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The Definition of Foreign Subsidy in the Foreign Subsidies Regulation

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TABLE OF CONTENTS

INTRODUCTION

In his Report on the "Future of European Competitiveness" (the Draghi Report), Mario Draghi stated that "the era of open global trade governed by multilateral institutions looks to be passing, and the EU's trade policy is already adapting to this new reality".[1] One of the central instruments functional to such adaption is the Foreign Subsidies Regulation (FSR or the Regulation),[2] which aims at "levelling the playing field", the conditions of which are altered by foreign subsidies. What is more, such subsidies are not caught by either of the two most advanced systems of subsidies control: State aid, pursuant to, Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) and the World Trade Organization (WTO) rules contained in the Agreement on Subsidies and Countervailing Measures (ASCM).[3] The FSR therefore aims at bridging this "regulatory gap".

As is predictable, the Regulation – being an instrument with far-reaching consequences, introducing a series of novel and burdensome obligations on every large undertaking wishing to actively participate in the economy of the internal market – has stirred notable interest in scholarly circles. Given this interest, it is surprising that the *definition of foreign subsidy* has not yet been the object of more extensive studies. Indeed, the notion is of self-evident importance. Understanding precisely which measures meet the requirements set out by Articles 3-6 FSR, and thus are a prohibited foreign subsidy, is the gateway for the application of most of the Regulation's provisions. Under this light, it is not an overstatement to say that correctly interpreting the notion, its nuances and complexities, is the "true north" on the compass of the FSR, without which any other analysis of the Regulation would be lost, unable to orient itself, or make sense of its surroundings. In this dissertation, we aim to (hopefully) contribute at bridging this gap.

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[1] Mario Draghi, The future of European competitiveness: a competitiveness strategy for Europe (2024), 16.

[2] Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market [2022] OJ L330/1 (FSR).

[3] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

However, this is no easy task. Indeed, all definitions of subsidies present in other areas of the law are nebulous and hard to grasp. As Professor Snape said in the context of the WTO rules on subsidies "the definition of a subsidy, and even of a trade-affecting subsidy, is essentially arbitrary and differs according to perception and political persuasion".[4] This holds true even in relation to the FSR, which is a legal instrument hugely influenced by political motivations, as Draghi's statement makes clear. However, such nebulosity and arbitrariness do not mean that a general understanding of the elements that form the definition of foreign subsidy is impossible; it just requires a more extensive understanding of the general context surrounding the principal object of our analysis – and some *creative* leaps.[5]

To achieve this goal, chapter 1 focuses on providing the foundations for a coherent application of the three principal methods of interpretation applied in the European Union: teleological, textual and systematic interpretation. First, for an effective use of teleological interpretation, we consider not only the declared objective of the Regulation, "levelling the playing field", but also the wider context from which the Regulation is born from, that of (open) strategic autonomy, which illuminates the political considerations that led to the Regulation's adoption. Second, we lay the groundwork necessary for a comprehensive textual analysis of the provisions defining foreign subsidies by tracing the main characteristics of Articles 3-6 FSR and by overviewing the functioning of the three forms of review that the FSR allows the Commission to undertake. Third, we consider the systematic influences of the Regulation. In particular, we focus not only on the way the Regulation may be influenced by other areas of EU law, thus *internally*, but also how it may be influenced *externally*, through the references made by the FSR's key provisions to the ASCM.

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[4] Richard H Snape, 'International Regulation of Subsidies' (1991) 14 The World Economy 139, 163.

[5] As explained by Tullio Ascarelli 'L'idea di codice nel diritto privato e la funzione dell'interpretazione' in Tullio Ascarelli, *Studi di diritto comparato e in tema di interpretazione*, (Milano: Giufré, 1952) p. 189, it would be a vain excercise to negate both the "creative" function of interpretation and its necessity to be, from a dogmatic perspective, declaratory. The duality of interpretation is in fact necessary to maintain both the law's "equity" and to guarantee legal certainty. Cf Benjamin N. Cardozo, *The growth of the law* (Yale University Press, 1924).

After having detailed in chapter 1 the different influences that may affect the interpretation of the notion of foreign subsidy provided by the FSR, chapter 2 focuses on the most relevant of said influences: the notion of State aid under Article 107 TFEU and the definition of subsidy under Articles 1 and 2 of the ASCM. In particular, this chapter provides an in-depth assessment of the elements of such norms that are, in our view, functional to the interpretation of the notion of prohibited foreign subsidy. In particular, we shall not only focus on the way such elements are established *in concreto*, but also on the *ratio* underlying them, so as to understand if these are, in effect, transferrable to the FSR. Needless to say, given the functional nature of this chapter, we shall not dwell on analysing the aspects of Article 107 TFEU and of the ASCM which are not strictly relevant for our purposes.

Finally, in chapter 3 we shall tie together the threads exposed in the previous pages and attempt to provide a thorough understanding of the various conditions that, together, form the notion of prohibited foreign subsidy. In the first part of the last chapter, we shall focus on the conditions necessary for a subsidy to "exist", pursuant to Article 3 FSR. In particular, we shall consider the notions of undertaking engaged in an economic activity in the internal market, of foreign financial contribution, of benefit and of "limitation in law and in fact". Such conditions raise an array of different questions, ranging from their substance to the ways these can be assessed in practice, all while considering the difficulties emerging from the "extraterritorial reach" of the Regulation. The second part of the chapter instead deals with the assessment that foreign subsidies must be subject to for these to be prohibited in the internal market: they must be distortive and have no redeeming qualities.[6] Most notably, we will delve into the intricacies connected to, on the one hand, the methods which must be used to prove distortions and the scope of such assessment and, on the other, the intrinsic uncertainty of "balancing tests".

[6] Csongor István Nagy 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm Shift?' (2023) 57 Journal of World Trade 889, 894.

CHAPTER 1 – FOUNDATIONS OF THE EU FOREIGN SUBSIDY REGULATION: OBJECTIVES, KEY COMPONENTS, AND THE IMPORTANCE OF DEFINING SUBSIDIES

INTRODUCTORY REMARKS

The Foreign Subsidies Regulation (Regulation or FSR) is one of the most important innovations introduced by the EU legislature in recent years. Our main interest regarding the Regulation is, specifically, to discuss the possible meanings that can be given to the fundamental notion of (prohibited) foreign subsidy and, after having done so, to attempt at defining the notion. This is essential not only from a purely academic perspective but, also, from an eminently practical one. Indeed, as will be explained in the coming pages, qualifying a certain measure as a foreign subsidy trigger relevant obligations upon economic operators. Therefore, understanding precisely when such obligations effectively arise (and when, conversely, they do not) is critical.

Defining the notion of (prohibited) "foreign subsidy" in the European Union (EU) legal order essentially, a matter of interpretation. EU law is usually subject to three different types of interpretation: teleological, textual and systematic interpretation.[7] While these different hermeneutical techniques will be applied in chapter 3, where we will finally attempt to determine how the contents of the combined provisions contained in Articles 3-6 FSR must be considered, in this chapter, we will provide the basis for carrying out such an exercise. We will begin our analysis by understanding, in Section 1, the objectives

[7] Koen Lenaerts and José A. Gutiérrez-Fons 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) EUI Working Paper in AEL 2013/9.

of the FSR. We shall first explain where it sits in the wider framework of EU "external" policies, in particular that of (open) "strategic autonomy", so as to be able, then, to consider its specific objectives in a more informed manner. In fact, as with every norm, it is necessary to understand the context in which it has been elaborated so as to guide the interpreter to a result that, while creative, is coherent with the logical consequences of its principles.[8]

In Section 2, we will instead focus on the main provisions of the Regulation itself which will provide us with a foundation to textually interpret the FSR. Moreover, it has the ancillary advantage of anticipating the *composite nature* of the Regulation, which is clear from a cursory reading of its provisions. Being aware of such composite nature is essential for the third part of our analysis, carried out in Section 3. In fact, considering EU law as a whole, the Regulation appears as a hybrid between State aid, Competition and (to some extent) Public Procurement law[9] and, also, (externally) influenced by WTO law. Deciding the role that each of these internal and external influences shall play for the purposes of defining "prohibited foreign subsidies", is an exercise that will be carried out throughout this whole work. However, in Section 3 we will highlight these main influences and try to gain a preliminary understanding of the interpretative problems that stem from choosing one or the others.

1. Objectives and Rationale of the Foreign Subsidies Regulation

1.1. The "creed" of Open Strategic Autonomy, and its various manifestations

Before analysing the declared objectives pursued by the FSR, it is necessary to place the Regulation inside a wider context, that of (open) "strategic autonomy" (hereinafter also OSA). In fact, such context is the fruit of wider political concerns that were instrumental to the decision to adopt the Regulation, which, in our opinion, must be taken into account in its interpretation, if not only for practical purposes. Indeed, such political origins of the Regulation will influence the way it is considered and, consequentially, applied in

[8] *See* T Ascarelli (n. 5), 189

[9] François-Charles Laprévote and Wanjie Lin, 'Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination' (2022) 25 Zeitschrift für europarechtliche Studien, 443.

practice by the Commission and by the EU Courts. While not attempting to divine how the Commission will consider every element of the definition of (prohibited) foreign subsidy, we find it more rational to apply teleological interpretation to the norm by considering also the *voluntas legislator* and not only the *voluntas legis.*[10] Or, at the very least, to be aware of what such *voluntas* is.

To do so, we will first try to define what strategic autonomy is by considering its historical origins and the different pieces of legislation that form a part of it. Even though the concept remains evasive, if not only because it is a product of political marketing,[11] understanding the *aims* of OSA is, in our opinion, sufficient for the purpose of the present analysis. Indeed, since these aims are, as will be shown, in an inherent tension with each other, correctly understanding the precise objective of the FSR requires to balance them with each other.

Historically, the concept of "strategic autonomy" was born as a response to threats of "hard security",[12] but its scope soon broadened coherently with the geopolitical changes of the modern era. This has been exemplarily showcased by Helwig and Sinkkonen, who break down the evolution of the concept in four different "waves"[13], going all the way back to the 1998 St. Malo Declaration[14] between the United Kingdom and France, in

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[10] The difference between the two concept should be clear, one (*voluntas legis*) refers to the interpretation of the law as an autonomous entity, completely detached from the objectives and the motives of those who willed it into being. The other (*voluntas legisaltor*) refers to the interpretation of the law keeping in mind those objectives and motives, *see* T Ascarelli (n. 5), 182. In EU Law there is a clear preference for the latter concept, as can be inferred from Koen Lenaerts José and A. Gutiérrez-Fons *Los Métodos de Interpretación del Tribunal de Justicia de la Unión Europea* (Marcial Pons, Ediciones Jurídicas y Sociales 2023), 68 who explain how "el Tribunal de Justicia debe necesariamente tomar en consideración los objetivos perseguidos por los autores de los Tratados". In our opinion, this approach can be extended, for secondary law such as the FSR, to the objectives pursued by the European Parliament and the Commission.

[11] Cf Matthias Bauer, 'The Impacts of EU Strategy Autonomy Policies: A Primer for Member States' (2022) European Centre for International Political Economy Policy Brief 09/2022.

[12] Defined as, *inter alia*, a form of security that "involves a substantial ability either to respond with a credible threat or the actual use of military force" in Aleksandar Fatić, 'Conventional and Unconventional - "hard" and "Soft" Security: The Distinction' (2002) 5 SEER: Journal for Labour and Social Affairs in Eastern Europe 93, 94.

[13] Niklas Helwig and Ville Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term' (2022) 27 European Foreign Affairs Review 1, 3.

[14] Franco–British St. Malo Declaration (4 December 1998).

which the "Common Security and Defence Policy" ("CSDP"), was established. In that declaration, in fact, the need for the EU's capacity for *autonomous action* was underscored.[15] The first of these two "waves", the former starting in the 1990s and the latter in the 2010s, as a result of the Arab Spring and of Russia's annexation of Crimea, still closely linked strategic autonomy to the idea of "hard" security. Conversely, the latter two manifestations of the concept are much broader. In fact, during the "third wave", which followed the election of Donald Trump as President of the United States in 2016,[16] the concept of strategic autonomy incorporated elements of "economic security" as well, in relation to, for example, the coercion of the EU in relation to economic sanctions to Iran and, moreover, the rise of "geo-economical" interventions by part of other countries such, as China with its Belt and Road initiative.[17] Finally, the last wave, born out of the COVID-19 pandemic, reiterated the *shift* of the notion of "strategic autonomy" from being concerned only with traditional national security, to addressing its economic aspects. In particular, the interruption of trade flows which followed the pandemic, brought forth a change in the discourse relating to "trade",[18] which stressed the need for the EU to equip itself, if necessary, "with tools to operate in a more hostile international environment".[19] Given the importance and the broadness of the economic sphere, the aforementioned *shift* in the scope of "strategic autonomy" brought it to cover virtually any EU policy with an external dimension.[20]

Together with a wider scope of the notion, the goals of strategic autonomy aimed at were also refined. In fact, as is shown by the wider denomination sometimes given to the

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[15] Ibid. point 2.

[16] N Helwig and V Sinkkonen (n. 13), 4.

[17] Barbara Lippert, Nicolai von Ondarza and Volker Perthes, 'European Strategic Autonomy: Actors, Issues, Conflicts of Interests' [2019] SWP Research Paper, 29.

[18] Cf Thomas Jacobs and others, 'The Hegemonic Politics of "Strategic Autonomy" and "Resilience": COVID-19 and the Dislocation of EU Trade Policy' (2023) 61 JCMS: Journal of Common Market Studies 3.

[19] European Commission and Directorate-General for Trade, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* (Publications Office of the European Union 2021), 12.

[20] Henri de Waele and Najibullah Zamani, '"Nobody Has any Intention of Building a Wall" Some Reflections on the EU's New-Found Assertiveness in the Sphere of Trade and Investment' (2023) 28 European Foreign Affairs Review 397, 402.

concept, i.e. "*open* strategic autonomy", the EU does not aim *only* at enhancing its economic security through autonomy but, also, prioritizes the need to maintain a form of balance with the imperative of strengthening the competitiveness of the EU,[21] thus holding true to its traditional openness to foreign trade and investments.[22] Nonetheless, the relevance given, on the one hand, to "openness" and, on the other to "autonomy", vary depending on the perspective of each Member State: on the one hand, the Netherlands and the Nordic countries prioritize the competitiveness aspect of the concept, while France and Italy (and to some extent Germany) stress the autonomy part of it.[23]

In this context, therefore, the general purpose of OSA and, of the measures forming a part of it, can already be sketched: OSA aims at protecting EU strategic interests, while still holding true to one of its core tenets, that of being an open and liberalized economy. With specific regards to the strategic interests that OSA is concerned with, we have already signaled that, now, these are closely interlinked with "economic security" concerns. However, as can be seen by the different measures that are commonly considered to form a part of OSA, the EU denotes "economic security" in a very broad fashion, considering not only typical business and financial subject matters but, also, *inter alia*, actions addressed at tackling climate change or at regulating technology.[24]

We find it therefore coherent with the introductory nature of this paragraph to provide a general overview of these different interests, and, consequentially, the various policies that have been implemented in safeguarding them. In this sense, the European Centre for

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[21] Cf Paolo Guerrieri and Pier Carlo Padoan, 'The European Union and the Double Challenge: Strengthening Competitiveness and Enhancing Economic Security'(2024), LUISS Institute for European Analysis and Policy, Working Paper 5/2024 , 1.

[22] H de Waele and N Zamani (n. 20), 403 fn. 17.

[23] Pierfrancesco Mattiolo, 'Concordia discors? The Foreign Subsidies Regulation and increased subsidization in the EU under the open strategic autonomy model', in J. Fechter and J. Wiesenthal (eds.) *The Age of Open Strategic Autonomy* (Forthcoming).

[24] For what relates to technology, *see* Josep Borell, 'Why European strategic autonomy matters' (Speech, EU External Action Service, 3 December 2020). Available at https://www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en. For climate *see* European Parliament, Council, European Economic and Social Committee and the Committee of the Regions 'EU External Energy Engagement in a Changing World' JOIN(2022)23 final.

International Political Economy (ECIPE), provided a taxonomy of the various policies that form a part of the overall OSA paradigm, which groups the different interventions under four overarching objectives:

1) The fulfillment of industrial and trade policy objectives through *direct interventions in favour of* EU undertakings, such as increased investing in R&D or industrial modernisation;
2) The correction of market failures *in the EU*: these are primarily linked to environmental issues and ethical concerns related to fundamental rights, in relation to which technological issues appear of primary importance;
3) The correction of market failures related to production and processing methods with an extraterritorial reach, such as value chain production and environmental standards; and
4) Responding to trade measures and behaviours of third countries, such as trade distortive policies.[25]

Many of the most relevant and novel policies of the EU fall under these objectives. For example, without any claim of exhaustivity, under the objective *sub* 1) falls the FDI[26], EU State Aid – and, in particular, Important Projects of Common European Interest (IPCEI).[27] Moreover, many of the recent legislative acts aimed at fostering a "digital single market"[28] fall under the category *sub* 2), together with the Artificial Intelligence Act (AI Act), one of the most innovative regulatory acts of recent years.[29] Also, some

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[25] M Bauer (n. 11).

[26] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79/1.

[27] Also known as 'Important Projects of Common European Interest' are a form of compatible State aid pursuant to Article 107(3)(b) TFEU.

[28]Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1 ("DSA") and Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 ("DMA").

[29] Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139

aspects of the General Data Protection Regulation (GDPR)[30] concerning restrictions to the free flow of data can be subsumed in objective *sub* 3). Finally, more to our point, the last category *sub* 4), concerning responses to behaviours of third countries, is where the Foreign Subsidies Regulation can be inserted.

After having provided this short overview of the goals pursued by OSA and the taxonomy under which policies and legislative acts can be categorized, we can now turn more specifically to the FSR, how *its objective* fits in the larger OSA picture and to what extent does it achieve the two main priorities of OSA: protection and competitiveness. In fact, while it has been noted[31] that, in abstract, these two are inherently tension,[32] OSA should not be understood as denoting "a binary choice between dependence and independence or engagement and decoupling,"[33] but rather as the *balancing* of these two tensions. However, the precise weight to give to each of these tensions is, at the end of the day, a matter of interpretation which, in relation to the FSR, must be pursued considering its *specific* objective and, also, the content of its provisions.

1.2. The Foreign Subsidies Regulation as part of OSA and its objective: levelling the playing field

In this second section, after having gained a better understanding of the origins of the concept and its different manifestations, we will consider the FSR as one of them, considering the more specific causes that brought it into existence. Then, we will consider its objectives in light of it.

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and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) OJ L 2024/1689.

[30] Regulation (EU) 2016/679 the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2017] OJ L119/1.

[31] H de Waele and N Zamani (n. 20), 403.

[32] Cf 'The EU's Strategic Autonomy Trap' <https://carnegieendowment.org/research/2021/03/the-eus-strategic-autonomy-trap?lang=en&center=europe> accessed 11 July 2024, where it is noted that: "The EU remains an open trader and insists it seeks deeper international partnerships, firmer and wider multilateral commitments, and more security engagement; but then it also declares an aim to achieve autonomy from such external factors. The strategy is tantamount to seeking external ties that give the EU more influence over others while diluting those ties that give others influence over the EU".

[33] N Helwig and V Sinkkonen (n. 13), 2.

The FSR falls uncontroversially under the paradigm of "open strategic autonomy". In fact, the "White Paper on levelling the playing field as regards to foreign subsidies",[34] the Commission communication that led to the FSR, specifically mentions, in its first page, that "Europe will pursue a model of open strategic autonomy,"[35] so as to be able to receive the full advantages of global trade. Also, the Commission explained how this would mean "shaping the new system of global economic governance and developing mutually beneficial bilateral relations, while protecting ourselves from unfair and abusive practices".[36]

Specifically, the FSR falls into the second limb of the model envisioned by Commission, as its primary objective is to "complement existing Union instruments with a new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field. In particular, the new tool complements Union State aid rules which deal with distortions in the internal market caused by Member State subsidies".[37] Therefore, in line with the taxonomy provided *supra*,[38] the goal of the instrument is to address distortive behaviours put forth by third countries, in this case through their subsides. This aspect of the FSR was effectively underlined by Mattiolo, who explained how "the FSR is an example of a 'defensive' approach to counter the effects of foreign subsidization, i.e. a policy tool that restores the level playing field by removing the effects of the subsidy".[39]

The necessity of "leveling the playing field", as explained both in the White Paper and in the recitals of the Regulation itself, stems primarily from State aid's law lack of extra-

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[34] European Commission, 'White Paper on levelling the playing field as regards foreign subsidies' COM (2020) 253 final.

[35] Ibid., 1.

[36] Ibid.

[37] Recital 6, FSR.

[38] *See* Ch. 1 Section 1.1

[39] P Mattiolo (n. 23), 13.

territoriality.[40] In fact, public spending by Member States in the Union is limited, with regards to contributions in favour of undertakings, by Articles 107 and 108 TFEU, insofar as State aid is generally incompatible with the internal market,[41] save for the possibility of such measures to be declared compatible under Article 107 (2) and (3). Conversely, since State aid has solely internal application, *third countries* can freely subsidize undertakings operating in the internal market, thus distorting therein.

In truth, such lack of extra-territoriality of State aid rules would not be determining for the creation of an "uneven playing field" if the other principal set of rules on subsidies, the WTO Agreement on Subsidies and Countervailing Measures (hereinafter: ASCM), were considered applicable to foreign subsidies. However, the EU institutions considered this not to be the case[42], and used the ASCM's inapplicability as one of the main reasons to adopt the FSR.[43]

Specifically, as the Commission notes in its White Paper, the provisions of the ASCM are not such as to complement the mere internal application of State aid rules. In fact, in relation to their *object* they apply only to subsidies related to trade in *goods*[44] and, in relation to their *scope* they relate only to subsidies granted by States to firms inside their territory. With specific concern to this latter element, Article 1.1(a)(1) ASCM states that

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[40] Luca Rubini, 'Transcending territoriality: Expanding EU State aid control through consensus and coercion' in Juan Jorge Piernas López, Leigh Hancher and Luca Rubini (eds), *The Future of EU State Aid Law: Consolidation and Expansion* (EU Law Live Press 2023) 120.

[41] Leigh Hancher, Tom Ottervanger and Piet Jan Slot, *EU State Aids* (6th edn, Sweet and Maxwell 2021) 45.

[42] Recital 5, FSR.

[43] In truth, the relevance of foreign subsidies under WTO law is quite contentious in the doctrine (compare, for example, the different stances of Luca Rubini 'Are transnational subsidies regulated by EU and WTO law?: the General Court has spoken (Case T-480/20 and Case T-540/20)', EUI Policy Paper 2023, and of Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60 Common Market Law Review 925). However, because, as we have stated before, we intend to analyse the definition of foreign subsidy while also maintain a sense of practicality, we will assume, at least for now, that the ASCM *does not* apply to foreign subsidies, as this is the way in which the EU institutions interpret the Agreement.

[44] World Trade Organization, 'Expert Group Meeting on Trade Financing – Note by the Secretariat', 16 March 2004, WT/GC/W/527, 5.

a subsidy exists "when there is a financial contribution by a government *within the territory of a Member State*".

The term "*within the territory of a Member State*" has been interpreted as referring to the "financial contribution", so as to indicate where the recipient of the financial contribution must be located[45] and not, instead, to refer only to the "government", so as to indicate that the definition applies only in respect to other WTO Member States. Therefore, foreign subsidies are generally excluded from the application of the ASCM.[46] It is on the basis of these inadequacies of EU and WTO law that the FSR was deemed necessary.

In particular, there are specific issues which the FSR aims at countering. Indeed, until recent years, foreign subsidies did not cause particular concern for Western countries, insofar as they were always considered "humanitarian" in nature, directed *from* western countries *to* less developed ones. However, such a conception gradually evolved, and subsidies have now become a tool to allow governments to enter foreign markets, distorting competition.[47] Such distortive use of foreign subsidies was accentuated by the involvement in other countries' economies of Chinese State-owned enterprises (or "SOEs"), which receive as part of the Belt and Road Initiative, special funding to relocate into third countries.[48] However, the EU's concerns in adopting the FSR were also correlated to heavy subsidization on the other side of the Atlantic. In particular, the United States adopted their "Inflation Reduction Act" (or "IRA") which "contains a wide range of financial incentives with the aim to accelerate the green transition to a low-carbon economy in the USA and to contribute to combat climate change".[49] The Draghi Report, moreover, provides concrete examples of how foreign policies relating to subsidies

[45] Victor Crochet and Marcus Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law' (2021) 20 World Trade Review 348.

[46] Cf Gary Horlick 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures', (2013) 8 Global Trade and Customs Journal 297, 298.

[47] Victor Crochet and Vineet Hegde 'China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement' (2020) 23(4) Journal of International Economic Law 844.

[48] Ibid.

[49] Péter Staviczky, 'The European Answer to the Inflation Reduction Act': (2023) 22 European State Aid Law Quarterly 78, 88.

damage the competitiveness on the internal market. For example, the Report highlights how European industries active in the sector of solar Photovoltaic technologies are disadvantaged at a global level due to the presence of US, Chinese and Indian schemes favoring domestic production. The result is an uneven playing field.[50] Moreover, in the transport sector the presence of targeted public subsidies by other regions, especially China, to vertically integrated or State-owned companies has resulted in dramatically lower pricing that is able to be offered by such companies.[51] This has not only negative effects on competition, but on economic security as well, insofar as it prejudices the autonomy of the ownership and management of European infrastructure.[52]

On the basis of the foregoing, by placing the FSR back under the banner of open strategic autonomy it is clear that the Regulation pursues the twin goals of, on the one hand, autonomy, by protecting the internal market from foreign firms advantaged by subsidization and, at the same time, maintaining its traditional openness and competitiveness, by aiming at achieving a "level playing field" and, thus, welcoming trade into the single market, provided that it is "fair" with respect to its internal conditions.

