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"FOREIGN SUBSIDIES IN THE EU INTERNAL MARKET: THE REGULATION (EU) 2022/2560"

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I. INTRODUCTION

In recent years, there has been an increase in third-country investment in the EU Internal Market, either through foreign undertakings or EU-based undertakings controlled by foreign ones. These undertakings often benefit from subsidies, i.e., direct or indirect support measures from third countries. These can take various forms: capital increases, exemptions, dedicated state funding, interest-free loans, unlimited state guarantees, reduced revenues from investment, or trade tax reductions.

These subsidies did not alarm the EU as long as it was an outgoing phenomenon from the West to developing countries. On the contrary, the EU looked favourably at foreign subsidies because they represented an important source of innovation and development. However, with the emergence of several global players with government-dominated economies, foreign subsidies became a source of concern since these subsidies were transformed from a tool to stimulate growth into an instrument used to achieve strategic goals and extend the influence of subsidising States.

For instance, there have recently been important acquisitions of EU undertakings by Chinese government-funded investors, such as the investment in the Portuguese electricity grid in 2012, the acquisition of Pirelli by ChemChina in 2015, or the sale of Logicor to China Investment Corporation in 2017. Finally, one must mention the acquisition of 57% of the Port of Piraeus and the more recent acquisition of 24.9% of the Port of Hamburg by the Chinese giant China Ocean Shipping Company (COSCO).

Since foreign subsidies constitute aid of a selective nature, the fear is that they might confer an unfair advantage on their beneficiaries by favouring access to strategic resources or infrastructures, facilitating investments or acquisitions of EU undertakings or participation in public tenders compared to non-subsidised EU competitors. Foreign subsidies may allow more advantageous bids in public tenders through outbidding or bidding at lower prices, thus encouraging aggressive market behaviours that contribute to the exclusion of non-subsidised undertakings. In this way, foreign subsidies can undermine the level playing field for undertakings in the

Internal Market by not allowing EU undertakings to compete on an equal footing with subsidised ones from third countries.

For these reasons, if these foreign subsidies were granted by the EU Member States and were assessed under the EU State Aid framework, they could be considered illegal as they have the potential to cause an inefficient allocation of resources resulting in a loss of competitiveness for undertakings that do not receive such subsidies.[1] Even the European Court of Auditors in 2020, in analysing the two most important Chinese state-led investment initiatives, the New Silk Road and Made in China 2025, pointed out that these strategies benefit from public funding that, if the Member States granted them, would be considered State Aid.[2]

However, while the granting of support measures to EU undertakings by Member States has always been subject to the strict EU State Aid framework, there is no similar discipline for subsidies granted by third countries to their undertakings operating in the EU, nor does European Concentration and Antitrust Law allow the Commission to assess whether an undertaking may have benefited from distortive foreign subsidies.

Even the existing WTO subsidy rules and EU trade defence rules only apply when subsidised goods are exported from third countries to the EU, but not when foreign subsidies favour certain investments into the EU, certain acquisitions, or specific tenders in procurement procedures, or when they affect services and financial flows. Therefore, the current rules fail to cover all distortions caused by foreign subsidies granted by third countries.

Hence, foreign subsidies represent a critical issue for the EU, which boasts an open and strongly interconnected economy. The EU, in fact, despite the abrupt slowdown linked to the pandemic – which caused trade to drop from €6180 billion in 2019 to €5448 billion in 2020[3] – still represents the world's largest trading bloc in front of China and the United States, which have a trading volume of €5818 billion and €5026 billion, respectively.[4]

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[1] EC, *White Paper on levelling the playing field as regards foreign subsidies*, Brussels, 17.6.2020 COM/2020/ 253 final, at 9.
[2] European Courts of Auditors, *The EU's response to China's state-driven investment strategy*, (2020), at 5.
[3] See *DG Trade Statistical Guide*, August 2022, at 21.
[4] *Ibid*.

To counter foreign subsidies that may distort the internal market by supplementing existing EU instruments, on 14 December 2022, the EU adopted Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation).[5] This Regulation has an ambitious goal: to level the playing field between all undertakings operating in the Internal Market, both European and non-European, by closing the existent regulatory gap.

The newly adopted Regulation will apply to all economic activities in the EU: it covers concentrations, public procurement, and all other market situations. In particular, the Regulation grants the Commission authority to examine financial aid given to undertakings operating in the EU by non-EU States and, if required, to remedy any distortions that may have occurred. To ensure a level playing field throughout the Internal Market and consistent application, the Commission will be the sole authority to apply it: to this end, it will have three tools at its disposal: two of prior authorisations aimed at ensuring a level playing field for major concentrations and bids in the large-scale public procurement procedure, and a general market investigation instrument to examine all other market situations as well as concentrations and lower value public procurement procedures.

The Foreign Subsidies Regulation creates an important framework for implementing the European Commission's new industrial strategy and has enormous potential and innovation. Due to its hybrid character, it can also draw on European and international best practices; however, as will later be seen, it presents several problems of interpretation and application. Indeed, the Regulation will have to balance the European interest in maintaining a favourable climate for foreign investment due to their considerable benefits for the Member States' economies[6] with that of enabling EU undertakings to operate on a level playing field. Moreover, the Regulation will have to favour a coherent interpretation of existing EU instruments and those of the WTO system to limit disputes as much as possible, maintaining an open, sustainable, fair, strong, and competitive Internal Market

[5] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 *on foreign subsidies distorting the internal market.*

[6] Communication from the Commission, *Welcoming Foreign Direct Investment while Protecting Essential Interests*, Brussels, 13.9.2017, COM (2017) 494 final.

based on the rules of international cooperation, enabling EU undertakings to operate and compete globally.

This work will provide an initial analysis of the Regulation. In particular, it will trace the complex and lengthy process that led to its adoption, trying to highlight the issues that emerged during the ensuing debate and the connections with existing EU and WTO instruments. The work will also elaborate on possible interpretations of the Regulation consistent with its hybrid approach while, at the same time, highlighting its critical application issues.

Therefore, this work will first reconstruct the economic background that led to the need to address foreign subsidies distorting the Internal Market. This will be conducted using the material available on the European Commission's website, economic data from the 2022 OECD reports on direct investment, and 2022 UNCTAD reports on trade in goods and services.

After explaining the proposal's facts and circumstances, the legal framework governing foreign subsidies will be examined. In particular, it will be given an account of the applicability of WTO discipline, State Aid and Competition Law, EU Directives on public procurement procedures, and the effects theory. A specific focus will then be devoted to the interplay between the Foreign Subsidies Regulation and Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation).

Analysing the existing legal framework before adopting the Foreign Subsidies Regulation will allow for establishing whether the former was inadequate to deal with foreign subsidies. It will also allow confirming the existence of the regulatory gap that led the Commission to propose the adoption of unilateral instruments supplementing the existing legislation.

Next, the work will examine the White Paper on foreign subsidies by accounting for what emerged in the relevant consultations and the critical issues complained of by stakeholders, systematising the various contributions, and providing a summary of the different views and their counterarguments. This analysis will highlight the critical issues that a unilateral framework on foreign subsidies must consider.

The work will then proceed to examine the text of the new Regulation by comparing it with the 2021 proposal and the one that was the subject of the political agreement between the EU Parliament and the Council, outlining its content and procedural rules, examining its ability to provide a solution to the problem and highlighting any open issues.

A case study will complement the analysis to assess the implications and effects of the new Regulation concretely. Indeed, there will be a specific focus on the acquisitions of the Port of Piraeus and – more recently – of the Port of Hamburg by COSCO.

This work consists of five Chapters and a Conclusion.

The first Chapter will examine the economic background of adopting the Foreign Subsidies Regulation, considering foreign direct investment as a tool for growth, development and innovation for the Member States, but also the growing concerns about the increasing interest of China and other foreign States in expanding their markets through foreign investments to extend their political and economic spheres of influence. The Chapter will also analyse the existing legal framework for foreign subsidies by highlighting the inadequacy of multilateral instruments, the inapplicability of EU competition rules, the limits of the effects theory, and the inability to rely on the EU procurement Regulations. A specific focus will then be made on the relationship between the Foreign Subsidies Regulation and the FDI Regulation. Finally, the legal basis of the Foreign Subsidies Regulation is explored in depth.

The second Chapter will analyse the White Paper by giving an account of its structure, the proposals made, and what emerged in the related consultations and the debate that followed. This will make it possible to highlight the main legal issues raised regarding the consistency with Article 32(1) of the SCM Agreement, the breadth of the definition of foreign subsidy, the risk of overlap with existing legal instruments, and the balancing test. Some issues specific to certain sectors that are particularly exposed to foreign subsidies will also be highlighted.

The third Chapter will explore the content of the new Regulation giving an account of the main changes made in the trialogue compared to the original proposal

submitted by the Commission in May 2021. In addition, it will be given a comparative analysis of the WTO framework on State Aid, the difference between the originally proposed EU balancing test and the one introduced in the Regulation, and the purpose of redressive measures to restore a level playing field and not as compensation for an injury. Finally, it will be analysed how the Commission solves the problem of the interplay between different Regulations.

The fourth Chapter will complete with the examination of the acquisition of the Port of Piraeus by COSCO. This case study will allow assessing the impact that the Foreign Subsidies Regulation will have in a sector particularly exposed to foreign takeovers, such as the port sector, and the regulatory vacuum affirmed by the Commission in the White Paper and later confirmed by consultations with almost all European stakeholders. A mention will also be given to COSCO's recent acquisition of the Port of Hamburg.

Finally, after the analysis conducted and apart from the assessment of the effectiveness of the Regulation, both in terms of its application and interpretation by the ECJ, this work will examine how the new Regulation responds to the demands that led to its adoption.

CHAPTER 1 – Filling the gaps for change: levelling the playing field

1. Foreign Subsidies and the New Regulation to level the playing field

The last few years have seen an increase in third-country investment in the Internal Market both through foreign undertakings active in the Internal Market and through undertakings based in the European EU (EU) but foreign-owned.[7] For instance, recently, there have been major acquisitions of EU undertakings by Chinese government-funded investors, such as the investment in the Portuguese electricity grid in 2012, the acquisition of Pirelli by ChemChina in 2015, or the sale of Logicor to China Investment Corporation in 2017. One must mention the acquisition of 51% of the port of Piraeus by the Chinese COSCO.[8]

While this trend is welcomed by States, as FDIs (Foreign Direct Investments) can contribute to development and growth, it has also become a growing concern for the proper functioning of the Internal Market. Such undertakings, in fact, often benefit from subsidies, i.e., direct or indirect support measures from the budgets of third countries,[9] which can take a variety of forms such as capital increases, exemptions, dedicated government financing, interest-free loans, unlimited government guarantees, as well as reduced revenues from investment or trade tax reductions, subsidies.[10]

These foreign subsidies, limited to an individual undertaking, industry, or category, are considered selective.[11] This concept is similar to that of State Aid as defined under Article 107 of the TFEU, the principles developed by the Case Law of the European Court of Justice (ECJ), as well as the enforcement practice of the

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[7] Trends in direct investment are examined in this Chapter, see *infra*, para. 2.1 using updated economic data and aggregate statistics from the *DG Trade Statistical Guide*, August 2022.

[8] Camilla Burelli, *La strategia europea contro le scalate estere alle imprese alla prova dei negoziati*, Eu-Blog, 15 March 2022, available at <https://www.eublog.eu/articolo/34961/La-strategia-europea-contro-le-scalate-estere-alle-imprese-alla-prova-dei-negoziati/>.

[9] European Courts of Auditors, *The EU's response to China's state-driven investment strategy*, review n. 3, 2020, para. 10 and *Closing remarks and challenges*, para. 69.

[10] *Commission Staff Working document impact assessment accompanying* the *Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, SWD (2021) 99 final, Brussels, 5 May 2021, at 7.

[11] Benedetta Lubrano, *Le sovvenzioni nel diritto amministrativo (profili teorici ed evoluzione storica nel contesto del diritto europeo)*, *Le sovvenzioni nel diritto amministrativo (profili teorici ed evoluzione storica nel contesto del diritto europeo)*, Ph.D. Thesis in Public Law at Alma mater Studiorum - University of Bologna.

Commission.[12] Similarly to State Aid, also foreign subsidies may give their recipients an unfair advantage that facilitates investment or acquisitions of EU undertakings or allows them to bid more advantageously in public tenders by helping to exclude non-subsidised undertakings or to favour business activities by undermining the level playing field among undertakings in the Internal Market by not allowing EU undertakings to compete on an equal footing with those subsidised from third countries.[13]

Emblematic in demonstrating the disadvantageous position in which EU undertakings may find themselves compared to those benefiting from foreign subsidies is the 2008 decision by which the EU Commission declared compatible with the Internal Market the proposed concentration of STX Corporation Co. (STX South Korea) to acquire control of Aker Yards A.S. A (Aker Yards, Norway), despite Fincantieri's complaint that the merged entity would benefit from State subsidies from South Korea.[14] This was upheld in 2019 when the Commission rejected the Franco-German concentration in the railway sector between 2019 Alston and Siemens[15] as a danger to competition in the Internal Market and not allowing EU undertakings to compete on an equal footing with China Railway Rolling Stock Corporation (CRRC). This SOE benefits from significant state support.[16]

And, again similar to State Aid, foreign subsidies can foster subsidy-seeking behaviour among undertakings, triggering an inefficient process that can lead to higher prices for the purchase of a good than the market price, outbidding,

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[12] See in this regard, *Commission Notice on the notion of State Aid as referred to in Article 107(1) of the TFEU* (2016/C 262/01), OJEU, 19.7.2016, where in addition to containing the Court's clarifications regarding the interpretation of Art. 107, *inter alia*, the main ECJ Case Law on the notion of an enterprise, the State origin of resources, and the notion of advantage is given in footnotes.

[13] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 7.

[14] Decision of 5 May 2008, *declaring a concentration to be compatible with the common market and the EEA Agreement*, Case No COMP/M.4956, STX/Aker Yards, C (2008) 1693 final, para. 79.

[15] Decision of 6 February 2019, *declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement*, Case M.8677, *Siemens/Alstom*, C (2019) 921 final.

[16] See Luca Rubini, *Transcending territoriality: Expanding EU State Aid control through consensus and coercion*, Working paper, European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme, at 9 (note 46), noting that from data found in the Global Trade Alert database, the CRRC reportedly received annual subsidies of USD 2485 million in 2016, USD 1653 million in 2017 and USD 2063 million in 2018, (Intervention 77444 and Intervention 77445), available at <www.globaltradealert.org>.

preventing other unsubsidised buyers from making efficiency gains or accessing essential technologies.[17]

One example is the Federation of EU Private Port and Terminal Companies (FEPORT) complaint regarding the acquisition by COSCO of a 35-year lease of the Greek Port of Piraeus, made in an international tender for the highest price. This investment then extended far beyond the seaport.[18] Another example is the winning bid of a Chinese consortium for the Pelješac Bridge project in Croatia[19]. That is because the economic effect of subsidies, i.e., market distortion, does not depend on whether the granting party is a Member State or a third country.

Indeed, the Commission, in examining the COSCO case in 2015 and 2016, respectively, focused on State Aid granted by Greece as a Member State but did not delve into foreign subsidies granted to this SOE by China.[20]

However, while existing State Aid control within the EU has a clear and strict framework that determines when subsidies granted by Member States are compatible with the Internal Market to limit distortion of competition and negative impact on other Member States' markets, third countries do not have similar control mechanisms for the subsidies they grant.[21]

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[17] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 7. See also the European Construction Industry Federation, according to which, in recent years, there has been an increase in cases involving third-country undertakings bidding for construction projects of all sizes across the entire EU. A major concern is China's increased market presence of state-owned undertakings. These SOEs benefit from a captive Internal Market and easy access to funds from national policy banks. As a result, when bidding for construction projects, these undertakings can offer tenders at prices that no privately-owned competitors can afford.
available at <https://www.fiec.eu/application/files/1216/3966/9161/2021-December-FIEC_Article-Distortive_Foreign_Subsidies-Construction_Europe.pdf>.

[18] On the international bidding process that led to the acquisition of the Port of Piraeus by COSCO Pacific Limited, a subsidiary of China Ocean Shipping Group Company (COSCO), see the Law n. 3755/2009, *Sanction of the Concession Agreement of Pier II and III port facilities of the Container Terminal of Piraeus Port Authority (PPA) SA and Regulation of relevant issues*, Government Gazette Issue A52, 30 March 2009. More in detail, see *infra*, Chapter 4.

[19] European Construction Industry Federation, cit. *supra* but see, also, Andre Tartar, Mira Rojanasakul, and Jeremy Scott Diamond, *How China Is Buying Its Way Into Europe*, 23 April 2018, available at <https://www.bloomberg.com/graphics/2018-china-business-in-europe/?leadSource=uverify%20wall>.

[20] See Commission Decision (EU) 2015/1827 of 23 March 2015 *on State aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited*, OJEU L 269/93 and the subsequent Commission Decision (EU) 2018/612 of 7 April 2016 *on State Aid SA. 28876 - 2012/C (ex CP 202/2009) implemented by Greece in favour of Piraeus Container Terminal*, OJEU L 101/73. For an in-depth examination of the COSCO case, see *infra*, Chapter 4.

[21] Claus-Dieter Ehlermann and Martin Goyette, *The Interface between EU State Aid Control and the WTO Disciplines on Subsidies*, *Eu State Aid versus WTO disciplines on subsidies*, European EU State Aid framework Quarterly, Vol. 5, No. 4, 2006, at 695.

This produces an asymmetry between Europe and other trading blocs that results in the aforementioned unequal conditions,[22] with an aggravating factor: unlike State Aid policy, which is defined by the Commission in close cooperation with the Member States in any case to limit distortions in the Internal Market, foreign subsidies are not oriented towards the achievement of Internal Market objectives but may conceal different strategic goals such as, for example, establishing a strong presence in the EU or promoting an acquisition to relocate technologies to different extra-EU sites of production.[23]

Therefore, the EU was faced with a complex legal question, namely, whether the existing legal instruments were sufficient to address the distortions caused by foreign subsidies or whether, faced with the regulatory gap, it was necessary to supplement the toolbox available to the Internal Market and, in this case, choose whether to continue with multilateral trade policy instruments or to act unilaterally by proposing a new Regulation. The latter is the choice made by the Commission with its proposal for the new Foreign Subsidies Regulation, presented on May 5, 2021.[24]

Due to its innovative nature, the proposed Foreign Subsidies Regulation inevitably raises many legal questions. However, examining them by considering their particular background is only possible. Therefore, this Chapter seeks, in addition to shedding light on the economic, political, and legal context that led the Commission to act to fill the legal gaps with the proposed Foreign Subsidies Regulation, to assess whether the analysis carried out by the Commission was complete or exhaustive, or whether there already exist in the EU system, including rules arising from international agreements signed as part of international organisations such as the World Trade Organization (WTO), appropriate legal instruments to address the distorting effects of foreign subsidies in the Internal

[22] See, in this regard, Massimo Merola's talk as part of the webinar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, organised by the Italian Antitrust Association, 19 November 2020, available at <https://www.associazioneantitrustitaliana.it/attivita/foreign-direct-investments-golden-power-and-foreign-subsidies-iniziative-europee-e-nazionali/>.

[23] Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, Concurrences No. 4, November 2021, at 210-214.

[24] Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market, Brussels, 5 May 2021, COM/2021/223 final.

Market. In the latter case, the decision made by the Commission would primarily belong to expediency profiles.

To this end, the Chapter first summarises the debate on foreign subsidies by giving an account of the reasons that led to the change of pace. Then, it delves into whether the statistical data updated to August 2022 on the Internal Market's trade with nonmarket economies[25] and recent data on FDI confirm the Commission's analysis, comparing it to those contained in the White Paper that refers to the pre-pandemic period. It will also question whether, on any misalignment, the legal uncertainty connected to the announced change in the rules on foreign subsidies may have affected.

The Chapter then addresses the changes related to the enlargement of the WTO to non-market economies and how this system has not proved capable of dealing with the related interactions, including those related to the risk that some investment strategies of these subsidised economies may be guided not exclusively by market logic. A major part of the investigation is, then, addressed to the issue of the regulatory gap, i.e., the examination of the legal framework of foreign subsidies in EU Law, which the Commission has found insufficient to address the distortions in the Internal Market caused by foreign subsidies.

These are the rules on competition, State Aid, and trade policy agreements, in addition to the public procurement Directives and the FDI Regulation.[26] It will

[25] In general, the term "*nonmarket economy country*" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so merchandise sales in such country do not reflect the fair value of the merchandise. This is not just a definitional issue since under the legal framework of the World Trade Organization, for example, China's designation as a nonmarket economy would allow its trading partners, including the United States, to use a special framework to determine whether Chinese exports are being sold at unfairly low prices and if so, to apply additional antidumping duties. In this regard, see Joel Trachtman, *Is China a Non-Market Economy, and Why Does It Matter?*, on Econofact,12 April 2017, available at <https://econofact.org/is-china-a-non-market-economy-and-why-does-it-matter>. The list of non-market economies, compiled by the International Trade Administration, includes The Republic of Armenia, the Republic of Azerbaijan, Republic of Belarus, the People's Republic of China, Georgia, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, Turkmenistan, Republic of Uzbekistan, and the Socialist Republic of Vietnam, available at International Trade Administration, available at <https://www.trade.gov/nme-countries-list>. On the effects of WTO enlargement to countries where the State plays a vital role in the economy, see also Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*.

[26] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 *establishing a framework for the screening of foreign direct investments into the Union*, OJEU L 79 I/1

be argued that although the Commission's examination of the existing legal instruments is not exhaustive because it did not consider the effects theory and the discipline on the exercise of special powers (Golden Power), nevertheless, even these instruments do not efficiently tackle the phenomenon of foreign subsidies.

As reflected in its jurisprudential application, the effects theory has yet to identify a general principle that would make the assessment applicable to all cases. Furthermore, there is no obligation to assess foreign subsidies since there is no purpose of preventing the distortion of the Internal Market. The Regulations on the exercise of special powers, in addition to being different among Member States, together with the Regulation for the control of foreign subsidies, are also intended to provide tools to address potential risks to public safety and order but not to level the playing field.

Having ascertained the existence of the regulatory gap, the question will arise as to whether Articles 207 and 114 TFEU can be used as a legal basis to regulate the matter unilaterally. Indeed, analysing the legal basis is an issue of fundamental importance in assessing the proposal's legitimacy. As the Court's Case Law has repeatedly emphasised, using an incorrect legal basis would render any measure useless because the correct legal basis has constitutional significance. Using an incorrect legal basis is likely to invalidate the act.[27]

1.1. The debate on foreign subsidies

Although the doctrine has not provided an unambiguous definition of a subsidy[28], partly due to the lack of Internal Market terminology used by nation-

[27] See the Opinion of the Court of 6 December 2001**,** Cartagena protocol, ECLI: EU:C:2001:664, at I, para. 5. For an overview of the CGEU's major decisions on the choice of legal basis see Annegret Engel, *the Choice of legal basis for act of the European Union: competence overlaps, institutional preferences, and legal basis litigation*, Springer, 2018.

[28] On the definition of subsidy in EU and National Law, see Roberto Cippitani, *La sovvenzione come rapporto giuridico*, ed. by Iseg Gioacchino Scaduto, Roma, 2013, 2 ed. (Monografie di diritto e Processo a cura di Antonio Palazzo), at 32-52 and, always, Roberto Cippitani, (2011*), Il concetto giuridico di sovvenzione nel diritto dell'Unione europea e nel diritto nazionale*, Contratto e Impresa. Europa, at 335-369. On the doctrine's difficulty in providing a unified legal framework for the concept of subsidy and the use of non-univocal terminology, see also, in addition to Roberto Cippitani, *Il concetto giuridico di sovvenzione nel diritto dell'Unione europea e nel diritto nazionale* cit. *supra*, see Benedetta Lubrano, *Le sovvenzioni nel diritto amministrativo (profili teorici ed evoluzione storica nel contesto del diritto europeo)*, cit. *supra*, at 120 ff.

states[29], EU Law, and non-EU States, [30] historically, subsidies have been perceived as a legal instrument used by States to support or stimulate private economic initiative and promote their interests, including strategic ones.[31] However, some Internal Market elements can be found in the definitions generally used, namely, the existence of a financial contribution from the budget of a state, not granted for consideration and such as to confer an advantage to a subject, defined as a beneficiary, who conducts an "*economic activity*" in each market.[32]

Regarding foreign subsidies, these have not been a cause for alarm in the EU as long as they were primarily an outbound phenomenon from the West to developing countries. The situation has become more complex with the emergence of China as a global power, and fears have grown that subsidies have been transformed from a tool to stimulate growth to a tool used to achieve strategic goals and extend influence.[33] However, the debate on foreign subsidies given by third countries to undertakings is familiar.[34]

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[29] For the definitions of for subsidy used by France and Spain compared with those of Anglo-American and Canadian Law, see Roberto Cippitani, *La sovvenzione come rapporto giuridico*, cit. *supra*, Chapter 1, para. 6, at 33-35 and also Roberto Cippitani, *Il concetto di sovvenzione nel diritto dell'Unione europea e nel diritto nazionale*, cit. *supra*, at 337-338.

[30] Compare, in this regard, the definition of grant used in European Union Law in Council Regulation (EC, Euratom) No. 1605/2002 of the Council of June 25, 2002 on *the Financial Regulation applicable to the general budget of the European Communities*, OJEU, L 248/1, Title VI, Chapter 1, Art. 108, according to which grants are direct financial contributions from the budget, made by way of a donation to finance the following an action designed to promote the achievement of an objective forming part of a European Union policy or the operation of a body pursuing an aim of general European interest or an objective forming part of a European Union policy with that, for non-EU States, contained in Art. 1 of the SCM Agreement that a subsidy exists if there is a financial contribution by a government or public body in the territory of a member, a direct transfer of funds such as grants, loans, capital infusions, potential direct transfers of funds or liabilities such as loan guarantees, a waiver of revenue otherwise due for tax incentives such as tax credits, a government provides goods or services, or there is any form of income or price support within the meaning of Art. XVI of the GATT, as well as that of subsidy of Anglo-American law contained in the *Black's Law Dictionary*, 5th ed., 1979, according to which a subsidy is a money subsidy made by the government for the benefit of the promoters of any enterprise, work or improvement in which the government desires to participate or which is considered a proper subject for government aid because such purpose may be of benefit to the public.

[31] See Victor Crochet and Marcus Gustafssont, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, World Trade Review, No. 20, Issue 3, 2021, at 343.

[32] See, regarding recurring elements of national and EU Law Roberto Cippitani, *Il concetto di sovvenzione nel diritto dell'Unione europea e nel diritto nazionale*, cit. *supra*, at 338. See also Claus-Dieter Ehlermann e Martin Goyette, *The Interface between EU State Aid Control and the WTO Disciplines on Subsidies, Eu State Aid versus WTO disciplines on subsidies* regarding WTO and EU Regulations, and more specifically to the benefit, cit. *supra*, at 704.

[33] Victor Crochet and Marcus Gustafssont, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 345.

[34] On the debate before the Regulation proposal, see Alain Alexis, *Foreign Subsidy Controls: The new European Commission proposal*, cit. *supra*. The topic, in doctrine, had already been mentioned,

The issue of foreign subsidies was already addressed in 1986, with the adoption of a sectoral Regulation of maritime transport aimed at countering injurious pricing practices of third-country undertakings, clarifying that some practices could exist thanks to "*non-commercial advantages granted by a State which is not a member of the Community*",[35] and then in 1997 when the tonnage tax, which allowed operating aid through an optional flat-rate system of taxation for undertakings operating in the maritime sector, as compensation for the tax incentives enjoyed by shipping companies established in third countries.[36] For the same reason, other sectoral Regulations were adopted in 2016 in the shipbuilding[37] and aviation sectors[38], with the possibility of imposing countervailing duties when it can be demonstrated that a third-country subsidy causes injury to the EU industry.

In the past, the EU Commission has also been criticised by some governments for imposing a strict State Aid policy. At the same time, EU undertakings' competitors in third countries enjoyed generous subsidies, as complained by France and Germany following the Alston Siemens ruling.[39] Nevertheless, for a long time, at least until the announcement of its willingness to explore the issue further with the White Paper,[40] the Commission did not consider State Aid control to be penalising EU undertakings and has, on the contrary, sought to export its model of State Aid control to all bilateral agreements.[41]

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including by Claus-Dieter Ehlermann and Martin Goyette, *The Interface between EU State Aid Control and the WTO Disciplines on Subsidies, Eu State Aid versus WTO disciplines on subsidies*, cit. *supra*, at 695.

[35] Council Regulation (EEC) No 4057/86 of 22 December 1986 *on unfair pricing practices in maritime transport*, 31 December 1986, N. L 378 /14, eighth consideration.

[36] See Alain Alexis, *Foreign Subsidy Controls: The new European Commission proposal*, cit. *supra*, at 211.

[37] Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessel, OJEU L 176/1.

[38] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJEU L 176/55.

[39] See, *inter alia*, Leigh Thomas, *France, Germany steps up pressure over Alstom-Siemens deal*, 21 January 2019, Reuters, available at <https://www.reuters.com/article/us-alstom-m-a-siemens-idUSKCN1PF0PK> and Nicolò Carboni, *Il caso Alstom/Siemens e la miopia geopolitica di Bruxelles*, Treccani, 19 February 2019, available at <https://www.treccani.it/magazine/atlante/geopolitica/Il_caso_Alstom_Siemens_e_la_miopia_geopolitica_di_Bruxelles.html>.

[40] Communication from the Commission to the European Parliament, the European council, the council, the European economic and Social Committee and the committee of the regions *a new industrial strategy for Europe*, COM/2020/102 final 10 March 2020.

[41] See Massimo Merola, webinar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, cit. *supra*.

Otherwise, the Commission has always tolerated asymmetries with foreign subsidies, drawing inspiration from the competitive training theory according to which State Aid discipline does not cause a disadvantage for EU undertakings but, in the medium and long term, creates competitive leverage because it creates beneficial competition training on the international level as well.[42] This is because the Court's jurisprudence considers the defence of the consumer to be the main objective to be pursued; therefore, the entire legislation has been built around this principle, with very little consideration for any collateral.[43]

The change of pace from this interpretation is due to multiple factors. First of all, in the aftermath of the Alston Siemens decision, there has been a shift in sentiment among Member States, with the French and German governments publishing a *Manifesto* on 19 February 2019 announcing their intention to propose a change to competition rules.[44] France and Germany's call was also supported by the Dutch government, which published a non-paper to strengthen the level playing field in the Internal Market,[45] and by Italy and Poland in a joint letter with France and Germany addressed to Commissioner Vestager, dated 4 February 2020.[46]

The European Court of Auditors itself made similar remarks in 2020, analysing the two most important investment initiatives launched by China, the New Silk Road and Made in China 2025, noting that these investment strategies involve Chinese state-owned undertakings benefiting from state public funding that, if granted by Member States, would have been considered State Aid.[47]

In addition, the trade wars between China and the U.S. have led to a rehashing of some trade agreements, the stalling of negotiations to change WTO

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[42] Ibid. cit. *supra*.
[43] See, Nicolò Carboni, *Il caso Alstom/Siemens e la miopia geopolitica di Bruxelles*, 19 February 2019, cit. *supra*.
[44] Bundesministerium fur Wirtschaft und Energie and Ministère de l'Economie et des Finances, *Manifeste franco-allemand, pour une politique industrielle européenne adaptée au XXIe siècle*, Paris, n. 1043, 19 February 2019.
[45] The Dutch Non-paper, *Strengthening the level playing field on the Internal Market*, is available at <https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field>.
[46] Bundesministerium fur Wirtschaft und Energie, Ministero dello Sviluppo Economico, Ministère de l'Economie et des Finances and Ministerstwo Rozwoju, joint letter from Germany, Italy, France and Poland to Commissioner Vestager, 4 February 2020.
[47] See European Courts of Auditors, *The EU's response to China's state-driven investment strategy*, cit. *supra*, para. 70. See also para. 10, where the ECA defines the set of initiatives for a new Silk Road and Made in China 2025 as "*China's state-driven investment strategy*".

rules, and protectionist tendencies of some States in the wake of the pandemic that have forced the need to conduct a rethink.[48]

Faced with these concerns, the Commission did not remain inactive and, in the new EU Industrial Strategy presented on 10 March 2020[49] for a green, digital, competitive, and more resilient Europe, announced its intentions to launch an in-depth review on how best to strengthen anti-subsidy mechanisms and instruments,[50] through the presentation of the White Paper on a level playing field for foreign subsidies, later adopted on 17 June 2020.[51]

The White Paper first delved into the conditions and circumstances that make it necessary to address the issue of foreign subsidies, also illustrating typical examples of subsidies and providing an analysis of existing legal instruments. The analysis highlighted a gap in EU trade, procurement, and Competition Law and its inadequacy in preventing the distorting effects of foreign subsidies.[52] While there is a strict discipline of State Aid on the concession of support measures to EU undertakings by the Member States, there is no similar discipline for subsidies given by non-EU countries to undertakings operating in the Internal Market.[53]

The White Paper also noted that the EU Concentration and Antitrust Law does not allow an assessment of whether an undertaking benefits from distortive foreign subsidies and that the EU's WTO rules on subsidies and trade defence are only applicable when subsidised goods are exported from third countries to Europe but not when subsidies favour investments, acquisitions or tenders in procurement procedures or when they affect services and financial flows. In the Commission's

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[48] See, in this regard, Massimo Merola, webinar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, cit. *supra*, but also Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, in Economic Law: The Application of EU Economic Law Outside the Territory of the EU, Springer 2021, at 197-200. On the future of Multilateralism, *inter alia*, see also Marco Zupi, *Il futuro incerto del multilateralismo commerciale e il ruolo dell'Organizzazione mondiale del commercio*, Osservatorio di politica internazionale, Centro Studi di politica internazionale (CeSPI), December 2018, No. 17. On the inadequacy of the WTO system to deal with the issues posed by WTO enlargement see also Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*, at 148.

[49] Communication from the Commission to the European Parliament, the European council, the council, the European economic and Social Committee and the committee of the regions *a new industrial strategy for Europe*, cit. *supra*.

[50] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*.

[51] *Ibid.*

[52] *Ibid*. at 9.

[53] *Ibid.* at 6.

view, not even the WTO system covers all distortions caused by foreign subsidies granted by third countries.[54] The White Paper thus suggested reasoning on the possibility of introducing new regulatory instruments, outlining several approaches and leaving it to the Commission to decide which would be the most effective in dealing with foreign subsidies.[55]

The White Paper was followed in the autumn of 2020 by a broad public consultation process among the Member States, EU institutions, and all stakeholders - including industry, social partners, and civil society organisations, but also ordinary citizens, aimed at receiving views and contributions on the strengths and weaknesses of the envisaged instruments to support the Commission in choosing the instrument deemed most effective in addressing the challenges posed by foreign subsidies so that it could present a legislative proposal. The general consultation was then accompanied by a further targeted consultation between November 2020 and January 2021.

Following the reflection initiated with the White Paper, the Commission presented a proposal for a Foreign Subsidies Regulation on 5 May 2021,[56] accompanying it with an impact analysis detailing the rationale behind the proposed Regulation.[57] The impact analysis confirmed, first, the lack of transparency and the sketchiness of data on third-country subsidies both because they are scattered among various countries and sectors and because of the poor compliance with the subsidy reporting obligation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) already highlighted in the White Paper as well as the need for more detailed investigations based on more advanced investigative tools.[58]

The impact analysis also describes several case studies that provide a clear indication of how foreign subsidies may have distorted the Internal Market by facilitating the acquisition of EU undertakings, influencing investment decisions, distorting trade or the behaviour of beneficiary undertakings, or otherwise creating

[54] *Ibid.* at 11.
[55] *Ibid.* at 10.
[56] Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market, cit. *supra*.
[57] Commission staff working document impact assessment accompanying the *Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*.
[58] *Ibid.* cit. *supra*, at 10.

an unlevel playing field, by examining, in more detail, some of the EU's trading partners, such as China, the US, Russia.

1.2. The journey so far

The proposal for a Regulation presented by the Commission was the subject of an extensive discussion between Parliament and the Council, which led to the provisional political agreement reached on 30 June 2022.[59]

The Agreement followed the 4 May negotiating position adopted by the EU Parliament with 627 votes in favour, eight against and eleven abstentions, at the same time as the negotiating mandate[60] agreed upon by the EU Council. [61] The draft Regulation was approved on 28 November 2022 by the EU Council.[62] The Regulation was then published in the Official Journal of the EU on 23 December 2022,[63] and entered into force on 12 January 2023, i.e., 20 days after its publication.[64] Its provisions will apply as of 12 July 2023,[65] whereas the notification requirements for mergers and acquisitions and public procurement procedures will only apply as of 12 October 2023.[66]

The new Regulation responds to the danger posed by foreign subsidies granted in various forms, such as, for example, interest-free loans, unlimited state guarantees, tax exemptions or reductions on investments or foreign trade, or even dedicated state financing by non-EU countries to economic operators active on EU territory[67]. Such subsidies, if granted by the Member States and assessed under the

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[59] European Parliament, Provisional Agreement Resulting from Institutional Negotiations, 11 July 2022.
[60] Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market – Mandate for negotiation with the European Parliament*, 4 May 2022, 8713/22.
[61] EP, negotiating position of European Parliament, *Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, (COM (2021)0223 – C9-0167/2021 – 2021/0114(COD)).
[62] Regulation of The European Parliament and of the Council *on foreign subsidies distorting the Internal Market*, PE-CONS 46/22.
[63] See Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 *on foreign subsidies distorting the internal market*, OJEU L 330/1.
[64] *Ibid*. Art. 54(1).
[65] *Ibid*. Art. 54(2)
[66] *Ibid*. Art. 54(4).
[67] EC, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*.

EU State Aid framework, could be considered unlawful because they can encourage an inefficient allocation of resources resulting in a loss of competitiveness for EU undertakings without the same support measures.[68]

Therefore, according to the Regulation, the Commission will be able to investigate foreign subsidies granted to undertakings active in the EU by non-EU governments. If the Commission determines that these financial contributions are distortive subsidies, it can take measures to mitigate their impact.

The Commission will have three instruments at its disposal for this purpose.

A first, notification-based instrument to investigate concentrations involving a financial contribution from a non-EU government where the acquired undertaking, one of the merging parties, or the joint venture generates an EU turnover of at least €500 million, and the transaction involves a foreign subsidy of at least €50 million.[69]

A second, notification-based instrument to investigate bids in public procurement contracts involving a financial contribution from a non-EU government, where the estimated contract value is at least €250 million, and the bid involves a foreign financial contribution of at least €4 million from a third country.[70] A third, more general instrument to investigate all other market situations where the Commission may initiate an *ex officio* review or request an ad hoc notification for smaller concentrations and public procurement procedures.

Once in force, the Regulation will become applicable in all Member States and covers all economic sectors, including those of strategic interest to the EU and critical infrastructure, such as those referred to in Article 4(1)(a) of the FDI Regulation.[71]

The Regulation also provides that the Commission, within three years of its entry into force, publish and update guidelines concerning the criteria for determining the existence of a distortion caused by a foreign subsidy in the Internal Market, the application of the balancing test, the application of its power to require prior notification of any concentration or foreign financial contributions received

[68] *Ibid.*
[69] See Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 *on foreign subsidies distorting the internal market*, cit. *supra*, Art. 20(3) let a) and b).
[70] *Ibid.* Art.28(1) let. a) and b).
[71] *Ibid.* third considered.

by an economic operator in the context of a public procurement procedure and the assessment of distortion in a public procurement procedure.[72]

The Commission should consult appropriately with stakeholders and Member States in formulating these guidelines.[73] The guidelines will make it possible to simplify the applicable regime as much as possible, to facilitate the application of the new rules, especially when they dovetail with the regulatory provisions already in force, thereby favouring the coherence of the system.

The Commission will also have a wide range of investigative powers to gather the necessary information, including requesting information from undertakings and carrying out inspection missions within and outside the EU.[74] If the Commission finds that a foreign subsidy distorts the Internal Market, it may balance its negative effects against the positive effects on the development of the subsidised economic activity.[75] If the negative effects outweigh the positive ones, the Commission may impose structural or non-structural reduction measures or accept commitments to remedy the distortion.[76]

2. Some reflections on the background

With the new rules, the EU does not intend to criminalise foreign investment but to ensure a level playing field throughout the Internal Market[77] to prevent less efficient operators who benefit from foreign subsidies from enjoying a competitive advantage over those who, while more efficient, do not benefit from such foreign subsidies. In this regard, the analysis of the Regulation can only start from the analysis of the economic and legal context that led to it.

2.1. The economic context and the emergence of foreign subsidies

Europe has undoubtedly played a significant role in shaping the rules of the WTO trade system and has, in return, received considerable benefits. Indeed,

[72] Seventy-third consideration.
[73] *Ibid*. and Art. 46.
[74] *Ibid*. Arts. 14 and 15.
[75] *Ibid.* Art. 6
[76] *Ibid.* Art. 7
[77] See the eighth consideration.

establishing the WTO marked a major step forward in creating a more integrated, dynamic, and open international trading system. Moreover, as the following statistics show, an evident connection between free and fair trade and economic growth is notable.[78]

The updated aggregate statistics confirmed the economic analysis made by the Commission first in the White Paper and then in the impact analysis. In fact, with 16% of the global Gross Domestic Product (GDP), along with China and the USA with 16.4% and 16.3%, respectively, Europe is one of the world's largest economies in which trade has become essential, [79]accounting, according to Eurostat data updated to 2022, for almost 43% of Europe's total GDP of €14,454 billion.[80] The Eurostat data also show that Europe, despite the abrupt slowdown brought about by the COVID-19 pandemic[81], with total trade in goods and services of €6275 billion in 2021, remains the largest trading bloc in front of China and the USA, with total trade in goods and services of €5818 billion and €5026 billion respectively in 2021[82].

The EU's choice to be one of the main promoters of an efficient, open international market based on the rule of law, interconnected with non-EU markets, has helped support EU undertakings' growth internally and across borders in third countries. However, while the interaction of the EU economy with the rest of the world has allowed EU undertakings to operate beyond Europe's borders increasingly, it has also meant that third countries were increasingly interested in operating in the Internal Market or that economic agreements allowed cartels and anti-competitive practices to be organised on an international basis, as well as that

[78] EP, *Fact sheets on the European Union, The European Union and the World Trade Organisation*, available at <https://www.europarl.europa.eu/factsheets/it/sheet/161/l-unione-europea-e-l-organizzazione-mondiale-del-commercio/>.
[79] Eurostat, *News Release*, 19 May 2020, available at <https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/2-19052020-BP-EN.pdf/bb14f7f9-fc26-8aa1-60d4-7c2b509dda8e>.
[80] EC, *DG Trade Statistical Guide*, cit. *supra*.
[81] According to Eurostat data, European trade of 27 Member States (EU) was hit hard by the coronavirus pandemic, with significant falls observed for both exports (-9.4%) and imports (-11.6%) compared with 2019, available at <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210325-1>.
[82] EC, *DG Trade Statistical Guide*, cit. *supra*, at 21.

some concentrations within the Internal Market have also involved undertakings from non-EU countries.[83]

According to the Commission, the increase of non-OECD investors has become increasingly large in recent years. And indeed, the most up-to-date FATS statistics confirmed this analysis: in 2018, there were 254,823 foreign-controlled undertakings in the EU27 area with a gross turnover of €7,266,277 million.[84]

These undertakings are insignificant in terms of numbers considering that in 2019 they accounted for only 1.2% of the 21.3 million active undertakings within the EU[85] but which, due to their above-average size, have a significant economic impact on the EU market.[86]

According to data for 2019, they accounted for almost 24.3% of value-added and contributed more than 16% to employment, i.e., almost one in six people employed in the EU non-financial business economy worked in a foreign-controlled undertaking.[87] In addition, the EU is also a supplier and recipient of FDI.[88]

Here, too, the updated data are in line with those of the Commission in the impact analysis: the study of global FDI stocks for Europe in 2020 is equal to €11,738.5 billion in outflows and €10,123.8 billion in inflows,[89] thus accounting

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[83] EC, Competition policy, *Facing the challenges of globalisation*, available at <https://ec.europa.eu/competition-policy/international_en>.

[84] The statistics on the structure and activity of foreign affiliates (FATS) provide information that can be used to assess the impact of foreign-controlled enterprises on the European economy. The most up-to-date ones refer to 2018, reflecting the fragmentary and incomplete nature of the data, available at Eurostat, available at <https://ec.europa.eu/eurostat/databrowser/view/fats_g1b_08/default/table?lang=en>.

[85] Eurostat statistics explained, *Inward foreign affiliates statistics*, *Foreign-controlled enterprises in the EU*, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Inward_foreign_affiliates_statistics#Foreign-controlled_enterprises_in_the_EU>.

[86] Eurostat statistics explained, *Archive: Foreign-controlled enterprises*, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Foreign-controlled_enterprises&oldid=372256>.

[87] Eurostat statistics explained, *Inward foreign affiliates statistics*, cit. *supra*.

[88] According to the definition of DG Trade, Foreign Direct Investment (FDI) is the category of international investment made by an entity resident in one economy (direct investor) to acquire a lasting interest in an enterprise operating in another economy (direct investment enterprise). Two main indicators are used: FDI flows denote the new investment made during the period, and FDI stocks (or positions) denote the value of the investment at the end of the period. Stocks and flows have different units and cannot be meaningfully compared.

[89] EC, *DG Trade Statistical Guide*, cit. *supra*, at 27.

for 27.96% of global FDI inflows and 34.1% of global FDI outflows, [90] slightly higher than those reported by the Commission.[91]

However, from the analysis of Global FDI, it emerges that FDI inflows to EU-27 countries are bucking the global recovery trend after the COVID-19-induced slowdown in 2020.[92] 2021 saw a decrease from the already declining levels of 2020, probably driven by the fall in Ireland, Germany, Luxembourg, and The Netherlands,[93] while still lying at a significant level, amounting to €117 billion or 8% of world FDI inflows.[94]

The decrease of 31% compared to 2020 levels and 68% compared to 2019[95] represent a significant figure considering that EU Commission estimates that 16 million jobs are linked to FDI in Europe.[96] However, the circumstance that this decline occurs simultaneously with the presentation of the proposed Foreign Subsidies Regulation and shortly after the approval of the new foreign investment control framework forces one to wonder whether these two factors could cause this counter-trend in investment flows. As the annual statistics suggest, it is still too early to conclude, as it still needs to be clarified what the simple correlations are and what the actual causes are. Still, it is something to be considered in considering the proposed Regulation.

2.2. Not just aggregate statistics: policy changes and WTO enlargement

More than aggregate statistics on international trade are needed to understand the rationale behind the Commission's Foreign Subsidies Regulation.

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[90] *Ibid.*

[91] At the time of drafting the impact analysis, data for 2019 had found 25% of global FDI inward stocks and 32% of global FDI outward stocks, EC, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*, at 4.

[92] Report from the Commission to the European Parliament and the Council, *Second Annual Report on the screening of foreign direct investments into the Union*, COM/2022/433 final, at 2.

[93] Report from the Commission to the European Parliament and the Council, *First Annual Report on the screening of foreign direct investments into the Union*, COM (2021) 714 final, at 2.

[94] In 2019, according to data from the *Second annual report on the screening of foreign direct investments into the Union*, cit. *supra*, at 2, it was 27%.

[95] *Second Annual Report on the screening of foreign direct investments into the Union*, cit. *supra*, at 2.

[96] EC, *Commission staff working document on foreign direct investment in the EU following up on the Commission Communication Welcoming Foreign Direct Investment while Protecting Essential Interests*, 13 September 2017, SWD (2019)108 final.

As mentioned in Chapter 2, changes in the international balance of power and the changing relationship between China and the United States-United States, which has led to a questioning of WTO rules, should also be taken into account, [97] as well as the advance of populist currents fuelled by the instability and fear resulting from the Covid-19 Pandemic, which has led some EU States to view supranational interference with suspicion and press for a reversal of course by calling for the introduction of neo-protectionist measures to replace the multilateral approach to WTO world trade.[98]

The crisis of the WTO system, due in part to its enlargement to non-market economies, also undoubtedly contributed to the Commission's choice. Indeed, this enlargement has certainly helped transform the Internal Market into a truly global trading system, so much so that the EU is now China's most important trading partner, and China is the EU's second-largest trading partner. Indeed, the total trade flows of goods between China and Europe grew to €604.7 billion in 2018, while the total amount of trade in services between the two countries almost amounted to €80 billion in 2017.[99] And the untouched economic potential for both sides is still considerable, even if the pandemic has resulted in a setback.

However, it cannot be overlooked that the participation in the WTO system of countries in which the State plays a significant role in the economy - such as China since 2001, Saudi Arabia since 2005, Vietnam since 2007, and Russia since 2012 - has made the political framework more complex due to the different view of the relationship between State and market and the different autonomy of state-owned undertakings from political governance.[100]

As Professor Csongor has observed, the WTO – created to meet the needs and characteristics of western democracies – has proved inadequate to address the issues that can arise from economies dominated by governments as WTO rules do

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[97] See, in this regard, Massimo Merola, online seminar *Foreign direct investments, golden power and foreign subsidies: iniziative europee e nazionali*, cit. *supra*.

[98] See Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 197.

[99] See the report of Business Europe, *The EU and China - Addressing the systemic challenge, A comprehensive EU strategy to rebalance the relationship with China*, executive summary, 16 January 2020, at 1, available at <https://www.businesseurope.eu/publications/eu-and-china-addressing-systemic-challenge>.

[100] See Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*, at 148.

not cover some of the issues raised by interactions with these economies. In contrast, while covered, others are so complex that they cannot be effectively managed.[101] Chinese undertakings recognise in some bond prospectuses that the influence may condition their investment patterns their governments – characterised by a different view of the state-market relationship – can exert formally or informally.

For example, the Chinese energy giant State Power Investment Corporation Limited (SPIC), one of China's five largest state-owned power generators and one of four approved nuclear power plant operators with exclusive rights to develop nuclear technology, explicitly mentions in a 2016 bond prospectus that it is one of 52 core state-owned undertakings supervised.[102] Similarly, Qinghai Provincial Investment Group, in a 2017 bond prospectus, points out that the Qinghai Provincial Government may exercise considerable influence over the Group.[103] According to the rating agency Fitch,[104] SPIC constantly receives capital injections and subsidies from the State.[105]

Therefore, consider both aspects, the one represented by economic data and the one relating to the current geopolitical changes. In that case, it is easy to understand the rationale behind the EU's proposal of a Foreign Subsidies Regulation. Europe fears that the strategies underlying the investments of undertakings controlled or, in any case, guided by the State may follow logics that is not exclusively, or not necessarily, commercial.[106]

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[101] *Ibid.*

[102] State Power Investment Corporation Limited (SPIC), Preliminary Offering Circular, 23 November 2016, at 62, available at <https://www.ifastgm.com.sg/igm/bond/relatedBondDocument/518/Prelim-OC.pdf>.

[103] Bond Supermart, Qinghai Provincial Investment Group Co Ltd, Bond information, Preliminary Offering Circular, at 14, available at <https://www.bondsupermArt.com/bsm/bond-factsheet/XS1613685475>.

