)0253/bilag/2/2249349.pdf ; last visited on 8th June 2023.

Eurostat statistic 2022

Eurostat statistic explained 2022; “Foreign Direct Investment Flows”. Published in 2022. Retrieved from: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Foreign_direct_investment_-_flows ; last visited on 8th June 2023.

Feport 2020

Feport; *“Position Paper on the White Paper on Foreign Subsidies”*. Published in 2020. Retrieved from: https://www.feport.eu/images/downloads/feport---position-paper-on-white-paper-on-foreign-subsidies.pdf; last visited on 8th June 2023.

Secondary sources

Edited Books

Rodrigues 2021

Nuno Cunha Rodrigues (ed.), “Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU”. Published by *Springer*, First Edition [2021], pages from 197 to 227.

Sánchez Graells 2021

Albert Sánchez Graells (ed.), *European Commission. Trade & investment – addressing distortions caused by foreign subsidies,* Edition [2021], pages from 25 to 45.

Other academic sources

Jones & Davies 2014

Alison Jones and John Davies; “Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate”. Published in*: European Competition Journal 453,* Volume 10(3), by *King's College London*.

Pages from to 1 to 43. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533860; last visited on 8th June 2023.

Melo Araujo 2017

Dr. Billy Melo Araujo; "Setting the rules of the game: the rise (and fall) of mega-regionals, deep integration and the role of the WTO". Published in*: Journal of International Law and Foreign Affairs*, Volume 21(2) [2017], by *UCLA*, pages from 101 to 153. Retrieved from: https://pureadmin.qub.ac.uk/ws/files/128693081/Araujo_Article_28Format_1_Final.pdf ; last visited on 8th June 2023.

McNelis 2019

Natalie McNelis 2019; *Fincantieri's shipbuilding 'European champion' may not float with EU regulato.* .MLex LexisNexis. Retrieved from: https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/fincantieris-shipbuilding-european-champion-may-not-float-with-eu-regulator; last visited on 8th June 2023.

Blažo 2021

Ondrej Blažo; "A New Regime on Protection of Public Procurement against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?". Published in: *International and Comparative Law Review*, by Palacký University Olomouc, pages from 138 to 161. Retrieved from: https://sciendo.com/article/10.2478/iclr-2021-0016 ; last visited on 8th June 2023.

Luja 2021

Raymond Luja; "The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union". Published in: E*uropean State Aid Law Quarterly, Volume 20(2), by Maastricht University. Pages from 187 to 199.* Retrieved from: https://cris.maastrichtuniversity.nl/en/publications/the-foreign-subsidies-regulation-countering-state-aid-beyond-the- ; last visited on 8th June 2023.

Nicolaides 2021

Phedon Nicolaides 2021; *Can the Decision of a Private Entity be Imputed to the State?*. Lexxion. Retrieved from: https://www.lexxion.eu/stateaidpost/can-the-decision-of-a-private-entity-be-imputed-to-the-state/; last visited on 8th June 2023.

Blockx 2021

Jan Blockx; "The proposal for an EU Regulation on foreign subsidies distorting the internal market How will it impact corporate mergers and acquisitions?". Pages from 1 to 9. Retrieved from. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936624 ; last visited on 8th June 2023.

Hornkohl 2022

Dr. Lena Hornkohl; "The EU Foreign Subsidy Regulation – What, why and how?". Published in the upcoming: *The Investment Weapon – Studies on the Law and Geo-economics of Foreign Investment Controls*, Volume 1 [2023], by *Hillebrand*, pages from 1 to 26. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172808; last visited on 8th June 2023.

Sire 2022

Thibault Sire 2022; *The uneven playing field: How to deal with foreign subsidies when assessing mergers?*. Concurrences.. Retrieved from: https://www.concurrences.com/en/review/numeros/no-1-2022/droit-et-economie/new-translation-the-uneven-playing-field-how-to-deal-with-foreign-subsidies ; pages from 1 to 9; last visited on 8th June 2023.