After having recounted the reasons for which this defensive approach was deemed necessary by the Commission, in the next section, we will consider the presence of other, parallel, "offensive" EU policies aimed at addressing distortive behaviours on trade by third countries. This is particularly important because since these policies are intertwined under the overarching OSA paradigm and, therefore, understanding their relationship will also help us identify more precisely the degree to which openness and autonomy must be balanced by the FSR.

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[50] *See* Mario Draghi, *The future of European competitiveness: in-depth analysis and recommendations* (2024), 130.

[51] *See* ibid., 216 where it is explained in detail how "other regions of the world provide targeted public subsidies, notably to vertically integrated and State-owned companies. The impact of this seems reflected in the pricing offered by foreign competitors benefiting from such support. In the shipbuilding sector, the distortive impact has been particularly acute. Asian competitors can offer prices up to 30%-40% lower than the EU. In the rail equipment and supply sector, Chinese companies offer drastically lower prices than their EU competitors in EU Member States' public procurement procedures".

[52] Ibid.

1.3. Critiquing the objective: levelling-the playing field while relativizing State aid control in the internal market

Indeed, in analysing the objective of the FSR, it is particularly useful to consider the aims of *other* measures implemented by the Commission to achieve the aforementioned "model of open strategic autonomy" in relation to global trade. In this context, we believe that the most relevant set of measures which should be considered concerns what can be widely described as the "relativization" or "relaxation" of the State aid prohibition inside the EU. Such a relaxation aims *inter alia,* to address the issue of foreign subsidization by adopting an offensive approach, facilitating subsidies *inside* the internal market, therefore mirroring the approaches of third countries.

It is here submitted that this more "offensive" approach manifests itself, primarily, in two initiatives: first, the Temporary Transition and Crisis Framework[53] (hereinafter "TCTF") and, secondly, the evolution of the criteria used for assessing the compatibility of "important projects of common European interest" (hereinafter "IPCEI").[54]

These form a part of the "second-pillar" of the Green Deal Industrial Plan[55], which aims at facilitating public spending in areas functional to the green transition.[56] The Green Deal can be uncontroversially brought into the wider paradigm of "open strategic autonomy" as, like we mentioned earlier, the concept of "economic security", which informs OSA, covers also environmental initiatives. Moreover, after the COVID-19 Pandemic, the *revivrement* of the Green Deal was accelerated by considerations other than the sole necessity of facing climate change. In fact, the Industrial Plan is intended as an answer to

[53] Communication from the Commission (C/2023/1188) Amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2023] ('TCTF').

[54] Communication from the Commission (2021/C 528/02) Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [2021] OJ C528/10 ('2021 IPCEI Guidelines').

[55] Cf European Commission, 'The Green Deal Industrial Plan: putting Europe's net-zero industry in the lead' (2023) Press Release available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_510

[56] Valentine Lemonnier, 'The EU Green Deal Industrial Plan': (2023) 22 European State Aid Law Quarterly 123, 126.

two different problems faced from two different sides: on the one hand, it aims at reducing the EU's dependency on foreign energy through the transition to renewable sources. Indeed, the risks of such dependency were revealed by the increase in energy prices that followed the Russia-Ukraine War.[57] On the other hand, it is intended as a response to the US Inflation Reduction Act,[58] as the discriminatory conditions therein threaten to take businesses from the EU, undermining free competition both at the production and the up-stream levels.[59]

An extensive examination of these measures would go beyond the scope of this introductory chapter, especially if considering the need for pre-existing knowledge of State aid law, which we have not yet provided. Therefore, we hope that a cursory glance at the facilitations provided therein will suffice for the purposes of highlighting their relationship with the FSR.

In particular, the TCTF combines two objectives under a single framework: first, a "short-term" objective for the acute crisis following the war in Ukraine and, second, a "medium-term" goal functional to the EU's advancement towards a net-zero age.[60] Aid would be provided, specifically, to speed up the deployment of renewable energy systems, including storage and heating solutions; to reduce carbon emissions in industrial manufacturing processes; and to boost investments in crucial areas of the carbon-neutral economy (such as battery technology and solar panel production). The TCTF made it easier to provide aid for smaller projects and emerging technologies, like renewable hydrogen production.[61] Moreover, the TCTF provides significant simplifications to the

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[57] Ibid.

[58] Christopher Jones 'The net-zero industry act and the reform of the Green Deal state aid rules: a convincing reaction to the Inflation Reduction Act?' (2023) EUI Policy Brief 2023/08.

[59] P Staviczky (n. 48), 80.

[60] V Lemonnier (n. 55), 128.

[61] Cf 'Temporary Crisis and Transition Framework: Dealing with Crisis and Transitioning to a Net-Zero Economy - But At What Cost?' (*Kluwer Competition Law Blog*, 4 April 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/04/04/temporary-crisis-and-transition-framework-dealing-with-crisis-and-transitioning-to-a-net-zero-economy-but-at-what-cost/> accessed 18 July 2024.

compatibility assessment normally conducted under Article 107 (2) and (3) and, also, to the already softer compatibility assessment conducted under the General Block Exemption Regulation[62] (hereinafter "GBER"), which has also been amended in light of the Green Deal Industrial Plan's "first pillar".[63] More specifically, the requirements of necessity, appropriateness and proportionality are all presumed if the specific indications of the framework are followed. For example, "necessity" is always presumed in light of the objective to reduce dependency on fossil fuels and appropriateness is presumed under certain circumstances, depending on if the aid is "investment aid" or "operating aid".[64]

However, the most relevant provision of the TCTF, especially if considering the purpose of our analysis, is without a doubt that provided for in Section 2.8 of the Framework. In fact, paragraph 85 of the TCTF allows aid schemes for investments of strategic importance in the transition to a net-zero economy but subordinates it, inter alia, to the condition that the activity remains in the area concerned (in turn inside the EEA), for a period of five years (or three if it is a SME). Moreover, paragraph 86, in relation to individual aims, gives Member States the possibility of "matching" a subsidy of another country that requires the undertaking to locate a part of its "strategic equipment" outside of the EU (so-called "matching aid") or the amount needed to incentivize the company to locate the investment in the EEA (the so-called "funding gap"), whichever is lower.[65] These provisions aptly show the dilemma the European Commission found itself in having, on one hand to protect the internal market, by applying the EU State aid rules and maintaining a level playing field between the Member States and, on the other, feeling

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[62] Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1 ("GBER").

[63] Regulation (EU) 2023/1315 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty [2023] OJ L167/1.

[64] *See* TCTF, Sections 2.5.1. and 2.5.2. which state that, when investment aid is provided in the form of direct grants, repayable advances, loans, guarantees, or tax advantages, its appropriateness is presumed. The same happens for operating aid , when structured as two-way contracts for difference.

[65] M Bauer (n. 11), 2.

the urgency not to make State aid hinder the competitiveness of EU companies.[66] Said dilemma not only mirrors the tensions immanent to OSA but, more specifically, mirrors the precise objectives pursued by the FSR.

The same can be said for the other part of the Green Deal Industrial Plan's "second pillar" that will be object of our analysis, that is the renewal of the criteria related to the compatibility of IPCEIs. Originally, projects of common European interest were only considered at the Treaty level, insofar as Article 107(3)(b) TFEU states that "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State" may be considered compatible with the internal market. However, not many cases were approved under this provision. In 2014, Guidelines on the criteria for assessing the compatibility with the internal market of aid for such projects were issued.[67] In particular, these explained how (i) aid had to assist in the execution of a (ii) well defined and precise project (iii) which had to be quantitively and qualitatively important, (iv) with a common interest and of benefit to all the Community.[68]

In 2021, with effect from 2022, new Guidelines were issued, which took into consideration the new economic reality that followed the pandemic.[69] In particular the renewed criteria innovated the IPCEI regime under two main directions. First, the new Guidelines aim at fostering an increased level of collaboration between Member States, so as to avoid competition *internally*. This is seen by provisions such as that in paragraph 16 of the Guidelines which modified the definition of "eligible IPCEI", by requiring at least four Member States to participate in a project, while the previous Guidelines only required the presence of "more than one Member State". Moreover, there are relevant

[66] V Lemonnier (n 55), 129.

[67] Communication from the Commission (2014/C 188/02) Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [2014] OJ C188/4.

[68] Ibid., Section 3.2.

[69] Mónika Papp and Róbert Szalay, 'EU Strategic Autonomy and State Aid Control. Case-Study on the Important Projects of Common European Interest' (Law in Business of Selected Member States of the European Union Conference, Prague, 2023) 134.

transparency provisions, so as to guarantee that all Member States have an equal chance at participating in the project. Finally, when considering the negative effects on competition arising from the aid for the purposes of the balancing test, provided for in paragraph 46 the possibility of a subsidy race between Member States is taken in particular account and would likely result in the *incompatibility* of the aid with the internal market.

In the second direction, instead, primary importance is given to EU policy goals, which are linked with the overarching paradigm of strategic autonomy.[70] In fact, the first of the general criteria for identifying the presence of a common European interest is the "alignment of the project with the Union's objectives or strategies" and that its "significant impact on sustainable growth".[71] Also, in line with the taxonomy provided for in *supra*, the correlation of the aid to a specific market failure or a societal challenge is another of these general criteria.[72]

The great success of the new IPCEI regime is easily seen by comparing the number of IPCEIs approved before and after January 2022, which is when the new Guidelines came into effect.[73] In fact, while before 2022 there were just three approved IPCEIs,[74] now there are an additional seven, all approved in the span of just two years.[75] In this context, therefore, an increased recourse to IPCEIs allows, on the one hand, to avoid an internal subsidy war between Member States, by forcing them to collaborate and, moreover, by pooling together the resources of multiple Member States, the EU levels the playing field with respect to foreign undertakings, which are also heavily subsidized.[76] Moreover, it is likely that in the near future the EU will make an even greater recourse to IPCEI, as it is

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[70] Ibid., 139.

[71] 2021 IPCEI Guidelines, para 14.

[72] Ibid., para 15.

[73] Ibid., para 54.

[74] M Papp and R Szalay (n. 68), 138.

[75] Cf with graph provided for in 'Approved IPCEIs - European Commission' <https://competition-policy.ec.europa.eu/state-aid/ipcei/approved-ipceis_en> accessed 21 July 2024.

[76] M Papp and R Szalay (n. 68), 138.

envisioned in the Draghi Report as one of the core instruments for the "revamping" of competition in the EU. Indeed, the Report contemplates the reform and expansion of this form of aid through the introduction of a new "Competitiveness IPCEI", which would be functional to the enhancement of EU industrial policy.[77] In particular, the new tool would (a) widen the scope of IPCEI beyond "breakthrough technologies and the 'global state of the art in the sector' to include industrial (e.g. infrastructure) projects of common interest", (b) make EU funding available, (c) lessen the burden on proposing projects and (d) speed-up their review process.[78]

On the basis of this brief overview of the two initiatives, we believe it clear that both have the same objective of the FSR, that is levelling the playing field in respect to foreign subsidization. In particular, the TCTF does so by facilitating the granting of aid and by giving Member States the unprecedented possibility to "match" foreign subsidies, while the new ICPEI interpretation "unites" Member States resources, allowing the emergence of successful (subsidized) projects that can compete with foreign (subsidized) undertakings. However, despite the commonality of objectives with the FSR, the diverging approaches adopted by these two sets of measures could create tensions. In fact, while the internal measures adopted in the Green Deal Industrial Plan follow an "offensive" approach, insofar as they aim at levelling the playing field through subsidization, the FSR is "defensive", as it at extends State aid law externally. Each of these approaches is, in abstract, sufficient to reach a level playing field and, therefore, applying them cumulatively could have the effect of "dis-levelling" it once more. What would be the purpose of facilitating the granting of State aid internally, so as to counter foreign subsidies, when these are less pervasive thanks to the influence of the FSR?

This final observation should not be intended as a critique of the objectives of the Commission, nor of the ways in which it tries to achieve them. Our goal is merely to see them in light of the *context* in which the FSR sits, so as to better interpret it the definition of "foreign subsidy", the purposes of our work. In fact, if we admit that the FSR's

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[77] Cf M Draghi (n. 49), 301.

[78] *See* M Draghi (n. 49), 305.

objective is to remedy the lack of extra-territoriality of State aid law and, thus, to "level the playing-field", we must make sure that the "playing field" is correctly understood. The internal situation which should be mirrored by the FSR must be the actual one present in the internal marker and not , instead, an idealized, and more restrictive one.

In the following section we will shift the object of our analysis of the FSR from the general framework in which it is posited to the Regulation itself, so as to correctly understand the general structure of the act.

2. ESSENTIAL PROVISIONS AND FEATURES OF THE FOREIGN SUBSIDIES REGULATION

After having explained the objectives of the FSR, while also giving notice to the wider political framework it stems from, we will describe the main provisions of the FSR. Other than serving the already mentioned function of giving us a foundation on top of which to interpret the text of the Regulation this will allow us, first to have an idea of the Regulation we are commenting, by detailing not only the specific elements that form the definition of "prohibited foreign subsidy", but the more "operative" provisions of the Regulation, i.e. those describing the three review tools of the Commission. These are important because they give us a further chance to reflect upon the internal logic of the FSR, thus, in some cases, providing useful elements for advancing our understanding on how "foreign subsidies" are to be interpreted. Also, it will give us a chance to highlight its composite nature, which will be further discussed in the next section (Section 3).

2.1. The relevant provisions for defining foreign subsidies

The bulk of the first chapter of the FSR, after explaining the scope of the Regulation in Article 1 and after providing the definitions of some relevant terms in Article 2, is dedicated to the concept of "prohibited foreign subsidy". In fact, while in truth it is specifically Article 3 that sets forth the requirements for a measure to be qualified as a foreign subsidy, it is only through the subsequent application of Articles 4, 5 and 6 that a foreign subsidy is prohibited[79] and, only then can the Commission take the steps provided

[79] Cf Recital 17. FSR. This is a notable difference with respect to State aid law, where, instead, all aid is prohibited, save the possibility of considering it compatible with the internal market *ex post*.

for in Article 7 FSR[80] or those provided for in Articles 25(3)(c)[81] and 31(2)[82] FSR. The former provision allows this institution to impose commitments or redressive measures, while the latter two grant the Commission the power to prohibit a concentration or the awarding of a contract in the context of a public procurement procedure.

This preliminary clarification is essential, as it will permeate the rest of this work. Were our analysis merely concerned with the "existence" of a foreign subsidy, as provided in Article 3, it would undoubtedly be incomplete, neglecting some of the most important and interesting aspects of the definition. Only through a comprehensive interpretation of Articles 3 to 6 can a correct definition of foreign subsidy be advanced, as it is the only way to appraise in full the distortive effects of a foreign subsidy, thus understanding whether, in light of the FSR's objective, such subsidies should or shouldn't be allowed in the internal market. We shall now overview each of these provisions in turn.

Article 3(1) states that for the purposes of the Regulation, a foreign subsidy exists when the following *cumulative*[83] conditions are met. In particular (i) a *third country* must (ii) provide a *financial contribution* to (iii) an *undertaking* engaged in an economic activity *in the internal market*. Such contribution must (iv) confer a *benefit* which is (v) *limited* in *law* or in *fact* to one or more undertakings or industries. The Regulation expressly clarifies some of the aforementioned concepts.

First, Article 2 specifies that for public procurement procedures the concept of "undertakings" overlaps with that of "economic operators" contained in the EU Public Procurement Directives.[84] For all other cases, instead, in the Regulation the term

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[80] Article 7, FSR.

[81] Article 25(3)(c), FSR.

[82] Article 31(2), FSR.

[83] Recital 11, FSR.

[84] The definition of economic operator, according to the EU Public Procurement Directives (Directive 2009/81/EC 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 defense and security, and

coincides with that provided for in competition and State aid law.[85] The second and third paragraphs of Article 3 instead provide clarifications on the notions of "financial contribution" and of "third country". First, Article 3(2) lists, non-exhaustively, certain types of possible financial contributions. Such notion is drawn very widely[86] and includes, *inter alia,* the transfer of funds and liabilities, the foregoing of revenue otherwise due and the provision or purchase of goods and services.[87]

Then, Article 3(3) establishes the different emanations of the State that inform the concept of "third country". Notably, other than the clear-cut case of the central government and public authorities of a third State, the provision also includes foreign public and private entities whose actions can be attributed to the State. With particular regards to public entities, the provisions clarifies that the possible attribution of their actions to third countries depends "on the characteristics of the entity and the legal and economic environment prevailing in that State".

Once all five of the aforementioned criteria are met, the Commission must then establish, on a case-by-case basis,[88] whether the subsidy is indeed distortive according to Articles

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amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76; Directive 2014/23/EU on the award of concession contracts [2014] OJ L94/1; Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243) is the following: 'any natural or legal person, or a contracting entity, or a group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market'.

[85] Cf Case C-41/90 *Höfner and Elser* [1991] EU:C:1991:161, para 21 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.' Moreover, the notion of economic activity is defined by the Court of Justice of the European Union as 'the provision of good and services on the market', *see* Case C-35/96 *Commission v Italy* [1998] EU:C:1998:303, para 36.

[86] Ulrich Soltész, 'Foreign Subsidies Control: A Bureaucratic Monster? (2023) 22 European State Aid Law Quarterly 175, 176.

[87] Extensively, the provisions lists: (a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; (b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or (c) the provision of goods or services or the purchase of goods or services.

[88] Cf Recital 17, FSR.

4 and 5. Moreover, pursuant to Article 6, the Commission must determine whether any negative effects stemming from the subsidy can be outweighed by its positive effects (the so-called "balancing-test"). If there is a distortion and the balancing test ultimately fails, the definition of prohibited foreign subsidy is fulfilled.

The former pair of provisions structure the assessment of a foreign subsidy's distortive nature as follows. First, under Article 4(1), the concept of distortion is explained and, then, the norm adopts an "indicator-based" approach listing cases in which distortions are unlikely, or outright excluded. A distortion is defined as the subsidy's liability "to improve the competitive position of an undertaking in the internal market and [its ability to] actually or potentially negatively affect competition in the internal market". Therefore, even a merely *potential* distortion of competition is sufficient for a distortion to be found. Moreover, Article 4(1) also provides a set of non-exhaustive elements on the basis of which to assess the distortion, such as the amount and the nature of the foreign subsidy, the situation of the undertaking, the level and evolution of economic activity of the undertaking on the internal market and the purpose and conditions attached to the foreign subsidy.[89] The subsequent paragraphs of Article 4 outline three categories of subsidies that are presumed not to distort competition in the EU internal market. According to the specific category considered, these presumptions are both rebuttable and irrebuttable. Conversely, the other element of the pair, Article 5(1) regards those subsidies that are *most likely* to distort the internal market. It appears as the provisions sets forth a rebuttable (positive) presumption of distortion, insofar as its second paragraph grants the undertakings concerned with the chance to prove that the subsidies aren't distortive.[90]

The final step in the assessment of the existence of a prohibited foreign subsidy is, as mentioned above, the "balancing test". Namely, pursuant to Article 6(1) of the Regulation, the Commission, on the basis of the information received by the Member

[89] Cf Recital 18, FSR.

[90] These are, as will be discussed extensively *infra*, Ch. 3 Section 2.1.

States,[91] *may*[92] balance the negative effects of the subsidy in terms of distortions of competition against other positive effects. In particular, such positive effects should, first of all, be economic. However, the norm also specifically allows for *policy* objectives to be taken into consideration.[93] It has been argued, in this context, that while the former, economic, effects must be territorially limited to be relevant for the purposes of the balancing exercise – as is intuitively understood from the text of the provision, which refers to "development of the [economic activity] on the internal market" – the policy objectives can be taken into consideration independently of the place of their effects.[94] According to Article 6 (2), moreover, the aforementioned positive effects should also be taken into account by the Commission when imposing redressive measures or accepting commitments.

It should be clear that these two assessments – the distortion of the internal market and the balancing test – are of fundamental importance in relation to the functioning of the FSR. In particular, they are central to the attainment by part of the Regulation of its principal objective, i.e. levelling the playing field. Nonetheless, as has been noted by scholars,[95] these provisions, and namely the "balancing test", are worded vaguely and have not been well fleshed out by the Regulation. As part of our elaboration of the notion of (prohibited) foreign subsidy, therefore, we will dedicate special attention to the specific State aid and WTO law provisions that consider the effects of national measures on the internal market (for the former) and on international trade (for the latter), attempting therefore to integrate the FSR's less precise provisions.

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[91] Recital 21, FSR.

[92] *See* Wolfgang Weiss, *The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?* (Springer 2024) 38, who, notwithstanding the presence of the conditional "may", believes that "the Commission is [in any case] under the duty to consider any possible positive effects proprio motu and to investigate the relevant facts on its own initiative, as a consequence of the right and duty of good administration".

[93] Cf Art. 6(1), which considers, first the "positive effects on the development of the relevant subsidised economic activity on the internal market" and, then, "the broader positive effects in relation to the relevant policy objectives, in particular those of the Union".

[94] Philipp Werner, Henry De La Barre and Kristina Music, 'Untangling the Foreign Subsidies Regulation' (2024) 8 European Competition and Regulatory Law Review 23, 33.

[95] Ibid.

2.2. *The three tools for investigating foreign subsidies*

We shall now complete our overview of the FSR's content by analyzing the three screening tools used by the Regulation to review foreign subsidies.[96] This analysis highlights the ways in which the notion of foreign subsidy, or single parts of it, are relevant for the functioning of the Regulation, underscoring the practical importance of defining foreign subsidies. In the following subsections we shall consider, first, the general *ex officio* review; then, we shall analyse the two "specialized", notification based tools: for concentrations and public procurement. Moreover, while the latter instruments are *ex ante*, insofar as, by imposing mandatory notifications before a concentration or the award of a contract, they attempt to catch distortive subsidies *before* they are able to affect the internal market. Conversely, the former, more general, instrument applies *ex post*.[97]

2.2.1. *The ex officio review*

The *ex officio* review is discussed in the FSR's second chapter and it is a general residual tool that is used by the Commission to scrutinize, of its own initiative,[98] the existence of a foreign subsidy distorting the internal market. Unlike the other two tools that will be examined in suit, the *ex officio* review is not limited in relation to the economic activities that it can investigate, save, of course, for those already covered by the other tools. In fact, the *ex officio* tool can be used to investigate concentrations or public procurement procedures only when these have been implemented, or the contracts pertaining to them have already been awarded[99] but, if they have already been the object of the more specific notification based tools detailed *infra*, the foreign subsidies that can be analysed can be the same only at the level of the *financial contribution* in question and not at the economic

[96] Lena Hornkohl, 'The EU Foreign Subsidy Regulation: Why, What and How?' in Jens Hillebrand Pohl and others (eds), *Weaponising Investments Volume II* (Springer 2024), 15.

[97] P Werner, H De La Barre and K Music (n 93), 30.

[98] Article 9, FSR.

[99] This is clearly provided for in relation to public procurement procedures *ex* Article 9(2) and can be inferred in relation to concentrations as well. For an in-depth explanation, *see* L. Hornkohl (n. 95) 17-18.

activity itself– the concentration or the tender, which can no longer be scrutinized.[100] The same foreign subsidy can be assessed again in relation to *another economic activity*.[101]

Therefore, the *ex officio* tool can investigate concentrations or public procurement only when (i) they have been implemented or the related contracts have been awarded and (ii) when they have not been already investigated under the two specialized instruments. Save from this exception, all other activities can be reviewed through this tool by the Commission, provided that these activities have taken place in the 10 years before the beginning of the review.[102]

With regards to the way in which the *ex officio* procedure is conducted, it is divided into two steps.[103] First, the Commission starts a "preliminary review" under Article 10 FSR, on the basis of information received through any source,[104] when it has reason to believe that a "foreign subsidy distorting the internal market exists". Based on the terminology used, it is clear that at this first, preliminary, step, there is no need to assess whether the alleged subsidy is, indeed, prohibited, as the phrase lacks any reference to Article 6 FSR.[105] During this preliminary review, the Commission will gather all the information it can to be able to assess correctly whether there is a foreign subsidy or not. To be able to properly fulfil its task, the Commission is endowed with significant investigative powers, allowing it to request information,[106] or conduct investigations both inside the EU[107] or in a third country.[108] If these provide false and misleading information, fail to provide the information requested or refuse to allow the inspection or otherwise impede

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[100] Cf L Hornkohl (n. 95), 19.

[101] Article 34(1), FSR.

[102] Article 38, FSR.

[103] L Hornkohl (n. 95), 20.

[104] Article 9(1) FSR lists information received from Member States, associations, natural or legal persons. Moreover, Article 36 FSR allow the Commission to conduct market investigations.

[105] L Hornkohl (n. 95), 21.

[106] Article 13, FSR.

[107] Article 14, FSR.

[108] Article 15, FSR.

the investigation, Article 16 allows the Commission to take a decision based on the facts available, notwithstanding the fact that this may lead to a less favourable outcome for the undertaking. Finally, Article 12 envisages the possible application of interim measures to prevent damage to the internal market and preserve competition when: there are sufficient indicators that the foreign subsidy is prohibited (*fumus bonis iuris*) and there is a risk of serious and irreparable damage to the internal market (*periculum in mora*).

Once the Commission has accumulated enough information, there are two different options. First, if such information results in sufficient indicators for the existence of a foreign subsidy, the in-depth review starts, pursuant to Article 10(3). If this is not the case, instead, the review is closed *ex* Article 10(4).