[104] Fitch ratings, Rating Action Commentary, 17 February 2022, available at <https://www.fitchratings.com/research/corporate-finance/fitch-affirms-state-power-investment-at-a-outlook-stable-17-02-2022>.

[105] Fitch ratings, Rating Report, State Power Investment Corporation Limited, 18 January 2021, available at <https://www.fitchratings.com/research/corporate-finance/state-power-investment-corporation-limited-18-01-2021>.

[106] See *First Annual Report on the screening of foreign direct investments into the Union*, cit. *supra*. With specific reference to China, see also European Courts of Auditors, *The EU's response to China's state-driven investment strategy*, cit. *supra*, at 5.

Whereas in the 1980s, foreign investment mainly concerned Western state-owned undertakings expanding abroad with state support, so much so that the EU looked favourably on foreign subsidies because they represented an important source of innovation and development at a time when foreign investment was also starting to flow from emerging to developed economies, the situation has become a source of concern.[107] And this concern has been amplified by China's rise as a global power, as Chinese undertakings setting up subsidiaries and participating in large projects often enjoy significant foreign subsidies. For example, direct or indirect subsidies to Chinese SOEs have amounted to 1.3-1.6% of total GDP in recent years.[108]

It was precisely these considerations that led the Commission and the Member States to fear that foreign subsidies were being transformed from an instrument to support domestic economic growth into an instrument used by some States for different purposes, including the interest in opening up new markets to increase their economic influence or to favour privileged access to strategic resources or infrastructure or to be able to bid for public contracts more advantageously than competing non-subsidised EU undertakings or to facilitate aggressive market behaviour by directing or facilitating acquisitions and thus undermining fair competition.[109]

Foreign public investment is particularly extensive in sensitive sectors, such as aluminium. In China, for instance, public-backed undertakings hold two-thirds of the global capacity for smelting and processing aluminium.[110] These industries are strategically important supply chains such as semiconductors, batteries, and renewable energy. For years, EU metal undertakings have protested that state-backed Chinese undertakings unload their excess production on EU markets at excessively competitive prices. During White Paper consultations, for example,

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[107] Victor Crochet and Marcus Gustalfsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 345.
[108] See Business Europe, *the EU and China addressing the systemic challenge*, cit. *supra.*
[109] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 10. On whether subsidies are being transformed into instruments to achieve strategic objectives see also Victor Crochet and Marcus Gustalfsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 345.
[110] OECD, *Measuring distortions in international markets: the aluminium value chain*, in OECD Trade Policy Papers, TAD/TC(2018)5/FINAL, 8 January 2019, at 13.

metal lobby Eurometaux told the Commission that China has invested strongly in its strategic metals industry through a program of industrial support and state subsidisation and is now the dominant player in the production of most metals.[111]

Also, overproduction can lead to market distortions. China and the GCC countries have a long-lasting tradition of state ownership in some relevant areas of the economy, such as oil and gas extraction[112] (PetroChina, Equinor, and Saudi Aramco) and air transport (Air China and Qatar Airways).[113] According to the Information Technology and Innovation Foundation, China is subsidising its state-owned aircraft manufacturer COMAC. This could lead to a reduction in the global market share of Airbus and Boeing.[114] Chinese undertakings have also acquired stakes in eight EU ports in the last ten years.[115]

Given the growing number of instances where foreign subsidies have eased the acquisition of businesses, conditioned investment, distorted trade in services, or otherwise influenced the behaviour of market participants, concerns for the Internal Market are reasonable.

However, it should be noted that individual Member States often welcome foreign investments as an important source of development, employment, and innovation. As Raymond Luja observed, it is indeed possible that many Member States, in responding to their own developmental needs, are inclined to neglect the general framework of the Internal Market, as well as that rules that are too incisive

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[111] See Eurometaux's position paper on the White Paper on levelling the playing field as regards foreign subsidies as a trade association representing the collective European non-ferrous metals industry, at 9, available at <https://eurometaux.eu/media/2095/em-submission_consultation_on-foreign_subsidies.pdf>.

[112] OECD, *Measuring distortions in international markets*, cit. *supra*, at 28.

[113] OECD, Online Stocktake of Company Reporting Requirements in Key Trading Hubs, available at <https://www.oecd.org/dev/company-reporting-requirements-different-trading-hubs-stocktake.htm>.

[114] Information Technology and Innovation Foundation is a think tank in Washington. See their response to the European Commission's Consultation on White Paper on levelling the playing field as regards foreign subsidies, available at <https://www2.itif.org/2020-consultation-foreign-subsidies.pdf>. For an analysis of the White Paper consultations on foreign subsidies, see *infra*, Chapter 2.

[115] See, in this respect, the position paper of the Federation of European Private Port Companies and Terminals (FEPORT), available at <https://www.feport.eu/images/downloads/feport---position-paper-on-white-paper-on-foreign-subsidies.pdf>. For an analysis of the White Paper consultations on foreign subsidies, see *infra*, Chapter 2.

or overly burdensome on business entail a real risk that foreign undertakings will be inclined not to invest in the Internal Market.[116]

3. The regulatory gaps

Faced with a China increasingly interested in enlarging its markets, the US increasingly distant from multilateral goals, and the Member States that were proceeding in no order on the required revisions of competition rules, the EU felt the need to examine whether the existing legal instruments were capable of addressing Internal Market distortions caused by foreign subsidies.[117]

The Commission, first in the White Paper and then in the impact analysis, considered that none of the legal instruments was adequate by pointing out that there are regulatory gaps, at least in cases where foreign subsidies take the form of financial flows facilitating the acquisition of EU undertakings or supporting the activity of an EU undertaking; the same applies when foreign subsidies distort public procurement procedures or provide an advantage to access EU financial support.[118]

To determine whether and to what extent the regulatory gap noted by the Commission exists, it is appropriate to examine, albeit briefly, the rules in International Treaties and those in EU Law that contain provisions on foreign subsidies.

In this regard, it should be recalled, as repeatedly stated by the Court, that international agreements or Treaties concluded by the EU constitute an integral part of its legal order from their entry into force.[119] The Agreement establishing the

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[116] Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, European EU State Aid framework Quarterly, June 2021, vol. 2, No. 2 at 187.

[117] For a review of the context in which the Commission acted, see para. 2. See notes 36 and 37 for some Member States' requests for revised competition rules.

[118] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 9 and EC, *Commission staff working document impact assessment*, cit. *supra*, para. 2.5. On regulatory gap see, also, Filip Krenek and Eddy De Smijter, *From a White Paper to a Proposal for a Regulation on Foreign Subsidies: Filling a Regulatory Gap in Protecting the EU Internal Market*, at 135-139, Chapter book in Asian Yearbook of International Economic Law by Manjiao Chi Marc Bungenberg Andrea K. Bjorklund *Editors*, 2022, *Springer*.

[119] See, Judgments of April 30, 1974, Haegeman, 181/73, ECLI:EU:C:1974:41, para. 5 and 6; of 21 December 2011, Air Transport Association of America and Others, C-366/10, ELI:EU:C:2011:864, para. 73; as well as Opinion 1/17, *EU-Canada ECG Agreement*, 30 April 2019, ECLI:

WTO, to which the *General Agreement on Trade in Services* (GATS) is a party, was approved by the EU on 22 December 1994 by Decision 94/800 and entered into force on 1 January 1995. It follows that the GATS is part of the law of the EU[120] – and the same principle applies vis-à-vis the SCM Agreement that forms Annex 1 of the decision of 22 December 1994,[121] even though the Court has consistently refused to grant direct effect to WTO Law, which therefore cannot be directly invoked by individuals or by the WTO Member States, as a canon of legality, to override EU measures.[122]

According to the hierarchy of sources, it follows from Article 218 TFEU that the rules of Treaties and International Agreements rank below EU primary law but, as seen from Article 216 TFEU, are themselves above secondary law.[123]

In addition, the Court has also clarified that the EU's commitments under the GATS are part of the Internal Market trade policy and fall under its exclusive jurisdiction.[124] Nor did the Court recognise WTO Law as a controlling norm for EU measures, except in limited exceptions, interpreted narrowly because, according to the Court, the legality of an EU act cannot be assessed considering instruments of International Law such as the WTO agreement.[125]

Since the rules on subsidies contained in the *General Agreement on Tariffs and Trade* (GATT) and those contained in the SCM Agreement are part of the law

EU:C:2019:341, para. 117 and, more recently Judgment of the Court (Grand Chamber) 6 October, C-66/18, para. 69, ECLI:EU:C: 2020:792.

[120] See, Filippo Fontanelli, *GATS the way / I like it: WTO Law, Review of EU Legality and Fundamental Rights*, ESIL Reflections, 3 June 2021, Volume 10, Issue 2.

[121] Council Decision, 22 December 1994, concerning the *conclusion on behalf of the European Community, as regards matters within its competence, of the agreements of the Uruguay Round multilateral negotiations* (1986-1994), OJEU, N. L 336/1.

[122] See Judgment of the Court (Grand Chamber) of 1 March 2005**,** *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)***,** Case C-377/02, para. 54, ECLI:EU:C:2005:121 and Judgment of the Court (Grand Chamber) of 16 July 2015, *European Commission v Rusal Armenal* ZAO, Case C-21/14 P, para. 38 - 39, ECLI:EU:C:2015:494.

[123] On the relationship of the draft Regulation on foreign grants and other legal rules, with special reference to the hierarchy of sources, see Till Muller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts*, Nomos e-library, at 433.

[124] See, to this effect, Opinion 2/15, *Free Trade Agreement with Singapore*, of May 16, 2017, ECLI:EU:C:2017:376, para. 36 and 5 Filippo Fontanelli, *GATS the way I like it: WTO Law Review of EU Legality and Fundamental Rights*, cit. *supra*.

[125] Filippo Fontanelli, *GATS the way I like it: WTO Law, Review of EU Legality and Fundamental Rights*, cit. *supra*.

of the EU, they will have to be considered in the assessment of the existence of the regulatory gap.

In addition, will be examined the EU competition rules contained in the *Treaty on the Functioning of the EU* (TFEU) and the basic provisions of EU Antitrust Law contained in Articles 101 to 106 also consider the effects theory and those on the EU State Aid framework contained in Articles 107 and 108 of the same Treaty. As well as since foreign subsidies could influence procurement procedures, must also be considered Directive 2014/24/EU[126] on public procurement, Directive 2014/25/EU[127] on procurement by entities operating in the water, energy, transport, and postal services sectors, and Directive 2014/23/EU[128] on the award of the concession contract. For completeness, the FDI Regulation, the EU exercise of special powers, the *Golden Power*, will be considered.

3.1. Are the WTO system's subsidy rules inadequate?

As is well known, the main international rules applicable to subsidies within the World Trade Organization (WTO) are contained in Articles VI and XVI of the GATT and in Articles 1, 2, 3, and 4 of the SCM Agreement, which apply to all WTO members.[129]

Subsidies have historically been a tool available to countries to stimulate industrialisation and economic growth in specific national sectors.[130] In this perspective, the GATT and the SCM Agreement have proved indispensable for the functioning of the global economy, ensuring openness and development but also security and predictability of the multilateral trading system.[131] However, these are rules designed to deal with situations where a WTO member subsidises the

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[126] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing, Directive 2004/18/EC*, OJEU L 94/65.
[127] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 *on procurement by entities operating in the water, energy, transport and postal services sectors and repealing, Directive 2004/17/EC*, OJEU L 94/243.
[128] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 *on the award of concession contracts*, OJEU L 94/1 ("Concessions Directive").
[129] Commission Decision Case No. COMP/M.4956 of 5 May 2008, STX/Aker Yards, C (2008) 1693 final, cit. *supra*, para. 79.
[130] Victor Crochet and Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 344.
[131] M. Schaus, *EU Trade Policy in Light of the New Industrial Strategy for Europe*, Intereconomics Review of European Economic Policy, 2021, Vol. 56, No. 3, 2021, at 150.

production or sale of its goods destined for export. At the same time, it needs to be clarified whether or not the rules apply to situations where a foreign State subsidises an undertaking operating outside its territory.[132] This is, in fact, a phenomenon that has only recently taken on significant dimensions; consequently, part of the doctrine has questioned whether the rules on international trade are adequately equipped to deal with the subject of foreign subsidies.[133]

Certainly, Articles VI and XVI of the GATT contain a discipline on subsidies to trade in goods. Article XVI GATT, paragraph 2, recognises that, in certain circumstances, a State's subsidies may distort trade, causing an undue disturbance and hindering the attainment of the Agreement's objectives.

However, in paragraph 4, the same Article only prohibits subsidies to products other than primary products. For the rest, Article XVI (1) merely provides that the State granting or maintaining a subsidy that results, directly or indirectly, in an increase in exports of a product or a decrease in imports is merely obliged to make a notification of the important nature and expected effects and the circumstances which led to the grant of the subsidy. The only obligation provided for, if it is considered that injury may result from the subsidy, is to examine it with the State concerned and consider the possibility of limiting it.[134]

The provision so needs to provide a precise measure against injurious subsidisation. The only remedies are those provided under Article XVI, paragraph 3, for export subsidies on primary products, which are limited to the extent that they allow a fair share of the world export trade of that product. Apart from this, the only remedy regulated, apart from the consultation mechanism in paragraph 4, is the possibility under Article VI GATT to impose satiation or countervailing measures by States deemed to have been adversely affected by subsidies.[135]

However, as correctly pointed out by the Commission, these provisions do not cover subsidies on trade in services, investments, or other financial movements related to the establishment and operation of undertakings in the EU, as the scope

[132] *Ibid.*
[133] *Ibid.*
[134] See Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*, at 150.
[135] *Ibid.*

of these Regulations only refers to aid related to the export of a product, which means aid provided to manufacturers.

Even concerning imports, the rule is not noticeably clear; for example, it is not certain whether it applies to a good produced in the EU territory by an undertaking controlled by a non-EU country even though the subsidy can distort the Internal Market since in this case, the case cannot be considered as an import[136].

Furthermore, contrary to Lorand Bartels's assertion,[137] the reference to Article XVII GATS, which prohibits WTO Members from discriminating against the services and service suppliers of other WTO Members, at least regarding services for which commitments have been entered into, is not relevant to address the issue of levelling playing field caused by foreign subsidies either. This provision aims to ensure that a host country does not discriminate against the services and service providers of another WTO Member and can therefore be embodied in the principle of non-discrimination, e.g., in the eligibility to participate in tenders in the Internal Market. Still, non-discrimination relates to the possibility of being allowed to conduct activities under the principle of reciprocity. Therefore, it has nothing to do with the market alteration if the service performed is subsidised. Moreover, footnote 10 of Article XVII(1) GATS states, "*Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers*".

The SCM Agreement, too, considers subsidies by dividing them into two categories: those prohibited under the SCM Agreement and those actionable, i.e., subject to WTO challenge or countervailing measures. Prohibited subsidies are contained in Article 3 and are divided into two categories: those contingent, in law or fact, upon export performance, export subsidies as identified in Annex 1 to the Agreement. The second category consists of subsidies conditional on domestic use

[136] *Ibid.*
[137] Lorand Bartels, *Does WTO law really not regulate foreign subsidies*? 22 June 2020, available at <https://www.linklaters.com/it-it/insights/blogs/tradelinks/2020/june/does-wto-law-really-not-regulate-foreign-subsidies>.

over imported goods and local content subsidies.[138] Thus, these are two categories of prohibited subsidies because they can directly affect trade and thus can adversely affect the interests of other Members.

Again, the prohibition is limited to trade in goods and does not apply to subsidies on trade in services or establishing or operating undertakings in the EU that do not trade in goods. The only remedy provided for is that contained in Article 4 of the SCM Agreement, which provides only that whenever a Member of the Agreement has reason to believe that a prohibited subsidy is being granted or maintained by another Member, it may request consultations with the country subsidising or maintaining the subsidy and if no mutually agreed solution is reached within 30 days of the request for consultations, proceedings for violation of the SCM Agreement may be instituted. However, this procedure does not consider the Internal Market but defers the assessment to the individual Member State and always refers to an individual case.

Even for imports, the rule is unclear: the definition of a subsidy in Article 1 of the SCM Agreement only considers financial contributions made by governments in the territory of a member of the WTO. Furthermore, Article 2 (b) of the Regulation defines the government as a public body in the territory of the country of origin or export.

In this regard, one cannot agree with the interpretation of some for which the term "*in the territory*" in Article 2(1) SCM does not refer to the place where the grantee is located, as well as the term "*within the jurisdiction of the granting authority*" is not limited to territorial jurisdiction but may apply to personal jurisdiction based on nationality.[139]

The provision recently gave rise to controversy over its interpretation in the anti-subsidy investigation opened by the EU Commission on 16 May 2019 concerning imports into the EU of certain Glass Fibre Fabrics (GFF) products originating in the People's Republic of China (PRC) and Egypt produced by

[138] On the local subsidies and the possible relaxation of WTO Regulation for such subsidies, see S. Charnovitz, *Green Subsidies and the WTO*, European University Institute Robert Schuman Centre for Advanced Studies, EUI Working Paper, RSCAS 2014/93, at 42.
[139] Lorand Bartels, *Does WTO law really not regulate foreign subsidies?* cit. *supra*.

undertakings that received subsidies through financial contributions from Chinese banks to undertakings operating in Egypt. [140]

The Chinese and Egyptian authorities argued that under the EU basic Regulation, there was no basis to attribute the conduct of the Chinese government to Egypt and that, even if there was a subsidy, it was granted to undertakings located in Egypt and not in China. According to China, the definition of government in Article 2(b) of the basic Regulation includes an explicit reference to the territory of the granting authority, and the term "*within the territory*" could not be interpreted in a relaxed manner.[141] This interpretation was kept from the EU Authorities, who reiterated that actions attributable to the government of the country of origin or export could be those originating directly from that government and those attributable to it.[142]

According to WTO scholars, the application of the SCM Agreement when the subsidised entity is not on the national territory needs to be clarified.[143] The WTO Report Panel on Definitive Anti-Dumping, states that the qualifying phrase "*in the territory of a member*" placed immediately after the words "*by a government or any public body*" not being separated by any comma would refer only to "*government or public body*" and not to the term "*financial contribution*" and would not stand for the place where the receiver of the financial contribution must be positioned.[144] The scholars' interpretation corroborates, at the very least, if not a gap or a lack of regulatory clarity.

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[140] EC, *notice of initiation of anti-dumping and anti-subsidy proceedings concerning imports of certain woven and/or stitched glass fibre products originating in the People's Republic of China* and Egypt, OJEU C167/11, 16 May 2019, at 11.

[141] See Commission Implementing Regulation (EU) 2020/776 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, OJEU L 189, 15.6.2020, para. 715.

[142] *Ibid.* para. 716 e 717.

[143] Victor Crochet and Marcus Gustafssont, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 345.

[144] Panel report, United States, Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, para. 8.67, WT/DS379/R, 21 August 2012. See, also, Victor Crochet and Vineet Hegde, *China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM*, Agreement, Leuven Centre for Global Governance Studies, Working Paper, No. 220, February 2020, at 10.

The need for a supplementary discipline, at least on services, is also highlighted in the GATS agreement itself, which contains, in Article XV, an intrinsic mandate for the development of rules on subsidies in trade in services, which has yet to be implemented.[145]

It should also be noted that the SCM Agreement requires WTO members to notify WTO of subsidy measures granted or maintained in their territory. However, the level of compliance with this obligation could be much higher. By October 2020, less than half of the 164 WTO members will have submitted complete subsidy notifications for 2019, more than a year after the deadline.[146]

These aspects are not resolved by anti-dumping[147] or countervailing Regulations nor by the WTO procedure since its decisions are non-binding and, in any case, referable to individual cases. Moreover, the subsidy decision by the Commission, which has no investigative powers of its own, is not based on a test assessing the effects on competition in the Internal Market.

However, albeit the discipline on subsidies contained in the GATT and SCM Agreement needs supplementation, so much so that the EU has engaged in trilateral talks with the U.S. and Japan to improve multilateral cooperation, nevertheless, the existence of a regulatory gap, at least on services does not necessarily lead one to agree with the Commission's choice to proceed unilaterally. The circumstance that there is a provision that includes a mandate to negotiate rules for service subsidies that still need to be developed might prompt one to believe that it is a kind of procedural reservation and that any supplementary rules must necessarily be adopted by agreement.

3.2. EU competition rules and the effects theory

The EU's competition rules are contained in Title VII, Chapter I of the TFEU, and Articles 101 to 109. As derived from Section I of Title VII, provisions

[145] See Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*, at 150.
[146] Filip Krenek e Eddy De Smijter, *From a White Paper to a Proposal for a Regulation on Foreign Subsidies: Filling a Regulatory Gap in Protecting the EU Internal Market*, cit. *supra*, at 137.
[147] See Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 *on protection against dumped imports from countries not members of the European Union*, OJEU L 176/21 30.6.2016.

101 to 106 are rules applicable to undertakings, whereas, as clarified in Section II, provisions 107 to 109 concern aid granted by States and apply to them.

The main purpose of Competition Law is to enable the proper functioning of the Internal Market as a key factor for the welfare of EU citizens, businesses, and society through rules designed to prevent restrictions and distortions so that the most efficient undertakings can stand on the market on their own.

Since the objective of the Commission's Foreign Subsidies Regulation is to prevent undertakings subsidised by or controlled by non-EU States from operating within the Internal Market with a competitive advantage to the detriment of EU undertakings, both cases contained in Articles 101 to 109 are relevant.

In the White Paper, the Commission considered that the provisions applying to anti-competitive conduct of undertakings in Articles 101 and 102 do not apply to foreign subsidies.[148]

In particular, according to the Commission's interpretation, the wording of Article 101 TFEU – that agreements between undertakings as well as decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the Internal Market are incompatible with the Internal Market, and therefore prohibited – in assessing whether an agreement distorts competition, considers the fact that an undertaking receives financial support to be entirely irrelevant.

On the other hand, what is pertinent for the prohibition are the purposes of the agreement or decisions, which cannot have as their object the restriction of competition or even as their effect the restriction or limitation of competition.

Similarly, for the Commission, Article 102 – which also considers as incompatible with the Internal Market the abuse by one or more undertakings of a dominant position within the Internal Market or in a substantial part thereof, where that may affect trade between the Member States – does not find a foreign subsidy facilitated that dominance. The conduct the law provision considers incompatible with the market is only anti-competitive conduct related to such dominance. Therefore, the Commission concludes that the case of a foreign subsidy facilitating

[148] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 11.

a non-dominant undertaking's anti-competitive behaviour is not covered by the existing rules.[149]

The Commission's interpretation is also supported under Article 2(1) of Regulation n. 139/2004 contains the elements the Commission should consider when evaluating concentrations between undertakings. As noted by Nuno Cunha Rodrigues, this article was not designed to consider possible foreign subsidies. Although it is sufficiently broad in considering the facts that the Commission should assess in a concentration, it does not expressly include foreign subsidies by providing among the elements to be considered only the market position of the undertakings and their economic and financial power, thus allowing the EC to ignore foreign subsidies in its evaluations.[150]

Although EU Antitrust Law does not expressly prohibit foreign subsidies that enable an undertaking to achieve dominance or facilitate an agreement, and there is no explicit obligation for the Commission to consider them when assessing a concentration or concentration, the issue is more complex. In the past, the issue of assessing State Aid has been addressed as early as 2001, in the RJB Mining case,[151] when in the context of a concentration transaction, the Court of First Instance annulled the Commission's decision. This happened because the Commission, in adopting a decision on the compatibility of a concentration between undertakings with the Internal Market, had ignored the consequences of granting State Aid without considering their effects on the protection of effective competition in the market concerned.[152]

The Court's decision was based on the fact that the Commission must respect consistency between the Treaty's EU State Aid framework and the other rules of the same Treaty, especially if the other rules are related to the goal of avoiding distorting competition in the Internal Market.[153]

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[149] EC, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market,* cit. *supra*, at 40.
[150] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 207.
[151] Judgment of the Court of First Instance (First Chamber) of 31 January 2001, case T-156/98 RJB Mining v. Commission of the European Communities, ECLI:EU: T:2001:29, para. 114.
[152] *Ibid.*
[153] RJB Mining plc v Commission of the European Communities, cit. *supra*, para. 112.

However, this needs to be clarified regarding foreign subsidies.[154] In the STX/Aker Yards case,[155] the Commission reiterated that from the RJB Mining case, it could not be derived a general obligation for the Commission to conduct a pre-assessment of the alleged subsidies in a concentration control procedure through a State Aid-like investigation to determine whether the undertaking had benefited from subsidies granted by a third country. Indeed, that case related to an extremely specific situation where the alleged State subsidies were linked to the concentration.

For the Court, subsidies granted by a third country do not fall under EU competition rules but may instead be subject to the applicable rules of International Law, i.e., GATT and the SCM Agreement.[156] This last consideration, namely that subsidies are subject to GATT rules, introduces another issue into the analysis: at least in the past, the Commission has felt that the evaluation of foreign subsidies should walk separately through the parallel track, that of multilateralism.

The EU State Aid framework contained in Articles 107 and 108 TFEU did not apply to foreign subsidies. Although Article 107(1) contains a general prohibition on aid granted by States or through State resources that affect trade between the Member States or distort competition – except as expressly provided in Article 107(2,3) – it is only addressed to the Member States, even though it is aimed at creating a level playing field within the Internal Market. Even though Article 107 speaks generically of aid provided by States, being inserted within the TFEU, it only applies to aid granted by the Member States that have signed the Treaty.[157]

Therefore, although the EU is the only territory in the world to have a system for monitoring public subsidies, it has no legislation applicable to foreign subsidies granted by countries outside the EU.[158] Consequently, Article 108 TFEU, which gives the Commission a role in monitoring existing aid schemes in the Member

[154] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 211
[155] Commission Decision, Case No. COMP/M.4956 of 5 May 2008, STX/Aker Yards. cit. *supra*.
[156] See Commission decision, STX/Aker Yards, cit. *supra*, para. 79.
[157] On the notion of State Aid as referred to in Art. 107(1) of the TFEU, see EC, *Commission Notice on the Notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union Notice*, OJEU C 262/1, 19 July 2016.
[158] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 6.

States, is also not applicable to foreign subsidies even if they favour undertakings operating within the territory of the EU.

Financial support granted by non-EU countries outside the EU, either directly or through their subsidiaries, is therefore not covered by the EU State Aid framework and cannot, under current legislation, be examined by the EU. [159] Therefore, the EU State Aid framework does not allow the control and elimination of distortions caused by foreign subsidies.

3.3. Extraterritorial application of Competition Law: the effects theory

In any case, the Commission's analysis in the White Paper, at least regarding Antitrust Law, is incomplete since the work does not elaborate on the applicability of the effects theory to foreign subsidies.

According to this theory of US origin,[160] also elaborated by the ECJ in its variant with the implementation theory,[161] the extraterritorial application of EU Competition Law may also be justified concerning conduct outside the EU territory if it can be expected that the conduct may have substantial and direct effects in the Internal Market.[162] The Commission has also used the effects principle to evaluate the application of EU Law since some decisions in 1964 related to certain anti-competitive practices.[163] Effectively, Articles 101 TFEU and 102 TFEU do not contain explicit indications about the possibility of their extraterritorial

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[159] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 209.

[160] The effects theory was first enunciated in the Alcoa case involving a cartel of aluminium undertakings among those based outside the territory of the United States. The Supreme Court affirmed that the Sherman act also applied abroad if the conduct had a substantial effect in the U.S. Market. See U.S. Court of Appeals for the Second Circuit, *Alcoa – United States v. Aluminium Co. Of America***,** 148 F.2d 416 (2d Cir. 1945), 12 March 1945.

[161] See, in this regard, Francesco Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, Rivista di diritto internazionale, Milan (2016), at 36.

[162] On the extraterritorial application of Competition Law with special reference to the effect's doctrine and on the nonlinear path of the ECJ, see Francesco Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at 46 ff., Lorenzo F. Pace, *L'applicazione extraterritoriale delle regole antitrust*, Dizionario sistematico del diritto della concorrenza, at 145 ff., available at <http://www.competition-law.eu/wp-content/uploads/2014/07/16.pdf>.

[163] 64/233/CEE: Décision de la Commission, du 11 mars 1964, *relative à une demande d'attestation négative présentée conformément à l'article 2 du règlement nº 17 du Conseil (IV/A-00061 - Grosfillex-Fillistorf)*, OJEU 58, at 915 and 64/344/CEE: Décision de la Commission, du 1er juin 1964, *relative à la demande d'attestation négative présentée conformément à l'article 2 du règlement nº 17 du Conseil (IV-A/12.868)*, OJEU 92.

application[164] but condition their operation on the existence of an anti-competitive effect of the prohibited practices in the territory of the Internal Market.[165] On the contrary,[166] the ECJ has taken various positions, sometimes justifying the extension of the scope of applying the EU Antitrust Law to foreign undertakings. Sometimes, as in the 1971 Beguelin case, it has at least implicitly resorted to the effect's theory, recognising that if the effects of a competition-restricting agreement were to occur on EU territory, the fact that an undertaking party to that agreement was based on the territory of a foreign State would not constitute an obstacle to the application of EU rules.[167]

Other times, such as in the Dyestuffs or Ici case, the Court, leaving aside the applicability of the effect's theory advocated by the Commission, has extended the application of Articles 101 and 102 TFEU to third country undertakings based on the principle of the economic unity of the undertaking or unity of behaviour by imputing the anti-competitive behaviour of the subsidiary undertaking to the parent one.[168]

Verisimilarly, then, the silence of the White Paper is due to the Commission's awareness of the Court's nonlinear behaviour toward the effects theory. The latter is aware that the issue of extraterritorial application of domestic law, well known in private international law, has instead raised numerous problems in public international law, which prohibits states, in the application of the principle of territoriality, from conducting the territory of another State any activity through its organs, without the consent of the host State.[169]

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[164] Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at 42.
[165] Lorenzo F. Pace, *L'applicazione extraterritoriale delle regole antitrust***,** Dizionario sistematico del diritto della concorrenza, cit. *supra*, at 145.
[166] On the not-always-straightforward position of the ECJ, see Lorenzo F. Pace, *L'applicazione extraterritoriale delle regole antitrust*, Dizionario sistematico del diritto della concorrenza, cit. *supra*, at 145. See also Judgment of the Court of 25 November 1971**,** Béguelin Import Co. v S.A.G.L. Import Export, Reference for a preliminary ruling: Tribunal de commerce de Nice – France, Case 22-71, at 958, para. 10/12, ECLI:EU:C:1971:113.
[167] See Judgment of the Court of 25 November 1971, *Béguelin Import Co. v S.A.G.L. Import Export*, cit. *supr*a, para. 10-12, ECLI:EU:C:1971:113.
[168] See Judgment of the Court of 14 July 1972, Imperial Chemical Industries Ltd. v. Commission of the European Communities, Case 48/69, para. 134, ECLI:EU:C:1972:70. What was relevant in this case was the ability of the parent undertaking, established in a third state, to use its power to impose on an EU affiliate a decision.
[169] On territoriality principle, see Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*.

It is also likely that the Commission's silence is because the extra-EU applicability of European competition law only arose systematically for a brief time since enforcing competition rules within the Internal Market was a priority.[170]

Nevertheless, as the reconstructions of Nuno Cunha Rodrigues and Francesco Munari show, the development of the Case Law of the ECJ has, in recent years, despite a non-linear path, moved towards the applicability of the effect's theory in Competition Law, in convergence with US Antitrust Law.[171] The Commission itself did not hesitate to reaffirm the extraterritorial effectiveness of Articles 101 and 102 TFEU, sanctioning agreements or unilateral conduct by undertakings not established in the territory of the EU.[172]

Therefore, assessing the existence of legal loopholes can only be considered complete with assessing foreign subsidies considering the effects theory. In this regard, it is understandable that with globalisation and States making significant investments outside their territory, the debate has mainly focused on the extraterritorial application of Competition Law because it is in this area that the greatest correlations between the global market and States are to be found.

The application of the competition rules of any State implies the automatic assessment of their extraterritorial effectiveness and the effects due to facts or conduct that may be harmful to competition even if occurring abroad because an anti-competitive practice may not be limited to the territorial borders of a State where the undertakings have their seat but may go beyond them, producing its effects on of another State's territory.[173]

The ECJ, already in the 1972 Dyestuff Case,[174] recognised the principle that parent undertakings with headquarters outside the EU could be attributed to the

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[170] Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at. 48.

[171] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 200 ff. and Francesco Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at 42 ff.

[172] Francesco Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at 48.

[173] Lorenzo F. Pace, *L'applicazione extraterritoriale delle regole antitrust*, Dizionario sistematico del diritto della concorrenza, cit. *supra*, at 144.

[174] Judgment of the Court of 14 July 1972, Imperial Chemical Industries Ltd. v Commission of the European Communities, cit. *supra*, ECLI:EU:C:1972:70. On this case, *Extraterritorial Application of Antitrust Legislation in the Common Market: The Dyestuffs Cases*, Columbia Journal of Transnational Law, 1973, at 169 ff.

conduct of their subsidiaries in the EU territory. Jurisprudence subsequently developed with the Wood Pulp case in 1988, the implementation theory, which held that Competition Law also applies to worldwide agreements if implemented in the EU territory.[175] Even though the conduct was performed outside the EU, the Court held that no provision of Article 85 TFEU precludes its application to persons outside the EU. According to the Court, if the applicability of the prohibitions existent in Competition Law depended on where the agreement was established, this would result in giving undertakings an effortless way of bypassing those prohibitions.[176]

In 1999, in the Gencor case[177] too, the Court held that concentration rules are applicable outside the territory of the EU if it is foreseeable that such transactions will have an immediate and substantial effect in the Internal Market, a recently confirmed principle in 2017 in the Intel case.[178]

However, as reflected in its jurisprudential application, even the effects theory cannot make up for the silence of Antitrust Law or the EU State Aid framework. Its main limitation lies in that, as seen in the Aker Yards case, [179] Case Law holds that the Commission has no obligation to assess whether an economic operator may have benefited from foreign subsidies.[180]

Moreover, as reflected in the discordant outcomes of the Mining and Aker Yards cases, on the assessment of foreign subsidies in concentration proceedings, Case Law still needs to identify a general principle that makes the assessment applicable to all cases. As Pace pointed out, the judgment on the legitimacy of a

[175] Judgment of the Court of 27 September 1988, A. Ahlström Osakeyhtiö and others v Commission of the European Communities, *Concerted practices between undertakings established in non-member countries affecting selling prices to purchasers established in the Community*, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, ECLI:EU:C:1988:447, at 5193 ff.
[176] Andrew N. Vollmer and John Byron Sandage, *The Wood Pulp Case*, INT'L L. 721, 1989, n. 3, vol. 23.
[177] Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 25 March 1999, Case T-102/96, Gencor Ltd v Commission of the European Communities, ECLI:EU:T:1999:65.
[178] Judgment of the Court (Grand Chamber) of 6 September 2017, Intel Corp. v European Commission Case C-413/14 P, ECLI:EU:C:2017:632.
[179] Commission decision, STX/Aker Yards, cit. *supra*, para. 79.
[180] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market,* cit. *supra*, at 208.

particular connecting factor has value only when it meets the need to resolve a dispute in concrete terms.[181]

In any case, the application of the effects theory, even if extended to situations falling under Articles 101 and 102 TFEU intended to cover all conduct which, although carried out abroad, produces distortions of the EU market, does not allow to deal with Internal Market distortions related to foreign subsidies. This is due to the Court's uneven jurisprudence on the obligation to consider subsidies when assessing the compatibility with the Internal Market of concentration transactions, as seen in the RBJ Mining and Aker-Yard cases. Not only is there no obligation to consider subsidies, but, on the contrary, the Court in the Aker-Yard case made it clear that foreign subsidies not covered by EU competition rules are subject to the applicable rules of International Law, particularly GATT and the SCM Agreement.[182]

In this respect, one consideration can be made. Antitrust Law in Articles 101 and 102 aims to ensure that dominant undertakings do not prevent effective competition from taking place by foreclosing the market to their competitors in an anti-competitive manner with consequent adverse effects on consumer welfare.[183]

Extraterritorial implementation of EU Laws and Regulations is a dynamic and expanding field, primarily pursuing internal objectives. For this reason, the extraterritoriality of EU Law is essentially connected to internal EU competencies and purposes, and the corresponding domestic developments influence the extraterritorial application of EU Law.[184]

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[181] Lorenzo F. Pace, *L'applicazione extraterritoriale delle regole antitrust, in Dizionario sistematico del diritto della concorrenza*, cit. *supra*, at 145.
[182] See Commission Decision, STX/Aker Yards, cit. *supra*, para. 79.
[183] Leonardo Serra, *Abuso di posizione dominante*, 6 July 2020, available at <https://www.altalex.com/guide/abuso-di-posizione-dominante>.
[184] Lena Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law, Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, February 2022, at 7.

In areas of EU Law that are susceptible to extraterritoriality,[185] and competition is historically one of them,[186] the extraterritorial application of the competition principle is directed toward ensuring a prominent level of protection for EU citizens and EU values even against situations that transcend EU borders.[187] The extension of Antitrust Law, through the effects theory regarding Articles 101 and 102, has thus meant that conduct outside the EU cannot, in any case, be directed at preventing effective competition. As Professor Munari made clear, the rationale for the extraterritorial application of EU Antitrust Law is remarkably simple: anyone who wants to operate in the Internal Market must abide by its rules.[188] In this regard, the statements of Commissioner Vestager are also noticeably clear.[189]

Thus, the Commission does not consider that the rationale behind the various Case Law decisions on the effects theory was to prevent circumvention of EU competition rules, at least limited to Articles 101 and 102. While it is true that the Case Law does not agree for the time being on imposing an obligation on the Commission to assess foreign subsidies,[190] however, the Commission is, nevertheless, empowered to give itself guidelines in this matter, especially since foreign subsidies are part of trade policy over which the Commission has exclusive competence.

As the Court stated in the Wood Pulp case, Competition Law cannot depend on where the conduct occurs.[191] Similarly, the Commission could determine the relevance of a foreign subsidy with the characteristics of prohibited State Aid, i.e.,

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[185] Not only competition matters are subject to extraterritoriality. but also, others such as consumer protection, security, personal data protection, or other fundamental rights and interests. See in this sense, Lena Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law*, cit. *supra*, at 8. See the ECJ's reasoning on the high level of protection of personal data throughout the EU and the extraterritorial application of data and Privacy Law in Judgment of the Court (Grand Chamber) of 24 September 2019, Case C-507/17, *Request for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 19 July 2017, received at the Court on 21 August 2017*, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), para. 54, 62, ECLI:EU:C:2019:772.

[186] See Judgment of the Court of 25 November 1971 Case 22-71, Béguelin Import Co. v S.A.G.L. Import Export., cit. *supra*, para. 11**,** ECLI:EU:C:1971:113.

[187] *Ibid*. at 8.

[188] Francesco Munari, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, cit. *supra*, at 55.

[189] See commission press release, 22 April 2015, *Antitrust:*
Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets.

[190] Commission decision, STX/Aker Yards, cit. *supra*, para. 79.

[191] Cit. *supra*.

it is attributable to a State, state resources are used, it confers a selective advantage, and it is capable of distorting competition by potentially affecting trade in the Internal Market.

3.4. Foreign subsidies under EU procurement Regulations

In addition to trade defence instruments and EU competition rules, a significant role in ensuring a level playing field within the Internal Market is played by public procurement rules, as they constitute one of the market-based instruments to promote smart, sustainable, and inclusive growth while ensuring the most efficient use of public resources.[192]

However, in recent years, the benefits of this approach have been challenged by foreign trade practices that weaken the principle of reciprocal treatment. Before the White Paper, the Commission had the opportunity on 13 August 2019 to reiterate the importance of ensuring more balanced and reciprocal conditions in economic relations with third States, including in public procurement, which accounts for around 14% of the EU's gross domestic product.[193]

Foreign undertakings are not subject to the EU State Aid framework. They can benefit from subsidised public funding, cheaper inputs, or, in any case, preferential support from a non-EU authority that allows the participating undertaking to bid significantly below market prices, which is especially influential when the award criterion is strongly price-driven.

Therefore, the White Paper questioned whether EU rules could cope with foreign subsidies in this field, aware that equivalent standards and requirements should apply to EU and non-EU bidders.[194] Foreign subsidies could influence the outcome of public procurement procedures in the EU: subsidised undertakings might, for example, be able to bid more advantageously by discouraging non-

[192] Directive 2014/24/EU, cit. *supra*.
[193] Communication from the Commission, *Guidance on the participation of third-country bidders and goods in the EU procurement market*, 2019/C 271/02, OJEU C 27. See, also, European Commission, *Guidance on the participation of third country bidders and goods in the EU procurement market*, 2 July 2020, <https://op.europa.eu/en/publication-detail/-/publication/c3f90a8b-4bc5-11ea-8aa5-01aa75ed71a1/language-en/format-PDF >.
[194] *Ibid.*

subsidised undertakings from participating or by winning tenders to the detriment of non-subsidised undertakings even though they are more efficient.

According to the Commission, the EU legal framework for public procurement does not tackle distortions in the Internal Market caused by foreign subsidies. It is hard not to agree with this position.

The existing EU legislative framework on public procurement includes several legal instruments, but none directly address foreign subsidies. Public procurement in the EU is primarily anchored to transparency, equal treatment, and non-discrimination in the Treaties. In addition, the EU Directives on public procurement,[195] utilities,[196] concessions,[197] and defence and security procurement[198] lay down harmonised minimum rules transposed into National Law. The Directives offer the possibility of awarding contracts based on the best value for money and allow States to choose the most appropriate and effective procedure based on general rules by introducing quality requirements, mechanisms to ensure compliance with environmental, social, and labour obligations, market, stakeholder involvement mechanisms, and tools to deal with abnormally low tenders.[199]

The public procurement Directive 2014/24/EU provides in Article 25 that contracting authorities shall accord to works, supplies, services, and economic operators from third countries that are signatories to international trade agreements no less favourable treatment than that accorded to works, supplies, services, and economic operators from the EU.[200] Consequently, the conditions of access of foreign States to EU public procurement, at least limited to what falls under the implementation of Article 25, can be considered open within the limits of the specific international agreements with third countries to which the EU has committed to grant access.

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[195] Directive 2014/24/EU, cit. *supra*.
[196] Directive 2014/25/EU, cit. *supra*.
[197] Directive 2014/23/EU cit. *supra*.
[198] Directive 2009/81/EC of the European Parliament and of the Council 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*, OJEU 67/612L.
[199] Michael Böheim, Nazareno Braito, Davide Ceccanti, Davide Fina, Duy Huynh-Olesen, Cécile Jacob and Katarina Kubovicová, *Foreign subsidies and public Procurement*, In-Depth Analysis requested by the INTA committee, 30 September 2021, in Think Thank European Parliament, the documents that help shape new EU legislation, para. 2.4, at 15 ff.
[200] Directive 2014/24/EU, cit. *supra*.

The need for conditions of reciprocity and mutual benefit is also confirmed by Regulation (EU) 2022/1031, which, in establishing that access of economic operators, goods, and services from third countries to the EU's public procurement or concessions markets falls within the scope of the Common Commercial Policy, also specifies that the EU supports the opening of international public procurement and concessions markets "*in a spirit of reciprocity and mutual benefit*".[201]

Economic operators from third countries that do not have agreements allowing for the opening of the EU procurement market or whose goods, services, and works are not covered by such agreements are not given any additional guarantees.[202] And this is understandable since there are fewer economic opportunities for EU corporations due to many third countries' reluctance to improve access to or open their public procurement or concession markets to foreign competition.[203]

The only provision in any way relevant to foreign subsidies might be Article 8(d) of the Concessions Directive,[204] where the methods for calculating the estimated value of concessions are defined, particularly where it provides that the value of subsidies or any other financial benefit in any form conferred by third countries may be taken into account for calculation.[205] But, even if the foreign subsidy is relevant for calculating the estimated value of the concession, it can still be considered for the evaluation of the tenders.

The Commission also believes that the EU Public Procurement Directives make no explicit provision for the participation of economic operators who benefit from foreign subsidies.[206] Controlling authorities have broad discretion in designing the bidding procedures and evaluating the bids submitted based on the notices prepared.

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[201] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 *on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on the access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)*, OJEU L 173/1, fifth consideration.
[202] Michael Böheim, Nazareno Braito, Davide Ceccanti, Davide Fina, Duy Huynh-Olesen, Cécile Jacob and Katarina Kubovicová, *Foreign subsidies and public Procurement*, cit. *supra*, at 27
[203] See the eight considered.
[204] Directive 2014/23/EU, cit. *supra*.
[205] Directive 2014/23/EU, cit. *supra*.
[206] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 12.

Therefore, in the law's silence and given the discretion left to contracting authorities in determining tendering procedures, it could be considered abstractly possible to include an express provision in the tender notices, subject to reciprocity mechanisms, to exclude from participation in tenders an undertaking receiving foreign subsidies.

However, unless expressly provided for in the tender notice as an exclusion criterion, public contracting authorities are not obliged to take foreign subsidies into account when assessing the eligibility criteria or the sustainability of a tender.

According to what has been maintained, the possible inclusion of such a clause is difficult to implement in practice because it entails the need for an appropriate justification in the tender notice to avoid complex legal challenges to prevent the introduction of discriminatory measures contrary to bilateral international agreements or the general agreement on public procurement between the EU and third countries.

In any case, unless an amendment to the Directive makes it mandatory in the Member States, leaving it to the discretion of individual administrations whether to include it in calls for tenders, it cannot be considered a general measure to deal with foreign subsidies to achieve a level playing field in the Internal Market.

Article 69 of Directive 2014/24/EU also does not contain any obligation to assess the impact of foreign subsidies. This provision empowers a contracting authority to reject an offer if the tenderer's justifications do not adequately explain an abnormally low price.[207]

If it is established that the cause of such a price is due to State Aid, i.e., a subsidy from a Member State, the tender can be rejected. Although, according to Case Law, there is no automatic obligation to exclude an undertaking from participating in a public procurement procedure, without further examination, on the sole ground that, due to public subsidies from which it benefits, an undertaking can bid at lower prices than unsubsidised buyers.[208] However, there is no corresponding rule regarding subsidies from third countries.

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[207] Directive 2014/24/EU, cit. *supra*.

[208] See Judgment of The Court (Fifth Chamber) of 18 December 2014, *Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service Srl*, Case C-568/13, ECLI:EU:C:2014:2466. See also Ondrej Blažo, *A new regime on protection of public procurement*

To justify the rejection of the tender as part of an overall evaluation, it should be demonstrated that foreign subsidies impede the concrete feasibility of the tender and the tenderer's ability to perform the contract at the abnormally low price offered.[209] However, it needs to be clarified why the Commission does not consider acting by amending Article 69 of Directive 2014/24/EU by including foreign subsidies in the grounds for exclusion, similar to State Aid. In this way, there would be a transposition requirement for Member States to include foreign subsidies in the criteria for evaluating anomalous bids.

Similar considerations can be made about Article 84 of Directive 2014/25/EU for concessions, which does not consider foreign subsidies for examining anomalous bids. For concessions, Article 38 of 2014/23/EU, in part, referring to the qualitative assessment of candidates, says nothing about foreign subsidies, requiring mere self-certifications on technical and professional capacities and financial and economic capacity.

While the need for action cannot be questioned since, as the analysis shows and as noted by the Commission,[210] the participation of subsidised undertakings in tenders or concessions may be part of a broader strategy of the subsidising country. Strategic interests play a special role when bidding for public concession contracts concerning the management or exploitation of large infrastructures; it needs to be clarified why action cannot be taken by amending the Directives rather than adopting new Regulations on foreign subsidies. Such a choice would also have the merit of maintaining the unified system, at least as far as procurement and concessions are concerned.

The choice to intervene by amending the Directives also could have two strengths. One is that with the mandatory transposition of the Directive, the issue would not be left to the discretion of the Member States and uneven application to the detriment of the homogeneous development of the Internal Market. The other

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against foreign subsidies distorting the internal market: mighty paladin or giant on the feet of clay?, International and Comparative Law Review, December 2021, Vol 21, No. 138-161, at 154.

[209] Michael Böheim, Nazareno Braito, Davide Ceccanti, Davide Fina, Duy Huynh-Olesen, Cécile Jacob and Katarína Kubovicová, *Foreign subsidies and public Procurement*, cit. *supra*, para. 2.4, at 15 ff. and also *Commission staff working document impact assessment*, cit. *supra*, at 44.

[210] EC, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*, at 30.

is that such a choice would not penalise foreign investment because subsidised foreign undertakings wishing to participate in tenders in the EU would have a clear rule identical to that of State Aid and would enjoy legal certainty and equal treatment with the Member States without having to undergo lengthy investigations that could also have the effect of delaying the conduct of tendering procedures.

Intervening by amending the Directive would also resolve the objections raised by those who suggest that the regime of investigating bids that are not abnormally low subsidised by a foreign government may be discriminatory compared to the regime of State Aid, where an offer not *prima facie* abnormally low is not investigated and could win the contract.[211]

3.5. The Interplay with Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union

In analysing the legal framework relating to foreign subsidies, Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation) is also to be considered. This Regulation was enacted on 19 March 2019 to address the lack of transparency and fragmented data on foreign subsidies for security and public policy reasons and to introduce a mechanism for cooperation and information sharing.[212]

It is a Regulation that aims to bring transparency and uniformity to the screening mechanisms for FDIs, i.e., for those investments from third countries in which the foreign investor intends to establish or maintain lasting ties with the undertaking in which it invests to then exercise an economic activity in a Member State[213], which normally translates into taking control or being able to exert an

[211] Albert Sánchez Graells, University of Bristol Law School, reported by 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?*, cit. *supra*, at 155.
[212] See Regulation (EU) 2019/452, cit. *supra*.
[213] For the definition of foreign direct investment, see *Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy*, Brussels, 7 July 2010, COM (2010)343 final, para. 1, at 2, as interpreted in light of the ECJ's decision, quoted in footnote 4.

influence on the decisions of the undertaking exercising an economic activity in the Member State.[214]

To this end, it establishes a cooperation mechanism between the various Member States and between the Member States and the Commission to integrate the EU dimension into the assessment; in the Internal Market, an investment in one country may affect the security and public order of other Member States. The Regulation extends to all segments of the economy and is not linked to any limit, as the need to control a transaction is not related to the value of the transaction; to give an example, small start-ups may boast limited value but can be important in strategic issues such as research or technology.[215]

The Regulation undoubtedly testifies to a change of line on the part of the EU, which for decades showed indifference to FDIs in terms of control and offered a reciprocal response to the protectionist activism of third countries such as the United States and China by mitigating a fragmentation caused by the heterogeneity of national legislations.[216]

But it also underlines a turnaround in the concrete management of relations with foreign countries such as China. The rationale behind the new Regulation is to safeguard Europe's strategic assets, such as infrastructures and critical production factors, including certain technologies, and certain sectors, such as the health sector, which could be targeted by hostile investors, especially in economic instability.[217]

It is a horizontal, non-sectoral act with which the Commission intends to accommodate foreign investment while protecting essential interests against the growing role of certain countries and promoting systemic cooperation between the Member States through a unified approach.[218] The Regulation thus provides, at least

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[214] On the FDI Regulation and the relationship with Sovereignty see the reflections of Daniele Gallo, *Sovranità (europea) e controllo degli investimenti esteri*, contribution for the lecture given on 4 November 2021 at the Alma Mater University, Bologna, Third Annual AISDUE Conference. The European Union after the Pandemic, Annali AISDUE, ISSN 2723-9969, Atti Convegni AISDUE, n. 10, 4 January 2022. On the interplay between the proposed Regulation and the FDI screening mechanisms, see Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application*, March 2022.