Colomo & Neven 2023

Pablo Ibáñez Colomo and Damien J Neven; "The Extraterritorial Dimension of EU State Aid Control". Published in: *EU State Aid Control: Law and Economics,* Edition 2, by *Kluwer.* Pages from 1 to 47. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375482 ; last visited on 8th June 2023.

Electronic sources

Cassa depositi e prestiti Spa (CDP) 2014

CDP: il Consiglio di amministrazione approva la cessione del 35% di CDP RETI al Gruppo Cinese State Grid Corporation of China. Retrieved from: https://www.cdp.it/sitointernet/page/it/cdp_il_consiglio_di_amministrazione_approva_la_cessione_del_35_di_cdp_reti_al_gruppo_cinese_state_grid_corporation_of_china?contentId=CSA11040 ; last visited on 8th June 2023.

The Baltic Times 2019

The Baltic Times; *Lithuanian anti-trust body says recovering fine from Gazprom is difficult.* Retrieved from: https://www.baltictimes.com/lithuanian_anti-trust_body_says_recovering_fine_from_gazprom_is_difficult/; last visited on 8th June 2023.

Herbert Smith Freehills 2021

Herbert Smith Freehills; *EU proposal to address foreign subsidies,* Retrieved from: https://www.herbertsmithfreehills.com/latest-thinking/eu-proposal-to-address-foreign-subsidies; last visited on 8th June 2023.

Siemenes Shareholder Structure & Voting Rights Announcements

Retrieved from: https://new.siemens.com/global/en/company/investor-relations/share-bonds-rating/shareholder-structure-voting-rights-announcements.html; last visited on 8th June 2023.

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Resumen: El propósito de esta disertación es explicar el nuevo Reglamento (UE) 2022/2560 sobre subvenciones extranjeras que distorsionan el mercado interno, explorando las razones de su creación, los aspectos que lo componen y sus limitaciones. Esta legislación despliega una nueva política, ya que por primera vez se da un paso más allá del control ejercido sobre los actores europeos en el campo de los subsidios. El interés se refleja en su impacto relevante en las nuevas relaciones comerciales entre la UE y terceros países debido al escrutinio del comportamiento ilegal de los actores no pertenecientes a la UE. La mayor parte de la disertación discute cómo se evaluarán los subsidios extranjeros a nivel de la UE a partir de ahora y cómo esto puede prevenir o contrarrestar las distorsiones causadas. Se explicarán las razones detrás de la creación de este nuevo Reglamento, sus pros y contras, sus partes constituyentes, la intersección de las nuevas herramientas con las políticas existentes, las dificultades de implementación y los problemas que deberían ser explorados y aclarados en mayor medida, así como las consecuencias de esta importante novedad.

Abstract: The purpose of this dissertation is to explain the new Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, exploring the reasons for its creation, its components, and limitations. This legislation introduces a new policy, extending beyond control over European actors in subsidies. Its significance lies in its substantial impact on the EU's new trade relations with third countries, scrutinizing the illegal behaviour of non-EU actors. The dissertation predominantly discusses how foreign subsidies will be assessed at the EU level henceforth and how this can prevent or counteract distortions. It will delve into the reasons behind the creation of this new Regulation, its advantages and disadvantages, its constituent parts, the intersection of new tools with existing policies, implementation challenges, and issues requiring further exploration and clarification, along with the consequences of this noteworthy development.

Palabras clave: Reglamento sobre subvenciones extranjeras, RSE, Comisión Europea, países terceros, contribuciones financieras, umbral, igualdad de condiciones.

Keywords: Foreign Subsidies Regulation, FSR, European Commission, third countries, financial contribution, threshold, level playing field.

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Avda. del Valle 21, 28003 Madrid
Teléfono: 91 514 04 22 | Fax: 91 514 04 28
idee@ceu.es, **www.idee.ceu.es**

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