In the case an in-depth review is undertaken, the Commission will fully consider whether the subsidy is prohibited *ex* Articles 4 to 6.[109] Once the investigation has ended, the Commission will adopt a decision, which will be of one of three kinds. On the one hand, if the subsidy is indeed distortive and is not outweighed by positive effects, the Commission may either adopt a "decision with redressive measures"[110] or accept the undertaking's commitments through a "decision with commitments".[111] Whereas, instead, the results of the preliminary review are not confirmed by the in-depth review, or the balancing test is successful, then the Commission will adopt a "no-contest decision".[112]

Considering the novelty of the Regulation, no decision following an in-depth review has yet been published. However, on the 21st of June 2024, the Commission communicated the beginning of its first ever in-depth investigation, in case FS.100011, "Emirates

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[109] Article 11(2) and 11(3), FSR.

[110] Article 11(2), FSR.

[111] Article 11(3), FSR.

[112] Article 11(4), FSR.

Telecommunications".[113] It will therefore be particularly interesting to understand how the process described here in theory will then be applied in practice.

2.2.2. *Concentrations*

The first of the two notification-based tools regards concentrations, and its functioning is explained in the third chapter of the FSR. First and foremost, Article 19 limits the scope of the assessment under the concentration tool. In fact, it explains that only distortions of competition *caused by* the concentration will be relevant to determine the prohibited nature of the foreign subsidy[114] and, moreover, it limits the range of subsidies reviewable by the Commission to those granted in the three years preceding the concentration.

The Regulation then continues by laying down, first, both the concept of concentration and of control under the FSR and, second, the thresholds which make a concentration "notifiable" and, therefore, subject the undertaking to the mandatory notification *ex* Article 21 FSR. In relation to the first definition, mergers, acquisitions and full function joint ventures are considered concentrations under the FSR. The definition is, therefore, virtually identical to that of a concentration under Article 3 of the European Union Merger Regulation[115] ("EUMR"), as is that of control describe in paragraphs 5 and 6 FSR.

In relation to the thresholds, the norm provides two cumulative conditions that must be met for the concentration to be notifiable. In particular, the first threshold under Article 20(3)(a) is that "at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union

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[113] Commission, Summary notice concerning the initiation of an in-depth investigation in case FS.100011 – EMIRATES TELECOMMUNICATIONS GROUP / PPF TELECOM GROUP pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560 [2024] OJ C 21.6.2024.

[114] However, for the difficulties in assessing such narrow distortions (also in the context of public procurement), *see* Morris Schonberg, 'The EU Foreign Subsidies Regulation': (2022) 21 European State Aid Law Quarterly 143, 149, who states that "when it comes to determining what redressive measures or commitments may be suitable to address the distortions identified, if the relevant distortions and effects are limited to those concerned with the market for the acquisition and with the competitive tender procedure for the public contract in question, it is difficult envisage how anything short of prohibiting that concentration and public contract award would be sufficient to address those distortions, rendering the other possible structural and behavioral remedies [superfluous]".

[115] Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EUMR) [2004] OJ L24/1.

of at least EUR 500 million". Evidently, the very high amount of turnover required to meet the threshold has the function of limiting the application of the tool to very big, and therefore most likely very distortive, transaction.[116] Moreover, in this way the administrative burden on undertakings is, to an extent, lessened.[117].

Article 20(3)(b) instead requires that all the undertakings party to the concentration be "granted combined aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding" it. *Prima facie*, therefore, it seems that the provision subordinates the notification obligation to the sole presence of a financial contribution. This was seen skeptically by most commentators when the FSR was first published, as they lamented an excessive broadness of the obligation.[118] In fact, on the one hand, the fulfillment of the threshold depends on the aggregate amount of the financial contributions received by *all the parties* to the concentration – the merging entities, the companies forming the joint venture, the acquirer and the acquired – and on the other, financial contributions are defined *non-exhaustively* by Article 3 FSR. These two elements combined were deemed to transform the threshold in a merely nominal hurdle, that would be fulfilled by every market transaction with the State.[119]

It is here submitted, however, that even if these concerns are not completely unfounded, they must be re-assessed in the light of the FSR's Implementing Regulation.[120] In the Implementing Regulation, in fact, the Commission provides, in Annex I, a detailed explanation on the ways in which foreign financial contributions must be notified. In particular, the Commission draws a neat distinction between financial contributions that

[116] P Werner, H De La Barre and K Music (n. 93), 27.

[117] Recital 35, FSR.

[118] *See*, ex multiis, U Soltész (n. 85), 176, M Schonberg (n. 113), 146 and Raymond Luja, 'The EU Foreign Subsidies Regulation: Countering State Aid Beyond the European Union' (2021) 20 Europeans State Aid Law Quarterly 187.

[119] P Werner, H De La Barre and K Music (n 82), 27.

[120] Implementing Regulation (EU) 2023/1441 n detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market [2023] OJ L177/1 (Implementing Regulation).

may fall into any of the categories of Article 5(1) points (a) to (d)[121] FSR and those that *do not fall* under those categories.[122] Whereas the first type of contributions have to be thoroughly detailed in the notification, for the second type an overview of the contributions equal or in excess of EUR 1 million is sufficient.[123] Moreover, financial contributions falling in the second category are *tout court* exempted from the notification requirement if they are tax deferrals, tax amnesties or tax holidays, provided that they are not *limited to certain regions or certain undertakings*.[124] Finally, all of these "second-category" contributions are exempted if they are in line with market terms.[125] In our opinion, while this bipartition does not directly narrow the scope of the notification obligation, it eases the burden of undertakings, and is in line with the FSR's intention of catching especially the largest and most distortive transactions.[126] It also relativizes the concerns expressed above, insofar as the "market-oriented" exception provided for in Table 1 makes it so that not all market transactions with the State are caught by the notification requirement.[127]

If these thresholds are met by a concentration, it must be notified pursuant to Article 21(1), "prior to [its] implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest". Until this moment, the concentration cannot be implemented pursuant to the standstill obligation *ex* Article 24(1). Once the notification is made, the Commission has 25 working days to decide whether to open an in-depth investigation, otherwise the standstill become

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[121] Annex I Section 5.1.

[122] Ibid. Section 5.3.

[123] Ibid., Table 1, point 1.

[124] Ibid., Table 1, section B, point 6(a).

[125] Ibid., Table 1, section B, point 6(c).

[126] Concurrences "antitrust code" Podcast, Foreign Subsidies – Margarethe Vestager, Episode of Friday Mar 17, 2023, available at <https://concurrences.podMargaretbean.com/e/foreign-subsidies-margrethe-vestager/>.

[127] However, in our opinion the most important element of this bipartition is that by asking economic operators to make a prima facie assessment of the distortiveness of the contributions, it confirms our contention, set out in Section 2.1. above. The definition of foreign subsidy cannot be compartmentalized to just its existence, as set out in Article 3 FSR, but should extend to the analysis of its distortiveness and the balancing test, so as to understand if a subsidy is, indeed, prohibited.

inoperable and the concentration would be implementable. If such in-depth investigation is indeed opened, then the clause remains operable for another 90 days, but this deadline can be extended for two reasons. First, the undertakings offer commitments, in this case the extension is of 15 days.[128] Second, the parties to the concentration request its extension within 15 days from the opening of the investigation (in this case, the extension does not have to be of 15 days).[129]

Moreover, even if an undertaking breached its obligation to notify the Commission can request the notification and, in this case, the time limits for the standstill obligation do not apply.[130] Also, if a specific concentration does not meet the thresholds listed above, the Commission can still request a notification if it suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration (the so-called "ad-hoc notification").[131]

Once the notification is made, the process for the assessment of foreign subsidies is the same two-step process we have explained with regards to *ex officio* review, the only differences being the aforementioned time limits and the absence of the "decision by redressive measures", as only commitments are allowed for concentrations, in line with the EUMR.[132]

2.2.3. Public Procurement

Finally, the fourth chapter of the FSR details the functioning of the last tool provided by the Regulation, that regarding public procurement procedures. In line with Article 19 FSR regarding concentrations, also Article 27 FSR limits the scope of the competitive distortions assessed through the tool those caused in the context of a public procurement procedure, and that therefore allow the beneficiary of the subsidy to foreign subsidy to

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[128] Article 24(1)(b), FSR.

[129] Article 24(4), FSR.

[130] Article 21(4), FSR.

[131] Article 21(5), FSR.

[132] *See* L Hornkohl (n. 95), 29.

submit an unduly advantageous tender.[133] Still in tandem with Article 19, also Article 27 limits the application of the tool to those subsidies granted during the three years prior to the public procurement procedure.

With specific regards to the thresholds, these are established in general in Article 28 (1) and then, Article 28 (2) provides a special rule in relation to procedures which are divided in lots. First, Article 28 (1) makes the notification subject to (a) the estimated value of that public procurement or framework agreement being equal to or greater than EUR 250 million and (b) the economic operator (the notion including its subsidiaries, holdings and, when applicable, the subcontractors and suppliers participating at the tender) being granted aggregate financial contributions in the three years prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4 million per third country. For the latter threshold, Annex II to the Implementing Regulation applies the same distinction between *prima facie* distortive and non-distortive foreign contributions that applies for concentrations. In particular, detailed information is necessary with respect to those financial contributions that appear to be distortive *ex* Article 5(1) points (a)-(c) and (e) of the FSR,[134] while a simplified notification is provided for those that do not appear to fall into the aforementioned categories, [135] and the same exceptions apply.[136]

Article 28 (2) instead specifies that, when the procurement procedure is divided in lots, not only should its estimated total value be of EUR 250 million but, also, the value of the lot (or lots) must be at least equal to EUR 125 million. Finally, paragraphs 4 and 5 contain some exceptions from the notification obligation based on the specific sectors in which the procedures are conducted, such as defence or security contracts, however they remain

[133] It is important to note that the term “unduly advantageous tender” is a *unicum* to the FSR. In fact, the EU Public Procurement Directives make recourse to a different term, “abnormally low tender”. Cf Luigi Gaetano Pezzotti Piccoli, ‘The new EU Foreign Subsidies Regulation’ (CEU Ediciones 2024), 14: “comparing the FSR and the PPD it is worth noting that the FSR addresses distortions in the internal market caused by third countries, while the PPD aims to remove obstacles to the free circulation of goods and services within the internal market. Focusing on the concepts, “abnormally low” refers to economic abnormality, while “unduly advantageous” implies illicit or unjustified behavior”.

[134] Annex II to the Implementing regulation, Section 3.1.

[135] Ibid., Section 3.3.

[136] Ibid. Table 1, Section B.

reviewable *ex officio*.[137] Moreover, even when the financial contribution does not meet the thresholds necessary for the notification obligation to arise, Article 29(1) still requires the economic operators to include *all* foreign financial contributions, identified through the same criteria of Article 28(1)(b), save, of course, the value of the financial contribution.

Also, if the notification or the declaration are missing from the tender, the contracting entity[138] can solicit them from the economic operators. If the notification and/or the declaration is not received in ten working days, the tender will be considered irregular and will, consequentially, be rejected. A differing aspect of these notification in and declaration requirements in respect to the concentration tool relates to the involvement of the single Member States in the notification process. In fact, it is the contracting entity that receives the notification or declaration[139] and must then communicate it to the Commission.[140] Moreover, when assessing the tenders under their powers *ex* Directives 2014/24/EU and 2014/25/EU (the 2014 Public Procurement Directives), the contracting entity must communicate to the Commission any suspicions on the presence of a foreign subsidy and cannot assess the abnormal advantageousness of the tender on the basis of the foreign subsidy alone.[141] In fact, such an assessment is exclusively for the Commission to make.

A final distinguishing element of this tool is that there is no "standstill provision", unlike for concentrations. During both the preliminary and the (possible) in-depth review, all the steps in the procurement procedure can take place, save for the final awarding of the

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[137] L Hornkohl (n. 95) 30 .

[138] *See for example* Article 3 of Directive 2014/25/EU, where contracting entities are defined as 'contracting authorities or public undertakings and which pursue one of the activities' specifically referred to in the Directive. Moreover, Article 4 states that the definition of contracting authority includes the 'State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.' Moreover, a public undertaking is 'any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

[139] Article 29(1), FSR.

[140] Article 29(2), FSR.

[141] Article 29(7), FSR.

contract.[142] For the rest, the public procurement tool of the FSR functions exactly like the notification based tool for concentrations. In particular, there can be an *ad hoc* notification, pursuant to Article 29 (8), and no redressive measures can be applied in the final decision.

On the basis of what has been said, the FSR establishes a comprehensive framework for addressing distortive foreign subsidies in the EU internal market. Through its three investigative tools – ex officio review, concentrations, and public procurement – the FSR creates a multi-faceted approach to identifying and mitigating the effects of prohibited foreign subsidies. This complex structure, as we have started to see in this section, is mainly caused by the influence generated on the Regulation by the different areas of EU and international law. As we transition to the next section, we will explore the importance of the FSR's composite nature for the purposes of systematic interpretation. This analysis will shed light on how the interconnected elements of the regulation interact with each other and how they can be relevant for the definition of "prohibited" foreign subsidy.

3. The systematic interpretation of a legal mosaic: the Foreign Subsidies Regulation's composite nature

Before being able to substantively address the hermeneutical issues raised by the notion of "prohibited foreign subsidy", our preparatory considerations of the Foreign Subsidies Regulation must also take into account the way the Regulation itself interacts with different areas of the EU and international legal systems. Indeed, another core tenet in the interpretation of EU law is that of *systematic interpretation*. As Lenaerts and Gutiérrez-Fons note, this kind of interpretation is born out of necessary compliance with the general principle of consistency of EU law.[143] This principle requires "not only that there should be consistent interpretation among all the provisions of the Treaties, but also that the EU legislator should consciously take account of that principle. This means that each

[142] Article 32(1), FSR.

[143] This principle derives from the CJEU's jurisprudence as a corollary of the principle of sincere cooperation *ex* Article 4(3) TEU. *See* Fabio Ratto Trabucco, 'The Effectiveness and Application of the EU Principle of Consistent Interpretation in Hungarian Courts' (2019) 26 Indiana Journal of Global Legal Studies 461.

provision of EU law must be interpreted in such a way as to guarantee that there is no conflict between it and the general scheme of which it belongs”.[144]

Systematic interpretation is all the more important in the context of the Foreign Subsidies Regulation, which, as we have foreshadowed in the previous section, is a “composite instrument”. In particular it draws mainly upon fundamental concepts from State aid, Merger control, Public Procurement and WTO law, as we will see in the following paragraphs.

While many references made by the Regulation to other fields of EU law are mere procedural overlaps and alignments,[145] symptomatic of the closeness between the FSR and other EU Law instruments, in other cases, such closeness may indeed cause some concepts to “spill-over” from other areas to the Regulation. In particular, individuating the concepts that inform the substantive elements of the notion of “prohibited foreign subsidy” is fundamental for our endeavor. However, we should anticipate that our understanding of the role of systematic interpretation may be slightly unconventional vis-à-vis its relationship with teleological interpretation. Indeed, whilst these are usually considered as interlinked, it is normally systematic interpretation that conditions the latter, as only by considering the interpreted provision as a part of a wider legal system can the objective pursued by it be correctly identified.[146] However, in this part of our analysis, we will invert this relationship by considering which of these various influence would lead to an interpretation that better conforms with the objectives – and the text – of the FSR, since they cannot all be given the same weight. As has already been stated, in fact, for the purpose of our analysis also the *voluntas legislator* is important. Nonetheless, a definitive assessment of the way the definition of “prohibited” foreign subsidy must be interpreted in light of its interaction with other legal systems will be possible to make only at a later stage, after having examined them in depth. In this Section, therefore, we will mainly point them out and consider the extent to which these

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[144] K Lenaerts and J Gutiérrez-Fons (n. 7), 13.

[145] L Hornkohl (n. 95), 31-36.

[146] K Lenaerts and J Gutiérrez-Fons (n. 7), 25.

are coherent with the objectives and the text of the provision. We will also assess the advantages and disadvantages of adopting one over the other.

In the following paragraphs, we divided our analysis in two parts. First, we will consider the actual and potential influences of other EU law acts on how the Regulation is interpreted and applied, what we call the *internal* perspective. Then, we will consider the actual or potential relevance of WTO law on the FSR, what we call the *external* perspective.

3.1. The internal perspective: relationships with EU law

The composite nature of the FSR from an internal perspective is immediately clear if we consider the text of the Regulation itself which, in its ninth Recital, states that "this Regulation should be applied and interpreted in light of the relevant Union legislation, including that relating to State aid, mergers and public procurement". These influences are also inferred by considering one of the legal bases on which the FSR was adopted, i.e. Article 114 TFEU. The norm is the legal basis commonly used to harmonize or approximate the laws of Member States for the safeguarding of the functioning of the internal market.[147] This provision was used as the legal basis of the Regulation insofar as its aim is precisely that to protect the internal market from undue distortions of competition. Thus, State aid law, Merger control and Public Procurement law are instrumental to the interpretation of the Regulation.

Moreover, the Regulation was also adopted on the basis of Article 207 TFEU, which allows the EU to legislate in the area of "common commercial policy", covering areas such as "foreign direct investment," "export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies".[148] In this context the relationship

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[147] Article 114 TFEU can be used to harmonize any divergence between Member State legislation related to the internal market, even if only potential. As stated in Case C-58/08 *Vodafone* [2010] EU:C:2010:321, para 33 it can also be used to prevent the emergence of new obstacles to trade.

[148] The first two paragraphs of Article 207 read: "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property,

between the FSR and the EU's basic anti-subsidy regulation (hereinafter "BASR"),[149] is also of particular relevance. However, since the BASR has the function of implementing the ASCM in EU law[150] we will consider such influences in the next section, where we talk more diffusely about the ASCM.

Considering, therefore, the specific relevance of State aid, competition law and public procurement law, to better distinguish between the different types of influences outlined before, i.e. the mere overlaps or alignments and the concepts that substantially affect the interpretation of the Regulation, we have divided them into two different categories: *functional* and *substantive* relationships. With the former term we indicate those relationships that allow the FSR to align with other legal instruments which will have to be applied in parallel to it, so as to allow this interplay to function seamlessly. On the other hand, we talk about *substantive* relationships when we refer to the notions present in other areas of the law which could influence the understanding of *autonomous* concepts of the FSR.

The functional relationships of the FSR are, mainly, with the EUMR and the EU Public Procurement Directives. This is relatively straightforward, as the two notification based tools of the FSR work concurrently with, on the one hand, merger control and, on the other, Public Procurement.[151] These have already been noted above, for example in relation to the adoption of the same definition of "concentration" or "control" provided for in the EUMR by part of the FSR, or in relation to the addition of the concept of

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foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".

149 Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55.

150 W Weiss (n. 91), 5.

151 Johannes Zöttl and Philipp Werner 'Vive l'Industriepolitik– M&A unter der neuen Drittstaatensubventionsverordnung' (2022) Neue Zeitschrift für Kartellrecht, 479.

"economic operator" to the notion of undertaking, used to align the FSR to the EU Public Procurement Directives. A thorough recounting of every such scenario is beyond the scope of this work and, therefore, we refer back to the above acknowledgments of functional relationships, which are in our opinion the most relevant in the Regulation.

Conversely, concerning the substantive relationships, a more in-depth discussion is deemed necessary. With specific regard to the notion of "prohibited foreign subsidy", we shall adopt a bipartite analysis that mirrors the structure of the definition set forth in the Regulation. Firstly, we will analyse the bearings of the other parts of EU law on Article 3 FSR, which states the conditions for the existence of a foreign subsidy. Secondly, we will consider the effect of these influences on the concept of "distortion of the internal market" and on the possibility of balancing the potential distortions *ex* Article 4-6 FSR.

As stated above, the main components of a foreign subsidy pursuant to Article 3 FSR are the presence of a (i) *financial contribution* (ii) attributable to a *third country* directed to (iii) an *undertaking* engaged in an economic activity *in the internal market*. Such contribution must (iv) confer a *benefit* which is (v) *limited* in *law* or in *fact* to one or more undertakings or industries. From an internal perspective, the most relevant provision of EU law to determine the concept of foreign subsidy is that contained in Article 107 (1) TFEU, i.e. the notion of State aid.

Specifically, Article 107 (1) TFEU establishes four conditions that must be cumulatively met for a measure to be considered as State aid. First, a measure must be "granted by the State or through State resources". Second, the measure must be such as to "favour certain undertakings or the production of certain goods", which is analysed by the Commission and the Courts in two separate parts: the selectivity requirement and the advantage requirement. Finally, the measure so formed must "distort or threaten to distort competition" and "affect trade between Member States".

The provision surely influences to some extent the interpretation of the concept of "foreign subsidy", for textual, teleological and systematic reasons. From a textual perspective, certain elements of the notion of aid appear similar to that of Article 3 FSR.

Both provisions apply to undertakings, both require the measure to be attributable to the State, for it to constitute a benefit or an advantage and, finally, seem to envision such benefit or advantage to be limited in scope to certain determined beneficiaries. From a teleological perspective, State aid aims at preventing distortions of competition or trade in the internal market, just like the FSR. What is more, the FSR's primary objective, as has been mentioned, is precisely to remedy State aid's lack of extra-territorial application. However, there are textual differences between the provisions, which are not present between Article 3 FSR and Article 1.1(a)(1) ASCM[152] which, instead, are almost identical. This poses a relevant question in regard to whether the EU legislator intended, by making the latter provisions very similar, to guide the interpretation of the former closer to the consensus on meaning of the latter.

Second, the combined provisions contained in Articles 4-6 FSR, prohibit foreign subsidies which, on the one hand, are "liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market" and, on the other, have no prevailing positive effects, neither economic nor policy-related which can be balanced against the distortion. *Prima facie*, the FSR's prohibition of such foreign subsidies could also be established, in line with their existence *ex* Article 3, on the basis of State aid law. From a systematic perspective, this is perfectly reasonable. In fact, the principle of consistency mentioned *supra* would appear to recommend interpreting each part of the notion of "prohibited foreign subsidy" in the light of the same set of rules. However, at a closer look, this might not be the case.

In fact, for what concerns the first element of the prohibition, i.e. distortions in the internal market, Schonberg has argued that due to the "indicator-based approach" adopted by Articles 4 and 5 FSR, the concept of distortion of the internal market is *sui generis*.[153] In any case, the central position given to the analysis of distortions by the FSR is at odds

[152] Discussed more diffusely *infra*, in Ch. 3, Section 2.1.

[153] M. Schonberg (n. 113), 147.

with the limited role it assumes in the appraisal of State aid *ex* Article 107(1) TFEU.[154] It may therefore be better to adopt the "more-economic approach" that is used to assess competition distortions in EU Competition law,[155] especially if considering that the Commission's powers to impose redressive measures or to accept commitments requires a sufficiently precise and granular discernment of the distortions caused by the foreign subsidy.[156]

The same doubts exist for the "balancing test" provided for in Article 6 FSR. The test is clearly inspired by the compatibility assessment conducted in State aid law, *ex* Article 107(2) and (3),[157] and, given the very abstract formulation of Article 6 FSR, it would clearly be useful – and in line with the principle of consistency – to take advantage of the more granular criteria provided for in State aid law which have, moreover, been refined by the Commission's decisional practice and the case-law of the EU Courts.[158] Nonetheless, it is debatable whether, indeed, a full analogy between the compatibility criteria of Article 107 TFEU and the positive effects relevant under the FSR is possible. Indeed, while the former are mainly of *social* and *policy* nature,[159] some commentators have posited that Article 6 FSR seems to privilege positive *economic* effects rather then social ones, thus bringing it more in line to the assessment of economic efficiencies under the EUMR. [160] However, since the text of Article 6 in relation to "the positive effects on the development of the relevant subsidised economic activity" mirrors that of Article

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[154] Ibid., 147.

[155] *See*, in general, Roger van den Bergh, 'The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Kovac Mitja and Vandenberghe Ann-Sophie (eds), *Economic Evidence in EU Competition Law*, vol 18 (Intersentia 2016).

[156] M. Schonberg (n. 113), 148.

[157] Ibid., 149.

[158] Ibid., 150.

[159] L Hancher, T Ottervanger and P J Slot (n. 40), 143.

[160] *See* Article 2(1)(b), EUMR and P Werner, H De La Barre and K Music (n.), 33 who state that "aside from the obvious parallel with the compatibility assessment under State aid law, the balancing test and the broad discretion of the EC in applying the test reminds of the efficiencies defence in antitrust and merger cases, for which the EC infamously set the bar exceedingly high".

107(3)(c), a coherent answer will be reached only after having detailed the characteristics of the compatibility assessment under Article 107 TFEU.

In conclusion, in this paragraph we have seen how the Foreign Subsidies Regulation is a composite instrument, internally affected, for what pertains to its procedural relationships, by the EUMR and the EU Public Procurement Directives and, for its substantive relationships, by State aid law and competition law. However, it is still difficult to state whether one should prevail over the other. In the following chapter, therefore we shall consider extensively State aid law, so as to gain a deeper understanding of its fundamental tenets and, therefore, being able to correctly understand the extent to which it applies to the notion of "prohibited foreign subsidy". However, before delving into this analysis, we still have to consider the external influences on the definition of "prohibited foreign subsidy" and, finally, reaffirm why investigating said definition is so important.

3.2. The external perspective: substantive relationships with WTO law

A merely cursory reading of Article 1 and 2 of the Agreement on Subsides and Countervailing Measures (hereinafter "SCM Agreement or ASCM") is sufficient to understand WTO law's potential relevance for the definition of foreign subsidies. In fact, Article 1.1(a)(1) defines subsidies as (i) financial contributions (ii) by the government of the country of export or origin of certain goods that (iii) confer a benefit. For the subsidy to be subject to countervailing duties, moreover, Article 2.1 specifies the benefit must be specific, either to certain undertakings, or geographically. It is therefore clear that, from a *structural* and textual standpoint, Article 3 FSR was modelled on the ASCM's definition of subsidy.