[215] Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, at 214.

[216] Daniele Gallo, *Sovranità (europea) e controllo degli investimenti esteri*, cit. *supra*, at 196.

[217] Regulation (EU) 2019/452, cit. *supra*.

[218] See, in this respect, the box on page 15 of the *First Annual Report on the screening of foreign direct investments into the Union*, cit. *supra*, where the Commission points out that the Regulation

in its objectives, the framework for the cooperation mechanism by ensuring that all Member States and the Commission monitor FDIs while considering the collective security of the Member States and the EU as well as the security of the Internal Market and the important level of economic integration it allows.

Monitoring and controlling FDIs with unitary measures limit the asymmetries between national legislations. Therefore, the Commission acted out of concern that foreign investments were directed at acquiring control or influence over undertakings with strategic technologies or strategic infrastructure or to have the availability of sensory inputs or information, as foreign investment in strategic undertakings in a Member State may entail a potential threat for the entire EU.[219]

As stated by then-President Jean-Claude Junker, "*If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed*".[220]

The Regulation, while undoubtedly forming part of the instruments at the EU's disposal to safeguard its essential interests and introduce control mechanisms aimed at the protection of security and public order, is aimed at other objectives and is unrelated to any form of competition protection or economic protectionism. In any case, despite its undoubted contribution to the strengthening and certainty of foreign subsidies, it needs to address the distortions caused by foreign subsidies. If the FDI Regulation were intended to level out the Internal Market, it would undoubtedly be an incomplete system if not supported by complementary measures. It could not achieve the goal of making the Internal Market increasingly fair and competitive.

The Direct Investment Control Regulation and the Foreign Subsidies Regulation will necessarily have operational links relevant to business, which can only be grasped at the implementation stage. Despite the areas of similarity, some differences should be highlighted, at least conceptually. It is directed primarily to

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is a cooperation mechanism that facilitates discussions and exchanges between Member States on horizontal issues of FDI screening.

[219] Daniele Gallo, *Sovranità (europea) e controllo degli investimenti esteri*, cit. *supra*, at 197.

[220] Annual State of the Union address, 2017 is available at <https://ec.europa.eu/commission/presscorner/detail/it/SPEECH_17_3165>.

protect different interests. The FDI Regulation makes it clear in Article 4 (1) that the prerequisite is the existence of serious prejudice to essential national defence and security interests.

Moreover, according to some authors, investment control has historically been considered a national prerogative as falling under the economic or industrial policy of Member States.[221] For this reason, even though they now fall under trade policy and thus under the exclusive competence of the EU,[222] the Commission has left it up to the Member States whether to maintain or introduce an investment control mechanism for reasons of security and public order, albeit by giving criteria to be followed,[223] unlike the Regulation for foreign grants.

It follows that while it is true that a State that has established a control mechanism in its legal system is certainly subject to the general principles of the Regulation, it is also true that there is no obligation for States to have such a mechanism.[224]

On the other hand, the control of foreign subsidies is typically a prerogative of the EU, falling within the scope of trade policy to protect the Internal Market and, thus, within the exclusive competence of the EU.[225]

Moreover, the rules on direct investment control are derogatory from the principles of economic liberalism by which the EU's policy has always been guided, so it is justified only when higher interests of a strategic nature are at stake. In contrast, foreign subsidy control is in line with the rules of the Internal Market, free trade, and protection of competition. It has at its basis the objective of improving the functioning of the Internal Market.[226]

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[221] Massimo Merola, online seminar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, cit. *supra*.
[222] See Communication *from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions*, cit. *supra*. See Art. 207 TFEU, which expressly includes foreign direct investment in trade policy.
[223] Raffaella Assetta webinar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, cit. *supra.*
[224] Daniele Gallo, *Sovranità (europea) e controllo degli investimenti esteri, supra*, at 198.
[225] For the legal basis see *infra*, para. 5. See also Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, European EU State Aid framework Quarterly, 2022, Issue 2, at 153-172, disputing the use of Art. 114 by the Commission.
[226] Massimo Merola, online seminar *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, cit. *supra*.

Thus, these are two different instruments in rules and, more importantly, in the goals they seek to achieve. In any case, the autonomy left to the Member States in adopting measures on the control of direct investments could lead to investors facing several parallel national screening procedures in the absence of an EU-wide screening system. It is precisely the need for closer integration with the Foreign Subsidies Regulation, once adopted, that could push the Commission to revise it, possibly towards creating an EU Authority.[227]

3.6. The different objectives of the legislation on the exercise of special powers

To complete the discussion on possible regulatory gaps, it is necessary to ask whether the discipline of golden power - i.e., the set of special powers that governments can exercise to protect their undertakings operating in strategic sectors – which normally translates into the possibility of imposing conditions or vetoes on certain resolutions or the acquisition of shareholdings by different parties – can be useful as a tool to address the issue of foreign subsidies.

Already Article 346 TFEU gave particular emphasis to the essential interests of Member States by stating that they could not be obliged to provide information contrary to their essential interests, and they may take such measures as it considers necessary for the protection of the essential interests of its security, albeit referring to the trade and production of weapons.[228]

Over the years, Member States have variously configured the exercise of special powers, based following the decisions of the ECJ[229], to ensure consistency

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[227] See in this sense Malorie Schaus, *EU Trade Policy in Light of the New Industrial Strategy for Europe*, cit. *supra*, at 149.

[228] Luca Vincenzo Maria Salamone e Giada Pacifico**,** *La disciplina giuridica dei poteri speciali dello Stato sugli assetti societari e i trasferimenti tecnologici nei settori strategici alla luce del decreto-legge n. 23/2020 (c.d. "Decreto liquidità"),* Il Diritto Amministrativo Rivista Giuridica, Anno XIV - n. 11 - Novembre 2022, available at <https://www.ildirittoamministrativo.it/disciplina-giuridica-poteri-speciali-Stato-assetti-societari-trasferimenti-tecnologici-settori-strategici-decreto-legge-23-2020-Decreto-liquidit%C3%A0-dpcm-2020-179-180/ted741>.

[229] See, *inter alia*, Judgment of the Court 4 June 2002, Commission of the European Communities v Kingdom of Belgium, case C-503/99, ECLI:EU:C:2002:328, in which the Court acknowledged that certain concerns may justify Member States retaining some influence over enterprises that were initially public and subsequently privatized, where such enterprises operate in the areas of services of general economic or strategic interest, but that such influence can only be allowed within the limits of a strict guarantee of compliance with public service obligations and Judgment of the Court (Third Chamber) of 26 march 2009, Commission of the European Communities v Italian Republic, case C-326/07, ECLI:EU:C:2009:193, which had ruled that the special powers held by the Italian State in Telecom Italia, Eni, Enel and Finmeccanica were incompatible with EU Law by syndicating

and respect for fundamental market freedoms, the interest of Member States in promoting foreign direct investment, and the need for such investment to be compatible with certain relevant essential strategic interests.[230]

Although the Court's rulings have mainly concerned intra-EU cases, it is well understood how the problems of balancing conflicting interests arise, especially regarding non-EU operators, when they invest in EU territory in public interest areas.[231]

The Commission and the ECJ do not consider the system of golden shares illegal *per se*. However, the conditions to be met are numerous and strict and concern the purposes, contents, means, and procedures.[232] In particular, the Court admits the restrictions or derogations to the Treaties provided for in these Regulations when there is a serious threat to essential public interests,[233] for imperative reasons of public interest,[234] or to ensure the security of energy supplies.[235]

There is no doubt that the various disciplines on the exercise of special powers, combined with the new framework for the control of FDI, should collectively provide the tools to address potential security and public order risks. However, these tools aim not to level the playing field but to the essential and incompressible goal of protecting one's strategic assets.

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the Italian Regulations on golden shares, namely the Prime Minister's Decree of June 10, 2004, by which the criteria and for the exercise of the special powers had been defined because they did not contain specifications on the circumstances under which the criteria for the exercise of the veto power could be applied and thus were not based on objective and controllable conditions. For an overview, see Fabio Bassan, *Dalla Golden Share al Golden Power: il cambio di paradigma europeo dell'intervento dello Stato nell'economia*, Studi sull'integrazione europea, 2014 at 57-80.

[230] Luca Vincenzo Maria Salamone e Giada Pacifico**,** *La disciplina giuridica dei poteri speciali dello Stato sugli assetti societari e i trasferimenti tecnologici nei settori strategici alla luce del decreto-legge n. 23/2020 (c.d. "Decreto liquidità")*, cit. *supra*, at 199.

[231] See, on this point, Daniele Gallo, *Corte di Giustizia UE, Golden Shares e Investimenti Sovrani*, Diritto del Commercio Internazionale, Anno XXVII Fasc. 4 – 2013, at 922-923, that presents, *inter alia*, the main rulings of the ECJ against Italy, France, Belgium, Portugal, the United Kingdom, Spain, the Netherlands, and Germany.

[232] Fabio Bassan, *Dalla Golden Share al Golden Power: il cambio di paradigma europeo dell'intervento dello Stato nell'economia*, cit. *supra*, at 6.

[233] Judgment of the Court of 13 May 2003, *Commission of the European Communities v Kingdom of Spain*, Case C-463/00, para. 72, ECLI:EU:C:2003:272.

[234] Judgment of the Court (First Chamber) of 8 July 2010, *European Commission v Portuguese Republic*, Case C-171/08, para. 49, ECLI:EU:C:2010:412.

[235] Judgment of the Court of 13 May 2003, *Commission of the European Communities v Kingdom of Spain*, cit. *supra*, para. 71, ECLI:EU:C:2003:272.

However, the objective underlying the various Regulations on the exercise of special powers by Member States is different from that on the control of foreign grants, although the concerns that sparked in the various Member States to the various Regulations on the exercise of special powers is, similarly to foreign grants, the lack of information and the concern that these Funds may be pursuing political and strategic objectives rather than the declared targets of maximising returns. In other words, even if the legislation on the exercise of special powers verifies the ownership structures of undertakings and the relative contestability, which may hide non-transparent or even hostile motives and thus be at odds with the strategic interests of the Member States, the safeguarding of the Internal Market is not a criterion to be taken into consideration an in the determination made by the Member State as to whether or not to exercise special powers.

4. The Commission's response to the deficiencies: bridging the gap to address change

Increased global competition, the trade tensions associated with economic uncertainty, and the new fragilities shown by the pandemic have caused Europe to leverage the scale and integration of the Internal Market and strengthen the defence of its strategic interests through the creation of conditions for greater and genuine competition and the development of reciprocally beneficial bilateral relations. Thus, to enable EU undertakings to compete globally and to protect themselves from unfair practices related to foreign subsidies, the Commission has decided to act through a trade policy review but acting on several fronts to balance the need to maintain a positive climate for foreign investment for the benefits it brings to the EU and Member States' economies with the need to find new instruments that enable the EU market to remain open, yet competitive and resilient.[236]

Therefore, on 10 March 2020, the Commission adopted the new Industrial Strategy for Europe,[237] which defines the framework of actions with which to

[236] Communication from the Commission, *Welcoming Foreign Direct Investment while Protecting Essential Interests*, Brussels, 13.9.2017, COM (2017) 494 final, at 2.
[237] Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social committee and the committee of the regions, *A new industrial strategy for Europe, Brussels*, cit. *supra*.

support the transition to a green, digital, competitive, and resilient economy, reinforcing it with the introduction, on 16 June 2020,[238] of the concept of EU strategic autonomy as a new horizon for EU trade policy. Indeed, it is with strategic autonomy that the EU makes the real change of pace with the aim, in the face of the multilateral system's inability to cope with the new challenges, of balancing the benefits of trade openness with greater resilience and an assertive stance against unfair trade practices.[239]

From now on, Open Strategic Autonomy becomes the new governance model for EU trade policy, the driving force enabling it to pursue its interests independently. While the EU economy has always been marked by an attitude of openness based on cooperation and multilateralism, the autonomy now implies the possibility of adopting unilateral instruments that stress the intention to protect the interests and values of the EU by acting autonomously to protect against possible unfair trade practices, even in the absence of multilateral, i.e., negotiated, solutions.[240]

Using strategic autonomy, the Commission addressed the issue of foreign subsidies through two instruments that complement and supplement each other.

The first of the actions to limit harmful subsidies and improve the level playing field between undertakings in the Internal Market was to commit to amend some trade provisions in free trade agreements.[241] Over the past 25 years, the WTO has contributed to the change in international economic relations by providing rules for world trade in goods and services that have fostered great growth.[242] However, some economies, such as China, have yet to develop into open-market economies and fulfil all the commitments in the WTO Accession Protocol.[243] This led the EU

[238] Consultation note of 16 June 2020, for a renewed trade policy for a stronger Europe,
[239] Malorie Schaus, *EU Trade Policy in Light of the New Industrial Strategy for Europe*, cit. *supra*, at 144.
[240] See the reflections of Luca Giordana, *Autonomia strategica aperta: la nuova strategia commerciale dell'Unione*, 2 March 2021, Apiceuropa.eu, available at <https://www.apiceuropa.com/autonomia-strategica-aperta-la-nuova-strategia-commerciale-dellunione/>.
[241] See European Commission presents comprehensive approach for the modernization of the World Trade Organization, EU concept paper on WTO modernization, available at <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>.
[242] See the opinion of Roberto Azevêdo, WTO director general, *I 25 anni di successi e sfide dell'OMC*, 13 January 2020 available at <https://www.swissinfo.ch/ita/punto-di-vista_i-25-anni-di-successi-e-sfide-dell-omc/45815244>.
[243] Business Europe, *The EU and China - Addressing the systemic challenge*, cit. *supra*, at 12.

Council to suggest to the Commission, on 28 June 2018, the need for an original approach to WTO discipline.[244] The EU Commission thus agreed, at the beginning of 2020, with the United States and Japan, to start a joint path to introduce elements of flexibility into the system, both in terms of the negotiation method and the decision-making process, and to improve the procedures for monitoring and reporting trade policies, to make the system more efficient.[245]

In the trilateral note – as the Commission will later do in the White Paper – the States pointed out that the current list of prohibited subsidies in Article 3(1) of the SCM Agreement is inadequate to address market and trade-distorting subsidies and that it will be necessary to add new prohibitions on subsidies consisting of unlimited guarantees, subsidies to insolvent or troubled undertakings in the lack of a trustworthy restructuring plan, subsidies to undertakings that cannot get long-term financing or investment from independent commercial sources, and subsidies to undertakings operating in sectors or industries in overcapacity.[246]

Although the EU strongly supports the reform of the WTO, the inability of the WTO to update its rules – negotiated in the 1980s and 1990s and unsuitable for today's challenges since based, like the GATT rules, on a liberal economic concept – the number of investments and loans from new trading powers such as China, and the long timeframes for multilateral negotiated solutions have convinced the committee of the inevitability of adopting a unilateral solution, at least in the medium term.[247]

Thus, on 17 June 2020, in the aftermath of the adoption of the Consultation Note that endorsed the concept of Open Policy Autonomy, the Commission published the White Paper on Foreign Subsidies in which new unilateral instruments to defend against unfair practices are envisaged going beyond the

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[244] See EC conclusions, 28 June 2018, para. 16 available at <https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>.

[245] See EC, press corner, *Trade/WTO: EU, U.S. and Japan agree on new ways to strengthen global rules on industrial subsidies*, 14 January 2020, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_43>.

[246] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington, D.C., 14 January 2020, is available at <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf>.

[247] To this effect, Luca Rubini, *Transcending Territoriality: Expanding EU State Aid control through consensus and coercion*, cit. *supra*, at 21.

traditional trade defence mechanisms of anti-dumping rules, countervailing duties and safeguard measures.[248] Therefore, the EU has chosen to follow a unilateral course of action to address real asymmetries, only supposed by some,[249] abandoning the traditional method of addressing regulatory differences through negotiation and the conclusion of agreements.[250] And it is no coincidence that in the introduction, the White Paper reiterates its link to Strategic Autonomy as a necessary tool to exploit the advantages of world trade fully.[251] The Covid-19 pandemic also revealed new vulnerabilities globally and within the EU. So, on 5 March 2021, the Commission updated the new EU Industrial Strategy considering the impact that the previous year, characterised by falling private investment and increasing liquidity problems on the part of undertakings, had on the EU economy and industry while confirming the priorities and actions of the Industrial Strategy.[252]

Not surprisingly, the new Foreign Subsidies Regulation was also published on the same day as the adoption of the update of the EU strategy, underlining the close link between the two instruments to close regulatory gaps and thus address the change represented by the new challenges.

5. The legal basis and the principle of attribution

The legal basis Legal is one or more Treaty provisions conferring legislative powers on the legislative bodies of the EU. According to the principle of attribution contained in Article 5(1) TFEU, every legislative or non-legislative act must be based on at least one legal basis, i.e., a Treaty provision conferring that specific competence. [253]

[248] Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, rivista.eurojus.it, Issue 4 (2020), at 123, available at <http://rivista.eurojus.it/wp-content/uploads/pdf/rubini-segni.pdf>.
[249] Luca Rubini, *Transcending Territoriality: Expanding EU State Aid control through consensus and coercion*, cit. *supra*, at 19.
[250] *Ibid.*
[251] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 1.
[252] EC, *Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery*, cit. *supra*, at 2 e 3.
[253] See in this sense Annegret Engel, *The Choice of Legal Basis for Acts of the European Union*, cit. *supra*, at 1.

Therefore, EU acts must specify the legal basis, i.e., the Treaty provision legitimising the adoption of that specific act, since any competence not expressly attributed to it is presumed to remain within the sphere of intervention of Member States. Thus, the legal basis is decisive in determining whether the EU can act independently, in parallel with the member states, or only in a supporting capacity.[254]

The choice of the legal basis is an issue of fundamental importance in assessing the legitimacy of the Regulation because, as the Court's Case Law has repeatedly pointed out, the correct legal basis is of constitutional significance. The use of an incorrect legal basis would render any measure useless, being likely to invalidate the act.[255]

Moreover, such a choice can sometimes create tensions between the EU institutions or between the EU and its Member States due to conflicting interests and possible overlapping competencies.[256] This issue is also relevant to the proposed Foreign Subsidies Regulation since, if the legal basis identified by the Commission were unsuitable, conflicts could arise with foreign States as well.

To limit these conflicts, the Courts, through their decisions, have developed general principles that serve to guide this choice.[257]

Therefore, the principle of conferral assumes decisive importance in the relationship between the Member States and the EU as a regulatory criterion for the vertical division of competencies. Indeed, each conferral of competence corresponds to a specular cession of national sovereignty in the multiple spheres of intervention envisaged by the Treaties and in the light of the objectives they foresee.[258]

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[254] *Ibid.*

[255] See the Opinion of the Court of 6 December 2001**,** Cartagena protocol, cit. *supra,* para. 5, ECLI: EU:C:2001:664.

[256] Annegret Engel, *The Choice of Legal Basis for Acts of the European Union,* cit. *supra*, at 1.

[257] Annegret Engel, *The Choice of Legal Basis for Acts of the European Union,* cit. *supra*, at 2, according to which the legal basis litigation of the past four decades has provided a range of criteria to increase legal certainty.

[258] On the division of competences of the European Union see, *inter alia*, Ornella Porchia, *Competenze dell'Unione europea*, Enciclopedia Giuridica Treccani, available at <https://www.treccani.it/enciclopedia/competenze-dell-unione-europea_%28Diritto-on-line%29/>. For an overview of the main competence of the Eu, see Armin Cuyvers, *The legal framework of the EU*, in East African Community Law: Institutional, Substantive and Comparative EU Aspect, Chapter 3, (Brill 2017).

Once regulatory gaps have been established, it is important to examine the legal basis of the proposed Foreign Subsidies Regulation in light of the principles of competence, subsidiarity, proportionality, and justification of the choice of legal instrument.[259]

5.1. The exclusive competence under Article 207 TFEU

The first thing that stands out is that the Commission does not find the basis of its regulatory power in competition rules, which, under Article 3(1)(b) TFEU, also falls under exclusive competence. Indeed, the Regulation is not a competition instrument, even though its substantive and procedural rules recall and are inspired at least in part by the existing antitrust and EU State Aid framework.[260]

Instead, the Commission found its power to act on a dual legal basis, using Articles 207 and 114 TFEU simultaneously. In this regard, Case Law permits the use of the dual legal basis. However, it is not commonly used because the objectives pursued should be inseparable and could lead to difficulties due to differences in legislative procedures.[261]

The objectives of the Foreign Subsidies Regulation can be reduced to two categories: a general one aimed at establishing a level playing field for EU undertakings and two or more specific ones aimed at identifying and eliminating distorting subsidies to ensure the proper functioning of the Internal Market.

To meet these objectives, the Commission preferred to use Article 207 TFEU, which allows the EU Parliament and the Council to adopt, by Regulation, the measures that set the framework for implementing trade policy. These include, according to paragraph 1 of Article 207 mentioned above, those of trade protection like FDIs, goods and services exchanges, and measures to be adopted in case of subsidies.

The same Article, in paragraph 2, gives the EU exclusive competence in adopting measures to define the Internal Market framework of trade policy.[262]

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[259] For an exam of legal basis of the proposed Regulation on foreign subsidies, see Justyna Smela Wolski, cit. *supra*.
[260] See Alain Alexis *Foreign Subsidy Controls: The new European Commission proposal*, cit. *supra*, at 211.
[261] Annegret Engel, *The Choice of Legal Basis for Acts of the European Union*, cit. *supra*, at 83.
[262] Regulation (EU) 2022/2560, cit. *supra*, para. 5.

Therefore, through Article 207 TFEU, the Commission has considered the link to trade policy to be prevalent, including the exclusive competence to regulate foreign subsidies that distort the Internal Market. This also comprises those situations where a subsidised investor intends to acquire an EU undertaking or participate in a public procurement procedure in the EU.

To evaluate whether a measure is encompassed by Article 207 TFEU, the Court has elaborated a dual-phase approach based on Opinion 2/15 of ECJ.[263] First, the instrument must pursue one of the general objectives of trade policy within the meaning of Article 21(2) TFEU. Secondly, there must be a specific link with international trade.[264] In this regard, Article 207 TFEU can be used as a legal basis when there is a link with international trade. However, the Foreign Subsidy Regulation is not aimed at promoting, facilitating or regulating international trade. Rather, it is intended to react to foreign subsidies that take the form of subsidised investments.

Since the new Regulation is a unilateral measure that does not have the primary objective of regulating trade, the use of Article 207 TFEU as a legal basis is only partially convincing. Indeed, Article 207 TFEU would undoubtedly have been appropriate if the instrument had been an international agreement aimed at investment protection.

However, bringing the action under exclusive competence means that, according to Article 2(1) TFEU, only the EU has the power to adopt a legally binding act on foreign subsidies. This power is excluded for Member States, which may only act if authorised by the EU or to implement EU acts. It is no coincidence that, as seen below in Chapter 3, the new Regulation centralises all decision-making power in the hands of the Commission based on this exclusive competence, while under the FDI Regulation, the Commission can only give an opinion. Still, the decision power is left to the Member State.

5.2. The principle of subsidiarity under Article 114 TFEU

[263] Opinion 2/15 of the Court (Full Court) of 16 May 2017, *Request for an opinion pursuant to Article 218(11) TFEU, made on 10 July 2015 by the European Commission*, ECLI:EU:C:2017:376.
[264] Justina Smela Wolsky cit. *supra*, at 166.

Based on these remarks, it is easy to understand why the Commission also considered Article 114 TFEU as a further basis for its regulatory power. This Article gives the EU a shared competence with the Member States to adopt measures on the harmonisation of the provisions disciplined by Law, Regulation, or administrative action in the Member States which relate to the establishment and functioning of the Internal Market, as long as it is within the limits of achieving the objectives outlined in Article 26 TFEU.

Therefore, Article 207 TFEU might not be a suitable basis for legitimising the Commission's use of the regulatory instrument in place of the agreement, i.e., a multilateral instrument that has been used in trade to date to regulate the subject of subsidies.

In particular, the ECJ examined in 2013 the relationship between Articles 207 TFEU and 114 TFEU in the context of a conflict between the European Commission and the Council over these two Articles. The examination was performed in the face of the Commission's action for annulment of Council Decision 2011/853/EU of 29 November 2011, on the signing of the European Convention on the Legal Protection of Services based on Conditional Access.[265]

The Commission considered that the contested decision fell under the Common Commercial Policy and should, thus, have been adopted based on Article 207(4) TFEU since it was primarily addressed to non-members of the EU.

In contrast, the Council held that the appropriate legal basis for the contested decision was Article 114 TFEU because the objective of the Convention was to remove or prevent obstacles to trade. In this case, the Court clarified that according to settled Case Law, the legal basis for an EU act must build upon objective elements susceptible to judicial review, including the purpose and content of that act.[266] The Court has also made it clear that the act pursues a dual purpose or has a dual component if one is identifiable as the main or predominant purpose or component, while the other is only incidental. The act must be founded on a single

[265] Judgment of the Court (Grand Chamber) 22 October 2013, European Commission v Council of the European Union, Case C-137/12, ECLI:EU:C:2013:675.
[266] Judgment of 8 September 2009, Commission v Parliament and Council, C 411/06, ECR p. I 7585, para. 45, ECLI:EU:C:2009:518, and Case Law cited therein. See, also, Judgment of 19 July 2012, Parliament v Council, C 130/10, para. 42, ECLI:EU:C:2012:472, and Case Law cited therein.

legal basis, namely the one needed by the primary or dominating purpose or component.[267]

The latter considerations lead Justyna Smela Swolky to believe that Article 207 TFEU is an appropriate basis for adopting the Foreign Subsidies Regulation, regardless of Article 114 TFEU. This was maintained even given that the ECJ favoured a broad interpretation of Article 207 TFEU and dismissed trade policy as minor if it is limited to tools affecting primarily traditional features of foreign trade.[268]

However, this interpretation does not consider that the opinion had been requested on an international agreement, particularly on whether a specific agreement (on rubber) could fall under trade policy. This differs from authorising the Commission to unilaterally regulate a matter, as in the case of Foreign Subsidies.

It is also not considered that Article 207 TFEU uses the term "*measures*". This suggests that it refers to instruments that are not only regulatory in nature and that the provision for regulatory use is limited by paragraph 2, i.e., provisions that establish the framework for implementing trade policies.

The fact that the broad interpretation refers to the conclusion of agreements, together with the wording of Article 207, makes it clear that the measures permitted by this Article are multilateral, i.e., adopted on a conventional basis. Therefore, the correct instrument would have been to proceed through an amendment to the GATT and SCM Agreement.

By pointing to Article 114 TFEU as the legal basis, the Commission shows to be aware of these concerns and seeks an additional legal basis. This Article gives the EU the powers necessary for creating the Internal Market to achieve an advanced level of integration. This results in norms characterised by a certain affinity[269] so that EU Law can serve as a regulatory framework for trade between

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[267] Judgment of 8 September 2009, Commission v Parliament and Council, C 411/06, ECR p. I 7585, para. 46, ECLI:EU:C:2009:518, and Judgment of 6 September 2012, Parliament v Council, C 490/10, para. 45, ECLI:EU:C:2012:525, and Case Law cited therein.

[268] Opinion of the Court of 4 October 1979, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber*, Opinion 1/78, para. 38, ECLI:EU:C:1979:224.

[269] See Antonio Malintoppi, *Il riavvicinamento delle legislazioni come problema di diritto internazionale*, Rivista di diritto internazionale, 1959, at 245.

Member States. However, according to Justina Smela Wolski, Article 114 TFEU is an inadequate legal basis, as no recourse to Article 114 TFEU is necessary when the distortion results from the behaviour of Member States. In contrast, the distortions originate from the behaviour of third countries in this case.[270]

While it is true that there are no Regulations or standards to be harmonised because there is no legislation on the subject by the Member States, the procedural model under Article 114 TFEU, by providing for the adoption of the co-decision legislative procedure, gives a significant role to the European Parliament and thus implies greater democratic legitimacy of the adopted act.[271] The EU institutions have also been able to rely on Article 114 TFEU in such a flexible manner due to ECJ jurisprudence. The latter has succeeded in gradually transforming the EU's harmonisation power into a regulatory power almost completely independent of the existence of national legislation.[272]

Furthermore, in such a situation, where several legal bases in substantive law could be applicable, a centre-of-gravity approach must be carried out according to settled Case Law.[273] The centre of gravity of the Foreign Subsidies Regulation, meaning its main purpose,[274] is to eliminate Internal Market distortions caused by foreign subsidies that alter the playing field.

However, the Court allows multiple legal bases when no predominant component can be identified, or the components are inseparably linked. In addition, practice shows that the legislator often opts to adopt the measure on a multiplicity of legal bases, even if the objectives are not inextricably linked and if the thrust of an agreement concerns only one policy area.[275]

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[270] See Justina Smela Wolski cit. *supra*, at 162-165, according to whom recourse to Article 114 is necessary when the distortion results from the behaviour of member states. In this case, the distortions originate from third countries' behaviour, not Member States.

[271] See Massimo Condinanzi, *Commento all'articolo 95* in F Pocar (a cura di) *Commentario breve ai trattati della Comunità e dell'Unione europea*, Cedam, Padova, 2001, at 498-499.

[272] R. Schütze, Limits to the internal market competence(s): constitutional comparisons, in L. Azoulai, The question of competence in the European Union, Oxford University press, Oxford, 2014, at 232.

[273] See Judgment of the Court (Grand Chamber) of 4 September 2018, *European Commission v Council of the European Union,* Opinion of Advocate General Kokott, para. 58, ECLI:EU:C:2018:364.

[274] Annegret Engel, *The Choice of Legal Basis for Acts of the European Union,* cit. *supra*, at 14.

[275] Laurens Ankersmit, *The boundaries of the development cooperation legal basis: What to make of the Court's 'centre of gravity' test?,* European Law Blog News and Comments on EU Law, 13

In the case of the Foreign Subsidies Regulation, the objective of eliminating present and future barriers is neither secondary nor indirect to the objectives of trade policy. As the Case Law makes clear, the goal of improving the functioning of the Internal Market can also be achieved by preventing the occurrence of future obstacles. Indeed, where they are likely to occur, the measure is specifically designed to prevent them.

It remains to be seen whether the Commission can proceed unilaterally to regulate foreign subsidies without prompting a multilateral amendment to the WTO's regulatory system. Once it decides to proceed, the Commission's choice to use both regulatory bases in Articles 207 and 114 TFEU is supportable.

From this perspective, the Regulation is justified in the context of the competing or supporting powers conferred on it by the Treaties. Indeed, the goal of levelling the playing field of the Internal Market is certainly more effectively achieved at the EU level than by national, regional, or local action from individual Member States based on the principle of subsidiarity. The EU action has added value in ensuring consistency with State Aid compatibility criteria, and this advantage could not be achieved at the Member State level.

Addressing the issue of distortive subsidies at the EU level also provides greater predictability and legal certainty for Member-State undertakings and subsidised foreign undertakings. The proposed provisions align with Member States' national interests as they tend to limit the competition-distorting effect of some foreign subsidies without precluding those that produce benefits in the EU Internal Market. [276]

Should Article 114 TFEU be deemed inappropriate, the Commission could still proceed under Article 352 TFEU, which is residual and allows the EU to legislate without specific investment.[277]

June 2014, available at <https://europeanlawblog.eu/2014/06/13/the-boundaries-of-the-development-cooperation-legal-basis-what-to-make-of-the-courts-centre-of-gravity-test/>.

[276] On this point, see, for example, Study Service No. 37 of the Italian Republic Senate Study Service, in which elements were provided to the 10th Standing Committee of the Senate to assess the compliance with the principle of subsidiarity and proportionality, available at <https://www.senato.it/service/PDF/PDFServer/BGT/01301113.pdf>.

[277] Ornella Porchia, cit. *supra*.

One last consideration: the Commission ignores Articles 103 TFEU and 109 TFEU as the legal basis since they are inappropriate due to the subject matter they are intended to regulate. In this regard, Article 103 TFEU might refer to rules that restrict competition but not those that aim to create new competition.[278] Finally, Article 109 TFEU has its scope in the regulatory implementation of Articles 107 TFEU and 108 TFEU and, thus, cannot cover subsidies granted by a third country.

5.3. The proportionality principle

Another aspect on which the proposed Foreign Subsidies Regulation deserves further consideration is that of proportionality, which is closely related to the principle of subsidiarity, according to which, under Article 5 of the TEU, the EU cannot go beyond what is necessary to achieve the objectives of the Treaties.

On this point, the EU Commission succinctly stated that the Regulation is in line with the principle of proportionality, as it achieves its objective in a targeted manner by imposing a burden only on undertakings operating in the Internal Market and receiving foreign subsidies.[279] The proportionality principle aims to ensure that the severity of the legal requirements or intervention strategy matches the policy's or legal framework's desired goals.

Certainly, the Regulation of Foreign Subsidies is a key part of the EU's strategy for the Internal Market. Certainly, if one refers to the criteria usually used by the Member States and recommended in the evaluation grid prepared by the Evaluation Task Force, the Regulation was preceded by an extensive economic and legal analysis, later transfused into the White Paper on Foreign Subsidies containing detailed elements supported by qualitative and quantitative indicators and relevant economic data.

However, while the definition of the problem is timely, the viable alternative solutions, particularly the profiles related to the relationship with WTO Law, still need to be explored. Indeed, more is needed to state the existence of a regulatory gap. As will be seen in Chapter 2, even though the proposal has been the subject of extensive consultations among the Member States, there have been divergent

[278] See, in this regard, Justyna Smela Wolski, *supra*, which also rules out the possibility of basing the proposal on Arts. 103 and 109 TFEU.
[279] Regulation (EU) 2022/2560, cit. *supra*, at 7.

opinions both regarding compatibility with Article 32 SCM Agreement and about administrative burdens which, in the proposed Regulation, are relevant and punctual, especially regarding tender procedures and risk of further delaying procedures.

Moreover, additional financial or administrative costs for Member States must be sufficiently estimated, as administrative structures will have to be adjusted. It should also be noted that while it is the responsibility of the Member States to notify under the EU State Aid framework, the same responsibility lies on the undertakings under the Foreign Subsidies Regulation. Thus, the administrative burdens need to be calculated.

Certainly, providing a flexible instrument such as guidelines will make it possible to balance the different underlying interests.

5.4. The choice of the legislative instrument

The choice of legal instrument is certainly related to that of legal basis. In particular, in cases where the legal basis is identified in more than one Article, there may be differences in the voting procedures identified by the same rules, such as the quorums required for approval (qualified majority or unanimity).

The Commission's identification of Articles 207 and 114 TFEU as the legal basis means that adopting an act requires qualified majority voting. Suppose this interpretation is not shared, and it is necessary to use Article 352 TFEU. In that case, the special rules of that Article should be used, which state that the Council shall act unanimously on a proposal from the Commission after obtaining the consent of the European Parliament.[280]

However, this difference is understandable because Article 352 TFEU represents the flexibility clause, albeit with the necessary limitations, including the impossibility of its recourse if the initiative can be traced back to attribution of competence enshrined in another provision of the Treaties[281] and without being able

[280] On the choice of legislative instrument, see Annegret Engel, *The Choice of Legal Basis for Acts of the European Union*, cit. *supra*.

[281] See Ornella Porchia, cit. *supra*, and Judgment of the Court 30 May 1989, Case 242/872, Commission of the European Communities *v Council of the European Communities*, ECLI:EU:C:1989:217.

to justify an initiative untethered from the general set of EU competencies.[282] Therefore, it is normal that, when used, a legislative approval procedure will be applied that ensures broad institutional participation and balance among the multiple interests at stake.

However, the perplexity already mentioned in the preceding pages remains in the background, and that is whether a modification of the WTO system I desirable.

Concerning foreign procurement subsidies, it is preferable to intervene with an amendment to the relevant Directives to prevent third countries' undertakings from being treated worse than those from the Member States.

Once the choice is made to intervene unilaterally, the word measures used in Article 207 leaves ample room. In this case, the choice of the legislative instrument is consistent with the legislative provision of Article 207(2), which provides that the Parliament and the Council shall act employing a Regulation directly applicable to the Member States. This is more suitable to ensure the same level of rights and obligations for individuals and a consistent and effective application of the rules throughout the EU, avoiding the fragmentation and multiplicity of disciplines in the case of the Directive, which is adopted by the Member States and has longer implementation times.

This choice is also a consequence of the lesser weight that a single national authority can exert in international investments, with the risk of jeopardising the EU's policies in this area.

6. Some considerations along the way

Following the framework outlined in the preceding paragraphs, some brief remarks can be made.

Addressing the phenomenon of foreign subsidies is certainly a key objective for the EU and the development of an Internal Market in line with the strategic interests of the Member States and the EU. The analysis of the legal framework of

[282] Ornella Porchia, cit. *supra*.

foreign subsidies confirmed the need for more existing legal instruments in the EU legal system and WTO trade defence instruments.

The long timeframe for reaching an international trade agreement to comprehensively regulate the phenomenon of foreign subsidies, including for services, has prompted the EU to seek unilateral solutions. The proposed measures are, without a doubt, the first implementation of the principle of strategic autonomy, or "*capacity to act autonomously when and where necessary and with partners wherever possible*".[283]

However, although the Foreign Subsidies Regulation should be seen in a broad context that symbolises the new direction taken by the EU, without thereby changing its openness to the market, but only supports it with a set of policies that protect its core activities or interests and those of its Member States, it still leaves some questions open, especially regarding the legal basis identified.

Moreover, although the new Regulation is not formally discriminatory, as it is not officially targeted at investments from specific countries, it is impossible to predict its impact on foreign investments, especially Chinese investments. And its actual effectiveness in achieving the objective will depend on how in practice, the balancing of opposing interests is conducted, i.e., between the need to continue receiving foreign investment and the need for this investment not to distort the market to the detriment of the EU undertakings. Current forecasts continue to vary: some observers predict that the mechanism will have a significant impact, and in contrast, others predict that it will have none. With time and its concrete implementation, it will become clear whether the Foreign Subsidies Regulation will enable effective control of foreign subsidies or will only have a deterrent role.

Certainly, the fact that investments directed towards the Internal Market are bucking the trend compared to the rest of the world economy, and despite the post-pandemic trade recovery, is a wake-up call. Indeed, it should not be underestimated that the decrease comes in the wake of the introduction of the new FDI Regulation and at a time when the EU has adopted the new Foreign Subsidies Regulation.

[283] Council of the European Union, *Council conclusions on implementing the EU Global Strategy in the area of Security and Defence*, 14 November 2016, 14149/16.

Given the multiplicity and divergence of interests, stakeholders' positions must be examined more closely. Therefore, the second Chapter will examine the White Paper on the various stakeholders' positions, suggestions, and concerns during the consultations.

CHAPTER 2 – The White Paper on foreign subsidies: reaffirming the EU leadership

1. The White Paper and the Brussels effect

The EC adopted the White Paper to launch an important reflection on how to address foreign subsidies that distort or threaten to distort the level playing field in the Internal Market and to assess whether the legal instruments on foreign subsidies available to the EU under existing legislation are adequate. [284]

It represents the EU's willingness to move beyond the existing regulatory framework that has proven deficient or inadequate. The White Paper, described by some as ambitious and visionary,[285] therefore, marks a significant shift in the Commission's priorities, aware that the Internal Market is fundamental to Europe's prosperity and cannot function without a level playing field.[286]

As seen before, behind this stated objective is, as well, the Commission's desire to reaffirm its ability to respond to the concern expressed by some Member States that it represents an obstacle to the competitiveness of EU industries because it refused to authorise macro concentrations so that EU undertakings would not be able to compete with undertakings that are active in the Internal Market but reside in third countries that have more lenient competition rules.[287]

To these criticisms, the Commission, through the White Paper, responds by suggesting a change of pace and proposing a unilateral measure that, if adopted, would enable it to retaliate against initiatives assertively and resiliently, such as *China's Belt and Road* and *Made in China 2025*,[288] at a particular historical moment

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[284] The economic and political context that led to the adoption of the White Paper and the issue of whether the existing legal framework for countering foreign subsidies is inadequate is addressed *supra*, Chapter 1, para. 2.

[285] Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 127.

[286] See the European Commission press release on 17 June 2020, White Paper, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1070>.

[287] The Commission decision, case M.8677, Siemens/Alstom, *Manifeste franco-allemand*, Dutch non-paper and the letter to Commissioner Vestager from Poland, Italy, France and German, are all reported *supra*, para. 1.1

[288] See Nuno Cuna Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, in Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU (book Chapter), ed. Springer, 2021, cit. *supra*, at 216 and also Luca Rubini, *I segni dei tempi: unilateralismo o*

characterised, at least in Europe, by unprecedented subsidy policies following the Covid-19 pandemic.[289]

However, there is another point to be made. With the decision to intervene by proposing unilateral action, the Commission is acutely aware of the Bruxelles effect, as brilliantly defined by Anu Bradford.[290] This mode of action by the EU is becoming an increasingly Internal Market in its foreign policy, aimed at pushing non-EU countries to follow, if not its own rules, at least its standards.[291] Therefore, the Commission is aware of two aspects: the first is that it is one of the largest and richest consumer markets supported by strong regulatory institutions. The other is that only a few undertakings active in the global market can afford to refrain from trading in the EU.

Therefore, with the White Paper, the Commission implicitly reiterates that the price of access to the Internal Market for non-EU undertakings is to adjust their conduct to EU standards, which can be considered among the strictest in the world. Therefore, behind the White Paper, there is not only the search for mid-term solutions to the foreign subsidy phenomenon, but there is, in the face of Member States' concerns about the length of negotiations on multilateral rule changes, the reservation of wanting to exert regulatory pressure at the international level to facilitate the conclusion of those negotiations.

And some Member States are also aware of this and, in responding to the consultations, openly discerned that it would be more appropriate to deal with these kinds of distortions by creating globally harmonised rules since it is complex to create unilateral rules designed to deal with problems determined by the economic policies of other countries. For these countries, if the proposed Regulation was to

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cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea, cit. *supra*, at 125.

[289] See Nicole Kar, *EU tools addressing foreign subsidies: anything but disguised trade remedies, and could they backfire*? Linklaters, 25 June 2020, available at <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2020/eu-foreign-subsidies-white-paper-series/eu-foreign-subsidies-white-paper-series/eu-tools-addressing-foreign-subsidies-anything-but-disguised-trade-remedies-and-could-they-backfire>.

[290] See Anu Bradford, *The Brussels Effect – How the European Union Rules the World*, Oxford, 2020.

[291] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law*, cit. *supra*, at 344, but also J. Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 155.

be pursued, it should have been designed to achieve a multilateral framework for subsidies in the medium to long term.

Therefore, the White Paper's added value is also found in the EU's strengthened political commitment to reassert its leadership in global trade policy.

As will be seen in the following sections, the strategic importance of the objective does not resolve the many legal doubts raised against the White Paper by the participants in the consultation, starting with the choice to proceed through unilateral action.

Therefore, this Chapter aims to illustrate some of the issues raised by stakeholders and sometimes even doctrine immediately after its publication. To this end, the structure and content of the White Paper are outlined preliminarily, with particular reference to the specific modules into which it is divided. Before analysing the contributions made in response to the consultations, the questionnaire will be presented to simplify understanding of the issues raised by the stakeholders and to demonstrate some of the legal issues that the Commission faced in drafting the Regulation.

Hence, several issues will be addressed, including the consistency of the proposed measures with the obligations of the EU as a member of the WTO, with particular reference to compliance with Article 32.1 of the SCM Agreement and the principle of discrimination as well as the issue of the definition of foreign subsidy, that of the risk of overlap with existing legal instruments and its connection with the increase in possible administrative burdens, as well as noting some recurring sector issues in the consultation material. Finally, the reported critical issues regarding the EU test, public procurement, and remedial measures will be analysed.

2. The White Paper: a synthesis

It will now be presented a synthesis of the White Paper that allows us to understand better the observations presented by stakeholders.

2.1. The structure

As for structure, the White Paper is more detailed than the non-paper submitted by the Netherlands in 2019. The latter is presented as a short document with a general analysis framework, and the corrective measures need to be more articulated.[292] Indeed, the Dutch paper merely states the problem's existence without providing any particular data by pointing out the need to solve it by establishing a new competition framework or harmonising State Aid Regulation and trade defence rules via bilateral trade agreements.[293]

The White Paper, on the contrary, is more structured, and its greater level of detail results from the Commission's in-depth work.[294] The issues raised by foreign subsidies about their effects on the Internal Market had already begun when the need for changes in WTO rules was highlighted.[295]

However, despite this greater level of detail than the Dutch non-paper, the White Paper does not achieve the degree of definition typical of a defined normative proposal, leaving several spaces open for reflection. This vagueness, evident in some places, is clearly due to the nature of the chosen instrument, which is typical of an official report that offers information on a particular sector to a selected audience of users, thus a contribution to outlining policy, postponing the definition of the regulatory proposal to a later time, in this case to the outcome of the consultations.[296]

Otherwise, the White Paper is a well-articulated document, divided into seven Chapters and two annexes in addition to an introduction in which the economic and political context in which it originated is given. Part of paragraph 2 of the introduction is devoted to identifying and circumscribing the problem related to the risk of foreign subsidies distorting the Internal Market. The remaining part highlights the need for more information on the number of foreign subsidies and a

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[292] See the Dutch non-paper, cit. *supra*. To this effect, .see also Victor Crochet and Marcus Gustafsonn, Lawful, *Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 346.
[293] See Dutch non-paper, cit. *supra*, at 1.
[294] See Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 126
[295] On the need to change WTO rules, see Chapter 1, para. 2.
[296] On the origin of the term "*White Paper*", see Anthony James, *Origin of White Papers, on klariti.com*, 17 June 2017, available at <https://klariti.com/2017/06/17/origin-of-white-papers/> and Craig Rosenberg, *The origin of White Papers*, on The Funeholic, 15 September 2008, available at <http://funnelholic.com/2008/09/15/the-origin-of-white-papers/>.

rich exemplification of the cases in which they are granted aimed at demonstrating the existence and significance of the phenomenon.[297]

As seen in Chapter 1, section 3 of the White Paper is then devoted to analysing the legal framework on foreign subsidies with particular reference to EU competition rules, [298] trade policy rules,[299] public procurement rules,[300] and EU funding rules.[301]

The White Paper's review aims to demonstrate the inadequacy of current legal instruments to comprehensively address the phenomenon because, as maintained in Chapter 1, current legislation either does not regulate the market-distorting potential of foreign subsidies or regulates them insufficiently.[302] Paragraph 4, after noting the need to introduce a new regulatory instrument to fill the gaps and complement existing instruments, outlines the framework of measures proposed to restore a level playing field in the Internal Market, identifying three types of distortions that can potentially be adversely affected by foreign subsidies.[303] These are direct or indirect economic support to an undertaking for its activity in the Internal Market that enables it to enjoy a competitive advantage over its competitors, direct or indirect economic support to an undertaking to facilitate the acquisition of an EU undertaking, and direct or indirect economic support to an undertaking to enable it to bid more competitively in public procurement.

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[297] These include the case in which buyers, to acquire an asset, are willing to pay a higher price than the market price, thus distorting the valuation of EU assets and resulting in the phenomenon known as *outbidding*, i.e., determining excessive prices and indirectly restricting the participation of other potentially interested but unsubsidised competitors. This case, together with the fact that the granting of foreign subsidies can also be determined by unstated strategic objectives of the subsidising foreign countries, brings to mind the Case of the Purchase of the Port of Piraeus by the China Ocean Shipping Company (COSCO), which will be the subject of the fourth Chapter as a distorting example of competition caused by foreign subsidies.

[298] See the *White Paper on levelling the playing field as regards foreign subsidies,* cit., *supra*, Chapter 1, para. 3.1, at 9.

[299] *Ibid.* cit. *supra*, para. 3.2, at 9-10.

[300] *Ibid.* cit. *supra*, para. 3.3, at 10-12.

[301] *Ibid.* cit. *supra*, para. 3.4, at 12.

[302] For the regulatory gap analysis, see *supra*, Chapter 1, para. 3

[303] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, Chapter 1, para. 4, at 13.

The White Paper then contains, in paragraph 5, a specific focus on foreign grants in the context of EU funding and, in paragraph VI, one aimed at examining the interaction between proposed and existing legal instruments.

Finally, paragraph 7 is devoted entirely to public consultation and introduces the two Annexes I and II, preparatory to this phase.[304] Annex I contains the definition of foreign subsidy that underpins the entire White Paper, defines its scope, and will be the subject of a specific question contained in Annex II, which, on the other hand, contains the detailed questionnaire on which stakeholders are asked to express their positions.

2.2. The contents

In the White Paper, each of the three types of distortion is addressed by a specific module, which can complement and integrate with the others without them necessarily constituting alternative options. On the other hand, a fourth module describes a broad strategy for foreign subsidies in the context of EU funds. For each module, the White Paper describes the basic characteristics, scope, and criteria that could guide the Supervisory Authorities' assessment of whether a foreign subsidy distorts the Internal Market, as well as the procedure and possible remedial measures.[305]

2.3. The Modules: 4 types for four different risks

2.3.1. Module 1: a general tool for subsidies

Module 1 addresses distortions caused by foreign subsidies granted to economic operators based in the EU or otherwise active in the EU market. It is a general tool designed to assess all foreign subsidies likely to cause distortions in the Internal Market. For this reason, it is not limited to EU resident undertakings but also covers foreign undertakings active in the EU that receive foreign subsidies. Thus, the module potentially involves a variety of businesses and circumstances. The notion of an undertaking referred to in the White Paper is derived from the ECJ's well-established interpretation that it encompasses any entity engaged in an

[304] *Ibid.* cit. *supra*, at 45 ff.
[305] *Ibid.* cit., *supra*, para. 7, at 15.

economic activity regardless of its legal status and method of financing, i.e., any activity consisting of offering goods or services in a market[306] and for which an undertaking can also be formed by different entities with separate legal personality, with control being relevant for this purpose.[307]

To this end, the White Paper specifies that an undertaking is based in the EU if one of its entities is based there.[308] Suppose the grant is awarded to an undertaking based outside the EU. In that case, it is, on the other hand, necessary to determine the extent to which the benefit of the foreign grant can be attributed to the EU-based entity based on certain criteria, such as the purpose, the conditions attached to the foreign grant, or the actual use of the funds.[309] In the case of both undertakings based in the EU and undertakings operating in the EU, the White Paper also states that the competent authorities can intervene only if the subsidy distorts the Internal Market.

However, the net of the express exclusion of foreign subsidies granted for imported goods and agricultural products covered by the EU's trade defence instrument is a broad instrument that also allows for the examination of acquisitions that have been facilitated by foreign subsidies and/or the market behaviour of a subsidised bidder in public procurement.[310]

To address the distorting effects caused by foreign subsidies, Module 1 proposes a two-step control instrument applicable to all market situations.

The first requires the Commission or another national authority to be identified to initiate a preliminary investigation when there is evidence to suggest that a foreign subsidy is likely to distort the proper functioning of the Internal Market or based on any report or information suggesting this. To facilitate its application, the White Paper also suggests that the risk of distortion is presumed for certain categories of foreign subsidies.

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[306] See Judgment of the Court of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98-C-184/98, ECLI:EU:C:2000:428, para. 74.
[307] See Judgment of the Court (Second Chamber) of 10 January 2006, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA and others*, Case C-222/04, ECLI:EU:C:2006:8, para. 107-112.
[308] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 14.
[309] *Ibid.*
[310] *Ibid.* cit. *supra*, at 13, note 24.

This category may include financial subsidies that are not compliant with the OECD Arrangement on Officially Supported Export Credits, as well as subsidies given to struggling businesses unless there is a restructuring plan, subsidies under which a government guarantees the debts or liabilities of certain undertakings without any limitation on the number of such debts and liabilities or the duration of the guarantee, operating subsidies in the form of tax relief outside the general measures, and foreign subsidies that directly facilitate an acquisition.[311]

The White Paper also proposes that during the preliminary and in-depth investigation, the Supervisory Authority may collect useful information from market participants and conduct inspections at the EU premises of the undertaking under investigation. If undertakings fail to provide the requested information or provide it incompletely, incorrectly, or misleadingly, the White Paper provides for the possibility of imposing fines or periodic penalties.

To assess the distorting effect, several indicators are identified, without claiming to be exhaustive, including the size of the subsidy,[312] the beneficiary's situation,[313] the situation of the market concerned,[314] the beneficiary's market behaviour[315] or level of activity, and privileged access to the Internal Market.

Suppose there are no issues after the preliminary investigation because there are no indications of a foreign subsidy or Internal Market distortion. In that case, the preliminary examination is ended after notifying the undertaking involved, the Commission, and all EU Member States.

If it is confirmed that foreign subsidies are distorting the Internal Market, the White Paper opens an in-depth investigation, under which the White Paper proposes the application of the EU interest test to assess whether the subsidised activity or investment has a positive impact greater than the distortion about public

[311] *White Paper on levelling the playing field as regards foreign subsidies,* cit. *supra*, at 15.
[312] It is clear that the higher the subsidy, the greater the risk of market distortion.
[313] Similar to the State Aid system, subsidies to small and medium-sized enterprises, under Annex I of Commission Regulation (EU) No 651/2014 of 17 June 2014, can be considered less likely sources of distortions.
[314] Subsidies granted to beneficiaries operating in markets with structural overcapacity are more likely to cause distortions than others. This is, for example, the case in the aluminium sector. See the response to the consultations by *European Alluminium,* aluminium industry stakeholders, available at <https://european-aluminium.eu/wp-content/uploads/2022/08/european-aluminium-position-on-the-white-paper-on-foreign-subsidies-1.pdf>.
[315] This is precisely the case of outbidding, i.e., favouring the submission of superior or distortionary bids in procurement procedures.

policy objectives, such as the development of jobs, attaining climate neutrality, protecting the environment, digital transition, security, public order, and safety. In this case, the Supervisory Authority may consider not insisting on the investigation further.

If the test of interest results in a negative outcome, the Supervisory Authority, according to the White Paper, should have the power to impose remedial measures, such as behavioural and structural remedies or the payment of compensatory amounts or make binding the proposed commitments to mitigate the distortion by assuming, in case of non-compliance with the remedial measures, the application of fines and periodic penalties.

Finally, on the criteria for assessing the distorting effects, the appropriateness of the remedial measures assumed, the inclusion of the EU test, the criteria on which the balancing should be based, and the Authority to which the preliminary and concluding investigation phases should be entrusted, the White Paper asks for the views of the operators, before finalising the proposal.

2.3.2. Module 2: addressing foreign subsidies in acquisitions

Unlike Module 1, which is general in scope, Module 2 is a specialised module that specifically addresses distortions caused by foreign subsidies facilitating the acquisition of EU undertakings to ensure that foreign subsidies do not confer any unfair advantage, direct or indirect, on grant recipients acquiring EU objectives, meaning, by direct advantage, that obtained through a subsidy expressly linked to the acquisition and, by indirect advantage, that obtained through increased financial strength.[316]

In this case, the examination conducted by the competent supervisory authority would be done *ex-ante*,[317] that is, before acquisitions involving possible foreign subsidies, through the provision of a mandatory notification mechanism. The concept of acquisition would include both the direct or indirect acquisition of control of an undertaking and the direct or indirect acquisition of at least a specified percentage of the shares or voting rights or any other form of substantial influence

[316] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, para. 42 at 22 ff.
[317] *Ibid.* at 24.

over an undertaking, a percentage to be identified with the support of the Stakeholders.

Module 2 also assumes a two-step system: a pre-notification containing a brief information note with the necessary basic information, such as legal information concerning ownership and Governance, financing information, the turnover information for the last three years, description of the business, financing of the transaction, financial contributions from third country authorities received for the transaction and any financial contributions from third country authorities received in the last three years and information on potential alternative purchasers.[318]

At the same time as the notification, the undertaking would be obliged to suspend the transaction, at least for a defined period that can be extended if the parties do not provide accurate information promptly, pending the Supervisory Authority's review, the standstill period.[319] The notification requirement would apply to acquisitions for which the undertaking has received a financial contribution from the Authority of a third country in the previous three years or plans to receive it in the following year, being directed at preventing a financial contribution from the Authority of a third country from facilitating the acquisition.

Suppose the Supervisory Authority has sufficient evidence that the acquiring undertaking benefits from foreign subsidies facilitating the acquisition. In that case, it may initiate an in-depth investigation at the end of which, if it finds that the acquisition is facilitated by foreign subsidies and is likely to distort the Internal Market, it may, as in the case of Module 1, conduct the EU interest test.

Suppose the acquisition needs to pass the EU interest test successfully. In that case, the Authority has two choices: accept commitments from the notifying party that would effectively correct the distortion or, as a last resort, prohibit the acquisition.

The Module also includes the possibility for the regulator to review *ex officio* an acquisition that should have been notified by the acquirer but was not,

[318] *Ibid.* at 27.
[319] *Ibid.* at 28.

even after its completion, a review that could lead, if the transaction has already been completed, to its cancellation.

The White Paper suggests that the new Regulations could identify thresholds above which acquisitions are potentially problematic. On the level of the thresholds, qualitative or quantitative, stakeholder opinion is sought, as well as on the possibility of linking the notification requirement to a certain quantitative level of foreign subsidies.

Then, the White Paper proposes, for the assessment of distortions caused by acquisitions, some quantitative criteria such as the size of the subsidy, the situation of the beneficiary, the market situation, the level of activity, and the beneficiary's access to its home market because an artificial competitive advantage could arise from this which could accentuate the distorting effect of subsidies.[320]

Finally, the White Paper advises that monitoring the implementation of Module 2, including prior notification of acquisitions, should be the Commission's responsibility to reduce implementation costs with a centralised system and provide greater legal certainty.[321]

2.3.3. Module 3: level the playing field in public procurement procedures

Module 3 is also specialised in nature and is aimed at regulating foreign subsidies in the context of EU public procurement procedures to prevent subsidies from allowing bidders to gain an unfair advantage, for example, by bidding below market price, if not below cost, enabling them to obtain contracts they would not otherwise have obtained.[322]

This module should be implemented through a legal instrument to examine foreign subsidies in the context of individual public procurement procedures aimed at excluding economic operators who have received distorting foreign subsidies and also lead to exclusion, under specific conditions, from future tenders. However, the scope should be defined in light of the EU's international obligations enshrined in the WTO Government Procurement Agreement and bilateral agreements providing for EU procurement market access.

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[320] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 26.
[321] *Ibid.* at 29.
[322] See, in this regard, *supra.* Chapter 1, para. 3.4, and Chapter 2, at 70.

Module 3 provides a mechanism whereby bidders should notify the contracting authority of financial contributions they have received in the previous three years from third countries or whether they believe they will be able to take advantage of them in the future. To limit the administrative burden on undertakings, the White Paper envisions introducing notification thresholds and conditions by, for example, limiting the grant period and providing for mandatory notification only if the value of the foreign financial contribution exceeds a certain level.

Again, the notification should include all of the information needed to determine if the economic operator receives foreign subsidies as part of the procurement procedure, such as, for example, information on the ownership and governance not only of the bidder but of all members of the consortium, subcontractors and suppliers who have received foreign financial contributions, those relating to the main sources of general financing of the bid, the 'total amount of foreign financial contributions received in the last three years and those received specifically for participation in the public procurement procedure, and the foreign financial contributions expected during the planned performance of the contract.

The White Paper also envisages the possibility that, for the sake of transparency, there should be a publication requirement for notifications and that in the case of failure to notify, sanctions should be identified, which may consist of both fines as well as provide, for the most serious cases, exclusion from the bidding process.

Regarding fact-finding procedures, the White Paper proposes mechanisms for cooperation between the Commission and national supervisory authorities, similar to those already in place in antitrust proceedings.[323]

Competent to receive the notifications would be the Contracting Authorities, which would then have to forward them to the competent National Supervisory Authority because of the Member State for the preliminary investigation during which any information deemed useful regarding the existence of a foreign subsidy and the conditions under which it was granted would be acquired. Again, the

[323] See, in this regard, Council Regulation (EC) no 1/2003,16 December 2002, *on the implementation of the rules on competition laid down in Articles 81 and 82 of the treaty*, OJEU, L 1/1.

investigation would be conducted in two stages: a preliminary investigation and an in-depth investigation.

During the preliminary investigation, all available or requested information would be examined. Depending on the outcome of the preliminary examination, the National Supervisory Authority could either conclude that there is no foreign subsidy by informing the contracting authority that it does not intend to continue with the investigation or, if it finds that there may be a foreign subsidy, initiates an in-depth investigation, informing the Commission and ensuring that public procurement procedures are delayed as little as possible, possibly including the introduction of time limits, since during the investigation the authority cannot award the tender.

However, the White Paper also suggests that the decision on the outcome of the in-depth investigation into the presence of the foreign subsidy should be made in consultation with the Commission. If the existence of the subsidy were to be proven, the contracting authority would have to determine whether the subsidy distorted the public procurement procedure, in which case it would exclude the economic operator from the current procurement procedure and, potentially, also from future procedures tendered by the same authority limited to a certain period. In the White Paper's proposed procedure, the foreign subsidy, if established, would be seen as an additional ground for exclusion from tendering procedures aimed at ensuring a level playing field between bidders benefiting from State Aid and those benefiting from foreign subsidies.

The White Paper also suggests that this mechanism should also be applied to procurement organised under international intergovernmental agreements under Article 9 of *Directive* 2014/24/EU[324] and Article 20 of *Directive* 2014/25/EU on the procurement procedures of entities operating in the water, energy, transport and utility sectors. [325]

2.3.4. Module 4: a tool for foreign subsidies in the EU funding

[324] Directive 2014/24/EU, cit. *supra*.
[325] Directive 2014/25/EU, cit. *supra*.

Finally, the White Paper includes a fourth module directed at addressing foreign subsidies in the context of EU funding to ensure that economic operators compete on an equal footing for the financial support an EU instrument provides regarding internal and external policies.[326] Indeed, it is intended to prevent EU funding from being added to other subsidies by contributing to favouring undertakings that have received foreign subsidies over other EU ones. Stakeholders were invited to comment on this Module as well.

The suggested procedures closely mirror that of Module 3.

3. Reactions

After publication, the White Paper elicited mixed reactions from representatives of EU and non-EU countries.

On the one hand, the Commission's enthusiastic and expectation-filled comments, such as that of EU Commissioner Margrethe Vestager,[327] who is presenting the White Paper, said that the proposed tools are necessary to ensure not only that the EU economy remains open and interconnected with the rest of the world but also to address the problem of predatory takeovers by foreign undertakings that have received foreign subsidies or that of Thierry Breton,[328] Commissioner for the Internal Market, who stressed that the White Paper is an essential element of the new industrial strategy for Europe based on competition, open markets and a robust Internal Market that will help EU undertakings compete globally or, again, like that of Phil Hogan,[329] Commissioner for Trade who said that the White Paper, adding to other existing EU instruments such as the foreign direct investment control mechanism and trade defence measures, complements the existing means to protect Europe's strategic autonomy.

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[326] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, para. 5, at 35 ff.
[327] EC, Statement by Executive Vice-President Margrethe Vestager on adoption of White Paper on foreign subsidies in the Single Market, 17 June 2020, available at <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1121>.
[328] EC, Commission adopts White Paper on foreign subsidies in the Single Market, 17 June 2020, cit. *supra*.
[329] *Ibid.*

Members of the EU Parliament also emphasised that the White Paper marks a step in the right direction in dealing with takeovers by Chinese undertakings, pointing out that other countries had also imposed restrictions on foreign investment, such as Japan, Australia, or the United States itself.[330]

Representatives of Member State governments also generally welcomed the White Paper: the German and French economy ministers, for example, stressed that the White Paper was a tool for establishing a level playing field and enabling competition with China and the United States.[331]

However, the opposite tenor is the reactions of some non-EU governments, such as China. Ambassador Zhang, in fact, in an exclusive interview with Bloomberg TV, said that he has observed the EU White Paper and intends to study it carefully, pointing out that many Chinese undertakings operating in Europe are concerned about the EU's tendency to close its doors given the recent measures and that he hopes the EU's measures will abide by the basic principles of the WTO, steer clear of protectionist moves and avoid creating new trade barriers masked as subsidies, to promote a good business environment for foreign corporate investors, especially at a particular time marked by the fight against COVID-19 in which the EU must avoid sending negative signals to the outside world.[332]

Singular in this regard is that on 10 January 2021, China released its third White Paper on foreign aid entitled *China's International Development Cooperation in the New Era*, which follows those of 2011 and 2014. Given that China is the world's largest emerging donor and foreign aid from China is essential to China's international relations, the report responds to the EU decision.

In this report, China emphasises that the government has relied on foreign aid and will continue to do so to support the concept of the global community of

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[330] Dafydd ab Iago, *EU mulls harsher-stance on foreign investments*, Argus, 17 June 2020, <www.argusmedia.com/news/2115229-eumulls-tougher-stance-on-foreign-investments?amp=1>.

[331] Bundeministerium für Wirtschaft und Klimaschutz, *Pressestament von Peter Altmaier und Bruno Le Maire zu aktuellen Wirtschaftsthemen und zur Corona-Pandemie*, 22 June 2020. See also Paula Riedel , Krista Koskivirta and Thomas Wilson, *The Commission's White Paper on Foreign Subsidies*, Kluwer Competition Law Blog, 25 June 2020, available at <http://competitionlawblog.kluwercompetitionlaw.com/2020/06/25/the-commissions-white-paper-on-foreign-subsidies/>.

[332] See *Ambassador Zhang Ming Gives an Exclusive Interview to Bloomberg TV*, Mission of the People's Republic of China to the European Union, 24 June 2020, available at <http://eu.china-mission.gov.cn/eng/mh/202006/t20200624_8203530.htm>.

the shared future and "*the Belt and Road Initiative (BRI)*", and these two initiatives will drive China's aid program and make strategic considerations the most significant features in aid allocation, with the stated goal of wanting to increase its influence in the Global South.

Another Chapter is devoted entirely to the possibilities offered by international exchanges and trilateral cooperation, with mention of pilot projects with Switzerland, Portugal, the United Kingdom, the United States, Australia, and New Zealand in 2013-18, underscoring the desire to support multilateral actions.

More nuanced are the reactions of the United Kingdom, which, having left the EU and no longer bound by EU State Aid and competition rules, has, in turn, announced a public consultation between 3 February and 31 March 2021 to devise its foreign subsidy control framework that reflects the UK's strategic interests.[333]

Other countries have also imposed restrictions on foreign investment at the same time as the White Paper: Japan has tightened its control over the oil sector, while Australia plans to tighten its foreign investment laws in the wake of growing tensions with China. Finally, the United States is working on greater control of more than 150 Chinese-listed undertakings, including Sinopec and PetroChina, controlled by the State.[334]

4. Public Consultation

The White Paper, during the period between 23 June 2020 and 23 September 2020, was the subject of a public consultation process aimed at the Member States, the EU institutions, and, more generally, all stakeholders, including industry, social partners, civil society organisations and academia but also ordinary citizens. The Commission has invited all Stakeholders to make comments or proposals to help

[333] In this regard, see Department for Business, Energy and Industrial Strategy, *Government response to the consultation on subsidy, A flexible, principles-based approach for the UK control*, presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy By Command of Her Majesty on July 2021, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998078/subsidy-control-government-response.pdf>.

[334] See Dafydd ab Iago, cit. *supra*, at 295.

identify new tools to address the Internal Market distorting foreign subsidies to level the playing field.[335]

4.1. Questionnaire

To this end, two annexes were included in the White Paper, the first containing the definition of foreign subsidy and the second including a questionnaire that stakeholders were invited to fill out to better structure their interventions. Specifically, the questionnaire, in addition to two broad questions about the need to introduce the new legal instrument and the comprehensiveness of the phenomena covered in the White Paper, also contained specific questions for each module outlined.

In the first Module, in-depth studies were requested on the sharing of the subdivision of the investigation procedure into two phases, on the investigative tools at the disposal of the competent authority, and on the criteria to be used in assessing the EU interest, as well as on the exhaustiveness of the remedial measures. The opinion of stakeholders on introducing the *de minimis* threshold was also requested by analogy with the EU State Aid framework,[336] below which the non-existence of distortions is presumed.[337]

On the other hand, the insights requested in the second module concerned the compulsory *ex-ante* notification, the two-stage articulation of the investigation procedure, the investigation tools, and the sharing of the definitions of acquisition, potentially subsidised acquisition, and the relevant thresholds subject to the acquisition transaction. Participants in the consultation were then asked for their views on the evaluation criteria for the EU interest test and remedial measures.

In the third Module, the question addressed whether the proposed Regulation should include a specific section on distortions caused by foreign subsidies in the context of public procurement procedures and whether the public

[335] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, para.7, at 45.
[336] Commission Regulation (EU) No 1407/2013 of 18 December 2013 *on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid*, OJEU, L 352/1, at 1.
[337] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, para. 7, at 48.

procurement framework proposed in the White Paper was comprehensive. Another in-depth study requested involved cooperation between contracting authorities and Supervisory Authorities in assessing whether foreign subsidy causes distortions in public procurement procedures.

Finally, a series of questions referred to the possible interaction between the various modules, i.e., the possibility of being combined and applied jointly and a specific focus on foreign grants in the context of EU funding.

The contributions provided in response to the consultation, being public, were published on the Commission's website unless an express request was made to keep them confidential.[338] The general consultation was then also accompanied by an additional targeted consultation between November 2020 and January 2021, as well as a structured dialogue with Member States through Council working groups, the Expert Group on Public Procurement, and bilateral and multilateral exchanges and conferences that contributed to the development of possible policy options. The targeted consultation was designed to help produce concrete examples of distortive subsidies, including the type, the sector concerned, the third country granting them, and the most commonly observed distortive effects on the undertaking and sector or market. The questions aimed to assess the policy options proposed in the Initial Impact Assessment and other policy options which should have been considered in the Impact Assessment, including economic, social, environmental, and administrative burden impacts. Therefore, these are policy-level consultations and whether or not to support the initiative.

The Commission Feedback uses the feedback from the targeted consultations to delve deeper into certain areas that are particularly exposed to the distorting effects of foreign subsidies.[339]

The following paragraphs examine the main legal issues raised during the public consultation by stakeholders in their contributions.

4.2. The response to the consultation, a general overview

[338] The list of contributions in response to the White Paper can be found at EC, *White Paper on foreign subsidies*, available at <https://ec.europa.eu/info/law/better-Regulation/have-your-say/initiatives/12452-White-Paper-on-Foreign-Subsidies/public-consultation_it>.

[339] Feedback on targeted consultations is available at <https://competition-policy.ec.europa.eu/international/foreign-subsidies_en#targeted-consultation>.

In response to the public consultation launched by the EU Commission, more than 150 submissions were received, including 17 from public authorities of Member States, 24 from stakeholders and governments of third countries, more than 100 comments from business and industry associations and individual undertakings; the rest from law undertakings, NGOs, academic institutions, and even individual citizens.[340]

The largest contributions came from the EU: 131 out of 150 responses, of which six came from Austria, 35 from Belgium, five from the Netherlands, six from Poland, four from Denmark, two from Portugal, four from Finland, one from Romania, 13 from France, two from Serbia, 19 from Germany, eight from Italy, five from Sweden, one from Latvia, three from Luxembourg, two from Malta, one from Norway, two from the Czech Republic, one from Hungary, one from Ireland, seven from Spain, one from Lithuania. Nineteen were contributions from non-EU countries: 1 from Mozambique, two from Canada, four from China, two from Singapore, one from South Korea, one from the United Arab Emirates, three from the United States, and seven from the United Kingdom.[341]

Although all of the submissions welcomed the opening of the debate on foreign subsidies, they reflect the different approaches to foreign subsidies found between EU Member and non-Member States, also contained in the Official statements made in the aftermath of the publication of the White Paper.[342]

In particular, those from governments belonging to the EU area confirmed the analysis contained in the White Paper and agreed, albeit with different nuances, with the reconstruction of the legal framework and the fear that some foreign subsidies may distort the Internal Market.

While some, such as the Austrian and Danish governments, agree with the legal reconstruction carried out by the White Paper and point to the need for swift action, others agree with its objective, knowing that it is impossible, at least in the short term, to address distortions in the Internal Market through the instruments of trade and trade policy, which are in any case considered the most appropriate

[340] Summary of the responses not targeted to the public consultation is available at <https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf>.
[341] *Ibid*.
[342] See *supra*, para. 3.

instrument. For example, in its commentary, while acknowledging that the White Paper is a good basis for discussion, Belgium stresses the need to acquire more information. The Swedish and Finnish governments have explicitly pointed out that the issue should be more properly addressed through trade policy, creating globally harmonised rules, and that, in any case, a unilateral instrument should be designed to pave the way to a future multilateral regulatory framework for subsidies.

For the French authorities, who were among the first to raise the issue of reforming competition rules, the response to the problem of the distorting effects of public support from third countries should be identified on three levels: the promotion of an ambitious agenda for reform of the multilateral rules governing subsidies, an increase in the use of trade defence instruments, and reform of competition policy.

No public contributions have been received from non-EU governments. Considering the contributions from countries belonging to the non-EU area, although not representing governments, it can be noted that they are more critical of the reconstruction of the legal framework and the approach to the solutions proposed in the White Paper. Again, there are different sensitivities in the United Kingdom (UK) and the United States (US), which understand the necessity of facing the issue of foreign subsidies, and in developing economies, such as China, which do not recognise the problem,

Whereas for example, the UK-based *Competition Lawyers Forum* (ECLF), while pointing out that it sees the White Paper consultations as a forum to open up the debate on foreign subsidies, nevertheless recognises the need to address distortionary ones, suggesting that it should examine whether existing mechanisms could not be strengthened rather than introducing a new general regime that could add complexity.[343]

[343] In this regard, it should be noted that the Commission considers that coming from *European Competition Lawyers Forum* (ECLF) as a non-EU contribution because it is based in the United Kingdom. ECLF is a group of competition law practitioners from law firms across the European Union founded in 1994 at the suggestion of some officials of the European Commission's DG Competition to take advantage of a forum for practitioners and senior officials of DG Competition to engage in an open dialogue on topical competition law issues. Therefore, it reflects different sensitivities from the responses of non-EU States. European Competition Lawyers Forum, *Response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies*, is available at

China Chamber of Commerce to the EU,[344] on the other hand, believes that there is no need for the EU to create new legal instruments specifically designed to address the issue of foreign subsidies as such instruments could be incompatible with the Treaties and International Agreements to which the EU is a party and with its obligations under the WTO. Furthermore, the existing legal framework at the level of the EU and its Member States is already equipped with instruments that can be adapted or interpreted, if necessary, and that are sufficient to correct any distortion.[345]

The Arm Chair, on the other hand, an association representing U.S. undertakings investing in Europe, expressly agreed with the objectives of the White Paper, noting that distortions of the Internal Market, in addition to hurting EU undertakings, can also harm non-EU undertakings subject to EU State Aid framework, operating in the EU under market economy conditions, pointing out some critical issues with particular regard to the interaction with existing legal instruments and procurement Regulations.[346]

Moreover, some contributors, even when acknowledging the possibility that foreign subsidies may have distorting effects, do not believe that the proposals in the White Paper are the best solution to address the issue of foreign subsidies, lamenting the lack of a clear legal basis found in the EU Treaties for legislative action. [347]. Belgium has also commented on the legal basis, suggesting that in addition to considering the international dimension and the impact on freedom of movement, the Internal Market should also be considered, and France, which agrees on Article 207 TFEU as the legal basis for future Regulation and, where this is not

<https://www.europeancompetitionlawyersforum.com/_files/ugd/b7d241_90a2f7bee15c45c18e1fcf1ca2156e36.pdf>.

[344] China Chamber of Commerce to the EU is a business association that helps Chinese enterprises in Europe chart the course for greater China-EU economic interaction and cooperation, which "*strives to serve the interests of member companies investing in the EU*".

[345] The response of the China Chamber of Commerce to the EU to White Paper is cit. *supra*. In this regard, see also *Chinese chamber expresses concern over potential legal barriers by EU*, available at <http://ex.chinadaily.com.cn/exchange/partners/45/rss/channel/www/columns/6h4i91/stories/WS5f6db84fa31024ad0ba7bebc.html>.

[346] In this regard, see, *inter alia*, *AmCham Eu* position paper, cit. *supra*.

[347] See *China Chamber to Commerce to the EU*, cit. *supra*.

sufficient, suggests using either Article 114 TFEU or Article 352 TFEU as an alternative.[348]

However, there is substantial uniformity on some issues between the positions of the contributors from EU and non-EU countries, for example, when they fear that said intervention may have, in any case, a discriminatory approach or when they emphasise the need to reduce interpretative doubts, to limit litigation, to provide for a regime that is as clear, predictable and transparent as possible, with adequate procedural safeguards to avoid that the proposed Regulation, if implemented, could stifle foreign investment also due to the increased administrative and regulatory burdens for investors of all nationalities.[349]

5. The main legal issues raised

The feedback received during all phases of the stakeholder's consultation was used in drafting the legal instrument and accompanying the Impact Assessment report.

Several legal profiles have been raised by third countries, Member States and European undertakings, whose main concern is to avoid losing direct investments from third countries. Some of these profiles have already been partly addressed by the Commission when drafting the May 2021 proposal.

Other aspects, as will be seen in Chapter 3, were the subject of the inter-institutional negotiations, i.e., the trialogues between the European Parliament, the Council, and the European Commission, and were incorporated into the provisional political agreement adopted by the Parliament in the text approved on November 28 to meet the critical issues raised.

Some of these legal profiles are worthy of further study in the following paragraphs.

5.1. Compliance with Article 32(1) SCM Agreement

[348] See, in this regard, France and Belgium feedback, cit. *supra*.
[349] See, *inter alia*, Allen & Overy LLP, *response to the consultation on the White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*.

One of the main legal issues that emerged from the consultations[350] concerned the fear, which was also shared by some scholars in the aftermath of the White Paper,[351] that the measures proposed in the new Regulations might be contrary to the provision in Article 32(1) SCM Agreement, which prohibits WTO members from taking any specific action against a subsidy of another Member except under the provisions of the GATT. Moreover, footnote 56 to the same Article specifies that "*this paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate*". [352]

The concern is that the extraterritorial effects of the unilateral measures proposed by the White Paper could increase the risk of foreign subsidy litigation against the Commission's actions as well as undermine the willingness of WTO members to follow the general rules of the SCM Agreement and the WTO Anti-Dumping Agreement, fine do to weaken the overall system.[353]

In this regard, Article 32(1) has already been the object of WTO's jurisprudence. In the US - Offset Act (Byrd Amendment) case, the Appeal Organ stated, "*Article 32.1 of the SCM Agreement limits the range of actions a WTO Member may take unilaterally to counter subsidization. Restricting available unilateral actions against subsidization to those expressly provided for in the GATT 1994 and in the SCM Agreement is consistent with this function*". [354]

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[350] See, *inter alia*, European Competition Lawyers Forum (ECLF), *Response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies,* cit. *supra*, at 1.

[351] See, *inter alia*, Luca Rubini *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea,* cit. *supra,* at 129 ff., Victor Crochet and Marcus Gustafsonn, Lawful, *Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*, at 352 ff., Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?* cit. *supra*, at 156 ff., Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, Journal of World Trade 56, No. 5 (2022), at 794 ff.

[352] See in this regard, the contributions of European Competition Lawyers Forum (ECLF), cit. *supra*, at 3 ff, Clifford Chance, at 4, and City of London Law Society Competition Law Committee, at 4, all available at EC cit. *supra*.

[353] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra*, at 364-366, but also Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea,* cit. *supra*, at 136, which notes a certain underlying ambiguity in the White Paper, between unilateralism and cooperation, yet unavoidable when policy faces multiple challenges and multiple perspectives are to be kept open.

[354] *United States - Continued Dumping and Subsidy Offset Act of 2000* - AB-2002-7 - Report of the Appellate Body, 16 January 2003, WT/DS217/AB/R WT/DS234/AB/R, para. 271.

This interpretation that sees Article 32 limiting the unilateral actions that a WTO member can take against subsidies[355] is consistent with the circumstance that the predecessor of the Subsidies Agreement, i.e., the Subsidies Code, in addition to intending to introduce stricter rules against subsidies was aimed precisely at limiting the actions that could be taken against subsidies in light of the extensive use of unilateral measures by the U.S.[356]

In light of the Case Law mentioned above and these considerations, in agreement with Victor Crochet and Marcus Gustafsson, there is a risk that the adoption of unilateral measures on foreign subsidies, if not carefully thought out, may run counter to this provision. The interpretation is further confirmed by the fact that the same decision specifies that responses to subsidies should take the form of "*multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system*".[357]

It follows that any unilateral action involving specific subsidies, if not taken in the form of multilaterally sanctioned countermeasures, would violate Article 32.1 of the SCM Agreement.[358]

If both requirements are met effectively, the measure to be introduced could fall under the case covered under Article 32(1). Indeed, "*The measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy*".[359] At the same time, it will be undertaken *against* a subsidy if it is undertaken not in response to a subsidy but to counteract it. The category in response to a subsidy is broader than that under Article 32, which is aimed at counteracting or deterring that practice.[360] Therefore, the White Paper, assuming the imposition of sanctions against the grantee, could fall under Article

[355] On the interpretation of whether the anti-subsidy term limits the unilateral actions that a WTO Member can take, see always *United States - Continued Dumping and Subsidy Offset Act of 2000*, cit. *supra*, para. 252.
[356] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra*, at 352 ff.
[357] *United States - Continued Dumping and Subsidy Offset Act of 2000* cit. *supra*, para. 273.
[358] On whether both requirements of specificity and anti-subsidy must be met jointly, see the same decision *United States - Continued Dumping and Subsidy Offset Act of 2000* cit. *supra*, para. 236.
[359] United States - Continued Dumping and Subsidy Offset Act of 2000 cit. supra, para. 239
[360] See, WTO, Report of panel *United States – Continued Dumping And Subsidy Offset Act Of 2000*, WT/DS217/R, 16 September 2002, para. 7.17, at 301.

32.1 of the SCM Agreement as it would fulfil both requirements of specificity and contrariety.

5.2. The difficulty of defining foreign subsidies

Another issue that emerged from the public consultation is the importance of the Regulation's timely definition of foreign subsidies. This is because the definition of foreign subsidies directly affects the scope of the Regulation, which is on the ridge of the State Aid discipline and the subsidy system under the WTO and the SCM Agreement.[361]

Again, positions between EU and non-EU stakeholders diverge. The bulk of the EU contributions from both Member States and other stakeholders are in favour of a broad definition of a subsidy that would also include the proposed amendments to the SCM Agreement suggested by the EU, the U.S., and Japan to the SCM Agreement that would apply to undertakings nonetheless active in the EU and not just those established in the EU.[362] However, some of them pointed out that the definition used in the White Paper, while broad, does not clearly express the link to the EU State Aid framework and the SCM Agreement.[363]

Some believe that the definition proposed in the White Paper, by defining financial contributions as subsidies as long as they are limited and provided by a non-EU government or by a non-EU government indirectly through public and private entities, goes beyond that provided in the WTO's Agreement on Subsidies and Countervailing Measures, in that it includes the sale or purchase of services, but also goes beyond the EU State Aid framework in that it requires undertakings to identify public and private entities whose actions can be attributed to a non-EU

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[361] An examination of the differences between the concept of foreign subsidies used by the Regulation and the concept of State Aid or subsidy in Art. 1 of the SCM agreement is covered in Chapter 3.

[362] See, *inter alia*, the position paper of the French Association of Large Companies (AFEP), at 1, available at <https://afep.com/wp-content/uploads/2020/10/AFEP_Comments_on_the_White_paper_on_foreign_subsidies.pdf>. See also the position of Aegis Europe, an association of more than 20 European manufacturing associations, at 4, available at <https://static1.squarespace.com/static/5537b2fbe4b0e49a1e30c01c/t/5eea345ea17bb35337d4e2cc/1592407140145/2020-06-17_AEGIS+Europe_Press+Release_White+Paper+on+an+Instrument+on+Foreign+Subsidies.pdf>.

[363] See the position paper from Sweden, cit. *supra*.

State and thus able to provide financial contributions that are considered subsidies. The latter analysis could be more manageable for undertakings, as they may need more visibility into whether such actions can be attributed to non-EU countries.[364]

Others suggest that the Commission use concepts developed under the EU State Aid framework to define which foreign subsidies fall within the scope of the proposed scheme rather than those developed under WTO rules, i.e., a selective benefit granted through state resources rather than a financial contribution that confers a benefit[365].

Still, others believe that the definition of subsidy should also include lower standards of labour law or environmental protection used in third countries, e.g., some labour EU undertakings' workers demand that exploitation of workers, disregard or circumvention of basic labour rights, and state actions harmful to the environment and climate in third countries should also be included in the definition of foreign subsidy.[366]

The heterogeneity of the proposed positions demonstrates the difficulty of arriving at a unified concept of foreign subsidy. This is also a challenge already encountered by doctrine in identifying an unambiguous definition of subsidy.[367]

It should also be noted that the issue of the relationship between the definition of subsidy contained in Annex 1 to the White Paper and that contained in Article 1 of the SCM Agreement, which contains a detailed list of subsidies that are expressly permitted and therefore not actionable, had been raised by the doctrine, even in the aftermath of the adoption of the White Paper.[368] According to these authors, if the measures proposed in the White Paper dealt with expressly permitted foreign subsidies, they would be contrary to the SCM Agreement.

However, determining whether the definition of subsidy in Annex 1 of the White Paper conflicts with that in the SCM Agreement is complex, as it needs to

[364] See the position paper from Computer & Communication Industry Association (CCIA Europe),16 December 2021, at 1, available at <https://www.ccianet.org/wp-content/uploads/2021/12/2021-12-16-CCIA-Position-Paper-on-foreign-subsidies-proposal.pdf>.
[365] See the response of Clifford Chance, cit. *supra*.
[366] See the comments of the German Confederation of Trade Unions at 3, cit. *supra*.
[367] On the difficulty encountered by the doctrine in providing an unambiguous definition of subsidy, partly due to the lack of unambiguous terminology compared to that used by nation-States, European law and non-EU States, see, *supra*, Chapter 1, para. 1.1.
[368] See part four of the SCM Agreement.

be clarified whether the SCM Agreement covers the situation where a foreign government grants the subsidy to a productive entity located in the EU.

However, the definition of subsidy in the White Paper contrasts with that part of the doctrine that believes that Article 1 of the SCM Agreement also covers subsidies to producers, regardless of the place of production and whether it coincides with that of the subsidising member, [369] even if it does not provide an adequate remedy for challenges to foreign producers that do not qualify as prohibited subsidies under Part II of the SCM Agreement.[370]

In this regard, WTO jurisprudence is not clear also if addressed cases where the recipient of the subsidy was not located in the territory of the subsidising member, such as in the Brazil-Aircraft case by concluding that export financing payments in the form of direct transfer of Funds by the Government of Brazil were a subsidy.[371]

According to Csongor István Nagy, footnote 56 to Article 32 would confirm the intention of the SCM Agreement not to be an exhaustive Regulation of countervailing measures taken in response to subsidies.[372]

According to Rubini, the decisions *United States – Continued Dumping and Subsidy Offset Act of 2000* and *EU Communities – Measures Affecting Trade in Commercial Vessels* read together provide a broad interpretation of the exclusivity clause of Article.[373]

The White Paper suggests that the SCM Agreement covers only subsidised imports of goods from third countries and does not apply to subsidies involving trade in services or the establishment and operation of undertakings in the EU

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[369] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra*, at 349.

[370] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra*, at 350, According to which remedies against actionable subsidies are available only when the beneficiary is located in the territory of the granting authority. See, in this regard, footnote 50.

[371] See Panel Report, Brazil – Export Financing Programme for Aircraft (Brazil–Aircraft), WT/DS46/R, 14 April 1999, para. 2.1–2.6, 4.19–4.20, and 4.40–4.48.

[372] See Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: can the Playing Field Be Levelled?* cit. *supra*, at 157.

[373] L. Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 129, and also United *States – Continued Dumping and Subsidy Offset Act of 2000 DS217)* and *European Communities – Measures Affecting Trade in Commercial Vessels (DS301)*

supported by foreign subsidies, which do not involve trade in goods.[374] By not providing the current trade defence system with adequate multilateral remedies, the White Paper points out that new legal instruments would be complementary to the EU's trade defence instruments, in line with obligations under the SCM Agreement, particularly Article 32.1.[375]

However, the position of the White Paper without delving into the regulatory framework can only be a mere statement of intent, which must be clarified in concrete terms in the Regulation, indicating how to avoid this contrast. Underlying this interpretation, as will also be seen in the third Chapter, is the assumption debated in doctrine on whether to consider the adoption of unilateral measures legitimate in the case of regulatory silence of agreements falling under the WTO. [376]

5.3. Compliance with the principle of non-discrimination

One of the recurring concerns among stakeholders, both EU and non-EU, is whether the new instrument complies with the commitments and obligations under international agreements, including the principle of non-discrimination,[377] which, as is well known, is made explicit in the principles of national treatment, i.e., internal discrimination, and the most-favoured-nation principle, i.e., external discrimination. This is an issue also alluded to by some in the doctrine.[378] Indeed, according to these authors, even if concerns about the altering playing field were confirmed, the EU would still be limited in responding to them, as it could not take

[374] See the *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 41, para. 6.5.
[375] *Ibid.* at 42, para. 6.6.
[376] To interpret WTO Case Law on Art. 32.1, see *infra*, para. 5, sub a).
[377] See, *inter alia*, feedback to White Paper of China Chamber of Commerce to EU, cit. *supra*, at 1, and Linklaters, Response to the European Commission's consultation on its White Paper on levelling the playing field as regards foreign subsidies, at 3, available at <https://lpscdn.linklaters.com/-/media/digital-marketing-image-library/files/01_insights/publications/2020/september/linklaters-llp_response_ec_consultation_white-paper-on-foreign-subsidies_september-2020.ashx?rev=4fde75f2-ff62-4110-8e1f-e2c67f6a9dd0&extension=pdf&_z=z&hash=A30D711E84F73B1413F2A5E79BF2B800>.
[378] See Ondrey Blazo, *A new regime on protection of public procurement against foreign subsidies distorting the Internal Market: mighty paladin or giant on the feet of clay*? at 144 it, Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law*, cit. *supra*, at 352.

discriminatory measures against affected undertakings or imported products and services.[379]

According to the principle of non-discrimination, WTO members are obliged to accord to all other members the most favourable treatment accorded to one of them and to ensure, in matters of taxation and domestic Regulations, equal treatment against foreign products, services, and service providers.[380] As clarified by WTO Case Law, service providers of one WTO Member and unsubsidised service providers of another WTO Member in the same sector must be considered similar. Therefore, a Member must treat these service providers similarly.[381]

Being in a better position than another is closely related to the concept of competition; that is, the determination of the similarity of services and service providers must focus on the competitive relationship of the services and service providers in question.[382] The ECJ has recognised this principle at the EU level. Still, the Court has emptied it of practical value because it declared WTO rules flexible and programmatic and, thus, not directly invocable by citizens of Member States.[383] However, the fact that WTO rules are not judicially actionable does not mean that they are not part of the community legal system.[384]

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[379] Lorand Bartels, *Does WTO law really not regulate 'foreign subsidies'*? cit. *supra*. and Lorand Bartels, *WTO law implications of the EU's proposal to target 'foreign subsidies' given to companies in other countries*, 22 June 2020, available at <https://www.linklaters.com/it-it/insights/blogs/tradelinks/2020/june/wto-law-implications-of-the-eus-proposal-to-target-foreign-subsidies-given-to-companies>.

[380] See Report of the Appellate Body, *Canada - Certain Measures Affecting the Automotive Industry* (*Canada-Autos)*, WT/DS139/ AB/R; WT/DS142/AB/R, 31 May 2000, para. 171.

[381] See Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra*, at 352.

[382] See Report of the Appellate Body, *Argentina - Measures Relating to Trade in Goods and Services (Argentina-Financial Services)*, WT/DS453/AB/R, 14 April 2016, para. 6.24.

[383] On the distinction of the term "*direct effectiveness*" understood as the effectiveness of substitution, i.e., the suitability of the provision of the international agreement, as a source of rights and obligations, to be applied to the concrete case in place of the conflicting rule of secondary Community Law or National Law otherwise applicable with the exclusionary effectiveness, i.e., the suitability of that provision, as a parameter of legitimacy, to prevent the effectiveness of that rule (but not to replace it), see the Opinion of Advocate General Mengozzi delivered on 15 February 2007, *Řízení Letového Provozu ČR, sp v Bundesamt für Finanzen*, Most favoured nation clause - Interpretation of secondary Community law in the light of international agreements entered into by the Community, footnote 22, ECLI:EU:C:2007:103.

[384] See, on this regard, *Italian motorcycle accumulator factory Montecchio SpA (FIAMM) and Italian motorcycle accumulator factory Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. v Council of the European Union and Commission of the European Communities*, Opinion of Advocate General Mature Poiares, 20 February 2008 Joined Cases C-120/06 P and C-121/06 P, para.37, ECLI:EU:C: 2008:98.

Therefore, some contributions in response to the White Paper have noted the possibility that this principle may not be met in several places. According to some, there would be a substantial difference between the procedure proposed in the White Paper and the procedure for State Aid. While the procedure referring to the latter is addressed to the Member States, the procedure proposed by the White Paper would concern the beneficiary of the alleged subsidy, who would be required to provide information himself, and, in addition, the subsidising States would not be able to interject and participate in the adversarial.[385]

While not wishing to accede to this interpretation, one must note that the difference in the subject matter of the investigation between the two procedures results in an asymmetry and imbalance concerning the treatment between governments and undertakings, especially in the context of investigative processes. The fear of the subsidising countries and, more importantly, the subsidised undertakings is that this procedural difference may be reflected in the manner of participation, ability to provide information, access to information, and, thus, in short, in fewer guarantees and potential procedural inequalities. Requiring undertakings to bear the burden of proof and responsibility that foreign country governments should bear would constitute discrimination against foreign undertakings.[386]

Moreover, the principle of non-discrimination would also be violated in the failure to apply to foreign subsidies the principle under Article 106(2) TFEU, which states that undertakings entrusted with the operation of services of general economic interest are subject to the rules of competition as far as the application of such rules does not obstruct the performance, in law and of the specific mission entrusted to them.

According to others, the introduction of a definition of subsidy that unequivocally places the burden of proof of non-distortion on undertakings would penalise those receiving extra-EU subsidies as opposed to those receiving EU subsidies since the burden of proof or otherwise of providing information in the

[385] See the response from Clifford Chance, cit. *supra*.
[386] See China Chamber of Commerce to EU, cit. *supra*.

latter case does not fall on the undertakings receiving State Aid but on the Member States that grant it.[387]

Overcoming the objection about non-compliance with the principle of non-discrimination would likely require structuring the new regime to ensure that the treatment of undertakings receiving foreign subsidies is no less favourable than that of undertakings receiving subsidies from EU Member States under the EU State Aid framework while also providing several procedural and judicial safeguards to ensure that foreign subsidy decisions are subject to appropriate levels of protection, including the right to intervene in the proceedings as well as adequate judicial review of Commission decisions.[388]

In addition, about services of general economic interest, it should be kept in mind that this is a legal concept under EU Law that has been interpreted and clarified by EU courts through numerous rulings. Therefore, it should not be difficult to envisage that in cases where an undertaking, whether foreign or domestic, provides services of general economic interest from the Internal Market or a Member State, this provision can also be extended to an undertaking receiving foreign subsidies, provided that it can meet the public welfare requirements established by EU Case Law. Indeed, a different determination could violate the principle of non-discrimination.

To avoid the risk of violation of the principle of non-discrimination, it was moreover suggested that future EU instruments should have a potential scope of application that coincides as closely as possible with the scope of Article 107 TFEU so that it could encompass forms of public financing or capital injections, preferential loans or preferential access to public property or faculties granted by foreign governments or all types of public entities, including state-owned undertakings.[389]

Consequently, foreign subsidies permitted as State Aid in the EU might be excluded from the scope. This position is also shared by some stakeholders who

[387] See the position paper of Computer & Communication Industry Association (CCIA Europe) cit. *supra*.
[388] See in this regard, the feedback from Mayer Brown Europe-Bruxelles LL and Clifford Chance, but also Contributions of Poland and Belgium, cit. *supra*. As will be seen in Chapter 3 these comments have been incorporated into the Regulation.
[389] See AFEP position paper of French Association of Large Companies (AFEP), cit. *supra*.

believe that those foreign subsidies that, if they were State Aid, would be considered compatible State Aid could not be incompatible with the Internal Market.[390]

Therefore, whatever measure is introduced, it will be paramount to ensure that any proposal does not lead to inconsistent treatment or discriminatory outcomes between recipients of EU State Aid and recipients of EU foreign subsidies. A more EU State Aid framework-based approach might be more defensible from the perspective of WTO non-discrimination requirements.[391] The view of those who believe it would not be sufficient to avoid the discriminatory nature that limitations on subsidies are also imposed on Member States by the EU State Aid framework is not supportable.[392]

Finally, one last note. European Competition Lawyers Forum[393] stresses the need for Internal Market instruments not to be based on instruments designed for WTO disputes and international trade protection, pointing out that this view would be consistent with the ECJ's jurisprudence on the autonomy of the EU legal order.

It has applied this principle in various contexts and interpreted it from different angles to defend the specificities and inherent nature of the EU's legal system. [394] In addition to designing the Foreign Subsidies Regulation on State Aid, this principle must also have as its corollary that disputes concerning the interpretation or application of the Regulation be submitted to the EU's judiciary system.

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[390] *Ibid*.

[391] In this regard, Simon Lester, Guest Post *by* Andrea Biondi and Michael Bowsher, Christopher Yukins , Luca Rubini and Gabriele Carovano, *The EU Gives Foreign Subsidies Its Best Shot: One Take on White Paper on Levelling the Playing Field as Regards Foreign Subsidies***,** International Economic Law and Policy Blog, 2 October 2020, available at <https://ielp.worldtradelaw.net/2020/10/guest-post-the-eu-gives-foreign-subsidies-its-best-shot-one-take-on-white-paper-on-levelling-the-pla.html> and Morris Schonberg, *The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions*, European State Law Quarterly, 2022, at 146.

[392] See Lorand Bartel, cit. *supra*. To support his argument, he cites the U.S.-Tuna II case, where it was found discriminatory for the United States to impose certain restrictions on Mexican tuna fleets. However, equivalent restrictions had been imposed on US tuna fleets for over a decade.

[393] See European Competition Lawyers Forum (ECLF), cit. *supra*, at 3.

[394] On the autonomy of the EU legal system from the ECHR, see, see Opinion 2/13 of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454. On the autonomy of the EU legal system from the WTO see Judgment of the Court (Grand Chamber) of 16 July 2015, European Commission v Rusal Armenal ZAO, Case C-21/14 P, ECLI:EU:C:2015:494, cit. *supra*, para. 48. On the autonomy of EU Law from bilateral pre-accession investment Treaties between Member States, Judgment of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik (Slovak Republic) v Achmea BV, para. 32-33 and 35-37, ECLI:EU:C: 2018:158.

In this regard, it should be noted that the State Aid and the subsidy discipline in WTO Law do not pursue the same objectives. WTO rules on subsidies were introduced to abolish subsidies as non-tariff barriers in the application of the principle of non-discrimination under WTO Law. At the same time, the EU rules on State Aid follow the broader goal of contributing to the realisation of the Internal Market. The EU system also seeks to maintain the Internal Market with undistorted competition under Article 26(2) TFEU. In contrast, WTO Law seeks trade liberalisation through the reduction of tariffs and other barriers to trade and eliminating discriminatory treatment.[395] The objective of the foreign subsidies' Regulation is more akin to that of State Aid since it is aimed at restoring or ensuring a level playing field in the Internal Market and thus at eliminating distortions.

As will be seen in Chapter 3, the Regulation is reminiscent of many places of State Aid discipline and European Antitrust Law, even though in some places, the experience of WTO rules is readily apparent. On the contrary, to ensure a level playing field throughout the Internal Market and consistent application of the new rules, the Commission has been identified as the only competent authority to apply it, thus incorporating comments on the autonomy of the legal EU order.[396]

5.4. Risk of overlap with existing legal instruments

Some stakeholders have highlighted the need to be careful about overlaps of the new Regulation with existing legal instruments and with OECD initiatives on best practices and fair competition to avoid the risk of producing double enforcement standards.[397]

In particular, the need was stressed for the design of each module to be meticulously elaborated within the framework. In complementarity with EU Competition Law, trade defence instruments and the International Procurement Instrument (IPI) are emphasised. This would decrease the risk of contradictions and scope for interpretative uncertainty while ensuring the internal coherence of the system to be introduced and fear that the extraterritorial effects of the proposed

[395] See the preamble to the Agreement Establishing the WTO, third considered.
[396] See the eighth considered in the Regulation.
[397] See, *inter alia*, the contribution from Poland and Sweden, cit. *supra*.

unilateral measures, compounded by the lack of international consultations, could increase the risk of foreign subsidy litigation against the Commission's actions. [398]

While stressing the need for consistency with existing legal instruments, some also point to simplifying legislation.[399]

In light of these concerns, some authors have also suggested approaching the topic with caution, expressing concerns partly since some of the tools proposed in the White Paper possess a broad scope. They could impose excessively heavy procedural burdens on foreign undertakings to prove they are not subsidised.[400]

In this regard, the addition of new legal instruments may lead to overlapping or even conflicting legal rules or procedures, creating some legal uncertainty for investors, to the detriment of the EU economy as a whole, just as the new instruments may affect levels of foreign direct investment with the risk of potential negative impacts. The trend that has emerged from this investment analysis is undoubtedly an early warning bell, although it is too early to conclude.[401] Therefore, the new Regulation must provide stable coordination among the various mechanisms.