Some similarities can also be seen between Articles 4-6 FSR, which set forth the legal test for the "prohibition" of foreign subsidies and Articles 3, 5 and 8 ASCM. In particular, these provisions divide, for the purposes of WTO law, subsidies in three categories, which are conventionally named the "red"[161], "green"[162] and "amber"[163] categories. In particular, the "red" and "green" categories provide the conditions under which subsides are respectively either automatically prohibited or always allowed; conversely, the Amber category is residual. Any subsidy that does not fall into Articles 3 or 8 ASCM, must be examined pursuant to the criterion of *adverse effect* contained in Article 5 ASCM, which "focuses on the effects that the subsidy has on trade, paying attention to whether market prices are modified because of the subsidy".[164] If such criterion is met, then the subsidy is "actionable" and, therefore, challengeable under the WTO dispute resolution mechanism.[165]

Said similarities consist, mainly, in the fact that also for the ASCM the prohibition of subsidies is only *ex post* and is not automatically triggered by any measure which meets the conditions of a subsidy, differently than what happens under Article 107 TFEU. Moreover, the *green* and *red* categories fulfill a function that is similar to that of the positive and negative "indicators" of distortions of competition provided for in Article 4 (2) and (3) FSR and in Article 5.

This said, however, there are also significant differences between the two set of rules. Considering the ASCM as a whole, these relate, mainly to the scope of the SCM Agreement and to the purpose of the FSR. On the one hand, the Agreement does not address subsidies from third countries in areas such as services, investments, or participation in public procurement within the EU's internal market. Its focus is exclusively on subsidies related to products, whereas the FSR's is not. On the other hand, the need to guarantee the objective of "levelling the playing field", caused by the presence of the State aid regime domestically, may depose in favour of applying the concepts

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[161] Article 3, ASCM

[162] Article 8, ASCM

[163] Article 5 ASCM

[164] Gustavo E Luengo Hernández de Madrid, *Regulation of Subsidies and State Aids in WTO and EC Law: Conflicts in International Trade Law* (Kluwer Law International 2007), 473.

[165] Ibid., 166

developed in State aid law – perhaps softened, as proposed in Section 3.1., by the used of some notions derived from EU competition law – to the notion of "prohibited foreign subsidies", rather than a different one which may not fulfill the objective. Indeed, it is nearly impossible for two different systems of subsidies regulation to catch the same measures. One would probably be stricter, or more relaxed than the other. What would be, therefore, the advantage of interpreting the definition of foreign subsidy in line with the concepts provided for in the ASCM? In our opinion, there are two possible arguments, only the second of which, however, is ultimately compelling.

First, there is the *systematic* argument, which would advise us to interpret the Regulation consistently to the ASCM, especially if considering, on the one hand Article 44(9) FSR[166] and on the other, WTO law itself. Indeed, as was clarified by the WTO Panel in *United States – Sections 301—310 of the Trade Act of 1974* national law which violates WTO rules breaches the international commitments made to other WTO Members.[167] However, we have seen that the Commission considers Article 1.1(a)(1) ASCM as *not* applicable to foreign subsidies.[168] It is therefore debatable that there is any need to interpret Article 3 FSR consistently with Article 1.1(a)(1) ASCM, since the two provision have, in the mind of the EU legislator, a different *scope.*

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[166] According to this provision, "[...] [N]o action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures and granted by a third country which is a member of the World Trade Organisation"

[167] *See* M Frank (n. 42), 949

[168] This, however, is not true for the BASR as there have recently been some very interesting developments in the case-law, *see* Case T-480/20 *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* [2023] EU:T:2023:90 and Joined Cases C–269/23 P e C–272/23 P *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* [2024] Opinion of AG Ćapeta EU:C:2024:411. However, the FSR and the BASR still have a very different scope, as the FSR is, as should be apparent, an instrument that is not solely trade-oriented. Indeed, as U Soltész (n. 85), 175-176, cleverly notes, "the FSR consists of a strange mix of (mainly) State aid control and a huge chunk of merger control to which the Commission has added some bits of trade law, antitrust, public procurement and FDI. In a way, it is somewhat comparable to the cross breeding of a cat and a dog and maybe a number of other family pets, like a goldfish, and maybe some elements of a difficult teenager thrown in for good measure".

Second, instead, lies the argument of legal certainty.[169] Given the great administrative burdens that the FSR places on economic operators and undertakings at large, it is essential for these to have, at least, a sure understanding of the measures that will be caught by the Regulation. Clearly, in the light of the arguments exposed above, the principle of legal certainty could be relevant only for the purposes of interpreting the first part of the definition of prohibited subsidy, as the most relevant similarities are present only between Article 3 FSR and 1.1(a)(1) and 2.1 ASCM. In our opinion, this would not only not constitute a problem but, actually, would allow to minimize one of the other problems highlighted above, i.e. the conflict between using the ASCM's definition and the necessity of fulfilling the FSR's primary objective, i.e. levelling the playing field. In fact, were only Article 3 FSR to be interpreted in the light of the Agreement, such objective could be accomplished by interpreting the other parts of the definition, disciplined in Article 4-6 FSR, in light of EU law instead.

Nonetheless, at least for now, this cannot be considered a solution to all our hermeneutical issues. In fact, with no knowledge of the substance of State aid and WTO subsidy law, it is impossible to propose a convincing definition of (prohibited) foreign subsidies.

CONCLUSIONS

In this chapter, we have attempted to lay the necessary groundwork for an analysis of the definition of (prohibited) foreign subsidies. To do so, we have adopted the three, principal, hermeneutical techniques used in the EU legal order: teleological, textual and systematic interpretation. This effort was necessary in view of the question we are trying to answer in this dissertation: what is a foreign subsidy?

First, in relation to teleological interpretation, we specified the objective of the FSR, which is to remedy the competitive distortions caused, in the internal market, by State aid law's lack of extraterritoriality. However, we placed such objectives in the wider

[169] For the relevance of this principle in the scholarship *see* Takis Tridimas, 'Legal Certainty and Protection of Legitimate Expectations' in Takis Tridimas, *The General Principles of EU Law* (OUP 2006), 242. For the relevance of the same principle in the case-law *see*, ex multiis, Case C-17/03 *Vereniging voor Energie, Milieu en Water* EU:C:2005:362, paras 73-75; Case C-362/12 *Test Claimants* EU:C:2013:834, paras 44-45; Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft,* EU:C:2015:386, para. 77.

paradigm adopted by the European Union to face the challenges stemming from the changed geopolitical scenario of the 21st century, that of (open) strategic autonomy. In doing so, we clarified how the FSR is not an isolated instrument, but interacts with other, parallel, attempts of the EU to face similar problems. In our reconstruction, such tension created by parallel instruments which, however, adopt different approaches – on the one hand "defensive" and on the other "offensive" – necessarily has a bearing on the way the objective of "levelling the playing field" must be understood. Second, we described the main provisions of the FSR, a clearly fundamental exercise for the use of textual interpretation. In doing so, we also were able to introduce the focus of the third part of our analysis, by gain a first understanding of the *composite nature* of the FSR. Finally, in the third section, we saw how different areas of not only EU law but also international law have strongly influenced the Regulation and how, understanding which one better fist its objectives and its textual structure will prove decisive in correctly delineating the notion of "prohibited foreign subsidy".

As we hope to have made clear in the midst of these influences, State aid and WTO subsidy law are clearly the most relevant. In the last section we provided some reflections on the coherency of each of these areas of the law with the objectives and the text of the FSR. However, before making any specific choice in relation to the "better" choice, a thorough understanding of each of these concepts is necessary. In the next chapter, therefore, both will be detailed specifically, so as to allow us to make well-informed and final considerations on the scope of each in the last chapter of this work.

CHAPTER 2 – A COMPARISON OF THE PRINCIPAL DEFINITIONS OF SUBSIDIES

INTRODUCTORY REMARKS

An in-depth assessment of the characteristics of the notion of "prohibited foreign subsidy" for the purpose of the FSR's application requires, as anticipated in the previous pages, a deeper understanding of its main influences: the notion of State aid *ex* Article 107 TFEU and the notion of subsidy according to the ASCM.

In this chapter, therefore, in relation to Article 107 TFEU we will focus both on the substantive conditions that determine the existence of a prohibited State aid and on the conditions under which the Commission can declare such an aid compatible with the internal market. Then, we will also overview the characteristics of (not yet prohibited) subsidies under WTO law and the threshold for their prohibition: specificity.

More specifically, Section 1 is divided into six subsections, each dedicated to a fundamental element of State aid law. First, the specific concept of "undertaking" in State aid law will be commented upon (Section 1.1). Then, the four cumulative conditions that contested measures must have to be qualifies as "State aid" will be explained. First, there are two "subjective conditions" of aid, i.e. imputability and the State resources requirement (Section 1.2.). Second, lies the concept of "a selective advantage", which will be analyzed separately, by focusing, first, on the "selectivity" of State measures

(Section 1.3) and, second, on their capacity to create an "advantage" for the recipient undertaking (Section 1.4). Finally, we will also comment upon the "negative conditions", (Section 1.5), i.e. distortion of competition and effect on trade, treating them jointly as, even if they are formally separated by the text of Article 107(1), they are considered "inextricably linked"[170] by the Commission and the Courts.

In Section 2, a parallel analysis will be conducted in relation to the ASCM. Section 2.1 is centered on the analysis of the different *types* of measures that have the capacity of being considered subsidies under Articles 1.1(a)(1), i.e. "financial contributions by a government or a public body". Section 2.2., instead, will study the "benefit" criterion, contained in Article 1.1(b). Thirdly, Section 2.3. will appraise the "threshold" for the ASCM's full application. Indeed, after a subsidy has been found to exist, it is also necessary for it to be "specific", for the other provisions of the ASCM to be operable.[171] Lastly, Section 2.4. will conclude our analysis of ASCM law.

[170] '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] OJ C262/01, para 186 ("Notice").

[171] Article 1.2, ASCM: "A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2".

1. THE NOTION OF STATE AID *EX* ARTICLE 107 TFEU AND ITS COMPATIBILITY WITH THE INTERNAL MARKET

In 1957, when the Treaty of Rome establishing the European Economic Community entered into force, its Article 92 already stated, in the same terms as Article 107 (1) TFEU does today, that State aids are generally incompatible with the internal market, save the possibility for the Commission to deem certain, notified, measures as compatible with the market, as provided by Articles 106 (2), 107 (2) and (3) and Article 108 TFEU. Sixty seven years later, however, the notion of aid continues to create doubts, its true contours far from defined, constantly shifting and evolving. Being able to pinpoint at least the basic principles underlying the notion of State aid and the Commission's compatibility analysis is therefore necessary to understand the extent to which these can influence the main elements of the notion of "prohibited foreign subsidy". With specific regards to the notion of State aid, we will attempt to underline its requirements not only *in concreto* by referring to the specific characteristics of aid measures that have been crafted and reiterated by the jurisprudence, but also *in abstracto*, underlying the logic, or *ratio*, implicit to each. This will help us not only to better understand such conditions but, also, will aid us when transferring them to the context of the FSR. Indeed, only by extrapolating the general principles underlying each norm is it possible to understand whether one's interpretation can be analogically extended to the other.[172]

From the onset, Article 107 (1) TFEU declares the general incompatibility[173] of aid with the internal market, providing that: "*save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

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[172] It is indeed in the concept of *ratio iuris* that the legal tradition has always found the basis of analogical interpretation: *ubi eadem ratio, ibi eadem iuris dispositio*. For a comprehensive analysis of analogical interpretation, *see* Luigi Caiani, 'Analogia (Teoria generale)' in *Enciclopedia del Diritto II* (Giuffrè Editore 1958), 363.

[173] L Hancher, T Ottervanger and PJ Slot (n. 40), 45.

From a structural point of view, as has already been noted, the notion of aid is comprised of four cumulative conditions, all of which must be met for a State measure to be qualified as incompatible aid.[174] However, before explaining these in detail, it must be noted that, as a general proposition, the EU Courts are keen in repeating that the notion of aid is an objective one,[175] there should be, therefore, little room for discretion by part of the Commission in determining the existence of aid, except when carrying out complex legal assessments. This justifies a full review of the measures at issue in specific cases by part of the Court.[176]

Moreover, the Courts have constantly repeated that an "effects-based approach" must be used in the assessment of aid: the notion of aid "does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects".[177] These preliminary observations are key for correctly understanding the *methodology* used by the Courts in their assessment of State aid. In fact, especially the "effects-based approach" is used to give flexibility to the notion of aid[178] and to expand its scope of application[179]. In particular, the latter expansion is achieved in two different directions.

First, the effects-based approach has been used to clarify that any economic or social objectives that a Member State may have had whilst creating the contested measure are irrelevant in the classification of a measure as "aid", insofar as it produces the typical effects of aid, i.e. a selective advantage that distorts (at least potentially) competition and

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[174] Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group SA and Others* [2016] EU:C:2016:981.

[175] Case C-487/06 P *British Aggregates Association v Commission and United Kingdom* [2008] EU:C:2008:757; Case C-290/07 P and *Commission v Scott SA* [2010] EU:C:2010:480.

[176] Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing Ltd* [1997] EU:C:1997:531, para 25.

[177] Case 173-73 *Italy v Commission* [1974] EU:C:1974:71.

[178]Cf Andrea Biondi and Elisabetta Righini, 'An Evolutionary Theory of State Aid Control' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (1st edn, OUP 2015).

[179] Cf Massimo Merola and Filippo Caliento, 'Is the Notion of Aid Broadening or Shrinking over Time, and If so, Why? A Subjective View on the Rationale of the Case Law' in Pier L Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law* (Edward Elgar Publishing 2020), 39.

affects trade, as was confirmed in *Italy v. Commission (Textiles)*. Second, such an approach can be considered as a "function over form" principle, insofar as it catches *all* national measures that meet the objective conditions of Article 107 TFEU, regardless of the regulatory technique used. For example, a tax measure that formally applies to all undertakings can be considered selective[180] and the correspondence of a measure to "normal market conditions" must be examined even if the specific measure apparently belongs to the exercise of public authority rights and powers.[181] These observations are essential, as they will return in our work.

1.1. The concept of undertaking

It is well known that the concept of "economic activity" functions as a limit to many provisions of Union law, such as the freedom to provide services, the right of establishment and EU competition rules, both between private operators, i.e. Articles 101 and 102 TFEU, and between Member States, i.e. Article 107 TFEU.[182]

In the specific context of competition law at large, the concept of "undertaking" is the gateway for the notion of "economic activity", as this is never expressly mentioned in any of the relevant norms. Therefore, the application of competition rules is dependent upon the existence of an undertaking, which in State aid law must be the *recipient* of the aid measure. In the field of competition law, the notion of undertaking is unitary, as was explained in *Cassa di Risparmio di Firenze,* a State aid dispute in which the Court of Justice referred generally to the concept of undertaking "in competition law".[183] Such concept "covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed".[184] More specifically, for the purposes of competition law an economic activity consists "in offering goods or services on a given market".[185]

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[180] Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] EU:T:2002:111.

[181] Case C-124/10 P *Commission v EDF* [2012] EU:C:2012:318, paras 79 to 81.

[182] Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in Catherine Barnard and Okeoghene Odudu (eds) *Outer Limits of European Union Law* (Bloomsbury Publishing Plc 2009), 225.

[183] Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] EU:C:2006:8 para 107.

[184] Case C-41/90 *Höfner and Elser* para 21.

[185] C-222/04 *Cassa di Risparmio di Firenze and Others*, para 108.

Moreover, the term "entity" is given a wide meaning, encompassing not only legal and natural persons, "but also several natural or legal persons, together referred to as a 'single economic entity'".[186] As a precise description of all the types of interactions between legal subjects liable to be qualified as a single economic entity is beyond the scope of this dissertation, suffice it to say that different legal subjects are qualified as a single entity when competition is impossible among them, so as to make it possible to consider the economic impact on the market of multiple entities as unitary.[187] Among many, classification as a single economic entity has a consequence of great relevance for the purpose of interpreting the notion of foreign subsidy: "each person forming part of a single economic entity may be held liable for an infringement of EU competition law committed by that economic entity".[188]

In the specific context of State aid law, Article 107(1) explicitly limits its functioning to aid given to "certain undertakings" or for "the production of certain goods". Therefore, the relevance of State aid provisions is circumscribed to when the *recipient of the aid* is an undertaking engaged in the offer of good and services in a market. Defining the recipient of aid as an undertaking is therefore an essential *precondition* for the functioning of State aid control.

Moreover, it is a *functional* definition and, therefore what matters for the purposes of qualifying a legal entity as an undertaking is the nature of the activity it carries out.[189] This has three important corollaries, as explained by the Commission in its Notice. First, the legal status of an entity under national law is irrelevant.[190] Second, the qualification of a certain entity as an undertaking is limited to a specific activity.[191] This means that a

[186] Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 Common Market Law Review 1721.

[187] Ibid., 1726-1727.

[188] Ibid., 1722. More on this *infra* in Ch. 3 Section 1.1.

[189] Notice, para 8.

[190] Notice, para 9.

[191] Notice, para 11.

single entity can be considered, at the same type, both an undertaking and not an undertaking, depending on the specific activities considered.[192] Finally, the profitability of the entity is not a determining factor, as even non-profits can offer goods and services on the market.[193] There are, however, two relevant exceptions to the functional interpretation of the definition of undertaking.

The first exception, the so-called "solidarity exception", excludes entities from being characterized as undertakings when they perform a purely social function, pursuant to the principle of solidarity enshrined in Article 3 TEU. To benefit from this exception, in theory, it is necessary for the entity to perform an exclusively social function, based on the principle of solidarity, and under State supervision.[194] Coherently with the third corollary cited *supra*, moreover, the for profit nature of an entity exclusively concerned with a social function is immaterial to its classification as an undertaking.[195] However, such entities are considered as undertakings when some "competitive elements" are present in the "social" system they operate in.[196] In the *Dôvera* case,[197] a recent judgment concerning the possibility of qualifying a public health insurer as an undertaking, the jurisprudence added granularity to this distinction, by emphasizing, on the one hand, which competitive elements are actually decisive in the distinction between a solidarity based activity and an economic one and, on the other, explaining which are the mandatory characteristics that a solidarity based system must have and which, instead, are merely

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[192] *See*, to this regard, Case C-74/16 *Congregación de Esculeas Piás* [2017] EU:C:2017:496 para 51, where the CJEU stated – in the context of assessing whether the exemption from a construction tax invoked by a catholic school for the construction of a hall, used for different purposes, was in line line with State aid law – that "it is possible that a single establishment may carry on a number of activities, both economic and non-economic, provided that it keeps separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities". Moreover, at para 62, it stated that, "where is mixed use of that hall, the tax exemption at issue in the main proceedings might be caught by the prohibition in so far as the hall is used for activities".

[193] Notice, para 10.

[194] Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, OUP 2014), 164.

[195] As also seen in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband* [2004] EU:C:2004:150 para 47-55.

[196] A Jones and B Sufrin (n. 193), 164.

[197] Joined Cases C-262/18 P and C-271/18 P *Dôvera* [2020] EU:C:2020:450.

ancillary. In relation to the first clarification, the Court of Justice of the European Union (CJEU) drew a distinction between "core" competitive elements, such as price competition, and competition on "supplementary" services, which is not determining for the purposes of qualifying the insurer as an undertaking.[198] More specifically, the Court stated that: "a competitive element which is intended to encourage operators to operate in accordance with principles of sound management, that is to say, in the most effective and least costly manner possible, in the interests of the proper functioning of the social security system, is not such as to change the nature of that scheme. It is, moreover, common ground that those supplementary services are provided on a free of charge basis, so that the ability to offer them in the context of the Slovak compulsory health insurance scheme cannot in any way call into question the social and solidarity-based nature of that scheme".[199] In relation to the second clarification, the Court stated that the mandatory requirements of a solidarity based social security system are the compulsory nature of affiliation, contributions which are fixed by law in proportion to the income of the insured persons, the rule that compulsory benefits set by law are identical for all insured persons and do not depend on the amount of the contributions paid by each; and a mechanism for the equalization of costs and risks.[200]

The second exception, instead, relates to cases in which an economic activity cannot be separated the "exercise of public powers" – which is defined as when an "activity [which] forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject".[201] When such inseverability exists, then "the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking".[202] Two main points can be briefly inferred form this exception. The first is that the category concerning the "exercise of public powers" is rather open-ended, as the jurisprudence refers generally

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[198] Juan Jorge Piernas López, 'When Is a Company Not an Undertaking under EU Competition Law? The Contribution of the *Dôvera* Judgment' (2021) 58 Common Market Law Review 529, 544.

[199]Cases C-262/18 P and C-271/18 P *Dôvera*, paras 43-44.

[200] Ibid. para 32.

[201] Case C-343/95 *Calì & Figli* [1997] EU:C:1997:160, paras 22 and 23.

[202] Notice, para 18.

to essential functions of the State or activities connected to them. Our second observation instead refers to the "inseparability" criterion, which has yet to be better fleshed out through criteria which allow to clearly understand *when* and *under what terms* an economic activity can be correctly considered as indivisible from the use of public powers. Moreover, the hastiness with which, in practice, the EU Courts decide on whether the test is fulfilled or not adds to the difficulty of correctly understanding its true contours. A good example of the "fast-and-loose" approach adopted by the jurisprudence is the *TenderNed* case,[203] where the CJEU held that one of the functionalities of the Dutch in-house electronic public procurement service (TenderNed) was to be considered as indivisible from the other functionalities of the platform. Thus, TenderNed as a whole could not be considered as an undertaking, excluding it from the application of State aid rules. In particular, the CJEU justified its contention that the various functionalities of the platform were indivisible by referring to the fact that they all were indispensable for its correct functioning and, therefore, separating them would prejudice the *objective* that the e-procurement platform was attempting to protect, i.e. the electronic functioning of public procurement in the EU as set out in the 2014 Public Procurement Directives.[204] This was done without giving any relevance to the claims made by the appellants, which stated that in many other Member States such functionalities were indeed separated.[205] Moreover, the Courts contention is not only factually incorrect, but also logically so, insofar as two different activities may well have the same goal, while still not being inseparable.[206] Being able to draw a clearer distinction between activities separable and inseparable from the exercise of public powers is, intuitively, very important and not only for purposes merely "internal" to EU law. Indeed, having clear rules for determining when a certain economic activity is inseparable from the State's activities is even more important in the context of the FSR, especially if considering that, in those situations, legal operators must,

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[203] Case C-687/17 P *Aanbestedingskalender and Others v Commission* [2019] EU:C:2019:932.

[204] Cf '10 Years on, the CJEU Creates More Uncertainty about the (in)Divisibility of Public Powers and Economic Activities in Public Procurement (C-687/17 P)' (*How to Crack a Nut*, 18 November 2019) <https://www.howtocrackanut.com/blog/2019/11/18/cjeu-creates-uncertainty-about-public-powers-and-economic-activities-in-procurement> accessed 26 August 2024.

[205] Ibid.

[206] Ibid.

to a certain extent, interpret foreign law to understand the true connotation of a third countries' State's "essential functions". This makes the risk of arbitrary and incorrect decisions even higher and, therefore, there should be, at the very least, clear guiding principles.

Nonetheless, save for these limited controversies related to the second exception to the notion of undertaking, determining when an entity exercise an economic activity is relatively straightforward and, moreover, it benefits from the guidance of a copious amount of case-law, not only relative to State aid law specifically, but also to other areas of EU Competition law. In the following subsections, we shall expose the more specific conditions provided for in Article 107(1) TFEU, which relate to the characteristics a certain *measure* must have to be considered a State aid.

1.2. The complexities surrounding the subjective conditions of aid

The first period of Article 107 (1) TFEU states that aid must be "granted by the State or through State resources".[207] We shall refer to these two conditions as the "subjective" elements of the notion of aid, as their function is to limit, subjectively, the application of the norm to selective advantages that have some sort of connection to the public sphere. Quite evidently, indeed, there would be no "State" aid without State involvement. However, the true scope of this provision must be correctly understood. In fact, whilst the letter of Article 107 (1) states that aid must be "granted by the State *or* through State resources", the EU Courts have clarified that these two sub-conditions must be intended as cumulative,[208] opting, therefore for a restrictive interpretation of the requirement.[209] For the measure to be considered to originate from the State, the measure must be both "imputable" to the State and funded "through State resources". Especially this latter requirement has been the object of quite a few scholarly discussions.

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[207] Emphasis added.

[208] Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] EU:C:1993:97, paras 19-20.

[209] Marco Lipari 'Ancora sulla nozione di aiuto: l'imputazione allo Stato di una misura di incentivazione' (Yearly AIDEN Conference, Gli aiuti di stato profili generali e problematiche energetiche, July 1st 2019, Palazzo EDISON, Foro Buonaparte 31, Milan).

1.2.1. Imputability to the State: the result of two opposing tensions

The imputability requirement is necessary to ascertain whether, irrespective of its method of financing, a measure can be considered as emanating from the State: it is necessary to consider whether the State was involved in the decision.[210] In certain instances, this is readily apparent. For example, measures taken by a public authority are considered as State aid *by definition*[211] Instead, when public undertakings are involved in the granting of a certain measure, a more complex analysis is required.

In particular, when aid is granted by part of public or private undertakings over which the State exercises a dominant influence, two contrasting principles must be balanced. On the one hand, given the EU's indifference to public or private forms of ownership[212] it is necessary to guarantee that decisions by part of public or private undertakings are not automatically presumed to be imputable to the State, thus *de facto* discriminating such undertakings in relation to private undertakings. On the other, there are burden of proof necessities, insofar as the Commission or a third-party cannot be realistically required to prove that there has been an explicit instruction by the State to the undertaking,[213] since there is a concrete risk that the close relations between the State and such undertakings could be exploited for the granting of aid and, moreover, the privileged nature of such relationships are such as to make it difficult to acquire the necessary proof.[214]

The balancing of such tensions was reached in the *Stardust Maritime* case, where the CJEU established that imputability had to be proved through the presence of certain

[210] Case C-262/*12 Vent De Colère and Others* [2013] EU:C:2013:851, para 17 Joined Cases C-434/19 and C-435/19 *Poste Italiane SpA* [2021] EU:C:2021:162, para 40.