It is also likely that the new instruments will increase the administrative burdens of undertakings already in the EU market and raise the costs of running administrative institutions. The game is therefore played on balancing the interests at stake, the criteria for evaluating investments, and the proportionality of the measures envisaged by the new intervention, which must be both targeted and proportionate so as not to be itself the cause of new distortions.[402] The principle of

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[398] See, in this regard, the response of the Chinese Chamber of Commerce, available at <http://en.ccceu.eu/2020-09/25/c_14.htm> and the contribution of Aegis Europe, cit. *supra*, as well as that of Andrea Biondi, *The EU Gives Foreign Subsidies Its Best Shot: One Take on White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, cit. *supra*.

[399] See the Finnish government's position paper, cit. *supra*.

[400] Cf. V. Crochet e M Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law*, cit. p.366, but also L. Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 136, which notes a certain underlying ambiguity in the White Paper between unilateralism and cooperation, yet unavoidable when policy faces multiple challenges, and multiple perspectives are to be kept open. See also the position paper of Freshfields Bruckhaus, Deringer, Global Law Firm with significant law and practice experience in the antitrust areas, 22 September 2020, at 2, cit. *supra*.

[401] See, in this regard, *supra*, Chapter 1, para. 2.

[402] See, in this regard, the assessment on the Dutch government's White Paper, available at <https://www.permanentrepresentations.nl/documents/publications/2020/08/21/assessment-white-paper-on-foreign-subsidies>, as well as the position of the Finnish, Belgian, and Swedish

proportionality, which is an integral part of the general principles of EU Law under Article 5 TFEU, requires that the means of a rule be appropriate to achieve the aim pursued and not go beyond what is necessary.[403]

Therefore, as suggested by some, the proposed Regulation must delimit the scope promptly, avoiding an overly interventionist approach, containing administrative burdens for businesses and the Commission or the Member States themselves, [404] possibly acting on the thresholds set at a level that relates only to the most relevant transactions.[405]

On this issue, the public consultation revealed a multiplicity of views. Those who questioned the relationship between notification thresholds and administrative burden note that high turnover thresholds limit the administrative burden for the Commission and operators. [406] However, this, on closer inspection, also means that very few investments and acquisitions, e.g., of innovative start-ups and scale-ups, would fall within the scope of the Foreign Subsidies Regulation, which underscores the turnover thresholds and notification requirement contribute to the effectiveness and proportionality of the instrument. In this regard, some EU industry and legal associations have also proposed that the new legal instrument should address only the most distortive subsidies.

To curb administrative burdens, some advocated reasonably short review periods and voluntary reporting mechanisms or reduced procedural time for cases that do not present particular problems, possibly assuming that *ex-ante* mandatory notification mechanisms were coupled with a system of silence consent: that is, once the transaction is notified, and subject to the lapse of a regulatory period, the investor could assume, without any feedback from the relevant supervisory authority, that they could proceed with the transaction.[407]

governments but also that of some law firms such as Allen & Overy LLP all available at EC, cit. *supra*.

[403] See, *inter alia*, Judgment of the Court (Second Chamber) of 18 June 2015, *the Republic of Estonia v European Parliament and Council of the European Union*, Case C-508/13, para. 28, ECLI:EU:C:2015:403, related to an appeal on a Directive in which the Union legislature included several provisions to limit the ability of Member States to impose additional burdens on small businesses over and above those provided for in the Directive.

[404] European Competition lawyers Forum (ECLF), cit. *supra*, at 4.

[405] See Freshfields Bruckhaus Deringer, cit. *supra*, at 2-3.

[406] See the Dutch position paper, cit. *supra*.

[407] See the French position paper, cit. *supra*.

Therefore, it becomes relevant that additional third-country subsidy control is proportionate in terms of time and administrative burden.[408] In this regard, in evidencing substantial agreement with the two-stage procedural system, some stakeholders shared the need for a two-stage procedural system while signalling the need for the criteria for initiating the in-depth investigation to be sufficiently rigorous and well-defined,[409] suggesting the introduction of elements of transparency[410] and pointing out the need that possible delays should not result from this articulation.

Some also point out that a restraining effect on economic activity and foreign direct investment could also come from the uncertainty created by the possibility of up to 10-year surveys.[411] Still, others fear the risk of retaliation by foreign governments through the selective opening of their markets. Finally, among the reactions, the more political ones of those who fear that the measures outlined in the White Paper may hurt future investment decisions and, above all, reduce inward FDI into Europe, linked to the legal uncertainty as to how the Commission will apply the measures, as well as the risk of retaliation by foreign countries against EU undertakings operating abroad, should not be underestimated. In this regard, the instrument must be introduced to provide that the decisions taken should be appealable before the EU courts, with the possibility of an expedited procedure, in line with the approach envisaged in the EU Merger Regulation.[412]

5.5. Industry issues

Regarding contributions from business and industry associations belonging to the EU, these generally point to issues specific to the sector, some pointing out the lack of transparency of foreign subsidies.[413] Some have expressed concerns about the threat that the massive production capacity of subsidised Chinese industry

[408] See the position paper of Bundesverband der Deutschen Industrie e.V. **(**BDI), 23 September 2020, at 2, cit. *supra*.
[409] See, in this regard, the contributions of Finland, Poland, cit. *supra*.
[410] See feedback from European film Agencies (EFAD) and Clifford Chance all available at EC cit. *supra*.
[411] See the contribution from Mayer Brown Europe-Bruxelles LLP, cit. *supra*.
[412] See, in this regard, International Bar Association, Antitrust Committee Merger Working Group, at 18, 23 September 2020, available at <https://www.ibanet.org/MediaHandler?id=B186F9B3-1B4E-4F74-8358-19CEDF01A098>.
[413] See position paper of Aegis Europe, cit. *supra*.

may pose to some particular sectors of EU industry, such as aluminium, which are in danger of being completely replaced by Chinese industry[414] or the EU maritime technology sector, which highlighted how in recent decades Europe has gradually lost entire segments of the shipping market, as well as technical skills and capabilities, to Asia due to aggressive Asian competitive distortions led and supported by States. [415]

Others have pointed out that foreign subsidies allow them to maintain significantly lower prices, enabling them to expand their activities in the EU at the expense of competitors.[416]

Concerns have also been expressed by EU airlines exposed to unfair competition from third-country airlines. Still, foreign subsidies given in the form of loans or capital injections to their EU competitors are controlled *de facto* by foreign airlines.[417]

The competitive disadvantage of EU undertakings can also be seen in the area of sustainability, as many undertakings have the incentive to reduce production

[414] See the contribution from Belgium, which expressly calls for a balance between subsidy-favoured acquisitions and foreign direct investment, as well as the contribution from *European Alluminium*, cit. *supra*.

[415] See the position paper by *Sea Europe*, an association representing nearly 100 % of the maritime technology industry in 16 nations, including EU Member States, Norway, and Turkey. Sea Europe points out that the other that in this sector, already heavily subsidised foreign operators can benefit directly or indirectly from EU funding programs which constitutes a kind of double subsidy, and that Regulation 2016/1035, although adopted to safeguard fair competition in shipbuilding, has never been enforced because it is conditional on the ratification of the 1994 OECD Shipbuilding Agreement, which has not been ratified by all parties and to which some nations moreover, such as China, are not a party. The position paper is available at <https://www.seaeurope.eu/images/files/2021/Position-papers/Trade-Finance/executive-summary---sea-europe-comments-on-the-white-paper-on-foreign-subsidies.pdf>.

[416] *Fertilizers Europe* pointed out that the dual pricing of gas in Russia and North Africa allows a price of commodity gas for the domestic industry below the export price situation that the EU's anti-dumping and anti-subsidy instruments fail to address, which encourages significant growth in the market share of foreign undertakings in the EU. This situation poses a risk to the EU fertiliser industry, which is engaged in the Green Deal decarbonisation transformation and needs to invest in low-carbon technologies. Therefore, foreign subsidies are a detriment to the competitiveness of European industries and the environment. The position paper is available at <https://www.fertilizerseurope.com/wp-content/uploads/2021/05/Fertilizers-Europe-PR_Regulation-on-Foreign-Subsidies.pdf>.

[417] See the position paper of *Airline Coordination Platform* (ACP), 22 September 2020, and that to the targeted consultations on October 29, 2020, expressing support for the integration of Regulation (EC) 1008/2008 and Regulation (EU) 2019/712), available at <https://ec.europa.eu/info/law/better-Regulation/have-your-say/initiatives/12621-Trade-investment-addressing-distortions-caused-by-foreign-subsidies/F872867_en>. Regulation (EC) 1008/2008 has, in fact, a strict foreign control test that does not include practices below the level at which a foreign entity acquires control.

in the EU and move it to third countries with lower costs but a greater environmental impact, a phenomenon known as carbon leakage.[418]

Last but not least, some agree that the measures to be introduced may also address distortions of the Internal Market due to subsidies granted by non-EU authorities in the context of EU funding, pointing out that in some areas, such as maritime technology, there are several examples of EU funds granted directly or indirectly to foreign producers, such as co-financing granted to EU undertakings ordering new ships from foreign ones. [419]

5.6. The EU interest test

Another relevant issue addressed during the consultations was the possible introduction of an EU interest test under which the distorting effects of a foreign subsidy could be balanced by their possible positive effect on the Internal Market or by corresponding to public policy interests recognised by the EU.

As the Commission in the White Paper envisioned, the EU interest test would be a useful tool to avoid turning defence against foreign subsidies into domestic protectionist policies because it would allow compatible aid under the EU State Aid framework to be used.

Under the EU interest test, a foreign subsidy could be authorised if State Aid from a Member State grants the same circumstances. Similar, if not identical, treatment to State Aid would help ensure compliance with the principle of non-discrimination of foreign subsidies.

Therefore, it is a concept introduced previously for the EU, given that the EU State Aid framework provides plenty of practice on balancing interests and maintaining fair competition. However, in the White Paper, this instrument is merely sketched out.

In this regard, the contributions received by the Commission have, for the most part, agreed with the proposed introduction, again with varying nuances. Some suggested that the proposed Regulation includes a level playing field in the Internal Market regarding innovation and sustainable technologies, such as contributing to

[418] See the contribution of Sweden, cit. *supra*.
[419] See Sea Europe's position paper, cit. *supra*.

climate neutrality criteria. In contrast, others highlight the need for the criteria for evaluating the test to be transparent and adequately clear to ensure legal certainty, [420] as well as that of having a trustworthy and as accurate possible source of information. [421]

Some have raised the question of whether such a test can go further and consider the interests of a foreign government. [422] In this regard, the question could arise when the grant is given for legitimate purposes, such as digital transformation, environmental protection, or the development of economic activities for which there is a market failure, even if not in an EU country. The goal of global climate improvement, for example, is a strategic goal for Europe. In this case, it could be considered whether the overlapping interest with the EU interest would allow the grant to be authorised or not considered.

Nearly all have suggested that the competence to conduct the test lies exclusively with the Commission, which is considered to be in the best position to assess the overall interest of the EU as opposed to the Member State Authorities.[423]

From this point of view, the EU does not prohibit member states from granting State Aid, as some State Aid may be allowed, but allows exemptions for aid that pursues certain objectives of Member States.[424] In particular, it may grant aid to undertakings in derogation of the prohibition in Article 107 in cases expressly provided for by the Treaty in Articles 93, 106(2), 107(2) and (3), and 346(1)(b) TFEU, where market forces alone fail to achieve maximum efficiency or produce or exacerbate social or regional inequalities. The White Paper, with the EU interest test, recognises that the positive effects of foreign subsidies should also be considered. Thus, the idea behind the forecast in the White Paper is to assume that if the distortion of the Internal Market caused by the foreign subsidy was adequately

[420] See the contribution of Finland and Poland, cit. *supra*.
[421] See the contribution of France, cit. *supra*.
[422] Clifford Chance, *Response of Clifford Chance LLP to the White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*.
[423] See contributions from Finland, the Netherlands, France, cit. *supra*.
[424] Osservatorio europeo sugli aiuti di Stato, *Introduzione al concetto di Aiuto di Stato, Università degli studi di Padova*, available at <http://www.osservatorioaiutidistato.eu/introduzione/documentazione/introduzione-al-concetto-di-aiuto-di-stato.html>.

offset by the positive effect of the economic activity or investment supported in the Internal Market, the foreign subsidy could be eligible.

The Commission has experience in analysing the compatibility of State Aid and particularly in assessing its positive and negative effects. This is a complex exercise, despite the Commission's advice in its guidelines. The ECJ recently recalled that to be considered compatible under Article 107(3)(c) TFEU, aid must be designed to facilitate the development of certain economic activities or areas and must not adversely affect trading conditions to an extent contrary to the Internal Market interest.[425] These criteria have proven relevant in State Aid and could be a benchmark in evaluating foreign grants.[426]

However, it should be kept in mind that when granting subsidies to their undertakings, third countries are not pursuing an economic development objective in the Member States but, rather, their trade policy objectives or objectives, for them, are strategic. A strict application of this condition could lead to a negative balancing test. The question that the proposed Regulation and, more importantly, the guidelines will have to answer is how this balancing of interests will be applied and to whom.

Regarding the evaluation criteria, it should be noted that the White Paper lists several factors to be considered in evaluating the grant. These are indicators found in State Aid practice, such as the size of the subsidy, the situation of the recipient, the situation in the relevant market, the market conduct in question, and the level of activity of the recipient in the Internal Market. However, it does not state the methodology it proposes for deriving the existence of distortions from the presence of these indicators. In other words, it needs to clarify the assessment standard.[427]

These considerations first presented the EU legislature with a choice: that is, whether the balancing test should be concerned primarily with positive economic

[425] See the Judgment of the Court (Grand Chamber) 22 September 2020, *Republic of Austria v European Commission*, Case C-594/18 P, ECLI:EU:C:2020:742.
[426] Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 218.
[427] In this sense, Luca Rubini, cit. *supra*.

effects on the Internal Market, such as efficiency, or whether, instead, public policy concerns could also be considered.[428]

Suppose one refers to the purpose of the future Regulation, unlike the FDI Regulation. In that case, the balancing should refer to economic conditions since the purpose is to achieve a level playing field in the Internal Market. Therefore, the positive effects should also focus on the economic sphere with the added value given by considering that economic effects are easier to quantify than political effects and can be included among the Commission's evaluation criteria with more predictability and legal certainty.[429]

This would be consistent with the interpretation provided by those in the doctrine who believe that the White Paper, in using the terminology of the EU interest test, borrowed the concept from EU trade law, which, through the criterion of EU interest, ensures that negative effects on some stakeholders are not disproportionate to the positive effects of trade instruments.[430] But this is not particularly helpful as there is still debate in the doctrine as to whether the EU interest criterion in trade law limits considerations to economic factors alone.[431]

The White Paper's EU interest criterion foregrounds non-economic policy objectives. It states that EU public policy objectives, such as job creation, achieving climate neutrality and environmental protection, digital transformation, security, public policy, public safety, and resilience, would be considered in the assessment.[432]

It will therefore be necessary to see how these concepts have been translated into rules in the draft Regulations under consideration. It will therefore be in the implementation phase that will serve as the discriminating factor, especially concerning the guidelines that can further characterise the balancing test and provide it with the necessary interpretive flexibility.

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[428] Lena Hornkohl, *The EU Foreign Subsidy Regulation – What, Why and How*?, 18 August 2022, at 9-10.
[429] See Lena Hornkohl, *The EU Foreign Subsidy Regulation – What, why and how*? cit. *supra*, at 9-10.
[430] *Ibid.*
[431] See Horváthy, Balázs , *The concept of 'Union interest' in EU external trade law*, Acta Juridica Hungarica, 55, No 3, 2014, at 261-276.
[432] See the White Paper, cit. *supra*, at 17.

5.7. Compensation measures

To address distortions caused by foreign subsidies, the White Paper provides that remedial measures can be imposed. The White Paper points out that aid granted in violation of the EU State Aid framework must be repaid with interest to the Member State that conceded it without authorisation. However, if applied to the foreign subsidy situation, this principle would mean that the financial benefit from the subsidies themselves would have to be returned to the third country, which might be challenging to apply in practice. It may therefore be necessary to make available a range of alternative remedial measures to the supervisor, such as structural remedies, behavioural measures, and remedial payments to the EU.[433]

In this regard, it was noted that the EU already has Regulations that allow for imposing corrective measures or accepting commitments to remedy the identified injury.[434] However, in these instruments, the prerequisite is identifying injury, and remedial measures must not go beyond what is necessary to compensate for the injury in question. In the case of foreign subsidies, on the other hand, the objective is not to compensate EU undertakings for injury but to remedy the distortion of the Internal Market caused by a foreign subsidy. As noted by Alen Alexis, the approach is to restore normal market conditions with commitments and remedies directly inspired by the practice followed in the field of concentrations.[435]

In fact, according to the Commission Notice on remedies deemed appropriate under Council Regulation (EC), No. 139/2004 and Commission Regulation (EC) No. 802/2004 on concentrations provides for the possibility for the Commission to adopt remedies, i.e., measures to remove competition concerns expressed by the Commission.[436]

[433] See White Paper, cit. *supra*, at 19 ff.
[434] See the existing instruments to combat unfair pricing practices in the shipbuilding, maritime transport and air transport sectors provided for in Regulation (EU) 2016/1035, Regulation (EEC) No. 4057/86 and Regulation (EU) 2019/712.
[435] Alen Alexis *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 220.
[436] See Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission (EC) No 802/2004, OJEU, C 267/1, para. 2.

Footnote 4 explicitly clarifies that competition concerns correspond to whether a concentration is likely to significantly impede effective competition in the Internal Market or a substantial part.[437]

On sanctions, the feedback presented by stakeholders at the consultations was among the most varied. For example, labour EUs pointed out that restorative measures should include payment of the financial benefit and behavioural measures such as banning certain behaviours in the market or publishing test results. The DGB, for example, suggests that these remedies should also include activities that support social-ecological change or the functioning of regional economic structures, such as investments in job security or good working conditions, as well as environmental protection or energy efficiency.[438]

However, based on the considerations made above about the purpose of the new legislation and the affinity with what the EU Commission envisions in the area of concentrations, the measures could more easily encompass access to fair and non-discriminatory terms to infrastructure, licensing of assets acquired or developed with the help of foreign subsidies, limiting capacity or presence in the market, abstaining from some investments, dispossessing assets.

A proportionate, gradual, and non-dissuasive approach to foreign investment will not be dispensed with. For these reasons, some in the consultations pointed out that introducing powers to impose remedies on transactions by banning or cancelling transactions after they have been closed would be undesirable because it would damage legal certainty and discourage investment.[439] For example, the Italian Golden Power legislation demonstrates that rather than remedial measures, *ex-ante* pre-notification or prior authorisation by the competent authority should be promoted to ensure legal certainty and avoid having remedial measures imposed on them later.[440]

5.8. Issues in public procurement procedures

[437] *Ibid.* at footnote 4.
[438] See the position paper of the Confederation of German Trade Unions (DGB), available at EC, cit. *supra*.
[439] See Clifford Chance, *Response of Clifford Chance LLP to the White Paper on levelling the playing field as regards foreign* subsidies, cit. *supra*.
[440] *Ibid.*

Finally, as a further relevant issue, associations of EU undertakings from sectors particularly exposed to competition from subsidised non-EU undertakings highlighted the importance of addressing distortions due to foreign subsidies in public procurement procedures. In particular, some undertakings reported that they had encountered *de jure* and/or *de facto* barriers that hindered their access to foreign public procurement markets.

In contrast, foreign undertakings could fully benefit from the EU's public procurement market opening policy by winning EU public procurement contracts due to the possibility of competing with artificially low prices favoured by their state's subsidies.[441] On the merits, they pointed out the need to proceed with the right balance between effectiveness and burden and to coordinate it with adopting the International Procurement Instrument (IPI) to help open up foreign procurement markets.

Some workers' EUs have also demanded that access to EU procurement markets or EU-funded infrastructure projects, including those outside the EU, be granted only to undertakings that respect basic workers' rights.[442]

In this regard, it should be considered whether, under the assumption that it is necessary to address the potential distortions that foreign subsidies can cause to EU public procurement, existing mechanisms could not be strengthened rather than introducing a new general regime that could add complexity to the already complex and time-consuming public procurement procedures. While the goal of catching abnormally low bids that benefit from foreign state support is worthy, it should be avoided by making the procedures excessively cumbersome. In this sense, the position of those who have urged the Commission to reconsider the basic principles of the instrument on foreign subsidies to consider whether the problem cannot be more properly addressed through a modification of the EU public procurement rules is reasonable.[443]

6. First reflections: is it impossible to avoid conflict?

[441] See, for example, Sea Europe's contribution, cit. *supra*.
[442] See, in this regard, the remarks of the German Confederation of Trade Unions (DGB), cit. *supra*.
[443] See, in this regard, *AmCham Eu* position paper, cit. *supra*.

The Commission's intention to ensure a level playing field on a global and no longer just an EU scale is, certainly, a strategic goal that moves from the shared assumption that the integrity of the Internal Market depends on levelling the playing field.

Commissioner Vestager argued that the proposals in the White Paper were not designed to address concerns arising from subsidies from some specific countries, as they are instruments that can be used in all cases since they do not target any specific member; it is, in fact, only Europe that calls for reciprocity and a level playing field.[444] However, it is important to pay attention to the critical issues that have emerged from the consultations and the opinion of part of the doctrine, especially regarding the legal framework of the multilateral rules of international trade.[445] Indeed, any disputes over foreign subsidies could undermine the willingness of WTO members to follow the general rules of the SCM Agreement and the WTO Anti-Dumping Agreement. This could have worrying consequences for Europe's many export-oriented industries. Therefore, the new Regulation must not underestimate the need for consistency with the existing framework of global trade rules. [446]

Certainly, for compliance with the principle of non-discrimination and the obligation of national treatment under WTO rules, it may be useful for foreign subsidies to be assessed similarly, or at least no worse, and in any case consistently with the State Aid discipline under EU rules. A relevant element will also be that of the measures' proportionality. Foreign subsidies should, no doubt, benefit, at least, from all the justifications provided in the EU State Aid framework for Member States' subsidies. However, it is presumable that the Commission's practice and jurisprudence will open up for further justifications, including other public interests and justifications that are separate from them at present, also because the Regulation should not in any way compress foreign investment. [447]

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[444] Francesca Basso, 17 June 2020, *L'assalto (cinese) alle industrie europee in crisi, ecco come la Ue vuole proteggerle*, available at <https://www.corriere.it/economia/aziende/cards/sovvenzioni-estere-ecco-come-ue-vuole-proteggere-mercato-unico-l-industria/libro-bianco_principale.shtml>.

[445] Rubini, cit. *supra*, at 127 available at <https://rivista.eurojus.it/wp-content/uploads/pdf/rubini-segni.pdf>.

[446] Victor Crochet e Marcus Gustafsson, cit. *supra*, at 366.

[447] Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 128.

And the instrument of guidelines, as will be seen below, provided for in the proposed Regulation, is an essential element that can, at least in part, reassure in this respect.

Certainly, the Regulation must carefully weigh the interests at stake to avoid unfortunate reflections on foreign investment and prevent the White Paper proposals, rather than levelling the playing field, from constituting anti-subsidy. However, it should be considered that the White Paper, by its nature as a working and in-depth tool on which consultations were conducted, could not, in any case, have had that degree of detail proper to the proposed Regulation.

The objective that the Commission has set for itself is – to use Rubini's words – ambitious but, above all, complex, given the legal profiles involved.[448] Indeed, the Regulation has important legal value because, as the Commission noted, it could incentivise third countries to adopt their State Aid control system, re-evaluate the use of subsidies in investment policies, and engage in negotiations for a more elaborate international framework governing subsidies within the WTO.[449]

Before any other consideration, Chapter 3 shows how the Regulation responded to the critical issues raised.

[448] *Ibid.* at 127.
[449] Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 199.

CHAPTER 3 – The EU Regulation 2022/2560 on Foreign Subsidies distorting the Internal Market. A first analysis and appraisal

1. The Foreign Subsidies Regulation: the kick-off

On 28 November 2022, the Council of the EU approved the Foreign Subsidies Regulation.[450] The Regulation was published in the Official Journal of the EU the 23 December 2022 and entered into force on 12 January 2023, i.e., twenty days after its publication.[451] Its provisions will apply from 12 July 2023, but notification requirements for concentrations, acquisitions and public procurement procedures will only apply from 12 October 2023.[452]

The transitional provisions also provide that the Regulation applies to foreign subsidies granted in the five years preceding 12 July 2023 if these foreign subsidies distort the Internal Market after 12 July 2023.[453] For foreign financial contributions granted to an undertaking notifying a concentration or financial contributions in a public procurement procedure, the period is reduced to subsidies granted in the three years preceding 12 July 2023.[454] In any case, the Regulation will not apply to concentrations for which the agreement was signed before 12 July 2023 and to public contracts awarded or procedures initiated before 12 July 2023.[455]

Consequently, as of 12 July 2023, the Commission may initiate *ex officio* investigations into foreign subsidies granted five years before that date as long as those subsidies distort the Internal Market after 12 July 2023.[456]

As of 12 October 2023, on the other hand, undertakings carrying out concentrations and acquisitions, i.e., concentrations and acquisitions in which the acquired undertaking, or the joint venture, is established in the EU and has a total turnover of at least €500 million and has benefited in the three years preceding the agreement, the announcement of the public bid or the acquisition of controlling

[450] Regulation (EU) 2022/2560, PE-CONS 46/22
[451] See Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, cit. *supra*, Art. 54(1).
[452] *Ibid*. Art. 54(4).
[453] *Ibid*. Art. 53(1)
[454] *Ibid*. Art. 53(2)
[455] *Ibid*. Art. 53(3,4)
[456] *Ibid*. Art. 53(1)

interest from financial contributions of at least €50 million from third countries, will have to notify the European Commission in advance of the proposed transaction.[457]

The publication in the Official Journal concludes a long journey that began with the presentation of the White Paper on a level playing field for foreign subsidies on 17 June 2020, followed by the European Commission's proposal presented on 5 May 2021.[458]

The last legislative step thus ends after the conclusion of the Provisional Political Agreement between the Parliament and the Council on 30 June 2022,[459] followed by informal contacts between the Council and the European Parliament. Under the joint declaration on practical arrangements for the codecision procedure,[460] the Commission reached an understanding of the dossier at first reading.

One compromise amendment and two amendments to the legislative Resolution containing statements were tabled during the trialogue.[461] The European Parliament adopted all amendments in a plenary session on 10 November 2022.[462] The vote's outcome in the European Parliament mirrored the institutions' compromise understanding. Consequently, the Council approved the Regulation in the wording corresponding to Parliament's position under Article 294(4) TFEU.

Following the approval, the President-in-Office of the Council of the EU, Josef Síkela,[463] said the new Regulation would enable the EU to ensure fair competition and a level playing field for all undertakings operating in the Internal

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[457] Cf. in conjunction with Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies that distort the internal market, *supra*, Arts. 20(3)(a) and (b), 20(3)(a) and (b) and 54(4).

[458] Proposal for a Regulation of the European Parliament and of the Council *on foreign subsidies distorting the Internal Market*, cit. *supra*.

[459] Provisional Agreement resulting from interinstitutional negotiations on Proposal for a Regulation of the European Parliament and of the Council *on foreign subsidies distorting the Internal Market*, cit. *supra*.

[460] See Joint declaration on practical arrangements for the co-decision procedure under Art. 251 of the EC Treaty, OJEU C145/5 30 June 2007.

[461] These are, respectively, Amendments 96 and 97,98 submitted by the Chairman of the International Trade Commission (INTA), Bernd LANGE (S&D, DE)

[462] See Note form General Secretariat of the Council to Permanent Representatives Committee/Council, Draft Regulation of the European Parliament and of the Council on Foreign Subsidies distorting the Internal Market, 18 November 2022, 14648/22.

[463] Josef Síkela, acting President of the Council of the European Union, is the Minister of Industry and Trade of the Czech Republic.

Market, European and non-European, by providing investigative powers to counter unfair practices advocated by some third countries.[464]

To ensure equal competition in the EU, the newly approved Regulation supplements the EU State Aid framework on distortions in the Internal Market caused by subsidies granted by Member States.[465] This fills the regulatory gap in the EU instruments highlighted in the White Paper and the impact analysis drafted by the Commission.[466] Indeed, while subsidies granted by EU Member States are subject to State Aid control, subsidies granted by third countries are, for the most part, unchecked because WTO rules do not cover all cases. However, the European Parliament, the Council, and the Commission, as emphasised in the joint statement on the sidelines of the approval of the new Regulation, have reaffirmed that the EU remains committed to an open multilateral system centred on the WTO and is strongly committed to strengthening the multilateral subsidy framework and promoting its compliance and enforcement.[467]

As will be seen, the Regulation does not resolve all the critical issues that emerged in the long journey leading to its adoption. This task has been even more challenging considering the usage of notions such as fairness, unfair practices, and a level playing field, which, albeit very evocative, take more work to make operational. Indeed, it is particularly complex to identify tools that fully capture the essence and effects of such expressions while defining their remedies.[468] Moreover, many of the outstanding issues will be resolved only by enforcement practice, discounting the Regulation being an offspring of the WTO system, like the competition and EU State Aid framework.

The Foreign Subsidies Regulation was born as a reaction to the inability to achieve a multilateral solution to the distorting effects of subsidies within the WTO

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[464] The statements of the rotating President of the European Union Parliament Jozef Síkela are available at <https://www.consilium.europa.eu/it/press/press-releases/2022/11/28/council-gives-final-approval-to-tackling-distortive-foreign-subsidies-on-the-internal-market/>.

[465] See the sixth consideration.

[466] For regulatory gap analysis see *supra*, Chapter one, para. 3.

[467] *Joint statement of the European Parliament, the Council and the Commission*, 18 November 2022, 14648/22, ADD 1, at 1.

[468] This is an observation already pointed out by Luca Rubini with reference to the White Paper, but still valid today. See Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 131.

system.[469] The same list of distorting subsidies proposed in the White Paper drew extensively on the experience of the WTO system, reinforcing the impression of a hybrid approach,[470] considering the similarities and differences with the definition of foreign subsidy in the SCM Agreement.[471] The definition of foreign subsidy in the Regulation parallels the definition of State Aid in Article 107(1) TFEU, although there are also some clear differences.[472]

The framework is also contaminated: in the context of State Aid, for example, the Commission cannot directly impose a sanction on a Member State not complying with the notification and standstill obligation. Moreover, according to the Regulation, the addressee of any decision is the undertaking, which makes the situation completely different from that of State Aid, including the facts decisive for assessing whether a benefit has been granted to an undertaking situated in a foreign State.

The wide discretion the Commission enjoys in reviewing foreign subsidies is partly different from the EU State Aid framework because, in the case of notification of new or existing State Aid, the Commission does not boast any room for manoeuvre. Therefore, the Foreign Subsidies Regulation draws on both experiences and builds on the more established strengths of State Aid, concentration control, Antitrust rules, and trade defence instruments.

This Chapter explains the content of the newly approved Regulation, giving an account of the main changes made in the trialogue to the original proposal submitted in May 2021 by the Commission. The Chapter will also show how the new Regulation relates to the issues addressed in the first two Chapters.

2. Purpose, subject, and scope

[469] See Chapter 1.
[470] Linklaters, *EU tools addressing foreign subsidies: anything but disguised trade remedies, and could they backfire*, cit. *supra*, at 5.
[471] Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 157.
[472] Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 194.

Interinstitutional negotiations, i.e., the trialogues between the European Parliament, the Council, and the Commission, have left the overall architecture of the Commission's proposal mostly unchanged, even though the original May 2021 text has undergone several modifications.

The seventy-seven considerations preceding the Regulation reveal all the complexity underlying the choices of the European legislator, even in light of the critical issues that emerged during the consultations and the trialogue negotiations.

These critical issues are essentially related, as noted above, to the need to adopt Regulations that are consistent with the international obligations undertaken, allowing the EU and individual Member States to continue to reap the benefits of foreign investment but also providing it with the tools to achieve the objectives introduced by open strategic autonomy, improving the resilience of the Internal Market and protecting it from distortions caused by foreign subsidies.[473]

As clarified under Article 1 with an amendment introduced by the Parliament,[474] by establishing a uniform system of Regulations to counter distortions brought on by foreign subsidies, either directly or indirectly, the Regulation seeks to support the functioning of the Internal Market by maintaining a level playing field.

Article 1[475] applies to foreign subsidies granted to undertakings, including public undertakings controlled directly or indirectly by the State, which conduct economic activity in the Internal Market. This includes any undertaking that acquires control of an undertaking established in the EU or is founded with it and any undertaking that participates in a public procurement procedure in the EU.

By also including, in the provisional agreement,[476] public undertakings controlled directly or indirectly by the state, the Regulation has taken on an even broader scope which, according to the preamble,[477] also includes undertakings of

[473] See, in this regard, the *Statement of the European Commission on multilateral rules to address distortive foreign subsidies on the occasion of the adoption of Regulation*, 18 November 2022, 14648/22, ADD 1, at 3.
[474] Parliament's amendment added a period at the opening of para. 1.
[475] See Art. 1, para. 2.
[476] See consideration 2(a) inserted in the provisional agreement text, which later became the third consideration in the final text of the Regulation.
[477] See the second consideration of the proposal.

strategic interest to the EU and critical infrastructure such as services, sea and air transport. [478]

2.1. The notion of undertaking

The scope of the Regulation is also affected by the definition of an undertaking. In this regard, unlike the proposal, the Regulation contains, in Article 2(1), a definition of undertaking included in the preliminary agreement, albeit expressly referring to public procurement procedures. This definition transposes the Case Law of the Court, which holds that, regarding Competition Law, an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and how it is financed".[479]

In light of the ninth consideration of the Foreign Subsidies Regulation, also appropriately included in the interim policy agreement, it is clarified that the Regulation is to be applied and interpreted "*in light of the relevant Union legislation, including that relating to State aid, mergers and public procurement*". Therefore, this definition of undertaking should be considered applicable to the entire Regulation. The distinction lies in the type of activity carried out by the undertaking, i.e., the exercise of an economic activity offering goods and services in the Internal Market – not its legal status and the way it is financed.[480] Nor does the nationality of the undertaking matter since the Regulation only requires that undertakings be active in the EU,[481] nor that the undertaking is established in the EU since the phrase "*established in the EU*" refers only to the case where an undertaking acquires control of another one established in the EU. It is, in fact, a

[478] See Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 156.
[479] See Judgment of the Court (Sixth Chamber) of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, para. 21, ECLI:EU:C:1991:161. In this sense, see also Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra,* at 212, although referred to the proposed Regulation by the Commission.
[480] See, even if referred to the proposal, Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies,* cit. *supra*, at 782, defining the notion of enterprise used in the functional type of proposal.
[481] See, in this regard, albeit regarding the proposed Regulation, Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 212, and, regarding the text of the interim agreement, Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 156.

narrower case than contained in the first sentence of paragraph 2 of Article 1, as clarified by the words "*among others*".

Hence, the only prerequisites required for the applicability of the Regulation are that the undertakings engage in economic activity in the Internal Market, including the acquisition of control of or a concentration with an undertaking established in the EU or participation in a public procurement procedure in the EU, and that a foreign subsidy has been granted that is likely to distort the Internal Market.[482]

The Regulation thus incorporates the jurisprudence of the ECJ, extending the Commission's jurisdiction to actions taken by individual economic entities outside the Internal Market that nevertheless have effects within that market. This is consistent with the principle mentioned above in the ninth consideration in light of the principles of the EU.

3. The constitutive preconditions of foreign subsidies: a comparative analysis with State Aid and WTO subsidies

Article 3 of the Foreign Subsidies Regulation defines the requirements that must be present for the existence of a foreign subsidy. Once again, the European legislator demonstrates a preference for factual and substantive elements instead of definitional aspects, as is also evident from the heading of the Article entitled "*Existence of a foreign subsidy*".

According to Article 3, for a subsidy to be considered to exist, several elements must be present, namely, the granting of a financial contribution by a third country, the existence of a benefit to the undertaking, the carrying out of economic activity in the Internal Market by the undertaking, and the selectivity of this benefit, i.e., that the benefit is limited in law and fact to one or more undertakings or one or more sectors.[483] The phrase "*directly or indirectly*", introduced in the Interim

[482] See Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. supra, at 156.

[483] On the co-presence of four main criteria for the existence of a foreign subsidy, albeit referring to the text resulting from the Interim Political Agreement, see also Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application,* cit. *supra*, at 512, which puts it in the broader

Agreement, highlights the desire to give the foreign subsidy a broad scope to encompass all subsidies in any way granted, compared to the wording in the Commission's May 2021 proposal.

3.1. The presence of financial contribution

Article 3 does not reference State Aid and Article 107(1) TFEU, even though the sixth consideration emphasises that the Regulation contains complementary aspects.[484] It does not even refer to the definition of subsidy in Article 1(1)(a) of the SCM Agreement, although it recalls it.[485]

However, some parallels and some differences can be drawn between both.[486] At first glance, Article 3 is closer to the definition of subsidy in Article 1(1) of the SCM Agreement, unlike Article 107(1) TFEU, which merely prohibits aid without defining it.[487] Indeed, by referring to financial contributions, Article 3 builds on the SCM Agreement's correspondent provision.[488] However, upon closer inspection, the wording in the Regulation is slightly broader, including indirect

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context of longstanding ongoing international discussions about how subsidies distort international trade and how to regulate them effectively.

[484] On whether the framework introduced is complementary to the EU State Aid framework, see Raimond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 188.

[485] In this sense, see Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 156. Art. 1(1) of the SCM Agreement considers a subsidy to exist where a financial contribution by a government or public body within the territory of a Member State confers a benefit. According to Art. 1(1) of the SCM Agreement, this is the case where there is a direct transfer of funds, or potential direct transfer of funds, or liabilities, or foregone or uncollected government revenue, or the provision of goods or services by a government, or where a government makes payments to a funding mechanism, or entrusts or direct private body to carry out one or more of the above functions which would normally be vested in the government. The practice differs in no respect from those normally followed by governments or where there is some form of income or price support.

[486] On the existence of parallels with the State Aid, see Raimond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 188. On the similarity, at least at first glance, with the definition contained in the SCM Agreement, see Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 156.

[487] In this sense see Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 156. However, see also Gustavo E. Luengo Hernandez de Madrid, *Regulation of Subsidies and State Aids in WTO and EC Law: Conflicts in International Trade Law*, Kluwer Law International,2007, at 442, according to which the concept of financial contribution in the WTO and EU text should be interpreted similarly despite their different wording.

[488] See Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 782.

transfers of funds or liabilities and the provision by a government of general infrastructure.

Moreover, the term "*inter alia*" in the opening sentence of Article 3(2) of the Regulation makes it clear that the list identified therein is not exhaustive and is, thus, likely to include additional cases. The European Council and Parliament have already included in the list, in the provisional agreement, for example, tax exemptions or the granting of special or exclusive rights without adequate remuneration.

3.2. Provided by a third country

Unlike Article 1(1) of the SCM Agreement, in Article 3 of the Regulation, for there to be a foreign subsidy, it is sufficient that a third country grants it, i.e., non-EU, regardless of whether it is the State of origin of the activity or another.[489] The SCM Agreement, on the other hand, targets members who have signed the Agreement.

According to part of the doctrine, the criterion used in Article 3 is affected by the need to use a non-discriminatory approach concerning the European EU State Aid framework that provides subsidies by Member States. This would imply the need to adopt a broad concept to define the term "*third country*", including subsidies provided through state resources.[490]

In addition, Article 3(2) reflects the panel's interpretations by clarifying that it is sufficient if the subsidy is attributable to a foreign government, either directly or indirectly.[491] Thus, both public and private entities may award a financial contribution. However, as clarified in the preamble, in the case of public entities, the wording allows for an assessment to be made on a case-by-case basis, considering different elements, including the characteristics of the entity and the

[489] See, in this regard, Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 782.
[490] See, this regard, Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application*, cit. *supra*, at 512.
[491] See Panel Report, *United States, Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, cit. *supra*, para. 8.67, at 42. In this regard, see also Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at, 157, according to which the wording used suggests a comprehensive approach.

State's legal and economic environment including the government's role in the economy.

In this way, the Commission wants to spotlight those countries, such as China, not only where the State plays a decisive role in the economy and for which imputability to the State could occur systematically.[492] However, for private entities, it is enough for the action to be traceable to the third country, considering the relevant circumstances. Both formulations, in each case, include assumptions that both public and private entities may act as intermediaries.[493]

Since the demonstration of the existence of the imputability condition is always complex, even in the EU State Aid framework, one wonders whether the criteria developed by the Commission in the guidelines will be used.[494] However, these criteria have accrued under Article 107(1), which refers only to the fact that the subsidy is granted by the State, unlike Article 3 of the Regulation, which contains a broader case. In this regard, observing the degree of consistency between the two disciplines will be interesting.

3.3. Conferring a benefit on an undertaking engaging in economic activity in the Internal Market

The requirement of benefit to the undertaking also follows that contained in SCM Agreement Article 1(1)(b).

Article 3 of the Foreign Subsidies Regulation does not define the parameters to establish the existence of a benefit. However, the thirteenth consideration in the preamble to the Regulation suggests that a financial contribution can be considered to confer an advantage on an undertaking if that advantage could not have been obtained under normal market conditions. The advantage should be determined through comparative benchmarks, including private investors' investment

[492] In this sense Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. supra, at 216.
[493] See Raymond Luja *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 188.
[494] See, *Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, (2016/C 262/01), OJEU C 262/1, para. 3.1.1, point 43.

practices, obtainable market financing rates, comparable tax treatment, or adequate remuneration for a given good or service.[495]

This also assumes that directly comparable reference values are unavailable, suggesting that existing reference values be adjusted or that alternative values are established based on generally accepted valuation methods. The same thing makes it clear that the sale or acquisition of goods or services following a transparent, competitive, and non-discriminatory bidding process should be in line with standard market conditions. Similarly, transfer prices in the context of goods and services traded within an undertaking may also confer an advantage if such transfer prices are outside the normal market conditions.[496]

The interpretation of benefit is reminiscent of Michel Porter's concept of competitive advantage, according to whom it is the ability to offer the buyer products at a lower cost than others. However, it is not related to a change in industrial or organisational strategy, as Porter assumed, but rather to receive a foreign subsidy.[497]

Moreover, it is a concept also used by the EU. For instance, the European Commission's recent request to Italy to abolish the corporate tax exemptions enjoyed by Italian ports to bring the national tax system in line with the EU State Aid framework underscores the belief that the corporate tax exemption enjoyed by port authorities may represent a competitive advantage in the Internal Market and therefore may constitute State Aid incompatible with EU rules.[498]

3.4. Limited, in law or fact, to one or more undertakings or industries

To fall within the scope of the Regulation, the advantage must be limited in law or fact to one or more undertakings or sectors. This requirement echoes, in part,

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[495] On the use of the thirteenth consideration as an interpretive canon of economic advantage, see Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application,* cit. *supra*, at 513.

[496] For the definition of benefit, see Gustavo E. Luengo Hernandez de Madrid, *Regulation of Subsidies and State Aids in WTO and EC Law: Conflicts in International Trade Law*, Kluwer Law International, 2007, cit. *supra*, at 443, which defines it as a situation of the beneficiary superior to normal market conditions.

[497] See Michel Eugene Porter, Il *vantaggio competitivo,* Piccola Biblioteca Einaudi Ns, 2011.

[498] See EC, press corner, 4 December 2020, available at <https://ec.europa.eu/commission/presscorner/detail/it/ip_20_2313>.

the concept of selective aid proper to Article 107(1) TFEU.[499] According to the ECJ Case Law, aid is selective if, under a given legal regime, the national measure favours certain undertakings or productions over others in a comparable material and legal situation, taking into account the objective pursued by the said regime. Therefore, it is a differential treatment that can be qualified as discriminatory.[500]

The term is also reminiscent of the one used in the context of the subsidy framework in Articles 1(2) and 2 of the SCM Agreement.[501] In both cases, the definition does not cover purely general financial contributions that do not favour specific undertakings. The Regulation also clarifies with consideration 15 that the actual disbursement is not relevant for the initial moment but rather the moment of granting.

The concept of selectivity was not originally envisioned by the White Paper but was introduced by the Regulation. Following its introduction, generally available financial contributions are excluded from the scope of the Regulation. According to Raymond Luya, it needs to be clarified that this exclusion was intended by the legislature but is the result of introducing this criterion in the Regulation.[502] In this regard, even the preamble does not clarify the reasons for inclusion, merely saying that the conditions are cumulative.

However, it must be assumed that the legislator drew an analogy with the specificity/selectivity requirement invoked under the EU State Aid framework and the SCM Agreement because distortion can arise since the subsidy is selective.

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[499] See, *Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, cit. *supra*, at para. 4, point 66. See also, albeit concerning the proposed, Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 216.

[500] See, *inter alia*, Judgment of the Court (Second Chamber) of 14 January 2015, *Eventech Ltd v The Parking Adjudicator*, C-518/13, para. 53-55, ECLI:EU:C:2015:9, Judgment of the Court (Grand Chamber) of 21 December 2016, *European Commission v World Duty Free Group SA and others*, Joined Cases C-20/15 P and C-21/15 P, para. 54, ECLI:EU:C:2016:981 and, more recently, Judgment of the Court (Fourth Chamber) of 15 May 2019, *AB 'Achema' and other v Valstybinė kainų ir energetikos kontrolės komisija (VKEKK) and others*, Case C-706/17, para. 84, ECLI:EU:C:2019:407.

[501] See that Art. 2 SCM Agreement to explain the specificity referred to in Art. 1(2) uses the terms "*is specific to an enterprise or industry or group of enterprises or industries*" referred to in this Agreement as "*certain enterprises*".

[502] Raymond Luya, The Foreign Subsidies Regulation, Countering State Aid Beyond the European Union, cit. *supra*, at 189.

4. Internal Market distortions: State Aid and SCM Agreements

Having established the existence of a foreign subsidy, the Commission should assess on a case-by-case basis whether it causes, or has the potential to cause, a distortion in the Internal Market, as clarified in Article 4 of the Regulation.

Unlike Article 107, based on the *prima facie* presumption that a financial benefit creates a distortion,[503] foreign subsidies are not prohibited, as also made clear in the seventeenth consideration of the Regulation. Indeed, the principle in this consideration represents an important canon of interpretation, testifying to the EU's willingness to introduce an instrument that does not unnecessarily pressurise foreign investment.

As noted by the European Economic and Social Committee, the problem is not foreign investment *per se* but foreign subsidies that facilitate the acquisition of EU undertakings, influence investment decisions, and distort trade in goods and services by conditioning recipients' behaviour and harming competition.[504] For the same reason, the concept of market distortion was also placed in a separate Article from the one governing the existence of a foreign subsidy, unlike the definition of intra-EU State Aid in which the concept of trade effect is an integral part.[505]

Otherwise, distortion recalls existing principles of State Aid and Competition Law. For there to be a distortion of the Internal Market, the foreign subsidy will have to improve the competitive position of an undertaking in the Internal Market and actually or potentially affect competition.[506]

The Regulation incorporates the Case Law on State Aid. According to the latter, to establish the impact of an economic advantage on trade between the Member States and the related distortion of competition, it is not necessary to prove

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[503] See Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 784, Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 216.

[504] See the *Opinion of the European Economic and Social Committee on the proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market* (COM(2021) 223 final – 2021/0114 (COD)), OJEU C 105/87, para. 2.6.

[505] See Raymond Luja *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 189.

[506] Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application*, cit. *supra*, at 513.

an actual impact of the aid on trade and an actual distortion of competition, but only to verify whether said aid is likely to affect such trade and distort competition.[507] However, the impact should be more than just assumed or presumed; it should be based on the foreseeable effects.[508]

4.1. The causal link between subsidy and competitive injury

The list of indicators contained in Article 4 also recalls – concerning the requirement of a causal link between the subsidy and the injury – Article 15 of the SCM Agreement, which states that the Authority imposing countervailing duties is required to provide evidence of the actual or potential adverse market phenomenon. However, in this case, the Appellate Body requires that the evidence be objective, verifiable, and credible.[509] Therefore, the requirement in the SCM Agreement is higher than in the Foreign Subsidies Regulation.[510]

As noted by Alain Alexis, causation finds a precedent in Regulation (EU) 2016/1035,[511] which requires the complainant to provide evidence of the causal link between the sale at an injurious price and the alleged injury.[512] In this regard, established State Aid practice could help to improve competitive positions, to include any support that mitigates charges normally included in an undertaking's budget, and to improve the competitive position of an undertaking.[513]

For the assessment of distortion, the Regulation identifies a list of indicators to be considered when quantifying or identifying the impact of a subsidy in the Internal Market, including in cases where the lack of transparency or the complexity

[507] See, *inter alia*, Judgment of the Court (Second Chamber) of 21 December 2016, Case C-76/15, *Paul Vervloet and others v Ministerraad*, para. 102, ECLI:EU:C:2016:975**,** Judgment of the Court (Grand Chamber) of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, Case C-74/16, para. 78, ECLI:EU:C:2017:496.
[508] See, Commission Notice on the notion of State Aid as referred to in Art. 107(1) of the Treaty on the Functioning of the European Union, cit. *supra*, at para. 6.3, point 190.
[509] See WTO, United *States – Countervailing Duty Investigation on Dynamic Random-Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, 21 February 2005, Report of the Panel, para. 7.215 at 60.
[510] In this sense, Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 785-786.
[511] See Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 *on protection against injurious pricing of vessels*, OJEU, L 176/1, Art. 5, para. 3, let. c).
[512] Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 214.
[513] *Ibid*. at 213.

of commercial realities makes this more difficult.[514] This is a non-exhaustive list, as evidenced by the inclusion in the provisional political agreement of the phrase "*in particular*", including the amount and nature of the subsidy, the situation of the undertaking and its location, and, as in the May 2021 draft Regulation, also the level, purpose and use of the undertaking's economic activity in the Internal Market.

However, as noted by Rubini already regarding the White Paper, the Regulation does not clarify the standard of assessment to derive a particular bias from the existence of these indicators.[515] According to Ondrej Blažo, differences in the standards for evaluating the elements of subsidies and their impact, such as basing the evaluation on mere indicators, would not immediately make the decision-making practice of anti-subsidy policy nor that of the Commission or ECJ immediately mutable.[516] Regardless, although these are, for the most part, indicators used for antitrust analysis, it nevertheless gives the Commission broad discretion.[517] In any case, from the examples included in the preamble, the distortion examination does not involve an analysis of competing undertakings, nor was the subsidy granted to facilitate a specific transaction.[518]

The fact that, among the indicators, the Regulation does not ask to examine the deterioration of business conditions and opportunities for foreign producers and suppliers underscores that market distortions caused by the foreign subsidy are closer to distortions of competition under Article 107 TFEU than to injuries under Article 15 of the SCM Agreement.[519]

The latter consideration is consistent with the fact that the protection of competition under the SCM Agreement is instrumental to the broader purpose of

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[514] See in this regard, the eighteenth consideration.
[515] Luca Rubini *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 133.
[516] See, for example, Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, para. 11, ECLI:EU:C:1980:209, which establishes the equation between strengthening economic position and distortion of competition.
[517] See *Opinion European Economic and Social Committee on the proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*, para. 3.6.
[518] See Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 785, which also notes that the effect of trade on Member States is not considered in the Regulation, nor would it make sense.
[519] See Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 786.

protecting free trade,[520] unlike foreign subsidies, which aim to protect a level playing field in the Internal Market and, thus, protect competition *per se*. The proximity to the EU State Aid framework emerges in the preamble, which expressly recalls the analogy of State Aid with certain categories of foreign subsidies,[521] such as unlimited guarantees, i.e., without any limitation on the amount or duration or unduly advantageous offers.