[211] Conor Quigley, *European State Aid Law and Policy* (4th edn, Bloombury Publishing 2022), 38.

[212] Cf Article 345 TFEU, which states that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

[213] Case C-482/99 *France v Commission* (*Stardust Maritime*) [2002], Opinion of AG Jacobs EU:C:2001:685, para 66.

[214] Notice, para 41.

indicators, non-exhaustively set out in the decision[215] and now stated in the Commission's Notice on the notion of aid.[216] These can be, cursorily, subsumed into two different categories: the indicators that concern *the influence of the State on the undertaking* and those that concern the *organic characteristics of the* undertaking (such as its legal status and its integration into the structure of the public administration). Through the use of these indicators, it is therefore possible to ease the burden of proof upon third parties, without, however, having to automatically presume imputability in the case of decisions by a public undertaking.

In concluding this analysis, it is important to address a final issue in relation to the imputability to the State of private undertakings' decisions. In fact, in the *Tercas* case,[217] the CJEU explained how there are "objective differences between a situation where the entity providing the aid is a public undertaking and that in which [...] that entity [...] is a private entity".[218] However, the CJEU insisted that such a difference does not mean that different standards of proof apply to different types of undertakings. Rather, on the basis of the principles set out in *Stardust Maritime*, which states that the evidence relevant for establishing imputability depends on "the circumstances of the case and the context in which that measure was taken",[219] the different nature of the entity means that "where

[215] Case C-482/99 *France v Commission* (*Stardust Maritime*) [2002] EU:C:2002:294 para 55. Cf Massimo Merola, 'Le critère de l'utilisation des ressources publiques' in Marianne Dony and Catherine Smits (eds), *Aides d'Etat*, (Editions de l'Universite de Bruxelles 2005), 39 "les indices de l'imputabilité auxquels se réfère l'arrêt Stardust, non seulement n'ont pas de caractère exhaustif, mais servent seulement d'exemple et représentent de simples critères d'enquête pour vérifier si la condition en cause est remplie dans les cas individuels".

[216] Notice, para 43. Such requirements include, *inter alia*: (a) the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities; (b) the presence of factors of an organic nature which link the public undertaking to the State; (c) the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies; (d) the integration of the public undertaking into the structures of the public administration; (e) the nature of the public undertaking's activities and their exercise on the market in normal conditions of competition with private operators; (f) the legal status of the undertaking; (g) the degree of supervision that the public authorities exercise over the management of the undertaking and (h) any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

[217] Case C-425/19 P *Commission v Italy and others* [2021] EU:C:2021:154.

[218] Ibid., para 70.

[219] C-482/99 *Stardust*, para 55.

[...] the entity that provided the aid is a private entity, the appropriate evidence for the purpose of demonstrating that the measure is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking".[220] In our opinion, notwithstanding the CJEU's statement, the consequence of this case-law is tantamount to requiring a different, higher standard of proof. Indeed if, as in the case under comment, the different evidence required is more exacting evidence,[221] then such evidence automatically leads to an elevation of the standard of proof.

1.2.2. State resources: a fragmented concept

The second "subjective condition" of Article 107 (1), instead, requires any state measure to be "granted through State resources". This requirement relates to the *method of financing*[222] of the measure. From the onset, however, it should be noted that in our reconstruction of the requirement and of its case-law, the concept of "State resources" has been transformed in a *series of tests,* aligning it, methodologically, to the notion of "imputability". There are, mainly, three tests that can be alternatively applied to establish the presence of State resources.[223]

The first test is the "public charge test", on the basis of which a certain measure is considered as State-funded when its financing produces a specific charge on the State's budget.[224] More specifically, as the Commission's highlights in its Notice, the State resources requirement is met when funds are transferred, directly or indirectly, to a certain

[220] C-425/19 P *Commission v Italy and others*, para 72.

[221] Indeed, this was the case in *Tercas* as, in first instance, the General Court had annulled the Commission's State aid Decision insofar as the imputability of an intervention by part of the Fondo interbancario di tutela dei depositi (FITD), a Fund administering bank's mandatory deposit guarantees, had been insufficiently proven. *See*, extensively, Joined Cases T-98/16, T-196/16 and T-198/16 *Italy and others v Commission* [2019] EU:T:2019:167 paras 107-132.

[222] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in a Comparative Perspective* (OUP 2009), 173.

[223] It must be noted that the presence of three distinct tests has never been explicitly stated by the CJEU, which to some extent still insist on a unitary notion of State resources, but is our personal reconstruction of the case-law.

[224] *See, inter alia*, Case C-379/98 *Preussen Elektra* [2000] EU:C:2000:585, para 116: "the measure at issue must necessarily cost the State money and financing through public resources is a constitutive element of the definition of State aid".

beneficiary. In particular, there is no need for a positive transferal of monies, it is sufficient for the State to forego revenue[225] and, therefore, even tax benefits or exemptions are considered a transfer of State resources. This principle was crystallized by the CJEU in *Preussen Elektra*,[226] where an obligation imposed by law on German undertakings to buy renewable energy at fixed, *above market*, prices, whilst imputable to the State, was not "granted through State resources", insofar as the obligation did not burden, in any way on the State's budget and no public monies were transferred.[227] In fact, such undertakings were obligated to pay the higher price with their own resources. The *Preussen* case-law therefore states that, in the absence of a transfer of State resources and of a consequential financial burden on the State, the "state resources" condition is not fulfilled. This decision, which is at odds with the *effects-based* approach detailed above, was best rationalized by Rubini, who explained it as a policy-oriented decision, justified by the CJEU's necessity to exclude from the application of State aid rules mere price regulation.[228]

However, the strength of the case-law regarding this first test is somewhat weakened by other judgments of the Court,[229] in which the use of State resources is established even in the absence of a transfer. In *Bouygues SA*,[230] the Court explained how "it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within

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[225] Notice, para 51.

[226] Case C-379/98 *PreussenElektra* [2001] EU:C:2001:160.

[227] Ibid., para 46.

[228] Cf Luca Rubini, 'The "Elusive Frontier": Regulation under EC State Aid Law' (2009) 8 European State Aid Law Quarterly 277, 297 "a policy choice has resulted in excluding more or less complex forms of regulation from the latter. While the main rationale of this choice substantially depends on the nature, and the under- lying government prerogatives, of these measures, the transfer or use of 'State resources' is the prominent argument used to dismiss them".

[229] Cf L Rubini (n. 221), 178, who states that "the transfer of State resources is the imprecise technical argument which the Court relies on to follow up an unjustified policy choice, and to eventually reach uncertain and arbitrary decisions".

[230] Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others* [2013] EU:C:2013:175.

the meaning of Article 107(1) TFEU".[231] Still, in that case, whilst adopting a softer, more functional approach,[232] the Court still required there to be "a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget".[233] Therefore, the need for some sort of loss of revenue for the State is still required, even if only potentially, in the form of a "risk".

This "softening" of the financial burden test follows logically from the gradual development of two new tests by the case-law, which substituted the need for the measure to represent a specific charge on the State's budget, by requiring some form of *control* over resources, the public origin of which is not evident *prima facie*.[234] These tests were developed, in our reconstruction of the development of the State the resources requirement, to remedy the creation of new form of State interventions by Member States, especially following the *Preussen Elektra* judgment.[235] Indeed, by stating that *above market price* payment obligations are not qualifiable as State aid, the CJEU paved the way for Member State to "outsource" the issuance of State aids to private or public undertakings, which had to finance them with their *own* resources, thus not producing any burden on public finances and, therefore, not qualifiable as State resources under the old case-law. In most of these new forms of State interventions, however, the extra-cost that in *Preussen Elektra* was directly received by the beneficiaries of the measures, is actually received to funds, which must then redistribute the monies received.[236] The proliferation

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[231] Ibid., para 100.

[232] Andrea Biondi, 'State Aid Is Falling down, Falling down: An Analysis of the Case Law on the Notion of Aid' (2013) 50 Common Market Law Review 1719.

[233] Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues*, para 109.

[234] Notice, para 57.

[235] *See* Christian Koenig and Jürgen Kühling, 'EC Control of Aid Granted through State Resources' (2002) 1 European State Aid Law Quarterly, 7, 16. Indeed, Koening and Kühling talk about the *Preussen Elektra* judgment as an "unintended message to 'creative' Member State".

[236] In particular, such funds can be of three different types, as explained by C Koenig and J Kühling (n. 234) there are those which simply have the role of redistributing monies, those which transfer resources according to the law, with little margins of discretion, and those "which merely operate accounts on behalf of the private enterprises being favored by the law".

of funds allowed the CJEU to refine its jurisprudence, without having to overrule *Preussen Elektra* since, in that case, no funds were present.[237]

In particular, as has been anticipated at the beginning of the paragraph, in the case of funds the State resources requirement is established "by contagion", in the presence of a sufficiently incisive degree of *control* by the State over the funds. Such control can be ascertained in one of two ways as was clarified, after some controversial cases,[238] in *Dobeles HES*.[239] The first requires that resources remain under public control, available to the State.[240] The second, instead, relates to cases in which funds derive from a compulsory charge, established by law, which is managed an apportioned in accordance with that legislation.[241] In the presence of such forms of control, the expenditure of the resources can in some way attributed to the State and, thus, be assimilated to a "financial burden" on public finances.[242]

With regards to the second test, i.e. "public control", while the case-law clearly requires proof of a "power of disposal" by part of the State on the funds,[243] it is not particularly

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[237] *See*, in this sense, C-262/*12 Vent De Colère* paras 35-36 where the CJEU, distinguishing the facts of the case from *PreussenElektra*, stated that "in the case which gave rise to the judgment in PreussenElektra, the private undertakings had not been appointed by the Member State concerned to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources. Consequently, the funds at issue [in PreussenElektra] could not be considered a State resource since they were not at any time under public control and there was no mechanism, such as the one at issue in the main proceedings in the present case, established and regulated by the Member State, for offsetting the additional costs arising from that obligation to purchase and through which the State offered those private operators the certain prospect that the additional costs would be covered in full".

[238] Daniel Vasbeck, 'State Aid, the Criterion of State Resources and Renewable Energy Support Mechanisms: Fresh Wind from Luxembourg in EEG 2012' (2019) 4 European Papers, 629.

[239] Joined Cases C-702/20 and C-17/21 *DOBELES HES* [2023] EU:C:2023:1.

[240] Cases C-702/20 and C-17/21 *DOBELES HES,* para 39 .

[241] Ibid., para 35.

[242] In this way, the overruling-averse CJEU is able to maintain the theoretical validity of the "financial burden" criterion stated in Preussen Elektra, without having much to regard it much in practice, thus sidestepping the obstacle posed by a formalistic requirement which would hinder a more penetrating control over the notion of aid. Of course, such a contradictory stance, together with the continuous evolvement and increased complexity of national aid measures, render the case-law convoluted and difficult to follow. In relation to the correlation between the complexity of the case-law and that of national measures *see* M Merola and F Caliento (n. 178).

[243] Case C-405/16 P, *Germany v. Commission* [2019] EU:C:2019:268.

clear what the elements that can demonstrate such power actually are.[244] In *Stardust Maritime*, in fact, one of the earlier cases to consider the "public control" criterion, the Court first established the existence of a dominant influence of the State on Credit Lyonnaise, the bank that granted the loan to Stardust, within the meaning of Article 2 of the Transparency Directive.[245] Then, however, it required something more: that the sums corresponding to the measure "constantly remain under public control, and therefore available to the competent national authorities".[246] Nonetheless, the Court presumed such constant control and did not give particular insights on the notion. In *ENEA* the contours of public control were partially clarified, as the Court mentioned elements such as the dictation of instructions and the exercise by the State "of influence in its capacity as majority shareholder in an undertaking".[247] Finally, in *Germany v. Commission (EEG 2012)*,[248] the CJEU gave particular attention to the distinction between, on the one hand, a mere dominant influence and, on the other, a power of disposal of the State on the funds.[249] In particular, it explained that the fact that the use of the funds by the State was specifically detailed by the law, was not conclusive in demonstrating that there was a power of disposal but, rather, that there wasn't, since the German State could not use them autonomously.[250] Therefore, even though the CJEU still has to lay down some clear principles on what a "power of disposal" actually is, it can be inferred *a contrario*, that it correlates to *the capacity of using the funds freely*.[251]

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[244] D Vasbeck (n. 237), 637.

[245] Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390/38.

[246] C-482/99 *Stardust Maritime*, para 37.

[247] Case C-329/15 *ENEA* [2017] EU:C:2017:671, para 35.

[248] C-405/16 P, *Germany v. Commission*.

[249] Ibid., para 74.

[250] Ibid., para 76: 'the exclusive allocation of the funds [...] tends rather to show [...] that the State was specifically not entitled to dispose of those funds, that it is say to decide on an allocation which differs from that laid down in the [law]'.

[251] This definition seems, to those who write, to mirror the concept of *possession*, typical of civil law, which manifests in an activity corresponding to the exercise of property rights. Only when the powers of control

For the third test, instead, the presence of two cumulative elements is functional for determining State influence over such funds, and thus, whether these are eligible to be qualified as State resources. First, the funds must derive from a compulsory charge and, secondly, a specific mandate conferred by law on the undertaking to "manage and apportion"[252] such funds is necessary. The characteristics of the compulsory charge have been specified in some recent cases. First, in *Dobeles HES*, the Grand Chamber of the CJEU clarified that, from a formal standpoint, it is irrelevant if the compulsory charge actually falls into the category of fiscal levies under national law,[253] provided that it has the characteristics required by the case-law. Then, in *Germany v. Commission (EEG 2012)*. it was clarified, citing the *Essent*[254] case, that the *faculty* of an undertaking to offset an additional cost imposed by the State to others through a charge excludes the presence of State resources. Instead, if the offsetting of additional costs is provided, it must be compulsory *de jure*.[255] This was confirmed by the General Court in *Germany v. Commission (CHP),*[256] where the presence of a contribution burdening certain network operators was not considered as "mandatory" because such operators *could* still pass-on the extra-cost suffered to downstream customers and, therefore it could not be established that the State "appropriates to itself the resources of the network operators, since, contrary to its contention, those network operators are not necessarily the ultimate debtors of the financial burden".[257] This case therefore further specifies the former, by explaining how the *de jure* contribution must be imposed on the *ultimate debtor*, even though it is not necessary for such a debtor to be the final consumer.[258] The second condition is, instead,

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of the State on the funds are equiparable to possession, can the funds be considered as "State resources". The existence of such powers can be inferred through *indicia*, such as those specified in the *ENEA* case: i.e. such as the dictation of instructions and the exercise by the State of influence in its capacity as majority shareholder in an undertaking. For more on the concept of possession, *see*, Rodolfo Sacco, 'Possesso (dir. priv.)' in Enciclopedia del Diritto vol. XXXIV (Giuffrè Editore 1985), 505.

[252] Notice, para 58.

[253] Cases C-702/20 and C-17/21 *DOBELES HES,* para 39.

[254] Case C-204/12 *Essent Belgium NV* [2014] EU:C:2014:2192.

[255] C-405/16 P *Germany v. Commission*, para 68.

[256] Case T-409/21 *Germany v. Commission* [2024] EU:T:2024:34.

[257] Ibid., para 76.

[258] Ibid., para 74.

much more straightforward. “Managing an apportioning” the funds according to law means that the entities administering those funds actually have little to no margin of discretion in *how to use those monies*. Thus, the significance of the State in their control is established, and they can be referred as “State resources”.[259]

The difference between these two tests is clear. Indeed, for the former the determining factor for establishing State resources is the link between the funds and the State. Therefore, control *over the monies* is critical and, thus, the test has the purpose of understanding whether the State acts as the owner of the funds. Conversely, in the latter test the focus is on the *method of financing* of the measure, which must resemble regular taxes as closely as possible. Only in the presence of a mandatory, *ex lege*, charge and thus of a clearly identified payer (the *ultimate debtor*) can State resources be established. The case-law therefore requires for an *a priori* determination of the subject obligated by the extra-cost. It is here submitted that, while, from an effects-based perspective it is hard to justify a difference between the compulsority of passing-on an extra-cost and the mere possibility of doing so, a *ratio* for this criterion is that the CJEU is attempting to limit the third test to cases in which the debtor is clearly determined because, otherwise, the structure of the aid measure would resemble mere price-regulation too much which, as we have explained, is excluded from State aid control on the basis of the *Preussen* case-law.

In conclusion, after having explained the (sub-)conditions of imputability and the three tests that compose the State resources requirement the central importance of both of the “subjective conditions” of aid in defining (prohibited) foreign subsidy should be clear. While the true extent of their role will be assessed only once both the notions of State aid and of Subsidy will have been comprehensively assessed, itis nonetheless important to State their relevance from the onset. Indeed, while the *imputability* criterion is central in understanding when a *financial contribution* can be attributed to the *government of a third country* pursuant to Article 3 FSR, the State resources requirement may play a relevant role in understanding the notion of a financial contribution,, which is therein defined non-

[259] Ibid., para 66.

exhaustively. In particular, it could help us understand if purely regulatory measures such as those object of the *Preussen* judgments would be caught or not by the definition and, also, whether the two alternative *control* tests developed by the CJEU's jurisprudence could be used to extend the notion of *financial contribution* to other types of measures.

1.3. The concept of "advantage" and its legal test

As already mentioned, the two elements of the "selective advantage" requirement are analyzed separately. In this section (1.3), we will focus on the existence of an advantage, in the next (1.4), the selectivity requirement will be assessed.

First and foremost, it is essential to underline that the concept of "advantage" is drawn very widely, as measures granting "any economic benefit"[260] or interventions that "mitigate the charges which are normally included in the budget of an undertaking"[261] are considered to constitute advantages. The effects doctrine, in fact, developed mainly in relation to the advantage requirement,[262] and it should therefore not be surprising that the notion is broadly defined. More precisely, we can see that the notion of advantage is "effects-based" in both of the directions we underlined earlier (in Section 1.1.), insofar as both the causes and aims and the form of the State measure are irrelevant for the existence of an advantage.[263] In particular, concerning the latter, tax advantages and social security contributions,[264] loans at discounted rates and injections of capital[265] have been considered as being able to confer an advantage.

However wide, any legal concept must have some sort of limit, and this is generally found in the so-called "Market Economy Operator Test" (or "MEOP"), which is applied by the Commission, in assessing the existence of State aid, to understand whether an economic

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[260] Case C-39/94 *SFEI and Others* [1996] EU:C:1996:285, para 60.

[261] Case C-387/92 *Banco Exterior de España* [1994] EU:C:1994:100, para 13.

[262]Cf Richard Plender Qc, 'Definition of Aid' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004), 6.

[263] Case 173-73 Italy v. Commission.

[264] Notice, para 68.

[265] A Jones and B Sufrin (n. 193), 26.

transaction made by the State is in line with normal market conditions.[266] First of all, from a *structural* viewpoint, transactions that are in line with the market conditions cannot be unilateral in nature, insofar as in such cases there cannot be any profitability, either short or long term, for the State and, therefore, any rational market investor would not partake in it. Quite simply in fact, a tax break or a direct subsidy cannot be scrutinized under the MEOP, because no investor would give a clearly gratuitous advantage to an undertaking. Where, instead, a relationship is bilateral, the gratuity of the advantage is less obvious and, therefore, the MEOP must be applied.

This concept has, moreover, solid footing in other EU legal principles, in particular the neutrality of the EU legal order to systems of property ownership.[267] Such neutrality could hardly be considered as a solid legal principle if virtually *every* economic transaction of the State could be caught by State Aid provisions, as this would be clearly prejudicial to a form of public property ownership, excluding the State from the possibility of, for example, investing in firms, or providing loans. The MEOP therefore serves the purpose of ascertaining whether another, private, economic operator would have rationally made the same economic transaction, therefore rationalizing the State intervention as a normal market participant who, clearly, has the right and possibility of investing in undertakings or providing them with loans.

It is yet to see if the general concept of "advantage" contained in Article 107(1) TFEU and, more specifically, if the MEOP itself is capable of being transferred to the concept of "benefit" contained in Article 3 FSR. However, before reaching a conclusion, it is essential to consider the notion of "benefit" elaborated by WTO law in the application of the ASCM.

[266] Cf Nicole Robins and Laura Puglisi, 'The market economy operator principle: an economic role model for assessing economic advantage' in Leigh Hancher and Juan Jorge Piernas Lopéz (eds), Research Handbook on European State Aid Law (2nd edn, EE Publishing 2021).

[267] Notice, para 73.

1.4. Framing selectivity as a "derogation by exception"

Having found an advantage to exist, it is also necessary to determine whether or not the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity.[268] As noted by AG Comas in his Opinion the selectivity requirement can be seen as a specification, in the field of State aid, of the principle of equal treatment[269] and, therefore, is "clearly linked […] to the concept of discrimination".[270] In particular, this requirement has the function of distinguishing between "general measures"[271] and State aids. The importance of this distinction is lucidly captured by Bacon who brings forth two main reasons, one economic and one political, for which general measures are typically considered to fall outside of the spectrum of Article 107(1) TFEU. From an economic viewpoint, general measures are considered not to be distortive of competition; whereas, politically general measures "could not be part of EC competition policy to eliminate all differences in the cost structure between countries, many of which derive from the economic and social conditions in those countries. Any other view would lead, logically, to the inconceivable result that almost any difference in Member States' laws which affected undertakings would fall within the supervisory power of the Commission".[272]

Selectivity can be "material" or "regional". The material selectivity criterion is established when the contested measure applies to specific undertakings or economic sectors in a given Member State.[273] When its application is territorially limited inside a member state, "regional" selectivity is established, save the exceptions that will be exposed *infra*. Moreover, the Commission's Notice on the notion of aid specifies that

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[268] C Quigley (n. 210), 85.

[269] Case C-353/95 P *Tiercé Ladbroke v Commission* [1995] Opinion of AG Cosmas EU:C:1997:233, para 30.

[270] C Quigley (n. 210), 86.

[271] For an extensive discussion, *see* Kelyn Bacon 'State Aids and General Measures' (1997) 17 Yearbook of European Law 269, 270 who, preliminarily, states that "general measures may be defined as general legislative and regulatory measures affecting the economy as a whole within a given Member State".

[272] Ibid.

[273] Notice, para 120.

material selectivity can be *de jure* or *de facto*. The difference lies in the fact that, in the first case, the discrimination in favour of certain undertakings stems directly from the legal criteria contained in the measure, whereas in the second case the measure is formally general in its application and the criteria its granting are objective but, *in concreto*, the measure favors certain undertakings[274]. Such a difference can be readily compared with the categories of "distinctly" and "indistinctly" applicable measures in the different area of free movement law.

From a logical[275] perspective, what the selectivity requirement aims at ascertaining, is whether a certain measure constitutes a *derogation by exception* and not, more simply, a *derogation by specification*. The difference between the two concepts was brilliantly explained by Natalino Irti.[276] First, he clarifies the difference between a special norm ("norma speciale") and an exceptional norm ("norma eccezionale"), which consists in the fact that the special norm is coherent with the internal logic of the general norm and adds effects to such a logic, whilst, on the other hand, an exceptional norm is in a position of contrast with the general norm, breaking such logic and introducing a new and personal one.[277] Then, the concept of derogation is explained as "*subtractive relationship* between two norms.[…] A norm derogates another, insofar as it subtracts from it a group or class of cases and, therefore, reduces its application".[278]

This same distinction applies to the concept of selectivity, both material and regional, as will be further noted. A measure is, in fact, materially selective only to the extent that the derogation represented by the norm is not justified "by the logic of the system", therefore by being in a position of contrast with such logic, breaking it. Simply put, an exceptional norm. The same is true for regional selectivity, where the scope of the criteria used to

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[274] Notice, para 121.

[275] We refer here to "logic" in a formal sense, as the relationship between general and special norms can be easily reduced to a system of inferences between propositions, exactly as formal logic can. For a practical example, *see* Silvia Zorzetto, *La norma speciale: una nozione ingannevole* (Edizioni ETS 2010), 84.

[276] Natalino Irti *L'età della decodificazione* (4th edn, Giuffrè Editore Milano 1999), 53-64.

[277] Ibid., 58.

[278] Ibid., 64.

ascertain whether cases of asymmetrical devolution of powers,[279] is to understand whether the decision to apply a certain fiscal regime by part of a local authority is coherent with the *ratio*, the logic of the constitutional arrangement of powers in a certain state or, conversely, breaks such logic. In the latter case, the measure is selective.

1.4.1. Material Selectivity

Whilst in certain cases material selectivity is easily found, and in particular when the contested measures apply *ad hoc*, i.e. explicitly to well-defined undertakings[280] or sectors of the economy[281] there are other cases in which such assessment is more arduous such as with tax advantages or exemptions.[282]

In these cases, the CJEU elaborated a "three-step analysis", which is generally considered necessary for assessing all measure which mitigate the charges that those undertakings would normally have to bear.[283] First, the general system of reference which the measure forms a part of must be identified. Then it must be verified if the measure constitutes a derogation from such system, insofar as it discriminates between operators which are in a "comparable legal and factual situation". If this second step is met, then, the measure is considered *prima facie* selective. However, the derogation can still "justified by the nature or general scheme of the (reference) system".[284]

The *Paint Graphos* case[285] gives us the chance of understanding three-step approach in practice, as the test was well explained by the CJEU. The judgment dealt with a special regime in Italian corporate tax, on the basis of which the income of cooperative companies was exempted from the general Italian corporate tax on the basis of certain conditions. To

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[279] *See infra* Section 1.4.2.

[280] Case C-15/14 P *Commission v MOL* [2015] EU:C:2015:362, paras 60 et seq.

[281] Case C-143/99 *Adria-Wien Pipeline* [2001] EU:C:2001:59 para 55.

[282] A Jones and B Sufrin (n. 193), 28.

[283] Notice, para 127.

[284] Notice, para 128.

[285] Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] EU:C:2011:550.

assess whether the tax exemption was selective, the Court explained, in a preliminary ruling, how the "three-step approach" would apply to those facts. In relation to the first step, i.e. the identification of the reference system, the CJEU found that to be the general Italian corporate tax regime,[286] because corporation tax for cooperatives was calculated on the basis of the same parameter (the amount of net profit) as other, non-cooperative undertakings. In short, the tax base was the same.[287] The assessment of the general system is, therefore, highly based on the regulatory technique used by part of the member state. If, conversely, a *tout court* separate tax would have been created for cooperatives *that* tax would have made the reference system.[288]

Then, in analyzing the second part of the test, the CJEU divides its analysis in two parts. First, it determines whether the measure brings forth a differentiation between the undertakings forming a part of the regime. This is easily found, insofar as the measure is a "exemption" which, by definition, causes a differentiation. Secondly, it must be verified if the differentiation actually discriminates against undertakings that are in a "comparable factual and legal situation, in the light of the objective pursued by the corporation tax regime, namely the taxation of company profits".[289] This specification is, clearly, essential. In fact, when compared with a widely drawn reference system (such as, in this case, the general system of corporate taxation) any measure could be considered as selective.[290] This way, instead, it is possible to understand selectivity in a narrower fashion, comparing like with like. Moreover, the Court also explains that the comparison must be made with reference to the objective of the reference system. and is quite strict in stating that these cannot be *extrinsic* to the reference system (such as environmental and industrial policy objectives), only *intrinsic* objectives of the norm are relevant.[291] In

[286] Ibid., para 50.

[287] Notice, para 133.

[288]José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) 17 European State Aid Law Quarterly 85, 87.

[289]Cases C-78/08 to C-80/08 *Paint Graphos and Others*, para 54.

[290] JL Buendía Sierra (n. 287), 88.

[291]Case C-6/12 *P Oy* [2013] EU:C:2013:525 para 27 and Notice, para 135.

Paint Graphos, the Court found that cooperatives *were not* in a similar situation to other undertakings, therefore the exemption was not selective. In particular, cooperatives have some peculiar characteristics, such as being incorporated not in pursuit of mere profit but with the aim of maximizing the mutual advantage of its member, they are not listed on stock markets, have limited access to equity and capital and their share and loan capital provide limited interest.[292] These characteristics are not shared by other undertakings, precluding them from being "comparable factual and legal situation, in the light of the objective pursued by the corporation tax regime, namely the taxation of company profits".[293]

Even though the CJEU considered the measure as not selective by the sole application of the second test, it provided the referring court guidance on the functioning of the third step as well. First of all, an exception from a general reference system can be justified "if it results directly from the basic or guiding principles of that tax system".[294] Again, the Court emphasizes the distinction between intrinsic and extrinsic objectives. While, the Court did not provide any explicit examples of such objectives in the case, the Notice on the notion of aid cites various possible bases for justification, for example the progressive nature of an income tax and its redistributive purpose, the principle of tax neutrality and the need to avoid double taxation. Then, the Court limits the possibility of such justification, subordinating it to the meeting of two requirements: that the implementation of the exception be not only theoretically consistent with the principles of the system but also practically consistent and that of proportionality. Therefore, the implementation of the mechanism must be such as to avoid abuses, for example, by corporations that take the legal form of cooperatives for the sole purpose of receiving the benefit.[295] Moreover, the measure must be suitable to achieve the desired end; must be necessary to achieve the

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[292] Notice, para 58-60.

[293] Ibid., para 61.

[294] Ibid., para 69.

[295] Ibid., paras 73-74.

desired end; and. must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved.[296]

The correctness of our interpretation of the character of selectivity as a "derogation by exception" should be confirmed on the basis of this practical application of the three-step approach. In fact, the second step, insofar as it considers the identity of the factual and legal situation, of undertakings in the light of the objective pursued by the tax regime to which the measure belongs[297] sanctions only those derogations that "break the logic" of the derogated (general) norm. This is seen also in the third step, where a measure can be saved even if "if it results directly from the basic or guiding principles of that tax system".[298] In this case, in fact, while the measure derogates by exception in relation to the references system, it derogates by specialty in relation to another (more important?) principle that guides the whole tax system: a typical example is the coherence of a fiscal measure with the principle of progressive taxation, which justifies the apparently discriminatory effects of, *inter alia*, corporate taxes based on turnover.[299] These conclusions are not, moreover, prejudiced by the cases of stand-alone taxes, where the general reference system is the measure itself – as the tax measure does not form part of a wider system with the same *ratio*. In fact, in such case, the presence of a general principle from which the departure of the measure must be considered is still drawn by the Commission or the EU Courts, as can be seen in the *British Aggregates* renvoi, where, even if the reference system was considered to be the stand-alone tax itself,[300] the General Court still sought to identify the "normal taxation principle underlying the AGL,"[301] on the basis of which to consider the *de facto* derogation. It is here argued that, in such instances, the Court gives normative character to the "principle" underlying the norm and,

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[296] For more on proportionality, cf Takis Tridimas, 'The Principle of Proportionality', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (OUP 2018), 247.

[297] JL Buendía Sierra (n. 287), 89.

[298]Cases C-78/08 to C-80/08 *Paint Graphos and Others*, para 6.

[299] *See*, for example, Case C-562/19 P *Commission v. Poland*, [2021] EU:C:2021:201 para 41.

[300] Case T-210/02 RENV *British Aggregates v Commission* [2012] EU:T:2012:110, para 51.

[301] Ibid., para 53.

consequentially, assess the type of derogation from the principle thus identified. In such an instance, therefore, the analysis does not change substantially, but only formally, as the reference system is not the wider set of "black-letter" laws that form part of that specific tax system, but the general (normative) principle that guides the stand-alone tax.

1.4.2. Regional Selectivity

Similarly to the concept of "material selectivity", also for "regional selectivity" the bulk of the legal issues arise in relation to taxation.[302] In particular, regional selectivity arises when "differential tax burdens or concessions may apply in different regions of a Member State".[303] The CJEU, in *Azores,*[304] the leading case on regional selectivity, distinguished three different power structures between the central State and infra-state entities, in order to better identify the presence of territorial selectivity, following the Opinion of AG Geelhoed.[305] These power structures are: the centralization of taxation powers, symmetrical devolution of powers and asymmetrical devolution of powers.[306] In the first scenario, where the State unilaterally applies a lower tax rate within a defined geographical area[307] the selectivity of a measure is *prima facie*. The second situation, instead, in which all local authorities have an "autonomous power in law to decide the applicable tax rate within their territory of competence, independently from the central government"[308] there is no selectivity because it is technically impossible to determine a general reference system.[309] In the third situation, instead, where only selected regional authorities have taxation power, a further analysis is needed, so as to ascertain whether that authority is "sufficiently autonomous […] with the result that […] it plays a

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[302] But *see* Notice, para 143 on how the "case-law has so far only dealt with tax measures. However, as regional selectivity is a general concept, the principles set out by the Union Courts as regards tax measures apply to other types of measures as well".

[303] A Jones and B Sufrin (n. 193), 43.

[304] Case C-88/*03 Portugal v Commission* (*Azores*) [2006] EU:C:2006:511.

[305] Case C-88/03 *Azores* [2005] Opinion of AG Geelhoed EU:C:2005:618.

[306] Case C-88/03 *Azores*, para 63-66.

[307] Ibid., para 63.

[308] Notice, para 144 (2).

[309] Notice, para 144 (2).

fundamental role in the definition of the political and economic environment in which undertakings operate".[310] This further analysis is aimed at understanding to what extent such autonomy exists, and requires: (a) constitutional autonomy, i.e. political and administrative autonomy *vis-à-vis* the central government; (b) procedural autonomy, i.e. the ability of the body to adopt the measure independently and (c) economic and financial autonomy, i.e. the assumption of the economic responsibility deriving from the measure by part of the authority. If all these conditions are fulfilled, then differential tax burdens are not considered selective. If they aren't, instead, the measure will meet the requirement and, if the other conditions are fulfilled, will qualify as State aid.

In our opinion, even regional selectivity can therefore be rationalized as a form of "derogation by exception", even if the precise notion of derogation is not perfectly translatable. Indeed, regional selectivity is more concerned with the relationship between territorial power structures rather than with the relationship between different norms or rules. However, if we consider the complex of constitutional, political and economic and financial characteristics of a certain national Member State as the system of reference, the jurisprudence sanctions as regionally selective only those measures that "derogate" from the general tax treatment immanent to that specific system. When, conversely, it is impossible to determine said system of reference or, instead, when a local authority is sufficiently autonomous, from a constitutional, political and economic perspective – and is therefore capable of constituting an independent system of reference – a territorially differential tax treatment does not amount to a "derogation" of the national, constitutional system of reference. Indeed, in the former case the system does not exist and, in the latter, it is substituted by the more local reference system.

All in all, while we are convinced with our rationalization of the concept of selectivity as a "derogation by exception", there are still difficulties in the application of the selectivity test in practice, and in particular of the three step approach for material selectivity. It is therefore debatable, and we shall consider the specifics in chapter 3, whether it is appropriate to extend this approach to the notion of "limitation in law or in fact" provided

[310] Case C-88/03 *Azores*, para 58.

for in Article 3 FSR. Moreover, the ASCM's notion of "specificity" is not perfectly identical to that of selectivity and, therefore, it is necessary to consider that first, before reaching any, even tentative, conclusion.

1.5. The "negative conditions" of aid: an inversion of the burden of proof?

The normative basis for the qualification of a "measure" as a State aid finally comprises also the two so called "negative conditions", namely "distortion of competition" and "effect on trade". These conditions are "negative" insofar as they are generally assumed fulfilled when the other conditions are present. In doing so, the burden of proof shifts, *de facto,* from the Commission to the other parties. Considering both the case-law and the Commission's guidance, what the parties alleging the inexistence of aid must prove (the *thema probandum*), is the "practical and theoretical exclusion of competition in the market where the aid was received".

In practice, these two conditions are analyzed jointly, as they are considered to be "inextricably linked",[311] albeit remaining distinct legal concepts.[312] In fact, while the "distortion of competition" condition aims at ascertaining the negative impact that aid measures have on the internal market, the "effect on trade" criterion is essentially a norm conferring jurisdiction on the Commission for the exercise of its control on State aids, establishing thus a separation between said powers and Member States' "independent economic action".[313] Moreover, even if the letter of Article 107 TFEU does not give any indication in this sense– unlike Article 101 TFEU, who refers to agreements that *may* affect trade – the case-law is clear on the fact that such distortions and effects are relevant even only *potentially.*[314] On the other hand, with regards to the extent of the Commission's formal burden of proof, it is settled that, for the purposes of determining

[311] Notice, para 186.

[312] L Hancher, T Ottervanger and PJ Slot (n. 40), 92.

[313] *See* Theresia De La Cruz Rothenfusser, 'The Impact of the Cases Marinvest and Ighoga on the Notion of the Criterion "Effect on Trade Between Member States"' (2024) 23 European State Aid Law Quarterly 125.and Case T-93/02 *Confédération nationale du Crédit mutuel* [2005] EU:T:2005:11, para 82.

[314] This is so, it must be said, for good reason, as State aid measures are usually notified *before* their actual implementation, so there are no actual effects or distortions for the Commission to directly assess. *See* ibid., 126.

the existence of a competitive distortion or of effect on trade, it not required to undertake any specific economic analysis nor to produce any substantive evidence.[315] Moreover, there is no *de minimis* threshold for effects on trade.[316] However, effects on trade (and distortions of competition) cannot be presumed nor be merely hypothetical,[317] and therefore it is necessary to highlight what the standard of proof[318] for the establishment of these criteria are.

In relation to distortions of competition, as the Commission notes, these are generally found to exist, for all intents and purposes, when there is a selective advantage granted by the State or through state resources in a "liberalized sector where there is or *could be* competition".[319] In relation to effect on trade, the standard of proof can be inferred from numerous cases of the CJEU,[320] and most notably the *Heiser* case,[321] where the Court found that a tax benefit enjoyed by the dentist of a small town in Austria was state aid, regardless of the fact that the dentist provided only local services,[322] "since it is not inconceivable,"[323] that the dentist could have competed with foreign undertakings. In relation to this requirement, therefore, the burden of proof is the fact that competition with *other* Member States *cannot be excluded*.[324] Said in other words, what the parties alleging the inexistence of aid must prove (the *thema probandum*), is the practical and theoretical exclusion of extra-territorial competition.

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[315] Notice, para 194.

[316] Notice, para 192.

[317] Notice, para 195.

[318] Cf Cees Dekker, 'The "Effect on Trade between the Member States" Criterion' (2017) 16 European State Aid Law Quarterly, 154.

[319] Notice, para 187.

[320] Case C-280/00 *Altmark Trans* [2003] EU:C:2003:415; Case C-494/06 P *Commission v Italian Republic and Wam SpA* [2009] EU:C:2009:272.

[321] Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] EU:C:2005:130.

[322] C Dekker (n. 317), 156.

[323] C-172/03 *Heiser* para 35.

[324] Cf C Dekker (n. 317), 156.

In conclusion, it is uncertain to what extent these concepts can apply to their parallel provision, Article 4 FSR, on "distortions of the internal market". Indeed, on the one hand, the effect on trade criterion is missing in Article 4 FSR, as there is no need to protect the autonomy of Member States' economic action, and thus provide a criterion for the attribution of the Commission's jurisdiction. Moreover, the text of Article 4 FSR and, especially, the indicators listed therein may be construed as require a deeper economic analysis of their effects, in contrast with the more "informal" approach adopted in the application of Article 107 TFEU.

1.6. The "compatibility" of aid measures

Notwithstanding the general prohibition of aid within the internal market, as provided for in Article 107 (1) TFEU, State measures can still be allowed when, after having been notified to the Commission pursuant to Article 108 TFEU, they are declared "compatible" with the internal market. The compatibility assessment is based on the conditions set forth in Article 107 (2) and (3) TFEU, as interpreted by the EU Courts and expanded upon by the Commission's decisional practice and its guidelines. Article 108 TFEU moreover clarifies that such an assessment is under the exclusive competence of the Commission. Finally, it is important to underscore from the onset how, as the declaration of compatibility constitutes an exception form a general prohibition, all of the following cases must be interpreted narrowly.[325]

Since entire books could be written on each of these provisions, we will attempt to curtail our enquiry on the compatibility of aid measures to the parts of the aforementioned provisions that are most relevant for our analysis of the FSR. Anticipating elements that will be discussed more diffusely in chapter 3, we will, first, consider specifically the exemption detailed in Article 107 (2)(b) as it is relevant for a better understanding of one of the "safeguards" *ex* Article 4 FSR.[326] Second, after having briefly listed the different exemptions provided for in Article 107(3), we will focus primarily on the compatibility with the internal market of Article 107(3)(c), as the jurisprudence provided, in the *Hinkley*

[325] Case C-73/03 *Spain v Commission* [2004] EU:C:2004:71 para 36.

[326] *See, supra,* Ch. 1 Section 2.1.

Point case,[327] some interesting reflections on the notion of "public interest objective" and on the nature of the "balancing test" that must be undertaken under the norm and which, intuitively, could be transposed to Article 6 FSR.

1.6.1. Cases of automatic exemption: Article 107(2) TFEU

Article 107 (2) provides that certain categories of aid "*shall* be considered compatible with the internal market".[328] From such wording it is clear that the norm limits significantly the amount of discretion the Commission enjoys in relation to the assessment of the types of aid detailed by the Treaty,[329] allowing only to decide *whether* a measure falls in one of the three Article 107 (2) categories. After having done so, exemption is automatic.[330]

More specifically, letter (a) exempts aid of a "social character granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned"; letter (b) exempts aid "to make good natural disasters or exceptional occurrences" and letter (c) regards aid granted to compensate certain areas of the Federal Republic of Germany economically disadvantaged by the division of Germany.

For our purposes, understanding the correct contours of the condition *sub* letter (b) is of particular interest, as the same exact formulation is used by Article 4 (4) FSR. First, the distinction between *natural disasters* (such as wildfires, floods, earthquakes and droughts) and *exceptional occurrences* (which are, more generally, *force majeure* events, such as wars, terrorist attacks and, most recently, global pandemics) should be relatively

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[327] Case C-594/18 P *Austria v Commission (Hinkley Point)* [2020] EU:C:2020:742.

[328] Italics added.

[329] C Quigley (n. 210), 255.

[330] L Hancher, T Ottervanger and PJ Slot (n. 40), 133.

clear. Moreover, it is also largely irrelevant, as the concepts are applied jointly to aid measures notified under Article 107(2)(b).[331]

Moreover, the Commission requires for there to be a *direct link* between the aid containing the compensation and the damage caused by the disaster or the exceptional occurrence and must be limited to the amounts strictly necessary for the compensation.[332] Furthermore, in relation to the types of damages that can be compensated, these comprise both the *damnum emergens* and the *lucrum cessans*.[333] On such basis, it is evident that, to be compatible under Article 107(2)(b) aid must aim solely at the *restitutio in integrum* of the situation present before the disaster or the exceptional occurrence but, however, cannot extend to making the situation *better* than what it was before. Indeed, aid for the development, and thus the *bettering*, of impacted areas must be assessed under Article 107(3).[334]

1.6.2. Article 107(3) TFEU: the discretionary exemptions and the balancing of positive and negative effects

The second group of exemptions, provided for in Article 107 (3) differ starkly from the those analysed above both in their content and in the way they are applied by the Commission. For what pertains to its content, Article 107(3) lists the following types of aid: (a) regional aid; (b) aid to promote the execution of IPCEIs or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas; (d) cultural aid; (e) aid authorized by the Council.[335] Second, in relation to the Commission's exercise of its

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[331] *See*, as an example Commission Decision (EU) 2020/394 concerning the measures SA.39119 (2016/C) (ex 2015/NN) (ex 2014/CP) implemented by the Hellenic Republic in the form of interest subsidies and guarantees linked to the fires of 2007 (the present decision covers only the agricultural sector) [2020] OJ L76/4.

[332] C-73/03 *Spain v Commission*, para 37.

[333] C Quigley (n. 210), 257.

[334] In the same sense *see* L Hancher, T Ottervanger and PJ Slot (n. 40), 140.

[335] More specifically, Article 107(3) lists: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred

exclusive competence, since Article 107(3) provides that such aid "may" be declared compatible with the internal market, it is clear that it enjoys a much wider degree of discretionality in carrying out the compatibility assessment. In this paragraph, we are mainly concerned with the latter trait of "compatibility" under Article 107(3). Indeed, the "balancing test" contained in Article 6 FSR makes no reference to any of the aforementioned categories of exemptable aid. Therefore, the only relevant normative concepts actually transposable to the FSR are those that relate to *the manner* in which the compatibility assessment is carried out. This requires us to understand the *limits* of the Commission's discretionality under Article 107(3).

In this context, until very recently, the criteria guiding the compatibility assessment were thought to derive from the *Philip Morris* judgment, where the CJEU developed the so-called "compensatory justification" principle. Such principle, as interpreted and applied by the Commission, based the exercise of the Commission's discretion upon the following consideration: does the aid measure enable the beneficiary to contribute to the achievement of an EU objective "over and above the effects of normal market forces"?[336] In the case of a positive answer, then the Commission would decide not to raise objections regarding the measure under exam. The "compensatory justification" principle is, in effect, a specification of the general principle of proportionality, cast in the context of "compatibility".[337] Indeed, the aid must be necessary for the attainment of a specific EU objective (insofar as the aid is essential to the achievement of the proposed objective and, therefore, normal market conditions would not be sufficient). Moreover, it must be appropriate (insofar as the aid measure is the appropriate policy instrument to achieve the objective) and proportional *stricto sensu* (insofar as it must not unduly affect competition

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to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

[336] Kamiel Mortelmans, 'The compensatory justification criterion in the practice of the Commission in Decisions on State Aids' (1984) 21 Common Market Law Review 405, 406.

[337] L Hancher, T Ottervanger and PJ Slot (n. 40). 143.

and trade and, therefore, a form of balancing between positive and negative effects of measures must be achieved).[338]

The Commission then expanded upon such case-law, developing seven conditions that aid must have to be assessable for the purposes of compatibility.[339] Such conditions are referred to as the "common assessment principles", because they are listed under this heading in all current Commission guidelines on compatibility *ex* Article 107(3).[340] However, they are applicable to all compatibility assessments, notwithstanding the fact that a certain aid measure is not encompassed by a specific guideline.[341] Most recently, however, the case-law brought forth some changes to the general criteria guiding the Commission's discretionary assessment of aid, especially in relation to one of these common assessment principles: the balance of an aid measure's positive and negative effects. Such advancements may indeed be relevant for a better understanding of how the "balancing test" pursuant to Article 6 FSR should be carried out and, at the very least, should be considered. Preliminarily, it should be noted that, while the case-law under comment refers to Article 107(3)(c) specifically, the considerations made by the CJEU in that context can be extended to all cases of compatibility insofar as, as we have already mentioned, the criteria guiding the discretion of the Commission are common to all forms of aid assessable under Article 107(3) TFEU.[342]

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[338] T Tridimas (n. 295), 247.

[339] Stig Eidissen 'Common Interest as a Condition for State aid Compatibility' (2020) 19 European State Aid Law Quarterly 452.

[340] Ibid.

[341] L Hancher, T Ottervanger and PJ Slot (n. 40) 148. Such principles are that: (a) the measure must contribute to a well-defined objective of common interest; (b) State intervention must be necessary; (c) the measure must be appropriate, i.e. the right instrument for the attainment of the objective; (d) there must be an incentive effect; (e) the aid must be proportional, i.e. the minimum amount required for the objective; (f) unnecessary negative effects on trade and competition must be avoided, i.e. the measure's "balance" of positive and negative effects must be positive; (g) the aid must be transparent, i.e. information regarding the aid must be readily available.

[342] Also, most of the scholarly articles on the case consider its impact on the notion of compatibility at large. *See*, *inter alia*, Phedon Nicolaides, 'Shedding Light into the 'Black Box' of State Aid: The Impact of Hinkley Point C on the Assessment of the Compatibility of State Aid' (2021) 20 European State Aid Law Quarterly, 4 and S Eidissen (n. 338).

The “balancing” of positive and negative effects of aid measures reflects the need for the negative effects of the aid to be “limited and outweighed by [its] positive effects”.[343] Such a requirement appears similar, at least in part, to the balancing test provided for in Article 6 FSR and, therefore, understanding how this is applied in the field of compatibility by the Commission is of self-evident importance. Unfortunately, however, the Commission’s decisional practice is, euphemistically, not very systematic and clear and indicators on the way such a balance must be achieved are almost completely absent: as has been brilliantly depicted by Nicolaides, the balancing test in the context of Article 107(3) is a “black box”.[344] More specifically, the Commission is not required to *quantify* the negative and positive effects of aid measures.[345] This renders carrying out a thorough balancing exercise virtually impossible, as even if the specific positive and negative effects are correctly established, there is no certain and replicable way for the Commission to explain how they compare with each other. In this context, the judgment of the CJEU in *Hinkley Point* has not brought forth monumental changes in the law. In fact, the most relevant point of the judgment concerning the balancing test is the emphasis that was placed on the need for the Commission to attentively consider both sides of the scale, i.e. the positive and negative externalities brought forth by aid measures and the clarification that the relevant negative effects are only those relative to the competitive impact on the internal market of the measure.[346] This has been praised as a timely reminder,[347] useful if considering the fact that, in the previous years, most of the Commission decisions had mainly focused on the positive effects of aid.[348] However, by not introducing an obligation to actually *quantify* such effects,[349] it did little to solve the

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[343] Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station [2015] OJ L109/44, para 495.

[344] P Nicolaides (n. 341), 6.

[345] Case T-630/15 *Scandlines v Commission* [2018] EU:T:2018:944 para 285.

[346] Ibid., para 110.

[347] José Luis Buendía Sierra ‘Making the (Hinkley) Point about Compatibility Control’ (2021) 20 European State Aid Law Quarterly 1.

[348] Ibid.

[349] Phedon Nicolaides ‘Demystifying the Balancing of the Positive and Negative Effects of State Aid’ (2024) 23 European State Aid Law Quarterly 136.

structural problem of the balancing test. Following *Hinkley Point*, in fact, it has been observed that the Commission updated its practice by merely adding a section in its decisions in which the "weighing" of positive and negative effects is, *in concreto*, reduced to a mere affirmation of the facts that these are, indeed, balanced. Such a practice has been endorsed by the General Court, which stated that "the consideration of positive and negative effects of aid may be succinct".[350] Even though the cited judgment did not provide a definition of a "succinct" balancing exercise, the case-law cited by the General Court seems to presume a successful balancing of the aid's effects when these are limited, i.e. there is no other better (less distortive) policy instrument for the achievement of the proposed objective.[351] It therefore appears confirmed that, indeed, in the case of article 107(3) the concept of "balancing" is used *atechnically* and is, in practice, fulfilled when the aid's negative effects are limited and, thus, the aid is "appropriate".[352]

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[350] Case T-390/20 *Scandlines v Commission* [2024] EU:T:2024:126, para 284.

[351] *See* Case T-162/13 *Magic Mountain Kletterhallen v Commission* [2016] EU:T:2016:341, para 110. In State aid terms, this is the requirement of "appropriateness" of the aid. *See*, in this sense, also P Nicolaides (n. 348), 140.

[352] Ibid.