Article 5 identifies certain categories of foreign subsidies that are more likely to distort the Internal Market for which the Commission does not need to make a detailed indicator-based assessment. Still, it is sufficient that the beneficiary can demonstrate that the subsidy has no distorting effects. In addition to unlimited guarantees and unduly advantageous offers, these subsidies facilitate concentrations and are granted to struggling undertakings. It is also stated that officially financed export would be justified if provided under OECD export credit agreements.

As for the changes in the indicators introduced in the provisional agreement, these concerned the size reference of the undertaking and its evolution in addition to the relevant one of lowering the threshold below which subsidies are unlikely to distort the market from the original €5 million to the current €4 million. Another relevant change is the introduction of the *de minimis* threshold, defined by analogy with Article 3(2), first subparagraph, of Regulation (EU) No 1407/2013, below which the subsidy is not considered distortive.

Finally, it should be noted that a foreign subsidy does not distort the Internal Market to the extent that it is intended to remedy the damage caused by natural disasters or exceptional events.

5. Balancing test versus EU interest test

Having ascertained the existence of a distortion, the Regulation provides in Article 6 that the Commission may conduct a comparison of the foreign subsidy's potential benefits and negative effects on the development of subsidised economic

[520] See Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 158.
[521] See, in this regard, the twentieth consideration.

activity within the Internal Market, as well as other potential benefits related to specific policy objectives, including those of the EU. This comparative assessment is preliminary to applying the reductive measures in Article 7.

Compared to the text proposed by the Commission in May 2021, in addition to the positive effects of economic development, the preliminary agreement took greater account of some of the comments made during the public consultation on the White Paper. It also introduced the possibility of assessing broader positive effects, such as strategic policy objectives of the EU.

The use of the wording "*in particular*" leaves open the possibility for the Commission to assess other strategic policy objectives, among which could be included those of individual Member States, those of International Organizations to which the EU is a Member or even those for which the EU has signed bilateral treaties with non-EU countries. Legitimate interests of a foreign government, such as digital transformation, environmental protection, or energy transformation, should be addressed in these cases.[522] In particular, if a foreign subsidy stimulates activities favoured by the EU without excluding EU-based competitors, the Commission could take a favourable position.[523]

In any case, borrowing from well-established Case Law on State Aid, any distortion cannot reach such an extent as contrary to the common interest.[524] However, the ECJ considers the latter requirement in conjunction with the economic development of certain activities or regions in the same judgment. On this point, the Commission's formulation is more flexible and broader. This consideration would result in the non-immediate use of the criteria inherent in the horizontal and sectoral balancing tests under the EU State Aid framework.[525] Despite the expansion, not only pure trade policy aspects can be considered, given conflicts with WTO Law. [526]

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[522] See, in this regard, the position paper submitted by Clifford Chance in response to the White Paper consultations, cit. *supra*, at 6.
[523] In this sense Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 191.
[524] Judgment of the Court (Grand Chamber) of 22 September 2020, *Republic of Austria v European Commission*, Case C-594/18 P, cit. *supra*, para. 19, ECLI:EU:C:2020:742.
[525] On this point see, also, Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 218.
[526] *Ibid*. but with reference to the proposed Regulation that provided a narrower case.

An important criterion on the comparative assessment to be considered is contained in the impact analysis that accompanied the May 2021 proposal, which specifies that the limit of the Commission's discretion in the assessment lies in the principle of proportionality.[527]

Benchmarking is one of the main differences from the White Paper's EU interest test, which limited balancing to EU public policy objectives. Marios Tokas noted that the EU interest test contained in the White Paper required that for the subsidy to be compatible, it not only had to be proportionate but also necessary, similar to the EU interest test for State Aid. On the contrary, by introducing the evaluative procedure, the European legislator wanted to exclude the analysis of necessity, which is more difficult to find in foreign subsidies.[528]

Furthermore, Thorsten Käseberg and Sophie Gappa observed that the EU interest test could prove problematic initially. It could be a complex tool to manage as it is open to political influence from all directions and because it could lead to disagreement among Member States on the allocation of advantages or disadvantages.[529]

In any case, with the introduction of the balancing test in place of the EU interest test, the Regulation took into account the remarks of part of the doctrine, which indicated that to ensure equality of treatment, it would be necessary for foreign subsidies to benefit from all the justifications provided under the EU State Aid framework, also including public interests and extra-EU justifications to make the new instruments appealing to third countries.[530]

It is, then, not to be ruled out that the desired integration of the instrument contained in the Foreign Subsidies Regulation and the EU State Aid framework would create an incentive to update their discipline.

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[527] EC, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market*, cit. *supra*, at 48.
[528] *Ibid.*
[529] Systems Competition – China's Challenge to the Competition Order: Do we need new rules to protect a level playing field for competition with firms from non-EU countries?, Competition policy international (CPI), 25 January 2021, available at <https://www.competitionpolicyinternational.com/systems-competition-chinas-challenge-to-the-competition-order-do-we-need-new-rules-to-protect-a-level-playing-field-for-competition-with-firms-from-non-eu-countries/>.
[530] Luca Rubini, *I segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, at 128.

6. The redressive measures: restoring a level playing field and not compensating for an injury

To remedy the distortion in the Internal Market caused, actually or potentially, by a foreign subsidy, the Regulation allows the Commission to impose remedial measures on the undertaking. Alternatively, the Commission may accept commitments offered by the investigated undertaking only if such commitments fully and effectively remedy the distortion in the Internal Market.[531] In this case, the Commission makes them binding.[532]

At first glance, the possibility of offering commitments to remedy the distortion is reminiscent of Competition Law. Indeed, in Competition Law, when the Commission finds that a concentration raises concerns because it distorts the Internal Market and creates, or strengthens a dominant position, the parties may submit commitments to make the transaction compatible. These commitments may also be implemented after the authorisation decision.[533] Like Competition Law, the Foreign Subsidies Regulation is not simply committing to future consistent business behaviour, practice, or structure but removing obstacles to effective competition.[534]

It is clear from the provision that the Commission's view in imposing the remedial measures or accepting commitments is not to reimburse an injury suffered, i.e., compensatory. Instead, the Commission's interest in assessing which reduction measure to impose is guided by the Regulation's underlying purpose, which is to restore a level playing field in the market.[535] This means that even the parameter on the proportionality of the measure, which is explicitly referred to in Article 7(3), must be evaluated in light of the purpose of the Regulation, which is to restore a

[531] See Art. 7(1)
[532] See Art. 7(2).
[533] See Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the EC Merger Regulation)*, considerations 30 and 31, and Arts. 6(2) and 8(2), OJEU, L 24/1 but also Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJEU, C 267/1, para. 5.
[534] See Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJEU, C 267/1, para. 9.
[535] In this sense, see Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 220.

level playing field. Therefore, measures can be, at most, what is necessary to achieve such levelling.

As also seen in the explanatory memorandum to the proposal submitted in May 2021, the proportionality of measures is a major concern for the Commission because the weighing of two interests must inspire the whole Regulation and the resulting action: favouring an efficient and competitive Internal Market and not squeezing foreign investment. For this reason, the principle mentioned in the preamble reminds us that when the Commission considers alternative remedial measures, it must choose those that enable the distortion to be fully and effectively remedied. Still, it will have to identify the least burdensome for the undertaking under investigation of all possible measures that achieve that result.[536]

Nonetheless, it will be necessary to question the relationship of possible coexistence between the existing measures to combat unfair pricing practices in the maritime and air transport sectors, which are, on the contrary, inspired by the principle of remedy to the injury suffered. The latter consideration is evident, for example, from a combined reading of paragraphs 1 and 4 of Article 14 of Regulation (EC) No 868/2004, whose paragraph 1 states that in addition to the distortion of competition, there must be an injury, and paragraph 4, which requires that remedies must not go beyond what is necessary to offset the injury. On the other hand, in the case of the Foreign Subsidies Regulation, the limit is the parameter to be found to fully and effectively remedy the distortions.[537]

6.1. Types of redressive measures. The purpose of reparation

As for specific remedial measures, Article 7 provides a non-exhaustive list, which may consist, for example, of offering access on fair and non-discriminatory terms to essential infrastructure acquired or supported by distorting foreign subsidies; provisionally restricting business activity or refraining from certain investments, divesting certain assets; requiring undertakings to dissolve the affected

[536] See the twenty-first consideration.
[537] See Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*, at 788.

concentration; and requiring affected undertakings to adapt their governance structure.[538]

Remedial measures include repayment of the foreign subsidy according to an appropriate interest rate calculated under Regulation (EC) No. 794/2004.[539] This is an interesting principle introduced in the trialogue, as the Regulation sanctions the use for recovery of foreign subsidy of the interest rate used for recovery of State Aid. The recovery of the foreign subsidy has, in fact, the same purpose as the recovery of State Aid. Indeed, according to the ECJ, recovery of State Aid is not a penalty but the logical consequence of finding it unlawful.[540] With recovery, the recipient is deprived of the advantage it enjoyed over its competitors on the market, and the situation before the aid was paid is restored.[541] They are thus both necessary to ensure that a level playing field is maintained in the Internal Market under Article 3(g) of the EC Treaty so that efficiency and growth in the Internal Market are ensured.[542] Thus, in both cases, they are not true sanctions but the logical consequence of establishing their distortive capacity.

In any case, if the undertaking under investigation proposes to repay the foreign subsidy, the Commission can only accept the repayment if it can ascertain its transparency, verifiability, and effectiveness, considering the risk of circumvention.[543] The question is how the Commission will implement this measure, which would allow the undertaking to continue to operate on a level playing field, especially if the distortion is only potential, and how the Commission will assess whether such reimbursement can remedy the distortions.[544]

As for proving proportionality, the explanatory memorandum of the Commission's May 2021 proposal for the Regulation includes in the general statement that the measures achieve the intended objective in a targeted manner and

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[538] See Art. 7(4) let. a) - i).
[539] *Ibid.* let. h).
[540] See Judgment of the Court (Sixth Chamber) of 17 June 1999, C-75/97, Kingdom of Belgium v Commission of the European Communities, para. 64, ECLI:EU:C:1999:311
[541] Ibid. para. 65.
[542] EC, Communication from the Commission (2019/C 247/01), Notice *on the recovery of unlawful and incompatible State Aid,* OJEU, C 247/1, para. 8 and 26.
[543] See Art. 7(6).
[544] See Lena Hornkohl, *The EU Foreign Subsidy Regulation -What, Why and How?* cit. *supra*, at 11. See also Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 191, according to which the foreign country granting the subsidy could also consider restitution an affront or deny having given it.

impose a burden only on undertakings that conduct economic activity in the Internal Market and receive foreign subsidies. However, this is not sufficient as a justification, and indeed, it will be necessary from time to time to verify its application when the reductive measure is implemented.

7. Three investigative tools

The Regulation states that the Commission has three different investigation tools to investigate foreign subsidies granted by third countries that may cause distortions in the Internal Market: two tools provide for *ex-ante* notification and refer to concentrations and acquisitions of EU undertakings and procedures for public procurement. However, a third instrument introduces the possibility for the Commission to conduct an *ex officio* investigation in all other market situations.[545]

The following paragraphs will examine the three procedures in more detail.

7.1. A general tool for foreign subsidies: the ex officio examination

Chapter Two, in Articles 9-18, governs the power given to the Commission to examine any source on alleged distortions caused by foreign subsidies in the initial information. This is a very broad power, discretionary in nature, as reflected in the use of the verb "*may*", allowing the Commission some leeway in deciding whether or not to initiate proceedings.[546] The discretion on the initiation of proceedings is also confirmed by the fact that the provisions do not include any obligation to examine the information received without delay or to inform complainants of any progress. However, where information on alleged foreign information comes from the Member States, the Commission should still inform them of the start of the preliminary review.[547]

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[545] EC, Press release, *Council gives final approval to tackling distortive foreign subsidies on the Internal Market*, 28 November 2022, available at <https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-approval-to-tackling-distortive-foreign-subsidies-on-the-internal-market/>.

[546] See Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 194, Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, March 2022.

[547] See the twenty-seventh consideration and Art. 10, para. 2.

Therefore, compared with the EU State Aid framework, the margin of discretion is greater, and the selection of cases to be dealt with could be affected by political considerations.[548]

The case applies to all case studies without notification, including concentrations and public procurement procedures below mandatory notification thresholds.[549] The Commission, in the legislative financial statement attached to the May 2021 proposal, noting the difficulty of providing an estimate by lacking previous statistical data, expects that between 30 and 45 cases per year could be initiated *ex officio* compared to about 30 concentration notifications and about 36 notification cases for public procurement.[550]

The procedure is reminiscent of the one used by the European Commission for existing State Aids, which may be subject to an *ex officio* review and follow a two-step procedure. In contrast, for new aids, the procedure usually begins with a notification to the Commission. [551]

Therefore, the Regulation, at least as far as the two-step procedural scan is concerned, recalls that of existing State Aid in which the Commission may request the Member State, *motu proprio*, to provide the necessary information.[552] If it doubts whether the subsidy complies with the EU State Aid framework during the preliminary examination, it can initiate a formal investigation.[553]

However, the two procedures differ from the one for existing State Aid in which the Commission is required to initiate the procedure in every case without

[548] In this sense also Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 194.
[549] Carolina Dacko, Charlotta Brodin, and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application*, cit. *supra*, at 514.
[550] See the Legislative financial statement attached to the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market, cit. *supra*, para. 3.2.2.
[551] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at 468, which highlights, *inter alia*, the impossibility of imposing an obligation to notify third countries before granting a subsidy. The notification requirement for merger and contracting situations refers to the undertakings involved.
[552] See Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union (codification), cit. *supra*, at Art. 21.
[553] See joint reading of Art. 23 para. 2 and Art. 4 para. 4.

undue delay.[554] This happens even though the ECJ has recognised that the Commission may prioritise measures that have raised serious difficulties considering the workload and the order of priority of cases and defer consideration of measures that, in its opinion, do not raise serious difficulties.[555]

Regarding procurement procedures, the Regulation clarifies that the Office review is limited to contracts awarded and does not result in the annulment of a contract award decision or termination of a contract.[556]

The Regulation gives the Commission broad investigative powers to gather the necessary information, including the power to request information from any undertaking or association of undertakings throughout the proceedings.[557] Note that information is acquired from undertakings operating within the Internal Market over which the Commission has jurisdiction, unlike the EU State Aid framework, where information is acquired from the Member States. Undertakings can be asked to provide elements only after the formal investigation has been initiated.[558]

Even during the preliminary stage, the powers of investigation and request for information can be extremely broad, so much so that the Regulations recall the possibility of using the same powers of investigation that can be used during the second stage.[559] In any case, the Commission must also consider the principle of proportionality when requesting information. To this end, the Commission must always state the legal basis and purpose, specifying the requested information and setting an appropriate time limit.[560]

According to Wolfgang Weiß, the Commission, as an Administrative Authority, is obliged to observe the general principle of efficiency and impartiality in the investigation; this principle leads to the view that the burden of proving the

[554] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at. 468
[555] See Judgment of The Court Of First Instance (Fourth Chamber) of 4 July 2007, *Bouygues SA and others v Commission of the European Communities*, Case T-475/04, para. 159, ECLI:EU: T:2007:196.
[556] See Art. 9 para. 2 and 3.
[557] See Arts. 13, 14 and 15.
[558] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at 470.
[559] See Art. 11 para. 1.
[560] See Art. 13 para. 4, let. a).

incriminating measures lies in principle with the Commission.[561] The corollary to this approach is the effort underlying the Regulation to base any action on the principle of loyal cooperation between the undertaking and the Commission itself.

Consequently, while it is up to the Commission to prove distortion, it also possesses the power to impose fines or periodic penalty payments in case of failure to submit the requested information promptly or in case of incomplete, inaccurate, or misleading information. However, this power can be exercised only if the Commission has first notified the undertaking in the information request order,[562] together with the notice, in case of non-cooperation. The Commission may also decide the state of the record.[563]

The Regulation also states that the Commission may address questions from third countries. This option is a way of responding to requests raised by some third-country stakeholders who noted an unequal treatment by the EU State Aid framework in not being able to participate in the proceedings. While the object of the interlocutions in the EU State Aid framework is the Member States, in the case of foreign subsidies, the proceedings are initially conducted against the undertakings.[564]

The Regulation also provides that if the undertaking or group of undertakings fails to provide information related to those necessary to establish whether the subsidy has conferred a benefit, the Commission may consider the alleged benefit, reversing the burden of proof.[565] However, this presumption only applies to the lack of information from a third country.[566]

As noted by Alain Alexis, unlike EC Regulation No. 1/2003 on competition rules, the Regulation does not distinguish between the request and the request with the decision to which the undertaking must respond in order not to incur

[561] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at 470.
[562] See Art. 13 para. 4, let. b).
[563] See Art. 13 para. 4, let. c).
[564] See, for example, the response of China Chamber of Commerce to the EU to White Paper, cit. *supra*, at 3.
[565] See Art. 16, para. 3.
[566] See, Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union,* cit. *supra*, at 195.

penalties.[567] The Foreign Subsidies Regulation provides only that the Commission may request all necessary information from the undertaking and that if this information is not provided, the Commission may decide on the state of the record. Therefore, the request in the Regulation can be equated with the request for a decision.[568]

The Regulation also provides that the Commission is authorised to conduct fact-finding visits to the premises located in the territory of the EU of an undertaking or an association of undertakings or if the third country concerned is officially informed and raises no objection.[569] If the inspection is within the EU, the undertaking shall be required to submit to the inspection provided that the officials conducting the inspection are authorised by the Commission to exercise their powers upon presentation of a decision of the Commission specifying the object and purpose of the inspection. The decision also contains a statement declaring that in the event of non-cooperation, the Commission may decide based on the data available and provides for the possibility of imposing fines.[570]

These are much more intensive investigative powers than the EU State Aid framework, which is understandable since subsidy review is directed toward undertakings. In contrast, a State Aid review is directed toward a Member State.[571]

The Commission's decision exhibited by officials must inform the undertaking under the inspection of its ability to appeal the decision to the ECJ under Article 263 TFEU.[572] This provision underscores the due legality of the inspection, which the ECJ can only review in analogy to Article 20(8) of the EC mentioned above Regulation No. 1/2003.[573]

The provision also allows for requesting assistance from the police or other equivalent authorities without defining it. To address possible objections of

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[567] See Council Regulation (EC) No 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,* OJEU, L 1/1, Art. 18, para.1.
[568] See Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 217.
[569] See Arts. 14 and 15.
[570] See Art. 14 para. 3.
[571] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at 473.
[572] See Art. 14, para. 3, let. d).
[573] See, in this regard, Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 224.

vagueness,[574] it was introduced in the provisional agreement that if national legislation requires the authorisation of the judicial authority to enable the envisaged assistance, such authorisation shall be sought. The provision is reminiscent of Article 20 mentioned above of the same EC Regulation No. 1/2003, which obliges the Member States to apply to the judicial authority if necessary and not only to the police.

The Commission may close the preliminary investigation if there is insufficient evidence to initiate the in-depth investigation because the foreign subsidy does not exist or because there are insufficient indications of actual or potential distortion in the Internal Market. In this case, the Commission shall inform the undertaking under investigation, the Member States, and the contracting authority or entity concerned if the preliminary examination had been initiated in connection with a public procurement procedure.[575] Based on the preliminary examination, if the Commission has sufficient evidence to believe that an undertaking has benefited from a foreign subsidy distorting the Internal Market, it will initiate an in-depth investigation.[576]

At the end of the in-depth investigation, unlike in the EU State Aid framework, the Commission enjoys a broad decision-making power. While in the State Aid investigation, the Commission can only take a positive or negative position, in the foreign subsidy investigation, the Commission may not raise objections if the preliminary investigation assessment has not been confirmed or if the positive effects of the foreign subsidy outweigh the distortion. Raymond Luja maintains that this latest decision is comparable to compatible State Aid.[577]

On the other hand, if the Commission finds that there is a distorting foreign subsidy that has failed the balancing test, it may take corrective measures to eliminate the distortion, accept commitments, require structural behaviours that may compel an undertaking to provide fair and non-discriminatory access to infrastructure, reduce its market presence, license acquired assets, return the foreign

[574] *Ibid.*
[575] See Art. 10, para. 4.
[576] See Art. 10, para. 3.
[577] See Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 196.

subsidy including interest, refrain from certain investments or divest certain assets or cancel a concentration, submit to reporting and transparency requirements.[578]

The difference between the two approaches is due to the difference in the objective of the Regulation. While in State Aid, the procedure is to authorise or prohibit an aid, in the case of foreign subsidy, the purpose is to eliminate the distortion and restore a level playing field.[579]

7.2. Ex-ante notification to assess distortions attributable to foreign subsidies in concentrations

The first of the *ex-ante* notification tools identified by the Regulation concerns the provision of mandatory notification to the European Commission of major concentrations.[580] To this end, the Regulation clarifies that a concentration occurs when a lasting change of control results from the concentration of two or more previously independent undertakings involving an undertaking located in the EU. It can also occur when there are acquisitions of direct or indirect control of undertakings in the EU by entities that already hold control of at least one other undertaking, including through the acquisition of interests in the capital or elements of the assets.[581]

The fact that the Regulation takes care to insert the phrase "*for the purposes of this Regulation*"[582] underscores that, once again, there is no general defining intention but only the need to circumscribe the scope of the Regulation. Therefore, the concept of concentration introduced is not general in scope but is limited to applying the newly introduced rules. Even so, while the White Paper provided for the possibility of including a notification requirement for the acquisition of non-controlling interests,[583] the Foreign Subsidies Regulation aligns the notion of

[578] See Art. 7 and also this Chapter, para. 6.
[579] See Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, at 472.
[580] See the eighth consideration talking about large-scale concentrations.
[581] See Art. 20, para. 1, let a) and b).
[582] Foreign Subsidies Regulation, cit. *supra*, Arts. 2(1), 3(1), 20(1,3), 21(5), 28(1) and 29(5), sixty-fourth consideration.
[583] See section 4.2.2.1 of the White Paper. In this sense Jan Blockx, *The proposal for an EU Regulation on foreign subsidies distorting the Internal Market How will it impact corporate concentrations and acquisitions?*, 5 October 2021, at 7.

concentration and control with that used by the EU Merger Regulation in Article 3(1,2).[584]

The grounds for exclusion are also the same as those contained in the same Article 3 of the EU Merger Regulation[585] and include the temporary holding by credit or other financial institution or insurance undertaking whose normal business includes the buying and selling or brokering of securities for its account or the account of others of shares in the capital of an undertaking for resale; control acquired by a person mandated by the public authority under the legislation of a Member State for liquidation, bankruptcy, insolvency, cessation of payments, composition or other similar procedures; transactions carried out by financial holdings referred to in Article 5(3) of the Fourth Directive 78/660/EEC.[586]

Using the same terminology and the same conceptual category is a relevant factor, especially in the case of subsidies not granted directly by a third country but through a public undertaking controlled by a third country.

Concentrations must be notified before their implementation. Following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest,[587] only when certain thresholds are met, i.e., when the target undertaking, one of the parent undertakings of a joint venture, or one of the merging parties is established in the EU and has an aggregate turnover in the EU of at least €500 million and the undertakings concerned have received an aggregate financial contribution from third countries in the three calendar years preceding the notification of more than €50 million.[588]

According to Jan Blockx, the financial contribution used by the Regulation is broader than that of subsidy in that it does not require either selectivity or a benefit/advantage to the beneficiary. The fact that the second threshold is calculated based on non-selective measures, i.e., applicable to all undertakings and sectors in

[584] Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the EC Merger Regulation)*, OJEU, L 24/1.
[585] *Ibid*. Art. 3, para. 3, let. a)-c).
[586] Fourth Council Directive of 25 July 1978 based on Art. 54(3)(g) of the Treaty *on the annual accounts of certain types of companies* (78/660/EEC), OJEU, No L 222/11.
[587] See Art. 21(1). It should also be noted that, according to Art. 21(2), a notification may also be made when there is evidence to the Commission of a *bona fide* intention to enter into an agreement or, in the case of a public bid, when they have publicly announced their intention to make such a bid, provided that the intended agreement or bid results in a notifiable concentration under para. 1.
[588] See joint reading of Arts. 20, para. 3, and 21, para. 1.

a country, could also bring under it the reduction of corporate tax rates and trigger the notification requirement in the case of a concentration.[589] This interpretation would lead to many more transactions being included in the threshold.

In addition, the fact that the Regulation includes among financial contributions the transfer of funds or liabilities, such as capital contributions,[590] means that non-EU sovereign wealth funds or public pension funds could trigger the threshold, regardless of how they determine their investments.[591]

To calculate the threshold that triggers the notification obligation, it should be borne in mind that the expression "*from third countries*" under Article 20, para. 3(b) suggests that the threshold can also be reached by aggregating financial contributions from all third countries and not by individual States. If this were the intention of the European legislator, the reporting burden could be further expanded.[592]

The general structure of the procedure – divided into two stages – is similar to that of concentration control, just as the calculation of turnover is regulated like Article 5 of the EU Merger Regulation.

Because of the numerous regulatory cross-references between the Foreign Subsidies Regulation and the EU Merger Regulation, careful application coordination will be necessary, given that transaction risks are being assessed twice, once from an EU perspective and once from a foreign subsidy perspective. This need has also been represented since the White Paper consultations.[593]

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[589] Jan Blockx, *The proposal for an EU Regulation on foreign subsidies distorting the Internal Market How will it impact corporate concentrations and acquisitions? cit. supra*, at 7.
[590] Art. 2, para. 2.
[591] Jan Blockx, *The proposal for an EU Regulation on foreign subsidies distorting the Internal Market How will it impact corporate concentrations and acquisitions?* cit. *supra*, at 7.
[592] In this sense also Jan Blockx, *The proposal for an EU Regulation on foreign subsidies distorting the Internal Market How will it impact corporate concentrations and acquisitions?* cit. supra, at 8, noting that although the first threshold is very high, the notification could also be triggered if a foreign public pension fund purchases an EU target with an EU turnover of at least €500 million or if an EU-based trader of raw materials purchased from foreign public entities (such as oil) purchases an EU target with an EU turnover of at least €500 million as well as if an EU-based infrastructure undertaking with EU turnover of at least €500 million and non-EU turnover from public customers, participates in a full-function joint venture, regardless of whether the joint venture is based in the EU or not.
[593] In this sense Guest Post by Andrea Biondi, Michael Bowsher, Christopher Yukins, Luca Rubini, and Gabriele Carovano**,** *The EU Gives Foreign Subsidies Its Best Shot: One Take on White Paper on Levelling the Playing Field as Regards Foreign Subsidies,* cit. *supra*.

In this regard, the objectives of the two Regulations are similar, although the two procedures are independent, and the European concentration discipline has thresholds that do not include global turnover.

As stated in the preamble of the EU Merger Regulation, "*Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted*".[594] The EU Merger Regulation is intended to be a specific legal instrument "*to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations*".[595]

The EU Merger Regulation was adopted to ensure that the assessment of an intra-EU concentration would be notified, based on the principle of subsidiarity, to the Competition Authority, which is best placed to investigate to ensure a level playing field in the Internal Market.

In particular, the Foreign Subsidies Regulation aims to assess the possible distortion caused by foreign subsidies through a subsidised acquisition or concentration transaction that is notified to the Commission to ensure a level playing field.[596] Indeed, as noted in the preamble, foreign subsidies can distort the Internal Market and undermine the level playing field for different economic activities in the EU, particularly in the context of concentrations involving a change in the control of EU undertakings, when such concentrations are financed in whole or in part through foreign subsidies.[597]

Prior notification is a serious procedural obligation that undertakings must comply with. In its absence, the Commission can intervene and impose sanctions of up to 10% of turnover on all parties to the concentration, including any EU undertakings that have not benefited from foreign subsidies. Given that an undertaking could be subject to two proceedings simultaneously, the instrument configures a significant administrative burden on economic operators.[598]

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[594] See the second consideration of the EU Merger Regulation.
[595] See the sixth consideration of the EU Merger Regulation.
[596] See Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, at 158.
[597] See the fourth consideration.
[598] See also Till Muller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts*, cit.

Some concentrations might even be notified simultaneously to DG COMP and the European Commission, which will proceed with two separate decisions. The Regulation is indeed concerned, in Article 44, to limit inconsistencies with other EU regulatory instruments and, thus, with the EU concentration framework.[599]

Therefore, similar to procurement procedures, one wonders whether it would not have been more appropriate to amend the EU Merger Regulation directly, extending its scope and purpose. This choice, in addition to ensuring greater consistency and avoiding accusations of discrimination, would also have limited the administrative burdens.[600] This is also because the EU recently published draft amendments to the EU concentration control system relating to the simplified procedure and the EU Merger Regulation, on which it concluded a targeted public consultation on 19 October 2022.

Given the potentially significant impact of concentrations on the Internal Market, the Regulation states that concentration transactions that fall below the notification thresholds may still be investigated by the Commission, either on its initiative or based on a complaint. In that case, the only limitation will be the threshold of €4 million over every three consecutive years.[601]

Finally, Article 24(1) establishes a standstill clause, i.e., that a concentration subject to the notification requirement cannot be carried out before the notification itself or during the Commission's examination.

The deadlines for the Commission's examination mirror those of the EU Merger Regulation, providing a standstill of 25 working days for the preliminary investigation and an additional 90 working days for the in-depth investigation. This period is extendable by an additional 15 working days if undertakings offer commitments to remedy the distortion of the Internal Market.

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supra, at 440, who notes that the wording could also involve third countries, such as the United States, which may benefit from secondary enterprises located in third countries.

[599] *Ibid*.

[600] The texts of the draft amendments to the EU concentration control system, relating to the simplified procedure and the EU Merger Regulation, on which the targeted consultations of 19 October 2022 were held, are available at <https://competition-policy.ec.europa.eu/public-consultations/2022-merger-simplification_en>.

[601] Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 215.

7.3. Addressing foreign subsidies in public procurement

The need to remedy Internal Market distortions caused by foreign subsidies is crucial in public procurement because of their importance in the EU economy and financing through public resources.[602] As highlighted in the preamble, this requirement is also found in procurement comparisons in the defence and security sectors covered by Directive 2009/81/EC.[603] Indeed, the balance between developing an EU defence and security equipment market is crucial in these areas. It is essential to maintain an industrial and technological base for the common defence and protect the Member States' national security.[604]

The Foreign Subsidies Regulation, similar to the May 2021 proposal of the Commission, maintained the requirement for undertakings to notify *ex-ante* bids in public procurement procedures whose estimated contract value is at least €250 million. However, the threshold for lots was added to the approved Regulation.[605]

An analysis by Ondrej Blažo based on data from Tenders Electronic Daily on the number of tenders that meet the €250 million threshold of estimated contract value shows that the intensity of the impact of the threshold envisaged in the Regulation varies across Europe. Indeed, while in some countries, the impact is marginal, in others, it is substantial. According to this author, 49 procedures in Germany would fall under it, compared to 267 in France and 293 in Italy.[606] Therefore, the threshold is not effective.

It is true that, as the preamble makes clear, this threshold responds to the need to consider, for mandatory notification, the most economically significant cases to minimise administrative burdens and not hinder the participation of SMEs in public procurement.[607] However, compared to the May 2021 proposal, the

[602] See the 40th consideration.
[603] Directive 2009/81/EC of the European Parliament and of the Council 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*, OJEU L 216/76.
[604] See the 40th consideration.
[605] See Art. 28, para. 1 let. c), but also Simone Ritzek-Seidl, *The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreemen*t, nomos e-library, at 427
[606] See 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?*, cit. *supra*, at 144.
[607] See the 40th consideration.

threshold for foreign financial contributions received has been reduced from the original €5 million per third country to the current €4 million.[608]

The European Parliament initially proposed lowering the notification thresholds. At the same time, the Council wanted to raise them,[609] so they reached a compromise that also considered the comments of the part of the doctrine which expressed fears that foreign government-backed undertakings might circumvent the thresholds by focusing on smaller tenders.[610]

Therefore, the Regulation mandates that undertakings notify the contracting entity of all foreign financial contributions they have received three years before the notification. Alternatively, they must state that they have not received any such contributions in the same period if they submit a bid or request to participate in a public procurement procedure that meets these value thresholds. Upon receipt of the notification, contracting authorities must send it immediately to the Commission.[611]

The purpose of the notification is to enable the Commission to assess whether the foreign subsidy is likely to give the undertaking receiving the foreign subsidy an unfair advantage concerning the works, supplies, or services that are the subject of the procurement process. This is to prevent foreign bidders from being financially supported by their governments through an unfair advantage fostered by the foreign subsidy. Indeed, they might be able to bid below market price or even at low cost, thereby obtaining public contracts and sometimes even succeeding in acquiring strategic objectives to extend their economic influence.[612]

The threshold does not have a *de minimis* value in public procurement procedures; that is, it should not be interpreted as a threshold below which there is no distortion. This interpretation is possible considering the provision of Article 29(8) of the Regulation, which states that the Commission may nevertheless initiate

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[608] See Art. 28.
[609] See Simone Ritzek-Seidl, *The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreemen*t, nomos e-library, at 427.
[610] See 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?* cit. *supra*, at 144.
[611] See Andreas Haak and Barbara Thiemann, *Fostering Tech Sovereignty with a Level Playing Field on State Aid and Foreign Subsidies, European State Aid Quarterly*, no 1, 2022, at 27.
[612] On the transformation of the function of foreign subsidies, see Victor Crochet Victor Crochet and Marcus Gustafsson, *Lawful remedy or illegal response? Resolving the Issue of foreign Subsidization under WTO Law,* cit. *supra,* at 343.

an *ex officio* procedure if it suspects that an economic operator has benefited from foreign subsidies during the three years before the submission of the tender or application to participate in the public procurement procedure even in those that are not subject to notification requirements.[613]

The procedures underlined above fill the regulatory gap in the Public Procurement Directives, which do not allow, even as part of the in-depth investigations provided for in Article 69 of Directive 2014/24/EU on the examination of funding sources concerning anomalous bids submitted, the evaluation of foreign subsidies.

However, the Foreign Subsidies Regulation goes beyond the scope of this Article, which states that, in case of submission of the anomalous bid, contracting authorities may require the economic operator to provide explanations on the manufacturing process, technical solutions, compliance with environmental, social, and labour obligations, etc. Indeed, the Regulation requires an undertaking participating in a procurement procedure when submitting a bid or application to notify all foreign financial contributions received during the three years preceding the notification or to confirm in a statement that it has not received any foreign financial contributions during that period.

This element was already mentioned in the White Paper consultation by Sánchez Graells, who pointed out that the regime for investigating non-abnormally low bids subsidised by a foreign government can be discriminatory.[614]

Regarding the calculation of the estimated contract value, the provisional agreement clarified that, compared to the text proposed in May 2021, the calculation criteria under Article 8 of Directive 2014/23/EU on the award of concession contracts, Article 5 of Directive 2014/24/EU on public procurement, and Article 16 of Directive 2014/25/EU on the procurement procedures of entities functioning in the water, energy, transport, and postal services sectors are used.[615]

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[613] In this sense, see also 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?* cit. *supra*, at 143.

[614] See the feedback of Albert Sánchez Graells from Università di Bristol Law School available at <https://ec.europa.eu/info/law/better-Regulation/have-your-say/initiatives/12621-Handel-en-investeringen-door-buitenlandse-subsidies-veroorzaakte-verstoringen/F2326817_nl>.

[615] See Art. 28, para. 1, let. a).

The contract value also refers to the framework agreement[616], given that framework agreements are a widely used procurement technique by contracting authorities and contracting entities.[617]

Among the changes included in the provisional agreement, it is also relevant that, for the reporting obligation, the contribution may be received not only by the economic operator but also by its subsidiaries that do not possess commercial autonomy, its investee undertakings, and, where applicable, its main subcontractors and suppliers involved in the same bid.[618]

Unlike concentrations, notifications on public procurement procedures are not made directly to the Commission but to the contracting authority, which must then communicate them to the Commission. Given the importance of information flows, the European Chamber recommended that effective communication mechanisms be established between the contracting authority and national authorities/Commission, particularly regarding initial notifications on potentially distortive bids.

Regarding deadlines, the Commission has 20 days to conduct its preliminary assessment, extendable by 10. The Commission must make a final decision within 110 days if it initiates a procedure. Therefore, the deadlines for the preliminary and in-depth investigation, compared to the May 2021 proposal, have been almost halved in response to concerns expressed by several parties during the public consultation about the risk that long investigation in public procurement procedures could lead to substantial delays in the awarding of contracts and end up harming the EU economy and businesses.[619]

In addition, even though all procedural stages may continue during the preliminary and in-depth investigations, no adjudication shall occur to avoid discriminatory situations against undertakings under investigation. This

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[616] *Ibid.*
[617] See the 40th consideration.
[618] See Art. 28, para.1, let. b).
[619] See the opinion expressed on 1 June 2022 by the American Chamber of Commerce to the EU, the Europe India Chamber of Commerce, the Australian European Business Council, the Japan Business Council in Europe, the Korean Business Association in Europe, and the Swiss American Chamber of Commerce, which welcomed the Council's proposed reduction of the terms from 200 to 110 working days, available at <https://www.amchameu.eu/system/files/position_papers/20220601_foreignsubsidies_jointstatement.pdf>.

accommodated the demands of third-country associations to protect undertakings making notifications in total transparency.[620]

In conducting the distortion of competition analysis, the Commission must assess whether the foreign subsidy allows an undertaking to submit an unduly advantageous bid concerning the works, supplies, or services. Article 5(1)(e) of the Regulation includes a list of the foreign subsidies most likely to distort the Internal Market. The Commission, in its investigation, will have to assess the perimeter of unduly advantageous tender.[621]

According to the provisions of Article 27, this assessment is based on the general indicators under Article 4, which determines when distortion of the Internal Market exists. These indicators include the amount of the foreign subsidy and its nature, the situation of the undertaking, including its size, the markets or sectors concerned, the level and development of the undertaking's economic activity in the Internal Market, the purpose of the foreign subsidy and the conditions attached to it, and its use in the Internal Market.

However, the preamble contains additional elements that can be used as canons of interpretation, given the non-exhaustiveness of the indicators under Article 4.[622] In addition, economic operators should be allowed to demonstrate that the tender is not unduly advantageous by providing the elements referred to in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU, which regulate abnormally low tenders in a way that does not discriminate with the criteria that apply to EU undertakings.[623] The Regulations do not consider the use of subsidised products, which could be a reason to reject the offer.[624]

Hence, what is the difference between an unduly advantageous bid under the Regulation and an abnormally low bid under the EU Directives mentioned above?[625]

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[620] *Ibid.*
[621] See Alain Alexis, *Foreign subsidy controls: the new European Commission proposal,* cit. *supra*, at 223.
[622] On the non-exhaustiveness of the indicators in Art. 4, see *supra*, in this Chapter, para. 4.
[623] See the 53rd consideration.
[624] See 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?* cit. *supra*, at 148.
[625] For a comparative perspective between the anomalous bid and the unduly advantageous bid, see 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?* cit. *supra, at 151 ff.*

The distinction between the two definitions must be drawn from the different purposes of the two provisions. According to the Case Law of the ECJ, the procedure for verifying an abnormally low bid is to protect the contracting authority by enabling it to assess the reliability and trustworthiness of the bid. The latter cannot be based on technically, economically or legally incorrect assumptions or practices that could jeopardise the proper performance of the contract, that is, the real possibility for the undertaking to perform the contract under the agreed conditions,[626] so much so that it must always be carried out regardless of the number of anomalous bids submitted.[627]

In contrast, the unduly advantageous bid is aimed at protecting competition and putting participants in a tender on an equal footing. It is more akin to what happens in tender procedures regarding unlawful State Aid. In cases where the economic operator has received State Aid, the contracting authority does not have to prove that the performance of the contract is unrealistic because the State Aid received by the economic operator provides sufficient funding for the performance of the contract.[628]

The same thing applies to foreign subsidies: the rationale of the provision providing for their examination is not to ensure the proper performance of the contract but to restore a level playing field. After all, the Public Procurement Directives, each within its specific scope, foster the development of effective competition in public procurement. The pursuit of this goal cannot be separated from the possibility for businesses to access public procurement procedures on an equal basis without any fear of discrimination.[629] Thus, levelling the playing field is achieved by setting objective criteria for bidding and awarding contracts and providing transparent procedures, including concerning subsidies received.

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[626] Judgment of the Court (Fourth Chamber) of 10 September 2020, Case C-367/19, *Tax-Fin-Lex d.o.o. v Ministrstvo za notranje zadeve*, para. 32, ECLI:EU:C:2020:685.

[627] See Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer presented on 5 June 2001, Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente Nazionale per le Strade and others*, para. 24-25, ECLI:EU:C:2001:640.

[628] 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?* cit. *supra*, at 151 ff.

[629] See Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer presented on 5 June 2001, Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente Nazionale per le Strade and others*, para. 25, ECLI:EU:C:2001:640, cit. *supra*.

The difference between an anomalous bid and an unduly advantageous bid becomes even more apparent when looking at Article 69(4) of Directive 2014/24/EU in the part where it provides that a contracting authority may exclude an undertaking if the anomalous bid is due to the receipt of State Aid received contrary to Article 107 TFEU. However, as clarified by the ECJ, this happens only if the obligation to repay the illegal aid threatens its financial well-being, so such a bidder may be unable to offer the necessary financial or economic security to the performance of the contract. Hence, the ECJ limited the application of Article 69(4) of Directive 2014/24/EU to the execution of the contract.[630]

As noted by Ondrej Blažo, it will be necessary for the Commission to address the coordination between the abnormally low bid and the unduly advantageous bid. Without an alignment of these concepts, disparities may indeed occur, and there may be challenges for violating the principle of non-discrimination under WTO trade rules.[631] An attempt at harmonisation has been sought in the preamble, which clarifies that the ban on award should apply only where the advantageous nature of the bid benefiting from foreign subsidies cannot be justified by other factors and the successful bidder and the bidding undertaking have not proposed adequate commitments to fully and effectively remedy the distortion.[632]

Other elements for evaluating the unduly advantageous bid could be those of the specific relevance of the quality of the bid, including know-how, technology, specialised personnel, patents, or similar advantages available to the subcontractor or supplier, especially if such elements are used to satisfy the majority of at least one of the selection criteria in a public procurement process.[633] In addition, in line with the Public Procurement Directives, the most economically advantageous tender from the point of view of the contracting authority or entity should be identified by the price or cost under a cost-effectiveness approach, such as life-cycle costing. It may include the best price/quality ratio, which should be evaluated

[630] Judgment of the Court (Sixth Chamber) of 7 December 2000**,** *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft***,** Case C-94/99, para. 30, ECLI: EU:C:2000:677.
[631] See 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?* cit. *supra,* at 145.
[632] See the 53rd consideration.
[633] See the 54th consideration.

according to certain criteria related to the subject matter of the contract, such as qualitative, environmental, or social aspects.[634]

On the other hand, the option of automatically considering subsidies above the €4 million threshold as distortive cannot be used even if it can be presumed that they reduce the undertaking's normal costs and provide an unfair advantage over competitors. The criterion of a significant share in the total public contract is not viable either.[635] Indeed, it is believed that the need to be unable to disregard a case-by-case analysis is connected to the evaluation.

8. The relationship with other EU instruments

As specified in the preamble, the Regulation complements the EU's competition and EU State Aid framework that fails to adequately address distortions in the Internal Market caused by foreign subsidies.[636] This supplementary function was already present in the original May 2021 proposal, a consequence of the Commission's regulatory gap analysis in the White Paper. The Regulation applies to foreign subsidies and their treatment in certain cases. The hitherto existing rules either do not cover all cases or are not always suitable for preventing Internal Market distortions.[637]

Under these considerations, the discipline introduced by the Regulation has a distinctive character. This is also since the legislature, with Article 44, has taken care to resolve inconsistencies with other EU instruments by providing that in the event of the concurrent application of the new rules with certain existent ones, those specific rules continue to apply and take precedence over those contained in the new Regulation.

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[634] See the 55th consideration.
[635] See Alain Alexis *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 223, which for the distortion of competition analysis assumes either the possibility of referring to established State Aid practice and considering that all subsidies above the de minimis threshold reduce the firm's normal costs and provide an undue advantage over competitors, or to give greater weight to the percentage of the contract covered by the subsidy. The benefit would be unjustified only if the subsidy covered a significant share of the total public procurement.
[636] See the sixth consideration.
[637] See Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts*, nomos e-library, cit. *supra*, at 431.

The reason for the concomitant application is that the subject matter of the two sets of rules is different: the EU State Aid framework concern State Aid granted by the Member States; the rules on subsidies to third countries concern subsidies granted by third countries. Therefore, these sets of rules should be mutually exclusive. For all not specifically provided for in Article 44, the principle of "*lex specialis derogat generali*" should apply.

The concept of integration should also be interpreted to mean that the Regulation is an instrument that complements the EU's efforts to improve multilateral rules against distorting subsidies.[638] The European legislator was aware that applying several rules to the same case generated legal uncertainty to the detriment of the development and growth of the Internal Market. Therefore, it specified that the implementation of the Regulation should be under EU Law and the WTO agreement and that it must also be in line with the commitments made under other trade and investment agreements to which the EU or Member States have acceded.[639]

This principle contained in the preamble was incorporated into the Regulation in Article 44 by expressly providing that, in the case of concurrent application, the Regulation should not affect[640] the application of competition rules, namely Articles 101, 102, 106, 107, and 108 TFEU as well as those of secondary legislation, namely Regulation n. 1/2003[641] and the EU Merger Regulation.[642]

The provision also expressly mentioned the rules of the TFEU. However, the Regulation could not affect them since it is a secondary source. As noted by Müller-Ibold, this might be an inaccuracy, but it stands to emphasise that in case of conflict, the rules of the TFEU prevail.[643] In contrast, Regulations implementing

[638] See the sixty-ninth consideration.
[639] See the sixty-ninth consideration.
[640] See Art. 44(1).
[641] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition; OJEU, L 1/1.
[642] Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the EC Merger Regulation)*, OJEU, L 24/1.
[643] See Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts,* nomos e-library, cit. *supra*, at 434.

the EU State Aid framework, Regulation (EU) 2015/1589[644] and Commission Regulation (EU) 651/2014,[645] are not mentioned.

However, according to the same authors, these Regulations may also have to be applied concurrently since the EU State Aid framework contained in the TFEU does not function properly without these implementing rules, even though this might be a deliberate choice of the European legislator.[646]

The Regulation deals with subsidies provided by third countries, whereas the State Aid provisions deal with State Aid provided by Member States. Hence, these two rules ought to be mutually exclusive. However, according to the same authors, the theoretical possibility of a grant being awarded jointly by a Member State and a third country should be considered; in such cases, the concurrent application would be possible, and an aligned result should be expected.[647]

Nonetheless, it cannot be ruled out that the regulatory silence of the European legislature is because these borderline cases of interaction can also be dealt with by the guidelines provided in Article 46.[648]

Article 44 of the new Regulation is also concerned with establishing a relationship with other EU Regulations. In particular, the Article above provides that the Regulation is without prejudice to the application of Regulation 2016/1037,[649] the FDI Regulation,[650] Regulation (EU) 2022/1031,[651] and Regulation 2019/712.[652] Finally, the Regulation provides that it is to be interpreted

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[644] Council Regulation (EU) 2015/1589 of 13 July 2015 *laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union*, OJEU, L 248/9.
[645] Commission Regulation (EU) No 651/2014 of 17 June 2014 *declaring certain categories of Aid compatible with the Internal Market in application of Articles 107 and 108 of the Treaty*, OJEU, L 187/1.
[646] See Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts*, nomos e-library, cit. *supra*, at 434.
[647] *Ibid*.
[648] See *infra*, para. 9, sub-9.2.
[649] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJEU L 176/55.
[650] Regulation (EU) 2019/452, cit. *supra*.
[651] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June *2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on the access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)*, OJEU L 173/1.
[652] Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 *on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004*, OJEU L

in a manner consistent[653] with Council Directives 2009/81/EC,[654] 2014/23/EU,[655] 2014/24/EU,[656] and 2014/25/EU[657] and Council Directives 89/665/EEC[658] and 92/13/EEC.

The interaction between trade defence instruments and the WTO system is more complex and, as noted above, has generated considerable perplexity among doctrine and during consultations. This is because the provision of Article 32 of the SCM Agreement, of which the EU is a Member, states that a Member State may take no specific action against a subsidy except under the GATT.[659]

The Regulation solves the problem by providing for a regime of mutual exclusivity, which can be inferred from a joint reading of the provisions of Articles 44(2) and 44(7).[660] In particular, Article 44 is almost tautological in that although it proposes to define the respective areas, it repeats the content in Article 32 SCM in some parts.

In any case, it is possible to infer from the tenor of the provision that third-country subsidies covered by the GATT and the SCM Agreement fall predominantly, if not solely, within the scope of the countervailing duties framework. Indeed, under Article 44(2), the rules of the Regulation may not affect the application of the implementing rules on trade defence against subsidised imports from third countries under Regulation (EU) 2016/1037.[661]

123/4. In particular, in the latter case, Art. 44(7) of the Regulation specifies that concentrations, as defined in Art. 20 of the Regulation involving air carriers, are subject to the provisions of Chapter 3. In contrast, public procurement procedures involving air carriers are subject to the provisions of Chapter 4 of the Regulation.

[653] See Art. 44(8).

[654] Directive 2009/81/EC of the European Parliament and of the Council 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 L 216/76.

[655] Directive 2014/23/EU, cit. *supra*.

[656] Directive 2014/24/EU, cit. *supra*.

[657] Directive 2014/25/EU, cit. *supra*.

[658] Council Directive 92/13/EEC of 25 February 1992 *coordinating the Laws, Regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors*, OJEU L 76/14.

[659] Regarding compliance with Art. 32(1) SCM Agreement see Chapter 2, para. 5, sub 5.1 and 5.2.

[660] In this sense, Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts,* nomos e-library, cit. *supra*, at 436.

[661] Regulation (EU) 2016/1037 of 8 June 2016 *on protection against subsidised imports from countries not members of the European Union ("Countervailing Duty Regulation")*, OJEU 2016 L 176/55.

In addition, since Article 44(7) makes it clear that an investigation under the Foreign Subsidies Regulation cannot be conducted or measures imposed if they are inconsistent with the EU obligations according to signed international agreements, under no circumstances can investigations or measures cover legitimate subsidies under the SCM Agreement.

On the other hand, subsidies from third countries not covered by the GATT or the SCM Agreement, those on services or those directed at the purchase of EU undertakings or in support of bids in procurement procedures not related to goods covered by the SCM Agreement, fall under the scope of the Regulation.[662]

Finally, regarding Raymond Luja's observation that Article 44 does not provide any exemption for bilateral investment or taxation agreements signed by individual states with third countries, despite a possible contrast with the new rules if distortions were limited to a single Member State,[663] the European legislator's choice is understandable as the Regulation aims to address foreign subsidies concerning the Internal Market as a whole.