2. Subsidies in the ASCM: Definition and Classifications

While the elements of the notion of aid *ex* Article 107(1) and the compatibility assessment may prove to be decisive in defining (prohibited) foreign subsidies because of the systematic and teleological influence that State aid control has on the FSR, we have already highlighted how, from a textual and structural perspective, some provisions of the FSR – especially Article 3 – appear to be heavily influenced by the ASCM.

In this second section of chapter 2, therefore, we will attempt to trace the main elements of the definition of subsidy according to WTO law, thus allowing us to make more informed comparisons and decisions in chapter 3 provision. In particular, we will consider the notion of "financial contribution", its substance and its rules of imputability (Section 2.1.), the notion of benefit (Section 2.2.) and that of specificity (Section 2.3.). Finally, we shall explain why the "traffic light system" will not be considered in the following analysis (Section 2.4.).

2.1. Taxonomy of relevant measures under the ASCM and their rules of imputability

The ASCM encompasses different *forms of governmental action*[353] in its definition of subsidies. In this Section, we shall offer an overview of these different forms and, also, consider the relevant *rules of imputability*, thus understanding how a specific "form of action" can indeed be considered "governmental". Article 1 ASCM provides, at the onset, two alternatives for the identification of governmental interventions relevant for the purposes of the Agreement at large.[354] On the one hand, Article 1.1(a)(1) considers "financial contribution[s] by a government or any public body within the territory of a Member", when such contributions fall into one of the categories provided for in subparagraphs (i) – (iii). On the other, Article 1.1(a)(2) simply states that "any form of income or price support in the sense of Article XVI of GATT 1994" is a relevant measure for the purposes of meeting the definition of subsidy. For our purposes, we will analyse

[353] L Rubini (n. 221), 277.

[354] G E Luengo Hernández de Madrid, (n. 163), 102.

only the first of these alternatives, insofar as Article 3 FSR expressly covers only financial contributions and, clearly, income and price support *are not* financial contributions.[355]

2.1.1. The forms of governmental action relevant to the notion of "financial contribution"

For the purposes of the SCM Agreement, a financial contribution is present when: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods.

In particular, it is essential to highlight that this list is *exhaustive* and, therefore, there are no other forms of governmental action that can be qualified as a financial contribution.[356] Additionally, the WTO Appellate Body has been consistent in explaining how the notion of "financial contribution" must be kept logically distinct to that of a "benefit".[357] Thus, the effective conferral of a benefit to the recipient of the financial contribution is immaterial in regards to the existence of the financial contribution itself.

Considering each of these types of measures in turn, the first types of financial contributions, listed *sub* (i) do not raise, *prima facie*, particular questions. Indeed, transfers of funds, whether direct or potential, are the most common form of subsidization[358] and thus easily recognizable in practice. Nonetheless, decisions by Panels and the Appellate Body have clarified certain aspects of the definition. First, in *Japan—DRAMs*, it was clarified that the different forms of direct transfers of funds listed in subparagraph (i) is merely exemplary and, therefore, other forms of transfers are relevant as financial contributions. In that case, for example, the modification of the terms of a

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[355] Ibid., 122.

[356] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20August 1999, DSR 1999:III, p. 1161 (*Brazil—Aircraft*) para 8.69.

[357] Ibid., para 157.

[358] G E Luengo Hernández de Madrid (n. 163), 108.

loan agreement created new rights for the debtor, with the consequential increase of the financial resources at his disposal.[359] Moreover, in *US—Carbon Steel (India)*, India attempted to argued that the presence of an intermediary agent, who had the function of collecting and administering certain funds, precluded the transfer from being qualifiable as "direct".[360] However, the Appellate Body disagreed with India, explaining how the use, in subparagraph (i) of the term "involves" "suggests that the government practice need not consist, or be comprised, solely of the transfer of funds, but may be a broader set of conduct in which such a transfer is implicated or included".[361] Finally, in *US—Large Civil Aircraft (2nd complaint)*,[362] a Panel provided strong indications, even if it avoided issuing a formal ruling on the matter,[363] on the interpretation of the term "potential". The dispute concerned a clause contained in an agreement between the State of Washington and Boeing which provided, amongst other options, the possibility for Boeing to receive the transfer of a certain amount in the case of a certain event. The then European Community argued that such an obligation fulfilled the requirements necessary to be considered a "potential transfer" but the US disagreed, and the Panel expressed doubts with this position. In absence of a conclusive ruling, therefore, the US's approach, which requires an *assured* commitment, thus not dependent on any sort of *alea*, is preferred for the purposes of WTO law.[364]

Second, the "foregoing or missed collection of revenue otherwise due" has been interpreted as the waiver by part of a WTO member State to raise revenue that it is entitled

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359 Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805 (*Japan—DRAMS*) para 7.442.

360 Marc Bénitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Wolters Kluwer : Kluwer Law International 2019), 328.

361 Appellate Body Report, *United States –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727, para 4.90.

362 Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7 (*US—Large Civil Aircraft (2nd complaint)*).

363 M Bénitah (n. 359), 331.

364 Ibid.

to.[365] In particular, the need for a precise entitlement of the State can be surmised from the use of the word "foregoing", as has been pointed out by the Appellate Body in *US–FSC*.[366] In the same Report, the Appellate Body also clarified, however, that such entitlement cannot exist merely *in abstracto*, as "governments, in theory could tax all revenues",[367] but must be concretely established, by comparing "the revenue actually raised and the revenue that would have been raised 'otherwise'".[368] Finally, Interpretative Note 1 of the ASCM clarifies that the remission or exemption of custom duties and taxes for a product destined to be exported does not constitute foregoing or revenue, insofar as imported like products bear those same taxes. In this case, in fact, the market conditions are neutral, identical for both imported and exported products.[369]

Third, item *sub* (iii) of Article 1.1(a)(1), i.e. the provision of goods and services (other than general infrastructure) or the purchase of goods by part of the government, has the function of extending the notion of "financial contribution" not only to a mere transfers of *funds* but, also, to transfers of assets "in-kind".[370] The most relevant interpretative issues raised by this category of financial contributions are, nonetheless, inconsequential for our purposes, as they solely relate to the definitions of "goods and services" since these enjoy a specific definition under EU law, which is clearly the relevant one for the FSR's interpretation.

A final hermeneutical issue which must be addressed before moving on the specific rules of imputability contained in Article 1.1.(a)(1) ASCM concerns the *method of financing* of financial contributions. In particular, it is not immediately clear whether or not a "cost to the government" – or, using State aid law terminology, a "financial burden" – is an

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[365] Ibid., 12.

[366] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations*", WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619, para 90.

[367] Ibid.

[368] Ibid.

[369] G E Luengo Hernández de Madrid (n. 163), 109.

[370] Ibid., 110-111.

essential condition for a subsidy to be qualified as such. This specific question had been contentious in WTO subsidy law for a long time, until the Panel addressed it in 1999, in the *Canada—Aircraft* Report.[371] While, admittedly, the issue arose in the context of the "benefit" requirement, and not in the more natural domain of "financial contributions",[372] these considerations are evidently extendable to our argument here as well. In particular, the Panel explained how, since Article 1.1(a)(1)(iv) ASC explicitly identifies a financial contribution when a private body is directed by a public body to implement one of the financial contributions listed in items (i)-(iii), and since in these case the net cost of the measure could, indeed, be suffered solely by the private undertaking, requiring a cost to government to be present for there to be a financial contribution would equate to rendering the provision *sub* (iv) moot.[373] Therefore, no "cost to government" requirement can be deemed to exist in WTO subsidy law. Such a conclusion expands the notion of "financial contribution", allowing, in particular, regulatory measures[374] such as price-fixing mechanism, where the State imposes maximum or minimum prices on certain products, to be brought into the definition of "subsidy".[375]

2.1.2. The rules of imputability of financial contributions

To be definitively qualified as a "financial contribution", a transfer of economic resources – of the kind listed in subparagraphs (i)-(iii) of Article 1.1(a)(1) ASCM –must also be imputed to a "government or public body" or, according to subparagraph (iv), it must be established that the government made payments to a funding mechanism or entrusted or directed a private body to adopt the relevant measure. This provision can be considered a residual rule of imputability, which has the function of avoiding the circumvention of

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[371] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV p. 1443 (*Canada—Aircraft*).

[372] L Rubini (n. 221), 143.

[373] *Canada—Aircraft*, para 9.115.

[374] Cf L Rubini (n. 221), 93 who conceptualizes regulatory measures as the conferral of an economic advantage on undertaking "by regulating their business environment, by introducing or removing rules and restrictions on economic activities".

[375] G E Luengo Hernández de Madrid (n. 163), 360.

ASCM rules by part of governments who provide subsidies *indirectly*, through private bodies.[376]

Considering, first, the notion of "a government or public body in the territory of a Member State", this is sometimes referred to in WTO law as "government in the broad sense" as it encompasses not only traditional governmental structures ("government in the narrow sense"), but also entities over which, as will be explained shortly, the government exerts some sort of influence.[377] In relation to the notion of "government", it is uncontroversial that this term, by suing the in-determinative article "*a*", refers not only to central government, but also to sub-national and local governmental entities. This has never been a source of contention in WTO law.[378] Conversely, there has been much debate on the notion of "public body", and much litigation arose especially in relation to the possibility of qualifying Chinese SOEs or State-owned Commercial Banks (SOBCs) as such.[379]

From a theoretical standpoint, there are three different approaches that can be adopted to define a "public body": the governmental control approach, the governmental function approach and the governmental authority to perform governmental functions approach.[380] These approaches were all considered in *US—Anti-Dumping and Countervailing Duties (China)*, to which we will refer to.[381] The first approach, quite clearly, requires an entity to be under State control to be qualified as a "public body". However, champions of this approach differ in relation to *how* such control must be established. The US's stance in the dispute, endorsed by the Panel, argues that the presence of a majority shareholding is sufficient.

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[376] Ibid., 11.

[377] M Bénitah (n. 359), 10.

[378] Ibid., 11.

[379] The relevance of these discussions for our purposes, especially considering the OSA context, should be self-evident.

[380] *See* M Bénitah (n. 359), 351.

[381] Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143 (*US—Anti-Dumping and Countervailing Duties (China)*).

The other, more restrictive, stance, while affirming that the presence of a majority is indeed pertinent for finding control, requires some sort of additional evidence. Secondly, as proposed by China in the context of the same dispute, the governmental function approach warrants the presence of two cumulative conditions: (a) an express act of delegation by the government to perform such functions and (b) the performance, by the entity of governmental functions when providing the financial contribution.[382] In an attempt to reach some sort of middle ground between the two schools of thought, the former too broad and the latter too restrictive, in the cited dispute the Appellate Body endorsed, by majority voting, the "authority to perform governmental functions approach". Here the Appellate Body endorsed a more functional approach, requiring, rather than a formal act of delegation, that entities be vested with, and exercise, authority to perform governmental functions.[383] Through such an approach, it is necessary to establish two main elements: (a) the investiture and exercise of governmental authority and (b) the performance of a governmental function. Through the introduction of this first element, much greater emphasis is placed on *if* a governmental function is attributed to the entity, rather than the modalities with which it is attributed. [384] With specific regard to the types of evidence that can be used to prove such investiture, the existence of meaningful control over the entity by the government, or formal *indicia* of such a form of meaningful control may be relevant. However, one thing has been made evident: merely formal links, such as a majority shareholding in the entity, are not sufficient for an entity to be considered as "being vested of governmental authority".[385] In relation to what precisely constitutes a "governmental function", instead, the Appellate Body didn't rule on the point, while the Panel limited itself to stating that this is decided on a "case by case basis".[386] Moreover, it was clarified that there is no need for a link between the performance of a governmental function and the provision of a financial contribution.

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[382] M Bénitah (n. 359), 352.

[383] *US—Anti-Dumping and Countervailing Duties (China)*, paras 317.

[384] Ibid., paras 317-319.

[385] M Bénitah (n. 359), 352.

[386] *US—Anti-Dumping and Countervailing Duties (China)*, paras 317-319.

Once an entity is considered a public body, *all* of its conduct is attributable to the government. All in all a precise and conclusive understanding of the notion of "public body" under the ASCM is still lacking. Nonetheless, the above mentioned theories and approaches are able of enhancing and refining our analysis for the purposes of determining the existence of a foreign subsidy.

The second general rule of imputability, provided for in Article 1.1(a)(1)(iv) ASCM is, as mentioned, an anti-circumvention provision, aimed at assuring that also "indirect actions" can be qualified as financial contributions. The norm first contemplates two possibilities of indirect action and, secondly, clarifies that such forms of actions are financial contributions only when functional to "the carry[ing] out one or more of the type of functions illustrated in (i) to (iii)".[387] The first form of action concerns government payments to a funding mechanism, i.e. a system established with the specific purpose to transfer financial resources to entitled categories.[388] This provision has raised virtually no controversy.

Conversely, the disputes concerning second form of indirect action, i.e. when a government "entrusts or directs" a private body to perform one of the above mentioned actions, has mainly focused on understanding the correct meaning of "entrustment and direction". Briefly surveying the two main schools of thought relating to this provision may help us better interpret the meaning of the "attributability to a third country" of a private undertaking's action *ex* Article 3(2), second indent, (c) FSR. The aforementioned diverging stances can be traced back to, on the one hand, multiple WTO Panels, which have consistently applied (with small refinements) the definition first introduced by the *US—Export Restraints* Panel and, on the other, the Appellate Body, who, in *US—*

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[387] This provision has been interpreted as requiring the entrustment or direction to be made in relation to one of the forms of governmental action covered in Article 1.1(a)(1)(i)-(iii). A more liberal interpretation, favored by the US in Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p.5767 (*US—Export Restraints*), which basically construed subparagraph (iv) as an open category, allowing different types of measures to be reconducted to the notion of financial contribution, was rejected by the Panel in the same case, which stated, at para 8.55, that: "the phrase 'type of functions' refers to the physical functions encompassed by subparagraphs (i)-(iii) and does not expand the scope of subparagraph (iv) beyond these".

[388] L Rubini (n. 221), 116.

DRAMS[389] rejected the Panels' views on the issue, innovating the general understanding of the concepts. In particular, in *US—Export Restraints*, a US law on countervailing duties came under WTO scrutiny, as it considered certain "export restraints" on products as financial contributions which had the effect of obligating a producer to sell all or a great part of its products in the domestic market.[390] Thus the provision would have the same *effect* as a "provisions of goods" in the meaning of Article 1.1(a)(1)(iii) ASCM. The whole controversy rotated around the following question: can such an obligation be considered as an "entrustment or a direction" to a private body by a government? The US argued the affirmative, as, in its view, such a provision was "functionally equivalent"[391] to an entrustment or direction. However, the Panel disagreed, claiming that these terms must be taken as to require "an explicit and affirmative [...] delegation or command".[392] One of the main reasons used to justify such an approach was the need to clearly differentiate cases of actual entrustment or direction "from the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market".[393] As mentioned, the following Panels confirmed such an approach, but clarified that the command or the delegation need not be explicit and formal but can also be implicit and informal.[394] The Appellate Body, however, opted for a less restrictive interpretation of the terms.[395] In particular, it correlated the concept of entrustment with the "action of giving responsibility to someone for a task or an object"[396] and that of direction with the "exercise of governmental authority over a private

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[389] Appellate Body Report, *United States –Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005,DSR 2005:XVI, p. 8131 (*US—DRAMS*).

[390] L Rubini (n. 221), 109, who considers such export restraints as "complex regulatory", insofar as it is an indirect way for a government to control the functioning of market. Cf ibid., 93 and 115.

[391] *US—Export Restraints*, para 8.22.

[392] Ibid., 8.30.

[393] Ibid., 8.31.

[394] Panel Report, *European Communities –Countervailing Measures on DRAMS from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671 para 7.57.

[395] G E Luengo Hernández de Madrid (n. 163), 116.

[396] *US—DRAMS* , para 110.

body”,[397] through means that may have a lesser degree of compulsion than a “command”. In broadening this rule of imputability, however, the Appellate Body also clarified that, in any case, “mere policy pronouncements [...] or acts of encouragement”[398] can never be deemed to constitute an entrustment or a direction. *US—DRAMS*, therefore introduced two new thresholds for the imputability of indirect actions to a government, one positive and one negative: government intervention on the decisions of a private body must be *more incisive* than policy pronouncements or encouragements but *need not be* an actual delegation or command. While we do not agree with scholars who have argued that such a change of interpretative course will cause more legal uncertainty,[399] as the concepts of “giving responsibility” and “exercising authority” do not, *a priori*, generate harder hermeneutical issues than the terms “command” or “delegation”, we would also appreciate some more guidance by the Appellate Body. In chapter 3, we will attempt to understand how these concepts may apply to Article 3(2)(cc) FSR and appraise their outcomes.

2.2. The benefit criterion: assessing advantageous outcomes

The second constitutive element of a subsidy, required by Article 1.1(b) ASCM is the existence of a “benefit”. Notwithstanding the fact that there is no express definition of the term in the ASCM, the case-law of Panels and the Appellate Body have informed our understanding of the requirement. In particular, a benefit is deemed to exist when, as a result of a financial contribution, the recipient is “better off” than he would have been without it.[400]

In assessing whether a financial contribution actually leaves the recipient “better off” than in its absence, it is necessary to understand whether the terms offered by the financial contribution are, indeed, more favourable than those that could be found on the

[397] Ibid., 111.

[398] Ibid., 114.

[399] *See* L Rubini (n. 221), 115 who states that “the more we leave clear notions such as command, moving towards subtle and less intense courses of action, the greater the risk that the financial contribution be defined on the basis of the *circumstances of the case* and the *behavior of third parties*”.

[400] *Canada—Aircraft,* para 157.

"commercial market-place".[401] In short, the benefit must be *extra-ordinary*.[402] Doing so require the undertaking of a counterfactual analysis, under which the financial contribution and the correlated, market calibrated, benchmark are compared. In particular, there can be two different types of evidence used to assess the benefit's extraordinariness. One is a mere numerical comparison between the two transactions (for example comparing the interest rate granted to an entity by the government and the market's interest rates).[403] The latter is the appraisal of the non-commercial considerations on the basis of which the financial contribution was granted.[404] Indeed, while there is no precise definition of what such considerations actually are, a benefit has been considered to exist when in the presence of insufficient analysis on a firm's profitability.[405] An exception to the need of assessing the financial contribution against its counterfactual applies in the presence of the foregoing or non-collection of revenue by a government, pursuant to Article 1.1(a)(1)(ii) ASCM. In such cases, indeed, the counterfactual analysis is reduced to a merely logical exercise, and it is quite easy to establish the existence of a benefit, as there are no other equiparable, commercial, transactions that can be compared with the foregoing of revenue. Indeed, as the Panel recognized in *US—Large Civil Aircraft (2nd complaint)*, these financial contributions are, essentially, a gift from the government to the recipient.[406]

Considering, moreover, the relationship between the benefit and the financial contribution requirement, it should be self-evident that an actual, identified and defined recipient of the benefit is required and, moreover, that there is no need for the financial contribution to have been materially received by said recipient. However, both of these statements have been the object of disputes in WTO subsidy law. In relation to the former, in *US—Lead and Bismuth II*, the US tried to extend the concept of benefit in such a way as to

[401] M Bénitah (n. 359), 20.

[402] G E Luengo Hernández de Madrid (n. 163), 125.

[403] M Bénitah (n. 359), 22.

[404] Ibid.

[405] *Japan—DRAMS*, para 7.276.

[406] *US—Large Civil Aircraft (2nd complaint)*, para 7.169.

encompass "benefits [to] the manufacture, production or export of merchandise"[407] but was, evidently, unsuccessful.[408] Secondly, the Appellate Body in *Brazil—Aircraft* explained that a benefit materializes when the "unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred".[409]

2.3. Specificity: The threshold for ASCM Application

As the name of this subsection implies, the specificity requirement is not a condition for a certain form of governmental action to be considered a subsidy, as for this to exist it is sufficient for the conditions provided for in Article 1.1 ASCM to be met. Instead, it functions as a threshold for the *application* of the provisions of the Agreement to already existing subsidies. This is clear from a cursory reading of Article 1.2 ASC, which states that "a subsidy as defined in paragraph 1 shall be subject to the provisions of [the Agreement] only if such a subsidy is specific in accordance with the provisions of Article 2". In particular, Article 2 ASCM provides that a subsidy is specific (a) when the access to a subsidy's benefit is limited to *certain* enterprises or industries (b) when only *certain* enterprises within a designated geographical region have access to the subsidy (c) when it has certain forms (*per se*) specificity. The first two of which will be the main object of our analysis.[410]

If a measure is specific, then it is *prima facie* "prohibited" by the ASCM, and subject to the application of its provisions. The fact that the ASCM's application is limited to specific subsidies is, much like in State aid law, motivated by both economic reasons, insofar as specific subsidies are deemed the most "distortive", due to the comparative

[407] Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, p. 2623 para 6.43.

[408] M Bénitah (n. 359), 17.

[409] *Brazil—Aircraft*, para 7.71.

[410] We shall not consider *per se* specificity in the following analysis for two reasons. The first is that the forms of subsidies which are considered *per se* specific are connected to trade-specific measures, which have little relevance in the context of the FSR and, secondly, because the FSR has no similar provision. We are much more interested with general rules, from which transferrable principles can be recovered, rather than excessively specific rules.

advantage given to *certain* firms as they are not "broadly available"[411] and by non-economic reasons, both political and practical.[412]

The first form of specificity concerns the case in which the access to the benefit deriving from the subsidy is limited to *certain* enterprises, a concept that comprehends, on the one hand, limitation of access in favour of *a single* enterprise or industry or in favour of a *group of* enterprises or industries.[413] We shall first understand these two concepts and then move on to considering limitation of access can be, in practice, ascertained. The notion of a "single" enterprise is clear enough, it refers to the situation of *ad hoc* subsidies. Conversely, the notion of "a group" of industries or enterprises requires more careful attention. Indeed, the use of the term "group" makes us understand that not *any* limitation to the access of the subsidy, to an undefined number of recipients, automatically means the subsidy is specific. The limitation must be made to a *group*, i.e. a "sufficiently discrete"[414] sector of the economy. If the enterprises and industries affected by a measure are, thus, "a group". If they are not a group, it does not. To prove one or the other option, the decisional practice of Panels and of the Appellate Body highlight the need to identify a "relatedness" between the firms that have access to the subsidy, a common feature.[415] The application of this test is clearly on a case-by-case basis.

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[411] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR2004:II, p. 571 para 7.116.

[412] In this sense, *see*, extensively, L. Rubini (n. 221), 364 who explains how "on the one hand, there are reasons of *pragmatic* order [as selecting only certain measures] rules would avoid a 'painstaking' review of too many governmental measures that may distort competition and trade [...] On the other hand, the selection operated by the specificity requirement would find a justification in considerations of more *political* order. General measures would require more deference and self-restraint. We have seen that, contrary to more specific measures, they are probably less distortive of competition and trade and are more easily justifiable in terms of legitimate public objectives. This could in turn reflect more simply the exercise of sovereign prerogatives".

[413] *See* Article 2.1 ASCM.

[414] Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997 para 7.1151.

[415] M Bénitah (n. 359), 27.

The limitation of access of the benefit in favour of certain undertakings (a single recipient or a group of recipients so-defined) can be assessed one of two ways: *de jure* or *de facto*. First, according to Article 2.1(a) ASCM, a subsidy is *de jure* specific, when "the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises". Therefore, specifically determining the recipients. It is not however necessary for a law in the formal sense to specifically regulate access to a subsidy for it to be *de jure* specific, but an "express act or pronouncement" from a granting authority[416] is sufficient, provided that such acts and pronouncements have binding force comparable to that of a law.[417] Moreover, in relation to the meaning of the term "explicit", this is understood as requiring the recipients to be easily and clearly identified by the law.[418] Nonetheless, the ASCM states, in Article 2.1(b), that when the subsidy is granted (*de jure*) on the basis of "objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist". [419] The reason for this specification by part of the ASCM can be easily understood. Indeed, in such cases, subsidies would be granted on pre-established conditions, not specific to certain companies or firms.

Article 2.1(c) ASCM, then, provides that even when a limitation to access is not explicitly provided in law, a subsidy can still be considered specific when, in practice, only a certain number of enterprises benefit from the subsidy (*de facto* specificity). Namely, the ASCM provides several factors that can be used to empirically establish specificity in this sense. These factors are: (a) the actual use of a subsidy program by a limited number of certain enterprises, (b) the predominant use of a subsidy program by certain enterprises, (c) the granting of disproportionately large amounts of subsidy to certain enterprises and (d) the manner in which discretion has been exercised by the granting authority (in this last case,

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[416] Appellate Body Report, *United States –Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015 (*US—Anti-Dumping and Countervailing Duties (China)*), para 4.146.

[417] M Bénitah (n. 359), 28.

[418] G E Luengo Hernández de Madrid (n. 359), 138.