9. Ensuring the necessary flexibility

9.1. The mechanisms for cooperation

Article 48 of the new Regulation states that the Commission shall be assisted by a committee established under Regulation (EU) No. 182/2011.[664] Therefore, it is a committee composed of representatives of the Member States and chaired by a representative of the Commission that gives opinions on the executive acts of the Commission. The Commission must take this opinion into the utmost consideration under Article 4 of the Regulation mentioned above, expressly referred to in Article 48(2), together with the conclusions reached in the debates held in the committee. Thus, it can depart from them by giving reasons.

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[662] In this sense, Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts,* nomos e-library, cit. *supra,* at 436.

[663] See Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 198.

[664] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 *laying down the rules and general principles concerning mechanisms for control by Member States of the commission's exercise of implementing powers,* OJEU, L 55/13.

This is an approach consistent with the existing procedure in the antitrust framework under Article 14(5) of Regulation (EC) No. 1/2003, which takes the committee's opinion with the utmost consideration.[665] However, this wording is not present in the Regulation adopted in the air transport sector, and in the latter case, the act is not adopted if the opinion is negative. This also happens under the shipbuilding sector's Regulation[666] since the draft decision-making rests with the Council. However, this mechanism for cooperation with Member States constitutes an essential element in all areas of competition and existing instruments on injurious pricing practices.

9.2. Guidelines, implementing acts and delegated acts

The introduction of any new regulatory regime is bound to generate some interpretive uncertainty, at least until the new provisions are implemented and evaluated. This is also true concerning the Foreign Subsidies Regulation.[667] Therefore, the implementation practice will highlight any need for amendment or additional regulatory coordination requirements. For this reason, Articles 46, 47, 48, and 49 provide the Commission with the power to adopt guidelines, implementing acts, and delegate acts.

9.2.1. Guidelines

The guidelines under Article 46 of the Regulation promote the predictability of the Regulation and will be regularly published and updated by the Commission every three years.

This implies ensuring that the economic operator and the foreign State know the legal consequences of their conduct so that they adopt informed conduct.[668]

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[665] Council Regulation (EC) No 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,* OJEU, L 1/1.

[666] Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 *on protection against injurious pricing of vessels*, Art. 10, para. 2, OJEU L 176/1.

[667] Morris Schonberg, *The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions*, European State Law Quarterly, 2022, cit. *supra*, at 152.

[668] On the Predictability Principle and jurisprudential interpretation, see, *inter alia*, Filippo Patroni Griffi, *Valore del precedente e nomofilachia*, Speech at the panel discussion as part of the Conference organized by the National Forensic Council "Il valore del precedente nel sistema ordinamentale", Roma, 13 October 2017, G.B. Ratti, *Some remarks on precedent and analogy* which analyzes the multiple meanings of the term "*precedent*" including that of a general rule supported by a certain logic and, as such, can be reconstructed in the typical form of an antecedent having as

Therefore, the European legislator's choice is explained by the growing need for law and decisions' predictability, in which the principle of legal certainty is embodied. This contribution was desired by the European Parliament and the Council, which, in their respective positions, highlighted the need to provide further clarification of certain provisions of the Regulation.[669]

The criteria for determining whether a distortion caused by a foreign subsidy exists in the Internal Market, the application of the balancing test, the use of its power to demand prior notification of any concentration or foreign financial contributions obtained by an economic operator in a public tender process, and the assessment of distortion in a public procurement process may all be covered by the guidelines. The Commission should appropriately involve relevant parties and Member States when developing such guidelines.

It should rely on the experience gained during the implementation and application of the Regulation. The preamble suggests that clarifications on the application of the provisions be made public before the publication of the guidelines as an additional element of transparency to facilitate the implementation of the Regulation in the initial stages of its application.[670]

9.2.2. Implementing acts

The Regulation then provides, in Article 47, for the Commission to adopt implementing acts regarding the form, content, and procedural details of concentration notifications. This includes any simplified procedure, notifications of foreign financial contributions, the declaration of the absence of foreign financial contributions in public procurement procedures, transparency requirements, and requests for information under Articles 13, 14(2)(c) and 15 of the Regulation as well as procedural details and deadlines for proposing commitments.

The purpose of the implementing acts can be inferred from the preamble and is to ensure uniform conditions of execution and, at the same time to simplify by limiting the administrative burden on the notifying parties. The advisory opinion of

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its object the main operative facts that activate the application of a rule, and the legal consequences provided for by that rule.

669 Simone Ritzek-Seidl, *The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreemen*t, nomos e-library, cit. *supra*, at 426.

670 See the seventy-third consideration

the Committee established under Regulation (EU) No. 182/2011 is acquired on the implementing acts, providing for the publication of the draft implementing act to be adopted with a consultation period of a minimum of four weeks to facilitate initial implementation practices. [671]

9.2.3. Delegated acts

The Regulation also states that the Commission, by the delegated act to be adopted under Article 290 TFEU, may, within two years, reduce the deadlines for the preliminary review and in-depth investigation[672] and, after five years of the Regulation's application, take action to change the notification thresholds for concentrations[673] and public procurement procedures[674] as well as to exempt certain categories of undertakings from notification requirements.[675]

Unlike previous acts, the purpose of the provision, as stated in the preamble, is not only to limit administrative burdens and provide interpretive clarification but also to ensure a level playing field in the Internal Market, even in the long term.[676] This will be done by allowing the Commission to react quickly in light of experience, in case, for example, it is discovered that notification thresholds have been set at an excessive level because the thresholds under the Regulation create a disproportionate burden on the affected undertakings, hindering beneficial foreign investments or, conversely, not covering problematic transactions.[677]

For implementation, the Regulation sets strict conditions by stating that the Commission shall conduct the assessment over a defined period, not less than two years, based on objective elements, such as the percentages of notifications that resulted in the closure of the preliminary examination or the adoption of a decision not to challenge, the percentage of notifications prohibiting a concentration or

[671] See, *infra*, para. 9.1
[672] See Art. 49(9).
[673] See Art. 49(1).
[674] See Art. 49(5).
[675] *Raymond Luja, The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, European EU State Aid framework Quarterly, June 2021, vol. 2, No. 2 at 198.
[676] See the seventy-sixth consideration.
[677] Simone Ritzek-Seidl, *The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreemen*t, nomos e-library, cit. *supra*, at 428.

awarding a procurement procedure or undertaking, the number of decisions with remedies, the number of notifications and the evolution of this number.

Similarly, to raise the threshold for concentrations, the Commission will have to assess that a substantial proportion of the decisions prohibiting a concentration or establishing commitments involved concentrations with a turnover of more than €500 million. Alternatively, the Commission must show that the notifications were mostly concluded without bans or commitments.

The power to adopt the delegated act can be used only once in five years, starting two years after the Regulation enters into force. During the work to prepare the delegated act, the Commission will conduct appropriate consultations, including of experts, following the principles set out in the Interinstitutional Agreement on Better Law-making of 13 April 2016.[678] The European Parliament and the Council must receive all documents at the same time as the experts from the Member States to ensure equal participation in the creation of delegated acts. The meetings of the Commission's expert groups in charge of drafting these delegated acts will be open to Member States' experts.

10. Taking the first steps

The Foreign Subsidies Regulation is about to take its first steps and, as for any new regulatory regime, will generate expectations and fear until the new provisions are implemented and evaluated. This applies to this case.[679]

In the context of the FDI Regulation, the European Court of Auditors is conducting a performance audit of the Member State Governments to understand whether the Member States consider the effectiveness and efficiency of the instruments contained therein to strengthen cooperation while safeguarding public safety and order.[680] Similarly, the implementation practice will highlight any need

[678] Interinstitutional Agreement between the European Parliament, the Council of The European Union, and the European Commission *on Better Law-Making Interinstitutional Agreement of 13 April 2016 on better Law-Making*, OJEU, L 123/1.
[679] Morris Schonberg, *The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions*, European State Law Quarterly, 2022, cit. *supra*, at 152.
[680] See European Court of Auditors, *2002 + Work Program*, 2021, at 7.

for amendment or further regulatory coordination for the Foreign Subsidies Regulation.

Although both the State Aid and WTO subsidy frameworks may provide a good starting point for interpretation, many question marks remain, especially concerning distortion assessment and balancing interests. These concerns have been shared by the Council and the European Parliament, who, during the legislative process, called on the Commission to issue guidelines precisely on these points. It will also remain to be seen how detailed these clarifications are and what and how much conflict may arise with third countries.

Accepting the need for such early clarification reflects the European legislator's awareness that foreign investment is essential. Thus, it remains to be seen what impact the Regulation will have on them, especially in light of the declining trend.

The next Chapter will address a concrete case of distortion of the Internal Market by a Chinese SOE, COSCO, to see if this Regulation is adequate to address foreign subsidies.

CHAPTER 4 – EU Foreign Subsidies Regulation: what impact will it have on the port sector?

1. The Port of Piraeus and Hamburg: distortions or opportunities

Regulation (EU) 2022/2560 on foreign subsidies, which has just entered into force, will target all undertakings, including public undertakings controlled directly or indirectly by a State conducting an economic activity in the Internal Market and Sovereign Wealth Funds that have received any form of direct or indirect financial contribution from a non-EU country.[681]

Therefore, the Regulation will also apply to undertakings operating in Maritime Transport that benefited from foreign subsidies in the three years before the Regulation enters into force.[682] Leaving aside the complex geopolitical implications of some recent operations in the port sphere, the European port infrastructure is certainly among those most at risk of ceasing to be a European strategic asset. As noted by FEPORT in the public consultations on the White Paper, EU seaports have recently attracted the attention of several Chinese state-owned undertakings as part of the Belt and Road Initiative's infrastructure projects. As recent studies have shown, these SOEs benefit from foreign subsidies.

The regulatory vacuum that has existed to date has yet to help facilitate a timely examination of the effects these operations conducted in the port sector by non-EU undertakings subsidised by third countries had on the Internal Market. Particularly under the previous regulatory framework, it was impossible to assess the long-term impact on the Internal Market of the increasing presence of the Chinese government in European port infrastructure and maritime logistics chains.

As it will be seen,[683] when the Commission examined the acquisition of the Port of Piraeus by Cosco Shipping for an alleged breach of the EU State Aid framework, it could not extend its scrutiny to analysing whether foreign subsidies

[681] See Art. 1(2) of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 *on foreign subsidies distorting the internal market*, cit. *supra.*
[682] See the transitional provisions and those on the Regulation's entry into force contained in Arts. 53 and 54 of the Regulation (EU) 2022/2560, respectively.
[683] See *infra*, para. 5.

influenced the bid submitted.[684] The rapporteur of the text, EPP MEP Christophe Hansen, said the Regulation could also apply to selling some Port of Hamburg facilities to COSCO.[685] The case is useful to understand how undertakings like COSCO can rapidly build market share in European ports and maritime services in a way that would be impossible in the opposite direction. This means understanding the different nature of COSCO from its European competitors, the unequal conditions it enjoys and the increasing size of its footprint in the Internal Market.

The next sections will examine the new Regulation's impact on the shipping industry. To this end, the acquisitions of the Port of Piraeus and the Port of Hamburg by COSCO will be used as case studies. The acquisition of the Piraeus port from a Chinese undertaking has captured the media's attention and is one of the first massive investments into the EU.[686] The Port of Piraeus and the more recent Port of Hamburg sent two emblematic cases of how a Chinese takeover of a European undertaking can pose both a threat and an opportunity.[687]

These acquisitions touch on all the major concerns surrounding Chinese FDIs in the West. They centre economic fears over the alteration of competition in the Internal Market, fears that Chinese FDIs could lead to social dumping, i.e., a deterioration in the rights of workers in the host country, geopolitical fears because they could be the focus of the emerging economies' strategy, but also the host state's development expectations.[688]

Therefore, these are two important cases for understanding foreign subsidies' impact on the Internal Market. Particularly, one will need to understand

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[684] See Commission Decision (EU) 2015/1827 of 23 March 2015 on State Aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited, cit. *supra*, and Commission Decision (EU) 2018/612 of 7 April 2016 on State Aid SA. 28876 - 2012/C (ex CP 202/2009) implemented by Greece in favor of Piraeus Container Terminal, cit. *supra*.

[685] See ANSA editorial staff, *Nuovo strumento a tutela mercato da sovvenzioni estere distorsive, Via libera della plenaria, Ue potrà indagare su sussidi a imprese Paesi terzi*, 10 November 2022, Ansa.it, available at <https://www.ansa.it/europa/notizie/europarlamento/news/2022/11/10/nuovo-strumento-a-tutela-mercato-da-sovvenzioni-estere-distorsive_80fb2135-725a-4bbb-8fe0-faf106fd47f9.html>.

[686] Sophie Meunier, *A Tale of Two Ports: The Epic Story of Chinese Direct Investment in the Greek Port of Piraeus*, at 2.

[687] *Ibid.*

[688] Huang Yixuan, *China's COSCO investment revives glory days of Greek port, Shine beyond a single story*, 5 June 2022, Shine beyond a single story, available at <https://www.shine.cn/biz/economy/2206056455/>, according to which, with COSCO's investment, Piraeus is strengthening its role as a hub in the fast-growing trade between Asia and Europe, with revenues set to reach an all-time high of €154.2 million in 2020.

whether this new Regulation can be a useful tool to balance Member States' interest in attracting FDIs as a development driver and avoiding Internal Market distortions in the sector of EU port undertakings.

This Chapter will first explain the strategic nature of Port assets and China's interest in European Ports in the context of the Maritime Silk Road. It will then briefly summarise the characteristics of Chinese SOEs as strategic undertakings that pursue China's interests and enjoy substantial funding from the Chinese government, focusing on the legal nature of COSCO and the funding taken over time.

It will then examine the two tenders in 2009 and 2016, as a result of which COSCO first acquired the concession on Piers II and III and then 67% of the Port Authority's shares that gave it control of the Port of Piraeus' trades.

This analysis will first confirm the existence of the regulatory gap that did not allow the effects of foreign subsidies to be examined in the two international bidding procedures. It will then proceed to explain how, if the Regulation had existed at the time of the publication of the tender notice, this would have allowed the transactions to fall within the scope of the Regulation. Indeed, the lack of a regulatory instrument allowed the out-bidding phenomenon to be identified as one of the presumptive factors of distortion of competition.

Finally, the analysis will highlight how, where international acquisitions or tenders involve strategic assets such as ports, the two new instruments recently introduced by the EU, namely the FDI Regulation and the Foreign Subsidies Regulation, must walk in parallel to be truly effective. There will also be a brief focus on the most recent acquisition of the Port of Hamburg.[689]

2. Ports, a strategic asset

Ports have always been a significant trade and transport asset for the European economy. Indeed, Europe's competitiveness depends on an efficient, often intermodal, transport and port system. In 1997, the Commission noted the

[689] Matteo Farnese, *La risposta della Commissione europea ai sussidi esteri che alterano la concorrenza*, 14 June 2021, Lab-IP, available at <http://www.lab-ip.net/la-risposta-della-commissione-europea-ai-sussidi-esteri-che-alterano-la-concorrenza/>.

need to establish a Community framework to ensure free and fair competition, pointing out that certain factors could distort trade flows between Member States.[690] The Commission later also highlighted the importance of the role of ports in strengthening the Trans-European Transport Network (TEN-T) as they ensure the territorial continuity of the EU, help regional and local maritime traffic connect peripheral and island regions, and are the access points from which multimodal logistics flows of the Trans-European Network can be organised.[691]

According to data from the International Chamber of Shipping, 11 billion goods are transported annually.[692] In 2019, the total value of annual global maritime trade exceeded $14 trillion. The shipping industry transfers roughly 2 billion tons of crude oil, 1 billion tons of iron ore, and 350 million tons of grain annually.[693]

According to the latest SRM report, global maritime trade estimates for 2023 remain positive, with a 2.3% increase over 2022.[694] The projected increase highlights the industry's resilience, which has also been challenged by risks and uncertainties related to the geopolitical environment. Maritime transport and logistics are worth about 12% of the global GDP, and many shipments are impossible by road, rail, or air. Even large volumes of key products such as chemicals, refined fuels, and manufactured goods are transported by sea. Over the past four decades, maritime trade has quadrupled, bringing benefits to consumers worldwide through competitive freight rates.

2.1. China's interest in European ports

In the EU, maritime transport accounts for 80% of total exports and imports in volume and about 50% in value.[695] As noted by FEPORT, ports are decisive entry points to the Internal Market, particularly for the supply and distribution of energy

[690] EC, *Green Paper on seaports and maritime infrastructure*, Brussels, 10 December 1997, COM (97) 678 final.
[691] Communication from the Commission, *Ports: an engine for growth, Brussels,* 23 May 2013 COM (2013) 295 final.
[692] International Chamber of Shipping data are available at <https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/>.
[693] *Ibid.*
[694] See, in this regard, presentation of the ninth annual report SRM, *Italian Maritime Economy, Porti, shipping e logistica negli scenari marittimi globali. Impatto di pandemia e guerra sul Mediterraneo, Impatto di pandemia e guerra sul Mediterraneo*, 23 September 2022, available at <https://www.assoporti.it/media/11537/sintesi-srm-maritime-2022.pdf>.
[695] See International Chamber of Shipping data, cit. *supra.*

and goods. Moreover, due to their role in logistics, they can play a key role in emergency supplies or military operations.[696]

European ports employ 1.5 million people and handle cargo worth €1.7 trillion yearly.[697] To sustain this level of trade, European shipping has had to develop highly sophisticated logistics chains, for which significant investment is required. The EU did not find it necessary to impose uniform models believing that diversity of governance and ownership structures was an important feature of the European port system in which no two ports operate similarly.[698]

Following the global financial crisis of 2008-2009, the change in the approach of investors in the port sector became evident. While they used to offer huge sums to obtain the rights to manage container terminals, since 2009, some tenders, such as that of the Port of Hutchinson, have been declared void due to the investors' difficulty in obtaining financing from the banks.[699] Consequently, the need to find resources to activate investments that are indispensable to the development of port traffic, together with the EU decision not to impose a single port management model by recognising the autonomy of Member States, has favoured the growing attention of some foreign States willing to invest in European port infrastructures.

In particular, European Ports have attracted the attention of China in recent years. This interest should be contextualised within the broader framework of the Belt and Road Initiative (BRI), inclusive of numerous infrastructure projects vowed to facilitate trade between China, Asia, Africa, and Europe through greater integration of China into the world economy.[700]

While an ambitious step forward for free trade, Chinese investments have raised doubts. Some, such as Shin Watanabe, have deemed them a debt trap for

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[696] See Feport's position paper on the public consultation on the White Paper, cit. *supra*, at 1.
[697] Simone Tagliapietra, *La lunga marcia della Cina sui porti europei*, il Sole 24 ore, 19 July 2018, available at <https://www.ilsole24ore.com/art/la-lunga-marcia-cina-porti-europei-AESmgaNF>.
[698] Communication from the Commission, *Ports: an engine for growth*, cit. *supra*, para. 2, at 6 and Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017, *establishing a framework for the provision of port services and common rules on the financial transparency of ports*, OJEU L 57/1, tenth considered.
[699] Athanasios A. Pallis and George K. Vaggelas, *A Greek prototype of port governance*, Research in Transportation Business & Management, No. 22, 2017, at 51.
[700] See Simone Tagliapietra, *La lunga marcia della Cina sui porti europei*, cit. *supra*.

developing countries that join the projects.[701] As noted by Francesca Ghiretti,[702] at the root of the fears is the concern that China will invest in port infrastructure by taking advantage of periods of difficulty in European ports to control the New Maritime Silk Road and increasing its control over trade routes to compete with European ports, such as Rotterdam, Antwerp, Genoa, Trieste, and Gioia Tauro.[703]

FEPORT found that ports with a presence of Chinese SOEs, such as COSCO, which receive large subsidies from the State without providing information on their origin, often compete with European port undertakings that do not receive subsidies or receive State Aid by European rules, threatening their competitiveness.[704]

Another concern is that China boasts the world's second-largest fleet of merchant ships and is the leading manufacturer of naval equipment.[705] According to Jonathan Holslag,[706] while Europe desires greater autonomy in vital sectors, it must nevertheless respond to China's rise in the maritime sector and the security implications. Compared to other sectors, such as chips, energy, and electric vehicles, the maritime sector has been perceived as less of a priority even though Chinese and European maritime policies show a deep contrast in strategy and values.[707]

2.2. State-Owned Enterprises (SOEs)

A study found that Chinese shipbuilding companies are aided by an opaque system of state support unrivalled in size, and this has been the case since the early 2000s after China joined the WTO.[708] The size and scope of the efforts would

[701] See Shin Watanabe, *China drops $11bn anchors to expand Maritime Silk Road*, 5 January 2020, Nikkei Asia, available at <https://asia.nikkei.com/Spotlight/Belt-and-Road/China-drops-11bn-anchors-to-expand-Maritime-Silk-Road>.
[702] See Francesca Ghiretti, *L'Iniziativa Belt and Road in Italia: i porti di Genova e Trieste*, IAI Papers No. 21, 17 April 2021, at 2-3.
[703] See Feport's position paper on the public consultation on the White Paper, cit. *supra*, at 2.
[704] *Ibid*.
[705] See SRM, *Italian Maritime economy, Porti shipping e logistica negli scenari marittimi globali*, cit. *supra*.
[706] Jonathan Holslag, *Every Ship a Warship. The Security Role of China's Maritime Sector and its Consequences for Europe*, September 2022.
[707] *Ibid.*
[708] Jude Blanchette, Jonathan E. Hillman, Maesea Mc Calpin, and Mingda Qiu, *Hidden Harbors China's State-backed Shipping Industry*, July 2020.

increase after the 2008 financial crisis when the global maritime industry collapsed in demand.[709]

SOE's shipping operators, COSCO and China Merchant Group, invested about $11 billion in overseas ports between 2010 and 2019,[710] including eight EU seaports in Belgium, France, Spain, the Netherlands, Greece, Italy, and, most recently, Germany.[711] COSCO's latest acquisition is a 24,9% stake in a terminal at the Port of Hamburg.[712]

These investments would be facilitated by public funds or Chinese banks financing Chinese SOEs investing in BRI projects. In 2016, the China Development Bank provided BRI projects with $12.6 billion in the financing, and China has also established the Silk Road Fund exclusively to invest in BRI projects.[713]

SOEs are legal entities controlled by the government to conduct business activities in specific sectors.[714] Such undertakings are an instrument of Chinese government policy that has traditionally assisted the government in reforming.[715] China, under the leadership of the Communist Party, defines its strategies regarding the goals of the state economy.[716]

Therefore, political governance sets economic, social, and political goals while determining the means of achieving them and related monitoring mechanisms.[717] SOE executives are recruited, trained, promoted, and evaluated by the Organizational Department of the Communist Party of China. They are bound not only by the policies but also by the business rules of Chinese Corporate Law.[718] The local party committee of each SOE also has veto power over major business

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[709] *Ibid.*
[710] See Shin Watanabe, *China drops $11bn anchors to expand Maritime Silk Road*, cit. *supra.*
[711] See Feport's position paper on the public consultation on the White Paper, cit. *supra*, at 2.
[712] Rossella Savojardo, *Le relazioni pericolose tra Berlino e Pechino: alla cinese Cosco il 24,9% del Porto di Amburgo*, Milano finanza, 26 October 2022, available at <https://www.milanofinanza.it/news/germania-governo-accordo-pechino-porto-amburgo-societa-cinese-cosco-quota-24-9-202210261301014799>.
[713] See Feport's position paper on the public consultation on the *White Paper*, cit. *supra*, at 2.
[714]Xiankun Jin, Liping Xu, Yu Xin, Ajay Adhikar, *Political governance in China's state-owned enterprises*, 6 May 2022, China Journal of Accounting Research, No 15, 2022.
[715] Amir Guluzade, *The role of China's state-owned companies explained*, World Economic Forum, 7 May 2019, available at <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>.
[716] Xiankun Jin, Liping Xu, Yu Xin, Ajay Adhikar, *Political governance in China's state-owned enterprises*, 6 May 2022, cit. *supra*.
[717] *Ibid.*
[718] *Ibid.* at 2.

decisions before the board of directors discusses the proposed decisions.[719] Recently China has strengthened the role of the Communist Party at the top of SOEs. An interim Regulation has stated that SOEs must implement the will of the Party and place Communist Party committees before the board of directors.[720]

2.3. COSCO Shipping

COSCO Shipping is an acronym for China COSCO Shipping Corporation Limited, a Shanghai-based SOE formed by the 2016 concentration between China Ocean Shipping Group Company (COSCO) and China Shipping Group Company (China Shipping).[721] It is a joint stock company with limited liability incorporated in the People's Republic of China, listed on the Shanghai Stock Exchange and the Hong Kong Stock Exchange.[722]

As of 30 June 2022, COSCO's total fleet included 1413 ships with a capacity of 113.47 million DWT[723], ranking first in the world. Its container fleet capacity was 3.03 million TEU[724], holding the first position in the world. Its dry bulk fleet of 442 ships for 44.75 million DWT, its tanker fleet of 227 ships for 29.29 million DWT, and its general and specialised cargo fleet of 167 ships for 5.56 million DWT all topped the world list.[725]

COSCO has invested worldwide in 57 terminals, including 50 container terminals. The annual amount of its container terminals is 131.79 million TEU, ranking first in the world; the global sales volume of its bunkering fuel exceeds 28.30 million tons, the largest in the world; the scale of its container leasing business reaches 3.91 million TEU, number three for dimension in the world. Its

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[719] *Ibid*.
[720] Orange Wangand Zhou Xin, *China cements Communist Party's role at top of its SOEs, should 'execute the will of the party'*, 8 January 2020, South China Morning Post, available at <https://www.scmp.com/economy/china-economy/Article/3045053/china-cements-communist-partys-role-top-its-soes-should>.
[721] China COSCO Shipping Corporation Limited, about us, available at <https://en.coscoshipping.com/col/col6914/index.html>.
[722] Commission Decision (EU) of 5 December 2017 pursuant to Article 6(1)(b) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area, C(2017) 8397 final, para. 1.
[723] Deadweight tonnage.
[724] Units of measurement for twenty-foot containers.
[725] China COSCO Shipping Corporation Limited, about us, cit. *supra*.

offshore engineering production expertise and ship agency business are also world-leading.[726]

However, COSCO does more than operate its ships. Indeed, the COSCO group's activities are divided into what is called a "6 + 1 *industrial cluster*"[727], i.e., a system that groups a variety of activities in six sectors: shipping, logistics, finance, ship and equipment manufacturing, shipowner services, social services, plus an interest in new online business models.[728]

COSCO operates a portfolio of terminals covering mainland China, Southeast Asia, the Middle East, and South America. COSCO also operates terminals in all 5 European ports, namely the Port of Piraeus in Athens, Greece; the CSP Zeebrugge Terminal in Antwerp, Belgium; the CSP Valencia terminal; the CSP Bilbao Terminal, Spain; the Euromax terminal in Rotterdam; the Vado Reefer Terminal in Genoa, Italy; and recently the Hamburg terminal in Germany.[729] In the case of Antwerp and Vado Ligure, COSCO acquired the shares through a sale by the Danish Maersk.[730]

In Alphaliner's ranking of the largest international shipping companies involved in intermodal freight transport, as of Dec. 31, 2022, COSCO ranks fourth behind the Swiss Mediterranean Shipping Company (MSC), Denmark's Maersk and France's CMA CGM Group and ahead of Germany's Hapag-Lloyd (Tab. 1).[731]

Tab. 1

SHIPPING COMPANY	**COUNTRY**	**VESSELS**	**TEU[732] CAPACITY**	**ORDER BOOK**	**ALLIANCE**
MSC	Switzerland	714	4,598,373	1,727,210	2M
MAERSK	Denmark	706	4,219,395	374,010	2M

[726] *Ibid*.
[727] China Cosco Shipping Corporation Limited Sustainability Report, 2017, at 5.
[728] Cosco Shipping profile *Group Profile*, available at <https://en.coscoshipping.com/col/col6918/index.html>.
[729] Cosco Shipping Ports Limited, Business Portfolio, available at <https://ports.coscoshipping.com/en/Businesses/Portfolio/#OverseasTerminals>.
[730] Gabriele Carrer, *La cinese Cosco è entrata nei primi cinque porti Ue. Ora punta quelli italiani*, formiche, 3 September 2021, available at <https://formiche.net/2021/09/cosco-porto-pireo-presenza-eu/>.
[731] The database of Alpha liner is available at <https://alphaliner.axsmarine.com/PublicTop100/>.
[732] TEU stands for a twenty-foot equivalent unit, a standard measure of length in container transport that corresponds to 20 feet or about 6 meters total.

CMA CGM	France	595	3,393,190	689,257	Ocean Alliance
COSCO	China	468	2,871,859	884,272	Ocean Alliance
HAPAG-LLOYD	Germany	248	1,882,689	377,554	The Alliance

Compiled by Luca Meledandri according to Alphaliner's data as of 31 December 2022

3. The Port of Piraeus

The Port of Piraeus is located about 10 kilometres southwest of Athens and has an area of 2.725 million square meters with a coastline of about 24 kilometres. It is the largest port in Greece and, because of its proximity to the Aegean Sea, is strategic in that it is the maritime crossroads between Asia, Africa, and Europe. In particular, the Port of Piraeus constitutes a gateway to Asia and Russia via the Black Sea; it is a central hub for Eastern Europe; it is connected to the national road network; and it is close to the North African and Middle Eastern routes.[733]

It also operates as an international cruise centre, with about 15 million passengers a year, representing the largest passenger port in Europe.[734] It is, together with the Port of Thessaloniki, classified as a Port of International Interest.[735] The other major ports in the Mediterranean are in Egypt at Port Said and Damietta, in Spain at Algeciras and Valencia, in Morocco at Tangier, in Malta, in Turkey at Ambarli, and in Italy at Gioia Tauro. The latter Italian port indirectly competes with the Port of Piraeus.[736]

[733] Eftychios Zakis, *Port Logistics and maritime security: the cases of Port of Piraeus and Port of Thessaloniki*, at 50.
[734] Philippe Le Corre, *China's Rise as a Geoeconomic Influencer: Four European Case Studies, Working paper, Carnegie Endowment for International Peace*, at 14.
[735] Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for* competitiveness, at 27.
[736] Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for competitiveness*, cit. *supra*, at 30.

Its strategic location makes it attractive to COSCO,[737] which has been interested in investing in its assets since 2005.[738] In 2004 it was among the terminal operating companies contacted by the Greek government as a possible investor since it was the main shareholder in the Port of Piraeus.[739] Moreover, in 2006, following the 2005 strikes promoted by the Panhellenic Seafarers' Federation (PNO)[740] that had highlighted the structural problems of the Greek shipping industry,[741] the government tried to promote an agreement with COSCO to attract investments. However, the agreement still needed to be accepted by the European Commission, which called for an open international tender.[742]

Before proceeding with the tender, the Ministry of Merchant Marine, to get an idea of private sector interest in the container terminal concession, contacted several terminal management companies, including COSCO, HPH, DP World, APM Terminals, MSC and Zim, which had expressed their interest in investing in the Piraeus port facilities.[743]

3.1. The 2009 tender

In 2009, when the financial crisis engulfed Greece, the government initiated the privatisation of some national assets, among which was the management of the

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[737] *Ibid.*

[738] Yuan Ma & Peter J. Peverelli, *Strategic decisions in Chinese state-owned enterprises as outcome of the sensemaking of the CEO: the case of COSCO's emerging involvement in the Port of Piraeus*, at 54.

[739] Among them, in addition to COSCO Shipping, were HPH, DP World, APM Terminals, Mediterranean Shipping Company, MSC, and FIL. See, in this regard, Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for competitiveness*, cit. *supra*, at 30.

[740] Karakioulafis Christina, *Strikes held in maritime industry,* European Foundation for the Improvement of Living and Working Conditions, 7 June 2005, available at <https://www.eurofound.europa.eu/publications/Article/2005/strikes-held-in-maritime-industry>.

[741] Iosifina Artemis Triantafillidis, *The present status of Sino-Greek Cooperation The case study of the Port of* Piraeus, Master's Thesis, Ca' Foscari University of Venice, A.Y. 2017-2018, at 13.

[742] Kousta Elena, *Strikes end at PPA following concession agreemen*t, European Foundation for the Improvement of Living and Working Conditions, 4 February 2010, available at <https://www.eurofound.europa.eu/publications/Article/2010/strikes-end-at-piraeus-port-authority-following-concession-agreement>.

[743]Benefit Case Studies, *Piraeus Container Terminal*, available at <https://www.benefit4transport.eu/wiki/index.php?title=Case_Studies:_Piraeus_Container_Terminal>, Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for competitiveness*, cit. *supra*, at 31.

container terminals at the Port of Piraeus,[744] to repay debts and avert default, which would have implied exiting from the Eurozone.

Therefore, to divest the activities of Piers II and III, the Greek government launched an international open tender for the concession of the exclusive right to use and exploit the port management services of Piers II and III of the Port of Piraeus Container Terminal.[745] The award criterion, against a self-financed investment aimed at further development and expansion of the port infrastructure, was the highest bid.[746]

Originally, in addition to COSCO, Dubai Ports World, Maersk, and Hutchison Whampoa were interested in bidding. In reality, only COSCO and a European business grouping consisting of Hutchinson Port Holdings L.T.D., Hutchinson Ports Investments S.A.R.L., Alapis Joint Stock Company SA, and Lyd SA submitted a bid.[747]

COSCO won the tender, which outbid the offer submitted by the European consortium led by Hutchison Port Holdings.[748] Specifically, COSCO offered €4.3 billion as total consideration for the 35-year concession period, 79% of which is guaranteed, and the implementation of investments of €620 million, 50% of which is aimed at tripling the capacity of the Container Terminal. According to Philippe Le Corre, COSCO's offer would have been five times the market value as it would have been about €123 million per year compared to annual revenues of €171.35 million in the year before the 2007 credit crunch and €116.04 million in 2008.[749]

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[744] Athanasios A. Pallis, George K. Vaggelas, *A Greek prototype of port governance*, cit. *supra*, at 51.

[745] The tender notice and related acts are published as an annexe to the law ratifying the concession of Piers II and III, Law 30 March 2009 No 3755, *concerning the Ratification of the Concession Contract for the port facilities of berths II and III of the container terminal of the public limited company 'Piraeus Port Authority S.A. (PPA S.A.) and the regulation of related matters*.

[746] Offshore energy, *Piraeus Port approves cargo terminals tender*, 15 January 2008 available at <https://www.offshore-energy.biz/httpwww-worldmaritimenews-comArticleport10980piraeus-port-approves-cargo-terminals-tender/>.

[747] See Reuters Staff, *Greek Alapis joins Hutchison in port tender bid*, available at <https://www.reuters.com/article/greece-piraeusport-bid-idUKL1265316920080512>.

[748] See News Room, *Piraeus port announces Cosco is tender winner*, available at <https://www.ekathimerini.com/economy/58053/piraeus-port-announces-cosco-is-tender-winner/>.

[749] See Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for competitiveness*, cit. *supra*, at 31.

The applicants did not appeal to judicial authorities about the bidding process or its outcome. Thus, the Greek Court of Audit approved the process, and the Greek Parliament later ratified the draft contract through Law No. 3755 of 2009.[750]

3.2. The 2016 tender

COSCO did not stop at Piers II and III but went further. In 2016, when Greece decided to sell a majority stake in the share capital of Piraeus Port Authority (PPA) by participating in an additional international tender process, COSCO first acquired 51% of the shares of PPA by submitting a bid of €280.5 million for 51%. After five years of availing itself of an enabling clause, it took over another 16% of the PPA with an additional €88 million. COSCO offered a total of €368.5 million to acquire 67% of PPA,[751] later submitting, even as the only bidder, an improved tied offer at the request of the Greek government.[752]

Of the six initial parties that expressed interest in participating in the tender, five passed the second phase on the evaluation of investment schemes, namely APM Terminals (Dutch-Danish), BV (Dutch), COSCO Group Limited (Chinese), International Container Terminal Services (Filipino), Inc. Ports America Group Holding (U.S.) and Utilico Emerging Markets Limited (British).[753] COSCO, which remained the sole bidder for the majority stake in the seaport, offered €22 per share,

[750] Law 30 March 2009 No. 3755, cit. *supra*.
[751] Dimitrios Manios, ARom Kim and Young-Joon Seo, *The Assessment of the Piraeus Container Terminal Privatization* Initiative, at 18.
[752] According to ANA-MPA, *Στο ύψος του 1,5 δισ. ευρώ θα ανέλθει η συνολική αξία που θα αποκομίσει το Δημόσιο από τη συμφωνία για τη διάθεση του 67% του ΟΛΠ στην Cosco*, 20 January 2016, available at <https://www.amna.gr/home/article/101412/>, the total value of the transaction amounted to €1.5 billion as the total value to the Greek state. According to the Hellenic Property Fund, the total value included, *inter alia*, the improved offer of €368.5 million, the obligatory investments of €350 million over the next ten years, and the expected revenue to the State from the concession agreement (concession fee of 3.5% of PPA's turnover), which was expected to total €410 million. The total amount also considered dividends and interest expected to be received from the Hellenic Financial Markets Agency and investments until the concession expires in 2052.
[753] See Enikos.gr., *Πέντε επενδυτικά σχήματα πέρασαν στη β' φάση για τον ΟΛΠ,* 5 June 2014, available at <https://www.amna.gr/home/Article/57242/>, Iosifina Artemis Triantafillidis, *The present status of Sino-Greek cooperation, The case study of the Port of Piraeus*, cit. *supra*.

about 70% higher than the pre-bid closing value of €12.95 on the day before the bid.[754]

Thus, on 24 June 2016, COSCO entered into a concession contract for the Port of Piraeus until 2052, which the Greek Parliament ratified through Law No. 4404 of 2016.[755] It should be noted that despite not completing the €300 million investment program initially stated in the contract, which it had pledged implement within five years of acquiring the 51% shareholding, COSCO nevertheless managed to acquire the additional 16% stake. This was possible thanks to a decision by the Hellenic Court of Audit, which ruled that COSCO was not responsible for the delays in implementing the investment plan, which the Court said had been fuelled by legal disputes sought by local committees over potential environmental issues.[756]

With the acquisition of most of the Port Authority's shares, COSCO has transformed itself from the concessionaire of Piers II and III into the owner of the entire Piraeus container terminal.

4. Foreign Subsidies and the distortive effects on public tenders

From an economic perspective alone, COSCO's investment in the Port of Piraeus ranks among the most successful Greek privatisations in recent decades. COSCO upgraded infrastructure introduced more efficient machinery and equipment, addressed labour issues, improved the management system, and generated more traffic. In addition, the circumstance that the right to use the assets is valid only for the duration of the concession, that the State still owns the land, that the government has the right to terminate the concession under certain

[754] See Agi, *Cosco compra il 67% del porto del Pireo*, 21 January 2016, available at <https://www.agi.it/economia/cosco_compra_il_67_del_porto_del_pireo-438280/news/2016-01-21/>.
[755] Law No. 4404 of 2016, *For the ratification of the amendment and codification into a single text of the Concession Agreement of 13 February 2002 between the Greek State and Piraeus Port Authority SA and other provisions*, Government Gazette 126/A/8-7-2016.
[756] See Ship Mag editorial staff, *COSCO sale a quota 67% nel Porto del Pireo*, 24 August 2021, available at <https://www.shipmag.it/cosco-sale-a-quota-67-per-cento-nel-porto-del-pireo/>.

conditions, and that the assets cannot be resold to the private sector without restrictions, also precludes calling it a full privatisation.[757]

However, to understand the impact of the new Foreign Subsidies Regulation, one must ask whether COSCO would have been able, without enjoying foreign subsidies, to submit the bids that enabled it first to acquire the management of Piers II and III for 45 years and later 67% of the Port of Piraeus.

In other words, it must be asked whether, at a time when the newly enacted Foreign Subsidies Regulation was not present in the EU, the financial contributions that COSCO was able to enjoy gave it an advantage in bidding in the international tenders in which it participated, thus altering the playing field to the detriment of its European competitors. Therefore, COSCO's acquisition of the Port of Piraeus helps to understand the innovative scope of the Foreign Subsidies Regulation.

4.1. The presence of a foreign subsidy

Had these competitions taken place today, would they have come within the scope of the new Foreign Subsidies Regulation under Article 1(2)?

In the preceding paragraphs, it was presented that COSCO is a Chinese SOE that participated in an international European tender to conduct economic activity in the Internal Market, i.e., for the management of piers II and III and, subsequently, for the acquisition of 67 % of the shares of the Port of Piraeus. It conducts multiple service activities, such as cruise shipping, container terminal business, etc., to manage the Port of Piraeus.

According to the jurisprudence of the ECJ, the construction and operation of certain types of infrastructure can be considered an economic activity. Just as providing infrastructure to third parties for remuneration constitutes an undertaking activity.[758] Therefore, COSCO was participating in international competition as an SOE to conduct economic activity in the Internal Market and, as such, falling within the scope of the Foreign Subsidies Regulation.

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[757] See Alkman, Granitsas and Costas Paris, *Chinese Transform Greek Port, Winning Over Critics*, The Wall Street Journal, 20 November 2014, available at <https://www.wsj.com/Articles/chinese-transform-greek-port-winning-over-critics-1416516560>.

[758] See Ship Mag editorial staff, *COSCO sale a quota 67% nel Porto del Pireo*, cit. *supra*.

The aid for which COSCO was eligible may also fall under foreign subsidies. In fact, according to Article 3(1) of the Regulation, a foreign subsidy exists when a third country directly or indirectly provides a financial contribution that confers a benefit to an undertaking engaged in economic activity in the Internal Market, and that is limited in law and fact to one or more undertakings or one or more sectors. COSCO, as an SOE, has received and continues to receive subsidies from the Chinese government.

In China, it is required by law for listed undertakings to report any subsidies received from government agencies. According to Alphaliner's data from the stock exchange documents, it is possible to reconstruct that, in 2020, COSCO received about $185 million in government subsidies, with a significant increase from those obtained in the previous year of $134.[759]

Also, according to Alphaliner, going backwards, COSCO's net income of $251 million in 2019 is largely due to $230 million in subsidies from the Chinese government, including $122 million for shipbreaking[760] and $77 million for other unspecified government subsidies.[761] Alphaliner's data also notes that since 2010, parent organisation COSCO Shipping Holdings has reportedly received $1.34 billion in subsidies from its government, including about $700 million for ship scrapping.[762]

If one looks at the subsidies declared in 2009, the year the concession contract was signed for the operation of Piers II and III, COSCO said it received about $777 million in subsidies from the Chinese government, a noteworthy

[759] Global Trade Alert, *China: Government subsidy changes for listed company COSCO Shipping Development in year 2020*, available at <https://www.globaltradealert.org/intervention/92968/financial-grant/china-government-subsidy-changes-for-listed-company-cosco-shipping-development-in-year-2020>.
[760] Mike Wackett, *Subsidies from China keeping ambitious Cosco in calm financial waters*, The Loadstar, making sense of the supply chain, 3 April 2019, available at <https://theloadstar.com/subsidies-from-china-keeping-ambitious-cosco-in-calm-financial-waters/>, according to which a Chinese shipowner who recycles a Chinese-flagged ship at a Chinese dismantling yard is paid a subsidy of about $400 per LDT, which, when added to the actual dismantling rate, is equal to twice the amount paid in dismantling sales from yards in India, Bangladesh and Pakistan.
[761] *Ibid.*
[762] *Ibid.*

increase in government subsidies from the previous year of $12 million.[763] The subsidy can include positive benefits and interventions that, in various forms, relieve burdens that normally affect an undertaking's budget. Thus, in the years it has been bidding, and even afterwards, COSCO has always received government subsidies from the Chinese government.

4.2. Providing an advantage

In 2009, looking for a global player with significant experience in terminal operations, i.e., one that had handled at least 1 million TEUs in the last year before the concession, Greece drafted a tender that prioritised the operator's experience and financial solvency without including other specific requirements.[764] The combination of some of the choices behind the call, such as the long duration of the contract; the emphasis on pre-selection criteria that could only be achieved by well-funded global players or consortia with specific expertise; and the association of the entrustment of an existing terminal with the right/duty to build a new one, may have limited the pool of potential entry candidates.

These choices, combined with the dominance of the financial rationale with the identification of the highest bid as the award criterion, resulted in the loss of some of the parameters applied in other concessions that would have ensured more than just the financial objectives.[765] On the other hand, the notice structured this way favoured the entity receiving foreign subsidies. Indeed, the foreign subsidies may have given COSCO a competitive advantage over other European market players who were not recipients of similar aid because the EU State Aid framework prohibited them.

Foreign subsidies allow an undertaking to submit a higher bid, encouraging out-bidding, i.e., the submission of above-market bids ending up indirectly limiting the participation of other potentially interested but unsubsidised competitors or, in any case, bypassing them. This happened in the case of the European consortium

[763] Global Trade Alert, *China: Government subsidy changes for listed company COSCO Ship Hold in year 2009*, available at <https://www.globaltradealert.org/intervention/77550/financial-grant/china-government-subsidy-changes-for-listed-company-cosco-ship-hold-in-year-2009>.
[764] See Harilaos N. Psaraftisa & Athanasios A. Pallis, *Concession of the Piraeus container terminal: turbulent times and the quest for competitiveness*, cit. *supra*, at 35.
[765] *Ibid.*

headed by Hutchison Port Holdings in the 2009 bidding process and the 2016 bidding process when COSCO was able to bid, as the only bidder, about 70 % higher than the closing value on the day before the bid. [766]

Therefore, the Port of Piraeus acquisition empirically confirms the distorting effect foreign subsidies can have on a public procurement process. Foreign subsidies, in fact, by encouraging the submission of a higher bid, facilitate the acquisition, allowing bidders to gain an unfair advantage. They, indeed, confirm the White Paper's assertion that the ability of a subsidised buyer to outbid competitors for the acquisition of an undertaking through foreign subsidies encourages a distorted allocation of resources and prevents unsubsidised buyers from realising efficiency gains or gaining access to essential technologies. As a distorting example of foreign subsidies, the White Paper cites, after all, the out-bidding phenomenon.[767]

5. The confirmation of the regulatory gap

Another reflection suggested by COSCO's acquisition of the Port of Piraeus is the confirmation of the regulatory gap highlighted in the White Paper before adopting the Foreign Subsidies Regulation. As argued in the White Paper, the regulatory gap did not allow the examination of the distorting effects on the Internal Market of foreign subsidies in some transactions conducted by undertakings subsidised by third countries, with the result that foreign subsidies have facilitated the acquisition of EU undertakings in a relevant number of cases.[768]

In COSCO's acquisition of the Port of Piraeus, one can also find confirmation of this aspect. Immediately after the tender, the port unions and the Piraeus prefecture doubted the tender's legality. However, the contract's ratification intervened by law did not help, and the Hellenic Court of Audit approved the tender process.[769]

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[766] Agi release, *Cosco compra il 67% del porto del Pireo*, cit. *supra.*
[767] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*, at 7.
[768] Editorial Comments, *Protecting the EU's internal market in times of pandemic and growing trade disputes: Some reflections about the challenges posed by foreign subsidies*, at 1366.
[769] DC (UE) 2015/1827 on State Aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited, cit. *supra*, para. 15.

Nonetheless, the fact that the ratification law established certain exemptions in favour of COSCO[770] allowed the Prefect of Piraeus and the Federation of Greek Port Workers, on 30 April 2009 and 7 May 2009, respectively, to refer the matter to the European Commission alleged violations of the EU State Aid framework.[771] It complained that the facilities were not provided for in the tender notice but only in the law ratifying the contract by altering the rules of competition among participants,[772] with the inclusion of more favourable contractual provisions in the concession contract signed at the end of the bidding process.[773]

However, the European Commission, while ruling that the differences between the concession agreement and the tender and the tax measure on income tax exemption for goods, works, and services provided outside Greece did not qualify as State Aid,[774] found that the remaining measures introduced by Law No. 3755 of 2009 amounted to incompatible aid, thus ordering Greece to recover them.[775]

In all the decisions in which the Commission examined the acquisition of COSCO, it delved into its profile, the nature of the business activity, the relevant market, the alteration of competition, and the alleged competitive advantage enjoyed by COSCO, but only regarding the State Aid granted by Law No. 3755 of 2009.

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[770] Exemptions ranged from income tax to the fact that its VAT and depreciation obligations would be more favourable than the standard obligations of a Greek undertaking and that accumulated losses could be offset against taxable profits of subsequent periods without any time constraint.

[771] DC (UE) 2015/1827 on State Aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited, cit. *supra,* para.1 and 2.

[772] For an overview of contract provisions, see Iosifina Artemis Triantafillidis, *The present status of Sino-Greek Cooperation, The case study of the Port of Piraeus*, cit. *supra*, at 15-17.

[773] DC (UE) 2015/1827 on State Aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited, cit. *supra,* para.1 and 2. The favourable conditions did not include the long duration of the concession, which was part of the original conditions in the tender as it was seen as a plus to guarantee the interest of terminal operators, with a mandatory extension for another five years subject to the construction of the new Pier III. para. 3.3.

[774] DC, State Aid SA.28876 (2012/C) (ex 2011/N) (ex CP 202/2009) – Greece Container Terminal Port of Piraeus & Cosco Pacific Limited, Brussels 11 July 2012 C (2012) 4217 final.

[775] DC (UE) 2015/1827 on State Aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited, cit. *supra.* The decision was then upheld by the subsequent CD (EU) 2018/612 of 7 April 2016 on State Aid SA.28876 - 2012/C (ex CP 202/2009) implemented by Greece for Container Terminal Port of Piraeus, OJEU L 101/73, excluding the compensation granted to PCT following the activation of the penalty clause of the concession contract.

The Commission did not delve into any decision about the foreign subsidies received by COSCO or the possible competitive advantages the latter received over European undertakings due to Chinese government subsidies. The Commission does not do so concerning the bidding process and the possibility of submitting particularly high bids. Still, it does not examine foreign subsidies concerning the economic activity that COSCO intends to undertake in the Internal Market. This confirms the approach of the White Paper on the inadequacy of the regulatory instruments available before the introduction of the Foreign Subsidies Regulation in preventing the distorting effects of foreign subsidies in the Internal Market.

Indeed, the Commission was aware, as the White Paper noted, that Articles 107 and 108 TFEU apply only to aid granted by the Member States and not to foreign subsidies. Nor was the Commission able to assess whether the foreign subsidies received by COSCO from the Chinese government favoured it in bidding for the tender, as contracting authorities boast wide discretion in setting the bidding procedures and evaluating the bids submitted based on the notices.

At the time of the 2009 and 2016 tenders, there was no obligation to exclude an undertaking from participating in a public procurement process merely because it could submit bids at higher prices than unsubsidised buyers due to the foreign subsidies it benefited from. On the contrary, the award criteria expressly stated that the only awarding criterion was the highest bid.

Moreover, as seen in Chapter 1, the European Public Procurement Directives do not include any obligation for contracting authorities to take foreign subsidies into account when assessing the eligibility criteria or the sustainability of a bid when evaluating an anomalous tender.[776] Article 69 of Directive 2014/24/EU on abnormal bidding does not include any obligation to assess the impact of foreign subsidies. The bid could only be rejected if it were determined that the cause of the bid was due to State Aid, i.e., a subsidy from a Member State. But there was no corresponding rule regarding subsidies from third countries. It was, in fact, only the Foreign Subsidies Regulation that introduced a tool for assessing the relevance of the foreign subsidy in a public procurement procedure.

[776] See Chapter 1, para. 3.4.

5.1. The distorting impact of competition in the port of Piraeus

COSCO's acquisition of the Port of Piraeus suggests two additional considerations about the newly approved Regulation.

The first concerns assessing the distorting impact on the Internal Market. According to the Regulation, distortion exists when a foreign subsidy is likely to improve an undertaking's competitive position in the Internal Market. For this purpose, it identifies certain indicators such as the amount of the foreign subsidy, the nature of the subsidy, the situation of the undertaking, the size of the undertaking, the size of the markets, the development of the undertaking's economic activity in the Internal Market, the purpose of the subsidy.[777] The size of the subsidy must be at most €4 million over three consecutive years. Otherwise, it is unlikely to distort the Internal Market.[778]

For the Commission to fully assess the distorting effect, there needs to be transparency on the foreign subsidy data. At the time of COSCO's participation in the two bidding procedures, for example, since there was no obligation to disclose the nature and type of subsidy for the European Commission, it would have been complicated to assess the effects of such foreign subsidies on the Internal Market. If we go backwards and look at the effects of COSCO's acquisition of the Port of Piraeus, one cannot fail to note the increase in the Port of Piraeus' movements from less than 700,000 TEU in 2009 to 3.6 million TEUs in 2014 and 4,9 million TEUs in 2019.[779]

Based on the data, the Port of Piraeus was uncompetitive in 2010. Since the acquisition of COSCO, it has developed to become the second-largest port in the Mediterranean.[780] The acquisition of the Port of Piraeus has been difficult for European ports, starting with those in Italy, forced to compete with a public giant from a foreign State not bound by the EU State Aid framework. The Port of Gioia

[777] See Art. 4(1)
[778] See Art. 4(2)
[779] Claudio Paudice, *Il Pireo, la base cinese per stravolgere l'Europa*, Huffpost, 6 May 2021, available at <https://www.huffingtonpost.it/entry/il-pireo-la-base-cinese-che-travolge-leuropa_it_60927f61e4b04620270e0879/>.
[780] *Ibid.*

Tauro, COSCO's main competitor, managed to resist only thanks to investments by MSC.[781]

5.2. The acquisition of 24.9% of the Port of Hamburg

Recently, COSCO has gained the attention of the media and institutions for its proposal to acquire shares in the Port of Hamburg. The acquisition of shares in the Port of Hamburg is different in some respects from that of Piraeus because it comes after the EU adopted the FDI Regulation.[782]

At the end of October, the German government approved COSCO to purchase a minority ownership of less than 25% in the Port of Hamburg (CSPL). Although the German federal government made it clear that the minority stake configures the investment as purely financial and not capable of influencing decisions on the port terminal and that this stake could not be exceeded without a new investment review procedure,[783] the agreement has raised concerns about the growing possibility of altering the playing field in the Internal Market.

Indeed, with the Hamburg and previous agreements, COSCO boasts a significant market share in European port infrastructure. While none of these investments, evaluated individually, present an immediate risk of distorting the Internal Market, taken cumulatively, the impact could be different.[784]

The acquisition of the Port of Hamburg suggests two more considerations. The first concerns the criteria to be used by the Commission in assessing the distorting effect under Article 4 of the Regulation, given that, as pointed out in consideration 17, foreign subsidies are not prohibited by the Regulation. To be so, they must improve the competitive position of the undertaking operating in the Internal Market and actually or potentially affect competition.[785]

Suppose, as was held in Chapter 3, that the Regulation incorporates the Case Law on State Aid, according to which, to establish the impact of an economic

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[781] *Ibid.*
[782] Regulation (EU) 2019/452, cit. *supra*.
[783] Rossella Savojardo, *Le relazioni pericolose tra Berlino e Pechino: alla cinese Cosco il 24,9% del Porto di Amburgo*, cit. *supra*.
[784] *Ibid.*
[785] Carolina Dacko, Charlotta Brodin e Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation - Potential Conflicts of Interests and in Application,* cit. *supra*, at 513.

advantage on trade between the Member States and the related distortion of competition, it is not necessary to prove the impact of the aid on trade and a distortion of competition, but only to ascertain whether such aid is capable of affecting trade and distorting competition[786] having regard to foreseeable effects.[787] In that case, it is not enough to argue, as Germany claimed, that the acquisition of the Port of Hamburg does not affect competition because the 25% share represents a purely financial investment.

Indeed, it must be considered that a company like COSCO that benefits from foreign subsidies, alongside subsidies enjoyed by the group to which it belongs, has the potential to affect competition in the Internal Market. In fact, according to Francesca Ghiretti, the cumulative distorting impact of all investments made in Europe should be considered when assessing the distorting effects of foreign subsidies rather than individual investments.[788]

In this regard, Article 4 allows this. If COSCO were to acquire today, it should be considered that in addition to Piraeus, it owns interests in 15 different European ports in Greece, Malta, Italy, Spain, France, Belgium, and the Netherlands.[789] Therefore, COSCO could gain a larger market share and increase European dependence on Chinese shipments due to unequal market access through its many investments.[790]

It will be important to understand how the Commission will decline the elements mentioned in Article 4. To see, for example, whether in the assessment of distortionary effects, the Commission also includes the cumulative effects that could result from the operation of the Chinese project. The latter connects via rail lines the Piraeus to the Western Balkans and Northern Europe via the Land-Sea

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[786] See, among others, Judgment of the Court (Second Chamber) of December 21, 2016, Case C76/15, *Paul Vervloet and others v Ministerraad*, cit. *supra*, para. 102, ECLI:EU:C:2016:975, Judgment of the Court (Grand Chamber) of June 27, 2017, Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe, Case C-74/16, cit. *supra*, para. 78, ECLI:EU:C:2017:496.

[787] See the Commission Communication on the concept of State Aid in Art. 107(1) of the Treaty on the Functioning of the European Union, cited above, para. 6.3, at 190.

[788] See Gabriele Carrer, *Il nuovo strumento UE anti sussidi (e Cina) spiegato da Ghiretti (Merics*), Formiche.net, 28 November 2022, available at <https://formiche.net/2022/11/ue-strumento-anti-sussidi-ghiretti-merics/>.

[789] See, *Growing Concern About COSCO's Rising European Footprint*, The Maritime Executive, 4 December 2022, available at <https://maritime-executive.com/Article/growing-concern-about-cosco-s-rising-european-footprint>.

[790] *Ibid.*

Express Route,[791] and its impact on EU trade routes goes far beyond the Port of Piraeus. Similarly, the Chinese contribution to financing the Budapest-Belgrade rail project was provided by two public banks, the China Exim Bank and the China Development Bank.[792]

According to FEPORT, compared to the existing sea routes bypassing the Strait of Gibraltar, the express land-sea route could grant a significant competitive advantage to COSCO with a significant impact on ports, reducing the number of stopovers and shipping time between China and the EU by 8-12 days.[793]

Such an advantage could be determined based on comparative parameters such as comparison with loan rates in the market. Suppose China set up the Silk Road Fund exclusively to invest in BRI projects. In that case, the provision of a loan from third-country banks with below-market interest rates may confer an advantage and, in COSCO's case, may have contributed to its expansion beyond its initial investment.[794]

5.3. The balancing test on the Port of Piraeus investment

The foreign subsidies received by COSCO also suggest some thoughts regarding the balancing test provided for in Article 6 of the Foreign Subsidies Regulation. The latter refers to the comparative assessment to be made by the Commission. Once distortion has been established between the distorting effects and the positive effects of the foreign subsidy. This happens regarding the development of the subsidised economic activity in the Internal Market while also considering other possible positive effects of particular policy objectives, with particular reference to those of the EU.

In this regard, the provisions in the Foreign Subsidies Regulation are quite vague. Therefore, it will be necessary to wait for the implementation of Regulation

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[791] See Nikos Papatolios *From sea to land, rail transforms transport through the Balkans*, RailFreight.com, 5 March 2021, available at <https://www.railfreight.com/corridors/2021/03/05/from-sea-to-land-rail-transforms-transport-through-the-balkans/>. The Land Sea Express uses the Port of Piraeus as its base; passing through Greece, northern Macedonia and Serbia it reaches Hungary, Slovakia, Austria and the Czech Republic, transporting imported goods from China and other Far Eastern countries. On its return from Central Europe, the train carries European products loaded onto ships to reach China.

[792] See FEPORT's position paper on the public consultation on the White Paper, cit. *supra*, at 2.

[793] *Ibid.* at 3.

[794] See FEPORT's position paper on the public consultation on the *White Paper*, cit. *supra*, at 2.

under Article 47, which the Commission is expected to adopt by 13 July 2023. In any case, it was seen in Article 3 that using the horizontal and sectoral balancing test criteria used in the EU State Aid framework could be more straightforward, given the Commission's broad formulation on balancing interests.[795]

Examined from an economic perspective alone, COSCO's investments in the EU rank among the most successful in recent decades. COSCO has upgraded infrastructure, introduced more efficient machinery and equipment, addressed labour issues, improved the management system, and generated more traffic. One can then understand how to read the reports made by the Beijing media. The collaboration is win-win, with brilliant economic and employment results on both the eastern and western fronts. The exponential increase in trade has become the main element of the narrative carried by advocates of Chinese investment.[796]

But what elements should the Commission consider in the balancing test on a port operation in addition to trade development? For the Commission to take a favourable position, it will be necessary for foreign subsidies to stimulate the subsidised activity without excluding EU-based competitors.[797] Moreover, any distortion cannot be contrary to the common interest, according to the well-established Case Law on State Aid that could be borrowed.[798]

It should be considered, then, that the presence of an operator such as COSCO has had a direct impact on all Mediterranean ports, including those in Italy,[799] in which, according to a study by SRM, 10.5 million TEUs were being moved in 2016 and just under 10.7 million in 2020. Therefore, growth in Italy was slim to none, and, to this end, Chinese competition did not help.[800]

As noted by the Italian General Confederation of Transport and Logistics (CONFETRA) in 2018, Chinese investments in some European ports force thinking

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[795] On this point, see Alain Alexis, *Foreign subsidy controls: the new European Commission proposal*, cit. *supra*, at 218. See *supra*. Chapter 3.
[796] Claudio Paudice, *La privatizzazione del Pireo è stata un affare, ma solo per i cinesi, non per i greci*, Huffpost,5 September 2021, available at <https://www.huffingtonpost.it/entry/la-privatizzazione-del-pireo-e-stata-un-affare-solo-per-i-cinesi_it_612d0b95e4b02be25b5ecea8/>.
[797] In this sense, Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, at 191.
[798] Judgment of the Court (Grand Chamber) of 22 September 2020, *Republic of Austria v European Commission*, Case C-594/18 P, cit. *supra*, para. 19, ECLI:EU:C:2020:742.
[799] Claudio Paudice, *Il Pireo, la base cinese per travolgere l'Europa*, cit. *supra.*
[800] *Ibid.*

about reciprocity in economic rights, compliance with the Community regulatory framework in terms of environmental sustainability of investments, transparency of subsidies, compliance with labour Regulations as well as the principles of proportionality and homogeneity of investments within the Internal Market.[801] These are elements that the Commission will have to keep in mind in its balancing activity, as well as whether foreign subsidies given for ship scrapping can be construed as an aid for environmental improvement and assessable in the comparison.

As noted in the impact analysis that accompanied the May 2021 proposal, the principle of proportionality limits the Commission's discretion in the balancing act.[802] For instance, examining the Syngenta case, the Italian Regional Administrative Court of the Lazio Region clarified that discretion is connoted because of protected interests.[803] It will then be interesting to see how wide the discretion will be in an area that is not about safety but about competitiveness.

Therefore, there are many elements that the Commission will have to take into due account in the balancing of interests, starting with the fact that having high financial resources may allow a subsidised undertaking to gain market share with low prices made possible by subsidies or with excess profits in their home market, for example through unregulated dominance.

Any prospective development of trades will also have to be evaluated, e.g., the acquisition of additional GDP, COSCO would come close to MSC and operate about 3.4 million TEU of capacity, thus catching up with Denmark's MAERSK, which says it has no plans to expand its 4 million TEU fleet.[804]

COSCO's purchase of critical infrastructure also raises an additional issue: the relationship between the national security direct investment control Regulation

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[801] See Confetra, *Belt and Road Initiative Position paper*, Data and analysis in collaboration with SRM - Studies and Research for the Mezzogiorno, 2018, at 11-13, available at <https://www.confetra.com/wp-content/uploads/Position-paper-Bri.pdf>. See also MediTelegraph interview with Marco Conforti, the observatory coordinator, available at <https://www.themeditelegraph.com/it/shipping/shipowners/2018/12/11/news/confetra-pubblicato-il-position-paper-sulla-belt-and-road-cinese-1.38080042>.

[802] See European Commission, *Commission staff working document impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal marke*t, cit. *supra*, at 48.

[803] See Tar Lazio, 13 April 2022, No. 13655/2021.

[804] Mike Wackett, *Subsidies from China keeping ambitious Cosco in calm financial waters*, cit. *supra*.

and the Foreign Subsidies Regulation. COSCO is not just a shipping company. Unlike its competitors, HAPAG-LLOYD or MAERSK, which have fiduciary responsibilities to shareholders to maximise return on investment and shareholder value, COSCO is an SOE owned and controlled by the Chinese government, and an instrument through which the Chinese government promotes its strategic interests.[805]

COSCO, for example, could be used by China to threaten to block exports or imports as a retaliatory weapon for diplomatic issues.[806] COSCO's arrival may also influence the foreign policy of some Member States. Indeed, Greece blocked in 2017 an EU condemnation to the UN directed at China for its lack of respect for human rights.[807] COSCO was also the only global transportation operator that did not stop deliveries with Russia after the Russian invasion of Ukraine. Thus, transporting Russian crude oil to China provided economic aid to Russia when it faced European economic sanctions.[808]

One of the questions the Commission will face when balancing interests in a port operation is whether among the possible negative effects to be considered should be those on European security or only economic interests. For example, COSCO is the main producer of naval equipment that could be used in armed conflicts.[809]

6. The lesson learned from the Ports of Piraeus and Hamburg

[805] On SOE's role, see *supra* para. 2.2

[806] Claudio Paudice, *La Cina accresce il dominio sulle Terre rare. Usa e UE sotto schiaffo*, Huffington Post, 5 December 2021, available at <https://www.huffingtonpost.it/entry/la-cina-accresce-il-dominio-sulle-terre-rare-usa-e-ue-sotto-schiaffo_it_61aa3eeae4b0f398af209871/>.

[807] Claudio Paudice, *Il Pireo, la base cinese per travolgere l'Europa*, cit. *supra.*

[808] Gabriele Carrer, *Occhio Italia. La guerra in Ucraina cambia le strategie della cinese Cosco*, formiche.net, 16 May 2022, available at <https://formiche.net/2022/05/cosco-ucraina-porto-di-palermo/>.

[809] See, in this regard, Jonathan Holslag, *Every Ship a Warship the Security Role of China's Maritime Sector and its Consequences for Europe,* cit. *supra.* which attributes COSCO shipping with the following statement "*Naval power is inseparable from the support of a strong navy*", according to which COSCO Shipping allegedly adapted some of its passenger ships to facilitate amphibious landings from the sea.

The analysis of the acquisitions of the Port of Piraeus and the Port of Hamburg by COSCO suggests some reflections that invest the future implementation and scope of the Foreign Subsidies Regulation.

The first is the confirmation of the regulatory gap affirmed by the Commission in the White Paper and by most European stakeholders in the following consultations. The lack of regulatory tools did not allow for an examination of the distorting effects on the Internal Market of Chinese foreign subsidies on the acquisition of the Port of Piraeus, not even when the Commission examined the case in the context of complaints regarding the conflict with the EU State Aid framework.[810]

European ports have so far been powerless in the face of the regulatory gap, without adequate tools to level the playing field. The Port of Piraeus is an emblematic case. As seen before, if the tools introduced by the Foreign Subsidies Regulation had existed when the international tender notices were published, it would have been possible to address the distortion of competition within the Internal Market by a subsidised undertaking.[811]

A further consideration concerns the vagueness of the rule on the comparative assessment between the distorting and positive effects of foreign subsidies of a subsidised economic activity in the Internal Market. In particular, it will be necessary to wait for the guidelines to understand the criteria in light of which other positive effects of policy objectives, with particular reference to those of the EU, should be considered. The effectiveness of the Regulation will depend in large part on this.

Moreover, the definition of foreign subsidies in the Regulation is broad enough to include most of the subsidies received from China.

COSCO's purchase of the Port of Piraeus also confirms that there may be an aggregation between foreign subsidies received by subsidised undertakings operating in the Internal Market and any State Aid arranged by the State in which they operate. Indeed, as seen before, the law ratifying the Pier II and III concessions established the possibility for COSCO to benefit from aid from the Greek

[810] See *supra*, para. 5.
[811] Claudio Paudice, Il Pireo, *la base cinese per travolgere l'Europa,* cit. *supra.*

government, which was later qualified as State Aid by the Commission. Therefore, this possibility will also have to be evaluated in the distorting effects.

The acquisition of the Port of Piraeus and, more so, the recent acquisition of the Port of Hamburg also underscore a certain weakness of the transitional provisions in Article 53. These provisions reduce the possibility for the Commission to review *ex officio* acquisitions already made by COSCO by providing that the Commission can conduct *ex officio* reviews on foreign subsidies granted in the previous five years only if those subsidies distort the Internal Market after 12 July 2023.

Thus, the Port of Piraeus acquisitions are unlikely to be reviewed in light of the new Regulation. Foreign financial contributions made in the three years before the entry into force of the Regulation will only be able to be reviewed if COSCO notifies of its intention to merge or its intention to participate in a public procurement process.

The transitional provisions also state that the Foreign Subsidies Regulation does not apply to concentrations for which the agreement has been concluded, a public bid announced, or a controlling interest acquired before 12 July 2023, and for public contracts awarded before the same date. Therefore, the transitional rules de-emphasise the retroactive action of the instrument.

Notwithstanding this last consideration, the analysis has highlighted the innovative scope of the Foreign Subsidies Regulation in allowing it to examine distortions in the Internal Market caused, even potentially, by undertakings subsidised by third countries, subjecting them to the same strict Regulations that EU undertakings must follow in the case of State Aid. On the contrary, the Foreign Investment Control Regulation aims to avoid dangers to security, public order, and strategic sectors with the Foreign Subsidies Regulation. In that case, the aim is to address distortions in the competitive logic of the market.

To be truly effective, these two new instruments recently introduced by the EU must walk in parallel and, more importantly, talk to each other. However, it remains to be seen if the guidelines, implementing acts, and amendments to the FDI Regulation will go in the same direction.

II. CONCLUSION

The Regulation (EU) 2022/2560 on foreign subsidies, approved by the European Parliament and published in the Official Journal,[812] comes at the end of a long journey that began with the presentation of the White Paper on 17 June 2020.[813] It then continued with the proposal for a Regulation presented by the Commission in May 2021, followed by the provisional political agreement between the Parliament and the Council on 30 June 2022.[814] The Regulation was finally adopted on 14 December 2022 and entered into force on 12 January 2023. Its provisions will apply as of 12 July 2023 and 12 October 2023.

The EU now boasts a new instrument to address distortive foreign subsidies that alter the level playing field in the Internal Market. The Regulation will prevent subsidised undertakings from benefiting from an unfair advantage when acquiring EU businesses or participating in public tenders.

While the EU State Aid framework determines when subsidies granted by Member States are compatible with the Internal Market, third countries do not possess similar control mechanisms. Moreover, while the Commission sets the State Aid policy in close cooperation with the Member States, foreign subsidies are not geared toward achieving common goals. In this regard, the Regulation allows the EU to address distortive foreign subsidies, which may also conceal strategic objectives that differ from or conflict with those of the EU.

The WTO rules, which were created to address the market needs of Western economies, proved inadequate upon its enlargement to countries where the State plays a significant role in the economy. Additionally, the multilateral nature of WTO rules failed to allow agreements on the necessary changes to be reached. Thus, the new Regulation pursues the ambitious goal of restoring fair competition among all EU and non-EU undertakings operating in the Internal Market. This will be done by closing the regulatory gap that did not allow the assessment of market distortions caused by subsidised undertakings. However, it will be crucial to pursue

[812] Regulation (EU) 2022/2560, cit. *supra.*
[813] *White Paper on levelling the playing field as regards foreign subsidies*, cit. *supra*.
[814] Provisional Agreement resulting from interinstitutional negotiations on Proposal for a regulation of the European Parliament and of the Council *on foreign subsidies distorting the internal market*, cit. *supra*.

this objective without producing a deterrent effect on foreign investment, which remains a source of development, employment, and innovation.

As pointed out before, the reactions to the White Paper, from doctrine,[815] from Stakeholders,[816] as well as those immediately following the Commission's proposal[817] and those downstream of the preliminary Political Agreement,[818] have highlighted the innovative scope of the Regulation, albeit with different nuances.

At the same time, because of its innovative nature, the Regulation has raised many legal questions that will only be clarified in its application practice and following the adoption of the implementing acts under Article 47 and the guidelines under Article 46.

The analysis carried out in the previous Chapters allows some final remarks.

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[815] Among the most significant comments in the aftermath of the *White Paper on foreign subsidies* include Lorand Bartels, *Does WTO law really not regulate 'foreign subsidies'?* cit. *supra*, Csongor Istvan Nagy, *Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?* cit. *supra*, Nuno Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, cit. *supra*, Luca Rubini, *Segni dei tempi: unilateralismo o cooperazione? Riflessioni su alcuni recenti sviluppi nella politica commerciale dell'Unione europea*, cit. *supra*, Victor Crochet and Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, cit. *supra*.

[816] Stake-holder positions on the White Paper that have been allowed to be made public are available at EC, Competition policy, cit. *supra*.

[817] Among the most significant comments following the Commission's presentation of the foreign subsidies' proposal include 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?* cit. *supra*. Manjiao Chi, Marc Bungenberg, Andrea K. Bjorklund, *Asian Yearbook of International Economic Law 2022*, at 149-193, cit. *supra*, Jan Blockx, *the proposal for an EU Regulation on foreign subsidies distorting the internal market, how will it impact corporate concentrations and acquisitions?* cit. *supra*, Andreas Haak and Barbara Thiemann, *Fostering Tech Sovereignty with a Level Playing Field on State Aid and Foreign Sub*, cit. *supra*, Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, cit. *supra*, Luca Rubini, Transcending *territoriality: Expanding EU State Aid control through consensus and coercion, cit. supra*, Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, cit. *supra*, Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, cit. *supra*.

[818] Among the most significant comments that followed the approval of the provisional political agreement between Parliament and the Council, see Carolina Dackö, Charlotta Brodin and Alice Arlebo, *The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application, cit. supra*, Wolfgang Weiß, *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*, cit. *supra*, Till Müller-Ibold, *The Draft Foreign Subsidies Regulation – Relationship with other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts*, cit. *supra*, Patricia Trapp, *The Procedural Framework of the Proposal for a Regulation on Foreign Subsidies Viewed from a Common Commercial Policy Perspective*, Simone Ritzek-Seidl, *The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreement*, cit. *supra*.

While aimed at protecting the Internal Market, the Regulation should not be framed in a purely defensive logic. It testifies, in fact, to a change of pace of the EU, which has been indifferent towards FDI control for decades and can now respond to the protectionist activism of third countries such as the United States and China.

The new Regulation places in logical consequence, not only in terms of time, with the FDI Regulation, albeit these two instruments profoundly differ. The FDI Regulation aims to protect critical infrastructures and technologies under the principle of European technological sovereignty. Instead, the Foreign Subsidies Regulation embodies the will to go beyond the strengthening of European technological sovereignty. The new Regulation is, in fact, an expression of the principle of open strategic autonomy, that is, the EU's ability to act without dependence.[819] The EU not only wants to preserve itself but also to become more competitive in the global market. Therefore, the need to strengthen technological sovereignty is accompanied by the necessity to pursue its strategic autonomy. These two concepts are distinct yet essential to each other.

Sovereignty implies strengthening the EU's ability to use and develop technologies to protect its integrity and security and that of the Member States. With the Foreign Subsidies Regulation, the EU reaffirms its sovereignty in an ever-changing world where global economic competition is increasingly fierce. In doing so, it does not change its distinctive open market character but supports it with new instruments that promote its or its Member States' strategic interests. Hence, the EU reasserts its centrality in international economic policy. In the face of protracted negotiations for the modification of multilateral norms, it reiterates a simple principle: those who want access to the Internal Market must adapt their conduct to European principles and standards. In this regard, the EU is internationally exerting its pressure to facilitate the conclusion of negotiations on the modification of multilateral agreements and, thus, fulfil the mandate contained in the GATS.

Furthermore, the decision to centralise the entire investigation and evaluation process in the hands of the Commission testifies to the EU's willingness

[819] Council of the European Union, Brussels, *Council Conclusions*, 14 November 2016, 14149/16, cit. *supra*.

to maximise the lessons learned from the experience of the FDI Regulation. According to the latter, the EU can only advise through an opinion the governments of Member States on how to proceed about transactions that occur within their borders and affect public safety and order. The FDI Regulation leaves it up to the Member States to decide. Provided they give their reasons, they may, in fact, also act contrary to the opinion since national security remains the sole responsibility of each Member State under Article 4 TFEU. Therefore, FDI control and its concrete application remain in national governments' hands.

On the contrary, the Foreign Subsidies Regulation focuses all three instruments of investigation on the Commission, from the prior authorisation for major concentrations and bids in public procurement procedures above a certain threshold to the more general *ex officio* one.

The difference between the two frameworks is that the protection of national security and public order falls within the exclusive competence of each Member State under Article 4 TFEU. Therefore, under the FDI Regulation, the EU can only alert the Member States through an opinion about security risks. However, the choice of measures to be taken in practice is left to the autonomous decision of the State concerned, which remains the sole party responsible for adopting the final act. Moreover, the rules on FDI control are only justified when overriding interests of a strategic nature are at stake since these rules derogate the principles of economic liberalism that have always inspired the EU policy. Therefore, only the Member States can assess these interests in concrete terms.

In contrast, in the Foreign Subsidy Regulation, the EU relies on its exclusive competence under Article 207 TFEU. In this case, it is the Commission that takes the final decision. Moreover, decisions taken by the Commission under Article 41(1) of the Regulation are addressed directly not to States but to undertakings. Even under Article 41(3) of the Regulation, when the contracting authorities are the addressees of the implementing act that prohibits the award of a contract, the final addressee is always the undertaking. In this case, the Member State merely implements the decision taken by the Commission, and the Regulation does not provide for the possibility of the State not complying, even giving reasons. The interest of the EU and the Internal Market prevails over that of each Member State.

As the procedural participation of the Member States is not specifically regulated, the Commission's decisions can only be challenged before the ECJ under Article 45 of the Regulation. However, it is unclear whether the disagreeing Member State has the power to appeal.

Moreover, because of the centrality of the Commission, the Foreign Subsidies Regulation is better suited to consider slow-burning risks compared to the FDI Regulation. These risks are those related to the possibility that some recurring transactions will create long-term dependency links in the Internal Market with some non-EU powers. The incisive powers conferred on the Commission also suggest further reflection on the risks of excessive discretionality that could result in regulatory uncertainty.

Be that as it may, although introducing new rules to ensure a level playing field and greater transparency has generally been welcomed, the most sensitive issue will be how the new rules will be implemented. In particular, the Regulation does not clarify what role will be left to the Member States. For instance, it is uncertain if they will only have the power to report on any distorting foreign subsidies or whether they will be able to interact with the Commission by adopting an opinion on transactions carried out in other Member States, as is the case under the FDI Regulation. Nor are the relationships between the antitrust authorities of the various Member States and the Commission clear concerning foreign subsidies in merger proceedings.

The European Commission will then have to consider that the Foreign Subsidies Regulation is an offspring of the WTO system, like the EU State Aid framework, and should, thus, be seen as a hybrid instrument drawing on both experiences. Regardless, despite much of the procedures and timelines of the Regulation being reminiscent of those for State Aid and concentrations, the problems addressed by the Regulation are different.

The EU must demonstrate that it can rapidly develop new methods of assessing foreign subsidies' positive effects, distortions, possible comparative benefits, and new approaches to commitments and remedies. When a transaction comes under scrutiny, the Commission must identify financial contributions from third countries in any form. It must determine whether such contributions can be

considered foreign subsidies, i.e., whether they benefit an undertaking operating in the Internal Market. If so, it needs to assess whether they are distortive in light of their purpose, nature, amount, product and market of reference.

Ultimately, the Commission will have to examine the possible positive effects of the subsidy received. Balancing its negative and positive effects will play a significant role in the effectiveness of the Regulation. In this regard, it is certainly true that the Commission has extensive experience in analysing the compatibility of State Aid and, specifically, in assessing its positive and negative effects. However, it will have to confront the fact that some established criteria taken as the basis for compatibility with the EU State Aid framework will not necessarily apply to foreign subsidies.

The Commission will need much flexibility to balance the negative consequences of the distortion with the favourable effects on the growth of the market's subsidised undertaking and other more general positive effects. Indeed, when third countries subsidise their undertakings, they do not necessarily pursue the economic development of the Member States or the Internal Market. Rather, they might do so only for commercial reasons. A strict application of this condition could, in fact, systematically lead to a negative outcome in the balancing test.

Certainly, the balancing criteria used in the EU State Aid framework will provide valuable guidance, but more is needed. The challenge for the Commission will be to draw not only on the ECJ jurisprudence but also on the WTO one – which is closer to the sensibilities of third countries – in light of precise, non-discriminatory, and proportionate criteria. The hope is that the guidelines adopted under Article 46 of the Regulation will also stay within the market's needs.

Not all legal issues in this long journey have been resolved, starting from the relationship between EU instruments and the WTO system. The effectiveness of the new Regulation will be determined by the Commission's interpretation of the enforcement practice under Article 44 on the relationship with other EU instruments. In this regard, the reading of Article 44 is clear concerning the provision in paragraph 5, which provides that the Foreign Subsidies Regulation prevails over Regulation (EU) 2016/1035 on the defence against injurious pricing practices in the sale of ships. However, the issue gets more complex regarding the

provision in paragraph 3, which states that the new Regulation is without prejudice to the application of the FDI Regulation. Article 44 does not clarify, in the event of a conflict with the FDI Regulation, which of the two measures may be considered to prevail, also in light of the Member States' exclusive responsibility for the protection of national security under Article 4(2) TFEU and the protection of essential security interests under Article 346 TFEU. Moreover, Article 44 does not state whether findings from FDI proceedings may constitute elements for assessment in foreign subsidy proceedings. It does not specify whether, based on evidence gathered in proceedings under the FDI Regulation, it will be possible to initiate *ex officio* proceedings under the Foreign Subsidies Regulation.

It will then need to be ensured that the implementation of the new Regulation is not undermined by claims of violation of WTO rules or other bilateral free trade agreements concluded by the EU. The EU legislator, by inserting Article 44(9), demonstrated to be aware that when different rules apply to the same case, legal uncertainty ensues. Thus, it made clear that the implementation of the Regulation must comply not only with EU Law but also with the WTO agreement and the commitments under other trade and investment agreements to which the EU or the Member States have acceded. Nonetheless, it will still be necessary to clarify the scope of the abovementioned provision.

Furthermore, Article 44(9) of the new Regulation prohibits any measure or investigation contrary to the EU's obligations under international agreements as well as taking measures against a subsidy granted by a third country member of the WTO under Article 32(1) of the SCM Agreement. Hence, it will be imperative for the Commission to assess the specific provisions of each international agreement on a case-by-case basis. The Commission must determine whether the relevant agreement contains any unique standards or distinctive procedural requirements for controlling subsidies that would prevent the Regulation from being applied. It will need to adopt interpretative criteria that limit as much as possible any conflict with the SCM Agreement and the WTO Anti-Dumping Agreement, which could have worrying consequences for the EU export-oriented industries. In this respect, it remains to be seen how the Commission will practically interpret Article 44 of the new Regulation.

A final consideration. The newly introduced regulatory framework has enormous potential. However, in addition to the interpretative and enforcement problems highlighted above, its limitation lies in the excessive administrative burden posed on undertakings, which will have to carefully monitor foreign subsidies received to assess whether they fall within the scope of the Regulation. This information is necessary to determine if a transaction falls under the notification thresholds for concentrations or public procurement procedures and if the Commission can initiate an *ex officio* investigation.

Therefore, monitoring foreign subsidies will be relevant for undertakings. The first measure to come into effect will be the *ex officio* investigation of foreign subsidies received in the last five years, albeit regarding only Internal Market distortions after the Regulation entered into force. Undertakings will then have to implement internal procedures regarding subsidies received, which are essential to pass a compliance audit by the Commission.

Given the broad definition of foreign subsidies under Article 3 of the Regulation, the data collection is likely to be onerous. Indeed, the financial contributions to be monitored could include loans, guarantees, investments – even through sovereign wealth funds – and tax breaks granted to an undertaking in the past three years. In addition, any reporting requirements will necessitate information on the foreign financial contributions that the undertaking has benefited from over the past three years. Thus, undertakings will need to assess whether these financial contributions have been made on market terms, possibly with the help of independent expert opinions.

In light of these considerations, the Commission needs to anchor its powers in clear and transparent mechanisms and promptly adopt the implementing acts under Article 47 of the Regulation. These include the form, content and procedural details of notifications, the transparency requirements, detailed rules for calculating procedural deadlines and for proposing commitments, and making efforts to limit the administrative burden of notifying parties. Undertakings should also be aware that the timeframes for approvals under the new Regulation will need to be added to the growing list of suspensive regulatory conditions and be prepared to consider the timing of negotiations.

Despite its ambitious aims, the Foreign Subsidies Regulation is bound to generate some uncertainty, at least once its provisions are implemented and tested by the Commission. The latter, aware of the many open issues, stated in the trialogue that it intends to develop the guidelines within a year of the publication of the Regulation and set three years as the maximum time. In the meantime, it will be interesting to see how the Commission will select the first cases for further consideration starting 12 July 2023.

III. ANNEX: INTERVIEWS

As a valuable complement of this study to acquire a more effective assessment of the issues touched by the Regulation, some interviews have been conducted to gather points of view of experts in charge of tasks related to the topic at stake both at the EU and National level.

In particular, on the relationship between Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market and Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, the opinion of Marion Chulia, a member of the DG Trade Department of the EU Commission, was obtained.

The opinion on Regulation (EU) 2022/2560 was also acquired from Zeno D'Agostino, President of ESPO – the European Sea Ports Organisation and the Port System Authority of the Eastern Adriatic Sea Ports of Trieste and Monfalcone, Paolo Signorini, President of the Western Ligurian Sea Port System Authority, and Vincenzo Garofalo, President of the Central Adriatic Sea Port System Authority.

Thanks to Marion Chulia, Zeno D'Agostino, Paolo Signorini, and Vincenzo Garofalo for their availability and the interviews they kindly granted me.
Given that these are still the initial stages of the Foreign Subsidies Regulation and that only the practical application will allow a better understanding, the answers given do not commit the EU Commission and only constitute personal opinions on the future application of the Regulation.
Similarly, the answers given by the Presidents of the Port Authorities do not commit the relevant administrations but only constitute personal opinions of operators in the sector.

1. European Commission, DG Trade, Marion Chulia

Are there any interactions between Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market and Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into

the Union? How is Article 44(3) of Regulation (EU) 2022/2560 to be understood, according to which "*This Regulation is without prejudice to the application of Regulation (EU) 2019/452*"?

First, we are looking at two different assessments, Internal Market distortions for Foreign Subsidies and security issues for FDIs. The "*without prejudice*" means that it will depend on which framework will be applied first, whether FDI or Foreign Subsidies. One should find a way to make them compatible and not conflicting in case both disciplines assess the same case. This expression precisely represents the balance to be found. It could very well be that the FDI screening is completed before assessing foreign subsidies. It depends on when the parties will submit the case to the national authority.

Indeed, States only boast a small margin of movement to stop the clock on FDI screening. So, if a Member State finishes the FDI screening first, foreign subsidies must be considered. If a Member State realises an FDI screening under the coordinating role of the EU Commission under the cooperation mechanism, the Commission will also have to consider foreign subsidies. So, there will be many issues to solve in that respect.

If there is a conflict between these frameworks, which one can be considered to prevail, considering the exclusive responsibility of Member States for the protection of national security under Article 4(2) TEU and the protection of essential security interests under Article 346 TFEU?

I do not have the view of the Commission on this matter. For sure, there is the exclusive competence of the Member States for essential security interests and the exclusive competence of the Commission for trade matters. The FDI Regulation is based on the TFEU. Also, one must remember that what the Commission will do on foreign subsidies will be binding, differently from what it is doing under the cooperation mechanism, which is not binding.

These are complex legal issues, and it will take time for these to be fully settled. Some cases might exist, but it takes work to predict them. This theoretical approach may be invalidated or confirmed by practice in the upcoming months. Single-source suppliers may be an interest. Indeed, examining whether the acquired

undertaking is the only one providing certain services or products could be relevant. This type of consideration applies in competition assessments and market distortions, where tensions would arise.

Does the information gathered in the application of Regulation (EU) 2022/2560 constitute evaluation elements on public policy and security under Regulation (EU) 2019/452?

The FDI screening will start first, then the assessment under the foreign subsidies' framework, but it is premature to say it. The information received under the cooperation mechanism on FDI screening can only be used for FDI screening. The Commission cannot use any information received under the FDI screening, which is confidential, for other purposes.

Based on the evidence gathered in a proceeding under Regulation (EU) 2019/452, is it possible to initiate an *ex officio* proceeding under Article 9 of Regulation (EU) 2022/2560?

The information received for FDI screening can only be used for the purposes it was transmitted. Therefore, if the Commission receives information from the Member States, it can use only them for the FDI assessment. The Commission can open *ex officio* cases, and it is sufficient to have information from the media without needing to demonstrate where it got the information. Legally speaking, Article 10(1) of the FDI Regulation states the "*information received as a result of the application of this Regulation shall be used only for the purpose for which it was requested*".

Are there margins for procedural cooperation between the enforcement authorities applying the two Regulations?

There will be a margin, and some practices in the enforcement will need to exist. Indeed, if a Member State asks for mitigating measures under the FDI screening procedure, it can impact the foreign subsidies' decision and the other way around. Therefore, I guess there will be a margin for cooperation enforcement, but at the current stage, it is premature to say how it will be structured.

How can the authorities cooperate within their respective proceedings, since the Commission is the enforcement authority under Regulation (EU) 2022/2560, while Regulation (EU) 2022/452 is enforced according to the cooperation mechanism?

There is a network of competition authorities coordinated by the DG COMP. There could be bridges with the framework on FDI screening under the cooperation mechanism, but this still needs to be implemented. These bridges will be set step by step through practical cases. Implementing this framework for the Commission and the national authorities would be challenging since the existing mechanism is already complex. Once this Regulation is fully in place, the matter will become even more complex. Therefore, it will be a challenge for all of us, but I look forward to it.

2. Port System Authority Presidents

2.1. Zeno D'Agostino, ESPO – the European Sea Ports Organisation and the Port System Authority of the Eastern Adriatic Sea Ports of Trieste and Monfalcone

On November 28, the European Parliament approved the new Foreign Subsidies Regulation, which will also apply to the maritime port sector. What will be the impact of the Regulation on this sector, in which international players have always played a role? Which will be the most exposed?

The Regulation applies to so many sectors. Until now, we have had national legislation that is a bit stricter than EU legislation, which provides for Golden Power analysis and investments made by European entities, not only from third countries. In the processes related to Golden Power, the Commission also involves other countries in certain national investments. This is quite interesting but critical because it can happen that in a Golden Power analysis of a single country, there is no kind of injury to the interests of the affected state. Nevertheless, because we are in a globalised world today, the acquisition by a third country of a company or a major stake in an Italian company can harm the interests of another EU country.

This happened, for example, between France and Germany in the case of a technology acquisition of a company entering the German defence supply chain, even though it was French. The French did not detect any problem in the third-party acquisition, while the Germans objected. However, the current Golden Power legislation does not provide for any strong action on the part of the EU other than an opinion. Certainly, going against the Commission's opinion is undesirable, but it is an opinion.

Instead, the new legislation on foreign subsidies could create problems. We instinctively think of the Chinese state-owned entity coming to Italy and investing, but it will involve every third nation, not only China. I pointed out at the European level that, apart from the classic countries that need to be watched, with the discipline on foreign subsidies, there may be problems regarding Italian ports that are participated in by third nations companies. PSA, the largest container terminal operator in the world, is an entity that Singapore's sovereign wealth fund owns, and it has various activities in Italy. MSC has recently acquired the Livorno container terminal, and in Trieste, it is moving from 50% to 80% ownership of the container terminal.

If we take all these situations and extend them at the European level to other more sensitive sectors than ports and logistics, a worrisome situation opens up. This will not be easy to manage and could also be politically governed. There could be situations where companies or acquisitions could be investigated that come from certain countries with which you do not have good relations. This would open dangerous scenarios because sanctions may involve restoring the previous situation, which is not always easy.

It won't be easy to assess the benefits these transactions between companies (which are not necessarily of public origin but can also be private companies enjoying advantages obtained in third countries) can bring. There is a great deal of Commission discretion in the discipline. I understand that it is a historical moment when you have to raise the barriers a lot; however, this discipline seems very strong.

Do you think that the mechanism identified by the Commission generates too much administrative burden?

While I find the prior discipline very interesting, this one seems invasive and, for that reason, difficult to apply in today's economy.

Does the notification mechanism in the new Regulation risk blocking foreign investments in the sector?

I believe not. We have to frame what is happening in a new global view of logistics. Today logistics chains are short and very different from what we had until two or three years ago when globally, they were perfect. Before, we could afford to move to any country or concentrate on a few countries for much of the production. However, Covid-19 has changed everything. Today we also see the logic of competitive repositioning of territories that previously mattered much less. For example, Turkey is increasingly gaining a key role because there is a tendency to shift activities to countries that do not create geopolitical problems. For instance, China is on the other side of the war and cannot be considered a friendly partner. So, a long wave of investment still refers to an old logistical view of the world.

In contrast, new investors will be closer to us, such as Turkey and Morocco, countries in the Mediterranean area. Investors will follow the rules that exist. Therefore, I am not afraid of a decrease in future investments, but the disruption that might occur on the investments that have already been made.

The balancing mechanism also allows for evaluating interests that are not only European. How should it be structured?

It is not easy to assess European interests because Europe is not a single entity with the same interests. Even just looking at Western Europe, the interests of France, Germany, and Italy diverge, and Germany has some less Atlanticist attitudes than our view. So the question is, what are the European interests? The problem escapes this specific case and is overall. There is no Europe with a unanimous and unambiguous vision concerning certain needs. We think about Chinese investments in Italy, but also the US, Switzerland, and UK, for example, are third countries, and there are already existing relations with these countries. A huge step forward has been taken, and some steps backwards could follow.

The Commission can examine *ex officio* foreign subsidies granted in the previous three years from the time of investigation, provided they alter competition in the next three. Do you think it creates a mechanism of uncertainty?

We are already in a situation of overall global upheaval, and this is an artificial disruption that creates additional problems. We will see how the new framework will be applied. Much certainty that the Commission has today about the application of the Regulation may waver when it is applied in a few months. In any case, very qualified facilities are needed, and they are not easy to find. The numbers we have heard need to be revised compared to the issues to be addressed.

Port System Authorities will be contracting authorities: they will conduct tenders and concession procedures where these Regulations apply. How are you preparing for this?

Because we have yet to reach the implementation stage, it is premature. Already the previous legislation was little known, and the fact that the government of a State has 72 hours to notify Brussels of the possible transfer of quotas to third-country entities was not that well known. Many people thought the analysis under the Golden Power framework at the national level was sufficient. Of course, we will do whatever is necessary to implement the discipline.

Another issue is the relationship between Foreign Subsidies Regulation and FDI. Port infrastructure is critical infrastructure, so how will the two instruments dialogue?

The previous instruments are more applicable because they provide fairly certain timeframes, as in the case of the FDI framework, which implies an opinion from the Commission. Regardless of whether it is an opinion, it still has its force. Indeed, States cannot pretend anything and bypass an opinion from Brussels. So, the two disciplines are complementary. However, I have great doubts about the feasibility of the new Regulation.

2.2. Paolo Emilio Signorini, President of the Western Ligurian Sea Port System Authority

On November 28, the European Parliament approved the new Foreign Subsidies Regulation, which will also apply to the maritime port sector. What will be the impact of the Regulation on this sector, in which international players have always played a role? Which will be the most exposed?

In the past decade, there has been an impressive acceleration of foreign investment in the EU. I give a trivial example: Genoa has four ports of call (Vado Ligure, Savona, Pra', and Sampierdarena). In Vado Ligure, there is COSCO and Maersk; in Pra', there is Singapore Port Authority (PSA); in Sampierdarena, there are MSC and Hapag Lloyd. This Regulation addresses more than half of the operators in our ports of call. We have a port system where the presence of foreign operators affects us quite substantially.

On procurement, on the other hand, I see a certain shyness on the part of foreigners. We have a major infrastructure investment program, we put several projects out to tender, including the new breakwater, but quite a few foreign companies have participated.

Do you think that the mechanism identified by the Commission generates too much administrative burden?

We are talking about six months for notification operations and 120 days for procurement. These are not immediate times, and I saw a somewhat aggressive intent of the Regulation. With these timeframes, the goal is to put the magnifying glass on certain transactions until approval is obtained. In terms of administrative burdens, the Commission has broad investigative powers, so we will have to see what happens. However, these procedures must avoid creating operator uncertainty.

Does the notification mechanism in the new Regulation risk blocking European investment in the sector?

On mergers and procurement, no, because they work well. A third-party company that participates in a tender is already aware of the limitations of the

tender, and I am more concerned about the timing than the uncertainties. On the other hand, the situation is more complicated in non-merger transactions that might be subject to notification.

The market has an incredible imagination. Collaboration can start with a partnership on a residual aspect, such as developing technology or commercial on a particular product. These partnerships could appear insignificant, but they could pave the way to important strategic and international security issues, such as security-related technologies like airport scanners.

The balancing mechanism also allows for evaluating interests that are not only European. How should it be structured?

This is the part that concerns me the most. The balance is remarkably interesting, and the Commission could be more inclined to grant the green light to operations that can bring great benefits. Countries with greater bargaining power could lobby to positively steer the Commission's assessment; this is the typical framework where European industrial policies are conceived.

The Commission can examine *ex officio* foreign subsidies granted in the previous three years from the time of investigation, provided they alter competition in the next three. Do you think it creates an uncertainty mechanism?

This is already used, for example, in Italian conflict-of-interest legislation, so extending this mechanism in other regulatory environments is fine.

Port System Authorities will be contracting authorities: they will conduct tenders and concession procedures where these Regulations apply. How are you preparing for this?

We will study and better understand the Regulations. The turnover thresholds of 200 million euros would certainly be considered for tenders in the Port of Genoa above this amount. Nevertheless, we have not had any foreign entities in the tenders. I need to understand how the turnover mechanism works; probably, the Commission will only look at the part of the tender related to the workings. On

transactions such as mergers, the acquired company must be above 500 million euros in turnover.

The largest terminal in Genoa produces 200 million euros in turnover, but it is part of a corporation that produces more in Europe. We need to understand how these thresholds work. We will have a lot to work with if they are to be interpreted broadly. There will be much work in notifications, where we have to see which is the acquiring and acquired company. The Antitrust Authority is now screening many transactions. Because of the extreme complexity of the giants operating in this sector, applying the Regulation is more complex.

You will be responsible for forwarding notifications from foreign companies wishing to participate in tenders to the Commission. Do you imagine a lengthening of the time of the procedures?

That is for sure. For example, if the Commission receives a notification regarding a COSCO's participation, it will be obliged to ask the Chinese authorities whether it has made any subsidies. This does not seem to be a procedure with a brief timeframe.

Another issue is the relationship between Foreign Subsidies Regulation and FDI. Port infrastructure is critical infrastructure, so how will the two instruments dialogue?

The discipline on FDI or Golden Power is a softer instrument than this. In the Golden Power framework, you can tell immediately if there is a troublesome profile, for example, in security. In this Regulation, on the other hand, the focus is on market distortion, and there are so many ways to subsidise. This Regulation can give the Commission a particularly powerful weapon.

Regarding COSCO's recent takeover of the Port of Hamburg, under the transitional rules of this Regulation, can the Commission-which has spoken out against it-can it, review the case?

The Commission will keep this operation under the magnifying glass. It will ask for information to check its powers because this is not a current merger.

However, it will want to know if there is a growth of powers through shareholders' agreements, so it will reserve the right to intervene should COSCO increase its influence.

2.3. Vincenzo Garofalo, President of the Central Adriatic Sea Port System Authority

On November 28, the European Parliament approved the new Foreign Subsidies Regulation, which will also apply to the maritime port sector. What will be the impact of the Regulation on this sector, in which international players have always played a role?

The Foreign Subsidies Regulation is an important act to enable EU companies to compete in the European Market on an equal footing with third-country companies supported by public subsidies, the impact of which was until now difficult to assess. On the other hand, as with all innovative legislation, it will be important to monitor the impact of the legislation from the standpoint of opening up the European Market and the bureaucratic burdens associated with investment operations.

The port, infrastructure, and logistics sectors will be areas where this Regulation can deploy its benefits and identify potential limitations, given the strong propensity for vertical integration and the progressive reduction in the number of active market players globally. Given these sectors' strategic nature, the possible interaction between foreign subsidy control mechanisms and Golden Power Regulation to protect national and EU strategic assets will have to be assessed.

Which will be the most exposed?

Some indications about the possible impacts of the Regulation can already be inferred from the preparatory documents that accompanied the approval process of this act. Unsurprisingly, examples cited by the preparatory documents include cases related to the construction and operation of infrastructure and means of

transport and the energy sector. These areas, along with vertical integration in freight logistics and the management of facilities related to the energy sector, are potentially impactful in the development activities of Italian and European ports of call.

Do you think that the mechanism identified by the Commission generates too much administrative burden? Does the notification mechanism in the new Regulation risk blocking foreign investments in the sector?

These are aspects of the Regulation that only practice can confirm. The main purpose of the Regulation, which is to ensure that third-country firms do not benefit in the European Market from operations outside the EU Market, should be kept in mind. This is an advanced interpretation of the EU State Aid framework, which is necessary for increasingly global markets but is characterised by different rules. In applying the Regulation and combining the different Regulations related to foreign investment in different sectors, the correct balance will have to be found to maintain the competitiveness of the European Market.

Port System Authorities will be contracting authorities: they will conduct tenders and concession procedures where these Regulations apply. How are you preparing for this?

The State Aid discipline is already one of the aspects being analysed in the abovementioned procedures. The application of the Regulation may impact the expected duration of the procedures, given the possibility of various stakeholders reporting potential foreign subsidy situations that distort competition. The Regulation has some safeguard mechanisms, as in Article 9, but it will be the Commission's practice to highlight possible critical issues and uncertainties that could be market-distorting.

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