[419] According to Interpretative Footnote 2, "Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".

particular relevance is given to the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions). In any case, all of these criteria are subject to an important *proviso* by part of the Agreement, i.e. that the diversification of economic activities within the jurisdiction of the granting authority and the duration of the subsidy program shall be taken into account when assessing the subsidy's specificity. Taking into account such additional factors is mandatory as the use of the word "shall" implies and it is essential to confirm that the *de facto* limited use of the subsidy by certain undertakings is a specific design feature of the subsidy. If such factors were not taken into account, the specificity of the subsidy could be simply due to certain intrinsic characteristics of the economic sector concerned or to the lack of a sufficiently long passage of time, necessary for the full implementation of the subsidy to occur.[420]

With regards to regional specificity, this is established when, pursuant to Article 2.2. ASCM, access to a subsidy is limited to only *certain* enterprises within a designated geographical region have access to the subsidy, within the jurisdiction of the granting authority. This provision raises two main interpretative questions. First lies the meaning to give, under Article 2.2. ASCM, to *certain enterprises* i.e. whether this holds the same meaning it did in Article 2.1. (thus, referring to a single or a group of enterprises or industries) or, instead, if it generally refers to *all enterprises,* provided that they are *located in a certain region*. Secondly, it is necessary to understand what a "geographical region" is for the purpose of the ASCM. In relation to the first question, we agree with Benitah's explanation that the latter option is preferable, which preserves the *effet utile* of Article 2.2. ASCM –as the former option would already be considered specific by Article 2.1. ASCM.[421] This approach was, moreover, confirmed by the Panel in *US—Anti-Dumping and Countervailing Duties (China)* which stated that "specificity in the sense of Article 2.2 of the SCM Agreement refers to limitation of access to a subsidy on the basis of geographic location alone, and that no further limitation to a subset of the enterprises in the region in question is necessary for such specificity to exist".[422] The

[420] In this same sense *see* M Bénitah (n. 359), 34.

[421] M Bénitah (n. 359), 38.

[422] *US—Anti-Dumping and Countervailing Duties* (*China),* para 9.157.

second question was also answered by the Panel in *US—Anti-Dumping and Countervailing Duties (China)*, which stated that "any identified tract of land within the jurisdiction of a granting authority" is a geographical region.[423] Finally, as was highlighted by the Panel's Report in in *EC and certain Member states - Large Civil Aircraft*, regional specificity does not exist if the "region" to which the granting authority limits access to the subsidy coincides with the full extent of the authority's jurisdiction. This case is usually fulfilled when the granting authority is a regional government.

2.4. A brief acknowledgment of the irrelevance of the "traffic light system" in WTO subsidy law for interpreting the notion of foreign subsidy

Any exhaustive review of the regulation of subsidies under the ASCM would have to conclude, logically, with an in-depth analysis of the so-called "traffic-light system",[424] on the basis of which the consequences that specific subsidies face under WTO law are decided. In particular, there are three different levels. First, certain subsidies are *per se* prohibited (Article 4 ASCM), as they are presumed to be detrimental to international trade.[425] Then, there are "actionable" subsidies, i.e. those reviewable under the WTO dispute settlement procedure. Such subsidies can, however, be challenged only if they have "adverse effects" on other WTO members, as provided for by Articles 5 and 6 ASCM.[426] Finally, there are "non-actionable subsidies", which are permitted, and cannot be subjected to neither to countervailing duties, nor challenged under the WTO dispute resolution mechanisms.[427]

However, as we explained in the introduction, this dissertation is not an exhaustive analysis of the ASCM (and, for that matter, neither of State aid law). All of the above notions have been reviewed because they serve a specific purpose, namely that of understanding how (prohibited) foreign subsidies should be defined. In our opinion, the

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[423] *US—Anti-Dumping and Countervailing Duties* (*China*), para 9.144.

[424] G E Luengo Hernández de Madrid (n. 359), 87.

[425] Ibid., 142.

[426] Ibid., 166.

[427] Ibid., 158.

“traffic-light system” is inapplicable to the FSR, and explaining its subtleties and intricacies would only serve to confuse the reader. Indeed, the categorization listed above, and especially the more detailed “adverse effects” test, all respond to a rationale that is completely extraneous to that of the FSR. While the former “focuses on the effects that the subsidy has on trade, paying attention to whether market prices are modified because of the subsidy”,[428] the latter is concerned with competitive distortions in the internal market. Moreover, WTO law provides no possibility of balancing positive and negative effects of distortive measures.

CONCLUSIONS

In conclusion, in this chapter we have provided an overview of the essential characteristics of the notions of State aid under EU law and of subsidies in WTO law. In particular, we highlighted on the aspects of such notions that are, in our opinion, the most relevant for defining (prohibited) foreign subsidies. Moreover, from a methodologic standpoint we focused on extrapolating from the relevant case-law the *general principle* underlying such definitions.

In relation to State aid law, we clarified how the imputability criterion, especially in relation to public undertakings, is the product of an effort to balance burden of proof requirements against the general indifference that EU law has in relation to public or private forms of ownership. We then rationalized the State resources criterion as consisting of three, alternative tests. We then assessed the functioning and the objective of the MEOP, i.e. catching above market-price transaction and qualified selectivity, both material and regional, as a “derogation by exception”. Fourthly, we considered the “negative conditions” of Article 107(1) TFEU highlighting the “effect on trade” criterion as a rule on the Commission’s jurisdiction and assessing the *probatio diabolica* natura of “distortions of competition”. Finally, we also discussed the compatibility of aid measures under Article 107(2) and (3) TFEU, while focusing, in particular, on the limits to the Commission’s discretionality *ex* Article 107(3) TFEU.

[428] Ibid., 473.

In the context, instead, of the ASCM, we focused solely on the two constitutive elements of the notion of subsidy: the existence of a financial contribution and the benefit received by the contribution's recipient. We detailed especially the former requirement, explaining not only the different forms of financial contributions caught by the definition but, also, their rules of imputability. Finally, we considered the "specificity criterion", distinguishing it not only in *de jure* and *de facto* but, also, considering its regional declination.

In the next and final chapter, where we shall attempt to draw the fundamental traits of the definition of (prohibited) foreign subsidies pursuant to the FSR, we will draw heavily from the considerations made in this chapter, which will be applied – in full or in part – to the parallel concepts present in the Regulation.

CHAPTER 3 – COMING TOGETHER? THE ROLE OF STATE AID AND WTO LAW IN THE FORGING OF A DEFINITION OF FOREIGN SUBSIDY

INTRODUCTORY REMARKS

In this third and final chapter, we shall exhaustively analyse the elements that form the concept of (prohibited) foreign subsidies under the FSR, with the aim of achieving an exhaustive understanding of the principal elements of the definition. In this endeavor, we will be aided by the considerations made in the previous chapters in relation to the definition that is given to subsidies and State aid under the ASCM and State aid law. However, while such definitions will surely be instrumental to further our understanding of the notion of (prohibited) foreign subsidy in this chapter, they are not conclusive, as the notion of foreign subsidy is an autonomous concept, founded on different premises and with a different objective than the other two notions. Therefore, in tracing the constituent elements of (prohibited) foreign subsidies we shall also consider the specific objective of the FSR, together with practical considerations – such as the conservations of resources of the Commission and the opportunity of the EU institutions to interpret foreign law.

In the following, Section 1 will be concerned with the elements constituting the existence of a foreign subsidy, as set out in Article 3 FSR. In particular, in Section 1.1. will explain the way a well-known concept such as that of "undertaking" is slightly modified in the context of the FSR. The notion of a "financial contribution", and the rules of imputability of measures falling in this *nomen juris* will be discussed in Section 1.2. In Section 1.3. we will analyse the "benefit" requirement. Finally, Section 1.4. shall interpret the condition of “limitation in law and in fact” delving into the *ratio* underlying the requirement and its material and regional dimension. Section 2 will, instead, focus primarily on the conditions that must be satisfied for a foreign subsidy to be deemed “prohibited” under the FSR. Section 2.1. deals with the distortive effects that foreign subsidies produce in the internal market, while Section 2.2. focuses on the “balancing test” that must be applied to distortive foreign subsidies, to ascertain whether their negative effects can be outweighed by a subsidy’s positive effects.

1. THE EXISTENCE OF FOREIGN SUBSIDIES

1.1. The concept of undertaking in the FSR: extension and exceptions

As in competition law, the notion of undertaking – and more specifically the connected notion of economic activity – is a limit to the application of the FSR. In particular, Article 3 FSR, states that a foreign subsidy exists only insofar as it “confers a benefit *on an undertaking engaging in an economic activity* in the internal market”.[429] As the FSR is a competition law tool, it therefore seems sensible and legally correct to interpret the term “undertaking” in the same way as it is interpreted in State aid law or in the context of Article 101 and 102 TFEU.[430] However, in truth there are some minor differences to the concept of undertaking, caused by certain peculiar characteristics of the Regulation.[431] First, we shall consider what the Regulation means when it explains that an undertaking must *engage* in an economic activity *in the internal market*. Second, we shall consider the specification, provided for in Article 2(1) FSR, that, the term undertaking in the Regulation must, for the purposes of public procurement, be interpreted as meaning “economic operator”, pursuant to the PPDs. The final peculiar characteristic of the notion

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[429] Emphasis added.

[430] I.e., as any entity “engaged in an economic activity, regardless of its legal status and the way in which it is financed”. Where an economic activity consists “in offering goods or services on a given market”.

[431] It should, however, be noted that the differences we shall be examining only relate to the “economic activities” that are relevant for the definition of a certain entity as an undertaking and do not, instead, extend to the notion of “entity” itself (cf Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (2nd edition, Hart Publishing 2015), 137). Indeed, the latter part of the definition is interpreted just as widely as it is in the context of competition rules. This can be easily inferred from recital 7 FSR, which states that: “this Regulation therefore establishes rules for all undertakings, including public undertakings which are directly or indirectly controlled by a State, engaging in an economic activity in the Union”.

of undertaking that will be considered relates to the possibility of extending to such notion the "exercise of public powers" and the "solidarity" exceptions is, analysed *supra*.[432]

Understanding, first and foremost, the correct scope of the phrase "undertakings engaged in an economic activity in the internal market", is of self-evident importance, insofar as this wording could be narrowly or broadly construed, and thus, depending on the breadth given to the definition, a variable number of legal subjects meeting the definition of undertaking could be relevant for the purposes of the FSR. Indeed, it is clear that the Regulation is color-blind, as it "makes no distinction on the basis of the recipient's undertaking nationality and equally applies to EU-owned and multinational companies".[433] It also clear that Article 3(1), by explicitly stating that the notion of foreign subsidy concerns benefits received by "undertakings engaged in an economic activity in the internal market", intends to limit the range of undertakings that can come under the Regulation's purview. What is not clear, instead, is how such phrase should be interpreted and, thus, how broadly or narrowly the category of relevant undertakings must be construed. In particular, there are two ways in which "engagement in the internal market" can be ascertained: (a) by considering if effects produced by a foreignly subsidised undertaking extend to the internal market[434] or (b) by considering whether foreign undertakings are in some sort of way established in the EU (for ex. through branches or subsidiaries).[435] In our opinion, the latter approach is preferable. In particular, the effects on the internal market of a foreign subsidy are already considered on the basis of Article 4(1) FSR. Moreover, it would hardly be convenient for the Regulation to limit the number of undertakings coming under the Commission's regulatory powers only *ex post*, at the level of considering the effects of a foreign subsidy the existence of which has already been ascertained. This clarification, however, should not be intended as excessively limiting. Indeed, while only undertakings which are in some fashion established in the

[432] *See* Ch. 2 Section 1.1.

[433] CI Nagy (n. 6), 897.

[434] Marios Tokas 'Playing the Game: The EU's Proposed Regulation on Foreign Subsidies' (2022) 56 Journal of World Trade 779, 782.

[435] R Luja (n. 117), 189.

EU are relevant for the purposes of the FSR, this does not mean that the financial contributions must be directed *at* the EU-subsidiary or branch. Indeed, as was explained *supra*,[436] connected to the notion of undertaking is the doctrine of the "single economic entity". On its basis, the Commission is allowed to extend its jurisdiction to infractions made by one of the actors part of the economic entity, even if they themselves are not established in the internal market.[437]

Considering, second, the way in which the notion of undertaking is affected by the reference made in Article 2 point (1) to "economic operators", it is here submitted that concept of "economic operator" is a *species* of the wider *genus* of "undertakings". Indeed, the PPDs, define an economic operator as "any natural or legal person, or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market".[438] Comparing this definition with the notion of undertaking, the "specific" nature of economic operators appears evident. Most notably, this is reflected by the *types* of *economic activity* which are caught by the definition, rather than by the *entities* engaging in them. Indeed, any entity can be qualified as an economic operator, provided that they engage in certain types of activities. Namely, offering the execution of works,[439] supplying products or providing services on the market. The effects of such narrower scope of the definition are, however, of little impact on the functioning of the FSR. Indeed, the rationale of the specification contained in Article 2(1) FSR is clearly that of ascertaining that only undertakings that are actually allowed to participate in public procurement procedures come under the purview of

[436] Ch. 2 Section 1.1.

[437] *See* M Tokas (n. 433), 782 and the case-law cited therein. Therefore, it can undoubtedly be confirmed that also so-called "transnational subsidies", are to be considered as part of the notion of "foreign subsidy" covered by the Regulation. The notion refers, in short, to the case of a three-country scenario, in which "the granting authority, the recipient company and the economic impact are in different states". For this and more on the subject, *see* Csongor István Nagy, 'Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?' (2021) 2 Central European Journal of Comparative Law 147, 149 et seq.

[438] Cf Article 1 point (14) Directive 2009/81/EC; Article 5 point (2) Directive 2014/23/EU; Article 2(1) point (10) Directive 2014/24/EU and Article 2 point (6) Directive 2014/25/EU.

[439] *See* Article 2(1) point 7, which defines works as "the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function".

Commission in the assessment of foreign subsidies. Any other subtlety related to the interpretation of "economic operators", [440] caused by the instrumentality of the concept to an area of EU law, such as public procurement, which does not aim at preventing competitive distortions in the internal market, has no bearing on the way the norm must be interpreted for the purposes of the FSR, which is, as we know, a competition oriented instrument.

Third, the extraterritorial scope of the FSR interferes, to some extent, with the operability of the two exceptions to the existence of an economic activity elaborated by the case-law. In particular, *supra*,[441] we explained that when a certain entity conducts an activity that can be qualified as an *exercise of public powers* or, also, when such an activity follows *the principle of solidarity*, it cannot be qualified as "economic", and thus, for the purposes of that activity, an entity is not an undertaking. While these exceptions pose no additional problems when the entity under scrutiny is EU-based[442] – since that situation is identical to the analysis of an undertaking's existence in EU law, the only differences relating to the object of the analysis, i.e. a foreign subsidy – they are, in our opinion, inapplicable to the cases in which the entity is based in a third country. For what regards the "public powers" exception, it is the *ratio* underlying the exception itself – namely the EU's deference as a *supranational* organization to the activities in which Member States manifest their sovereignty[443] – that confines its application to EU-based entities.

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[440] In this sense, a very telling example is found in Case C-416/21 *Landkreis Aichach-Friedberg* [2022] EU:C:2022:689 paras 52 et seq. where the CJEU concluded that, although two economic operators constituted a single economic unit, these could not be considered as a "single economic entity" for the purposes of assessing "the discretionary exclusionary grounds under the public procurement rules". Indeed, such the judgment must be contextualized under the specific *ratio* of public procurement rules which are different from those underlying competition law. Moreover, the irrelevance of this judgment is further confirmed by Article 28(1)(b) FSR which specifically extends the notion of economic operator to include "subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure". For more on the judgment *see* 'Undertakings and Economic Operators under the Foreign Subsidies Regulation | May - 2024 | A&L Goodbody' <https://www.algoodbody.com/insights-publications/undertakings-and-economic-operators-under-the-foreign-subsidies-regulation>. Also, for a different opinion in relation to the application of the "single economic entity" to the public procurement tool of the FSR *see* R Luja (n.), 193.

[441] *See*, Ch. 2 Section 1.1.

[442] L Hornkohl (n. 95), 7.

[443] A Sánchez Graells (n. 430), 137.

Conversely, in the case in which such activities are undertaken by a non-member State, there is no basis for such deference. Moreover, we saw in the *TenderNed* case just how complex tracing a dividing line between sovereign activities and economic ones is, such difficulties would only be exacerbated when considering third countries. The second way for an activity to not be qualified as economic is, moreover, for it to be performed by an entity for an exclusively social function, based on the principle of solidarity pursuant to Article 3 TEU and under State supervision. There are two principal reasons for which, in our opinion, this exception cannot not be applied to foreign undertakings. The first relates to the impossibility of a foreign entity to contribute in any material way to the principle of solidarity which, according to Article 3(3) TEU is to be understood as solidarity "between Member States". Secondly, the requirement of (Member) State supervision – a necessary element to conclude that the activity is isolated from regular market forces[444] – would be lacking.

All in all, therefore, the corollaries of the competition-derived definition of undertaking we exposed in the previous chapter can be remodulated as follows: (a) economic activities are relevant only in so far as they take place in the internal market, which must be held as meaning that a foreign undertaking must be, in some fashion, established in the internal market; (b) the legal status of an entity under national law is irrelevant; (c) the qualification of a certain entity as an undertaking is limited to a specific activity and, thus, a single entity can be considered, at the same type, both an undertaking and not an undertaking, depending on the specific activities considered;[445] (d) the profitability of the entity is not a determining factor; (e) the solidarity and public powers exception can be applied only to EU-based undertakings and *not* to undertakings based in a third country.

[444] Ibid., 139.

[445] In relation to this corollary, it is noteworthy to mention that the FSR formalized the case-law of the CJEU first set out in *Congregación de Esculeas Piás*, where at para 51, it was clarified that establishments must avoid "any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities". Indeed, recital 16 FSR states that "a financial contribution provided exclusively for the non-economic activities of an undertaking does not constitute a foreign subsidy. However, if a financial contribution for a non-economic activity is used to cross-subsidise the economic activities of the undertaking, it can amount to a foreign subsidy falling under the scope of this Regulation".

1.2. The notion of foreign financial contributions in Article 3(2) FSR

The notion of foreign financial contribution is of fundamental importance, not only – as is evident – for the purposes of defining foreign subsidies, but also for the functioning of the FSR as a whole. In fact, the obligation to notify concentrations or public procurement procedures under the FSR stems, as is provided for in Articles 20(3) and 28(1), from the receival of a foreign financial contributions, when their aggregate value is above the already mentioned thresholds.[446] A general definition of foreign financial contributions is therefore essential, so as to understand what forms of governmental action are caught by the FSR. In particular, Rubini notes that there are four main techniques which can be used to understand the legal relevance of public interventions in the economy: (a) the formulation of the definition,[447] (b) the origin of the resources,[448] (c) the rules of imputability[449] and (d) the pursuance of public policy objectives by governments.[450]

In the following pages, we shall divide our analysis of foreign financial contributions in two parts. First, we shall overview the forms of governmental action that fall in the notion

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[446] *See* Ch. 1 Section 2.2.

[447] *See* L Rubini (n. 221), 98 "The more general and intuitive technique is the *formulation of the definition*. Definitions may be drafted in different ways. They may be general or specifc, and more or less comprehensive. They may be sufficiently explicit so as to cover only certain forms of action, say those that involve clear and direct transfers of economic resources. By contrast, they may be more generally worded with a potentially wider coverage, comprising more indirect and complex measures granting economic advantages. Further, and most importantly, they may, more or less clearly, distinguish measures according to the (financial or regulatory) *nature* of the action of the government".

[448] Ibid., "The second technique refers to those cases of indirect action when the government acts through a third party, or, in any event, the transfer of economic resources involves a third party. The main legal issue is whether, and, if so, under what conditions, the government may be held responsible for the conduct of the third party. We have seen that the direction of the government may be characterized by various aspects of complexity. Definitions reflect this complexity in the relevant *rules of imputability*. These may be crafted in different ways, which are more or less sophisticated and comprehensive. For example (and in order of a progressive strictness), they may simply demand a classification of the financing body as public, or, if the focus is on the actual conduct, they may require proof of a definite causal nexus or rather expect a more intense and clear act of direction, like an order ".

[449] Ibid., "The third method to determine the relevance of the measure at issue focuses on the *origin of the resources* used to finance the action of subsidization. A long-standing issue in the two systems is whether the definitions of subsidy and State aid necessarily require a cost to government or may also be financed with private resources".

[450] Ibid. This technique does not, however, find place in the present analysis insofar as public policy objectives in the FSR are relevant, as will be explained *infra*, only at the level of the prohibition of foreign subsidies and not, instead, in relation to the notion of financial contribution.

of “financial contribution”, trying therefore to trace a general definition of the term. In particular, applying Rubini’s first and third techniques, we will analyse the way in which the definition is formulated in the Regulation and whether it requires that the resources used to finance it have a specific origin. In the second part, applying Rubini’s second technique, we shall consider the rules of imputability of financial contributions to a third country, thus establishing what makes them “foreign” financial contributions.

1.2.1. Defining financial contributions: formulation of the definition and origin of the resources

In interpreting the term “financial contribution”, the use by Article 3 FSR of the same wording provided for in Article 1.1(a)(1) ASCM is strongly indicative of the legislator’s intention to assimilate the two concepts. However, even from a textual standpoint, the two provisions are not identical, as the forms of financial contributions listed in subparagraphs (i)-(iii) ASCM are exhaustive, whilst those provided for by Article 3(2) FSR are merely illustrative, as can be understood from the use of the words *inter alia* in the norm. It would therefore be unwise to give conclusive relevance to the developments made by the WTO case-law for the purpose of defining financial contributions under the FSR, thus excluding any bearing or relevance of State aid law. The lack of an exhaustive list of measures constituting financial contributions make it necessary, for the purposes of defining foreign subsidies, to recover – on the basis of the text, the objective and the systematic influences of the provision – a general definition of “financial contribution”.[451]

To do so, it is essential to start from the forms of financial contributions listed in Article 3(2) FSR. Indeed, while their non-exhaustivity is a legislative choice made with the principal purpose of avoiding an excessive granularity of the notion of financial contribution by providing a single statutory definition, so as to prevent *lacunae* in the regulation of foreign subsidies – caused primarily by the inventiveness of States in

[451] What is more, there is no analogically applicable definition present either in State aid law, which as is known defines its measures on the basis of their effects (the creation of a selective advantage for the recipient) nor in WTO law where these were always defined *per relationem*, by referencing the typified forms provided in Article 1.1(a)(1) ASCM.

designing subsidies[452] – such forms of action are sufficient to understand the core contents of the definition we are searching for, i.e. the degree of complexity of governmental actions covered by the norm.[453]

First, Article 3(2)(a) FSR makes it clear that both direct and potential transfers of funds or liabilities are covered by the FSR. This is so notwithstanding, the fact that the provision does not contemplate, *expressis verbis* the complexity of the transfers it lists, insofar as it generally refers to "transfers of funds and liabilities". Indeed, the types of transfers listed in the norm mirror those listed in the ASCM. For example, Article 1.1(a)(1)(i) ASCM when providing that potential transfers are part of financial contributions, exemplifies this category by referring to "loan guarantees", which are listed in Article 3(2) FSR. But what is the precise connotation to give to such forms of transfer of funds or liabilities?

In relation to "direct transfers" we saw that the Appellate Body, in *US—Carbon Steel (India)*, explained how the presence of an intermediary agent, with the function of collecting and administering funds does not preclude a transfer from being considered "direct", as the presence of the term "involves" suggested that "government practice need not consist, or be comprised, solely of the transfer of funds".[454] While we believe it more appropriate to qualify such forms of transfers as "indirect", since Article 3(2)(a) does not contain the term "involves" and moreover, from a mechanical perspective, transfers of funds through intermediaries are by their very nature "indirect", these must undoubtedly be considered as financial contributions under the FSR. Indeed, indirect forms of transfers are commonly considered State aid under Article 107(1) TFEU.[455] Moreover, such expansive interpretation is in line with the non-exhaustive formulation of Article 3(2) FSR. Secondly, considering "potential transfers", we saw how the Panel *US—Large Civil Aircraft (2nd complaint)*, while not formally deciding the issue, strongly advised for the

[452] *See,* C Koenig and J Kühling (n. 234), 16

[453] For the use of this term *see* L Rubini (n. 221), 96

[454] *United States –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, para 4.90.

[455] Notice, para 47.

US's approach, which considered a transfer potential only when this is, even if not yet materialized, assured. Conversely, the EU believed that even a conditional transfer is relevant for the finding of a financial contribution. Given the EU's preferred interpretation of the notion and the exemplary nature of the norm, we believe that conditional transfers could fall into the notion of financial contributions under the FSR.

Through the influence of Article 3(2)(b) FSR, it is possible to establish that also indirect transfers are caught by the FSR's definition of financial contribution – if this was not sufficiently clear from the inclusion of intermediaries under Article 3(2)(a) FSR discussed above. Indeed, as explained *supra*, the foregoing of revenue can be easily understood as a waiver, by part of a third country, of revenue it is entitled to.[456] Such a form of financial contribution is evidently indirect, as there is no positive transfer of monies to an undertaking but, more simply, an indirect mitigation of the charges normally incurred in. This contention finds support in State aid law which, as is known, includes indirect transfers of monies, such as tax benefits[457] and the allocation of exclusive rights without adequate remuneration.[458] Moreover, it seems logical, just as in the ASCM, for such an entitlement to have to be proved *in concreto* also in the context of the FSR, insofar as governments have, *in abstracto,* power to tax all revenues.[459]

Finally, while Article 3(2)(c) FSR provides no further indication on the complexity of the measures covered by the Regulation, it helps us understand just how wide the net of financial contributions is cast.[460] Indeed, by covering any provision and purchase of goods and services, the FSR extends the notion of financial contribution to basically any form

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[456] M Bénitah (n. 359) 331.

[457] Notice, para 51. Specifically in relation to the FSR, *see* the Commission's Questions and Answers on Regulation (EU) 2022/2560, at no. 16 "exemptions granted by third countries from ordinary tax regimes (e.g. profit-based taxes, property taxes, stamp duties etc.) constitute "foreign financial contributions"".

[458] Notice, para 51.

[459] *United States – Tax Treatment for "Foreign Sales Corporations*", para 90.

[460] Cf Article 1.1(a)(1) ASCM which covers only the purchase of goods.

of commercial transaction between two parties – provided that this can be attributed to a third country.[461]

It should be clear, therefore, that the Regulation draws an incredibly wide definition of financial contribution, which can be synthesized, for now, as every financial value received by an undertaking from a third country,[462] directly or indirectly, actually or potentially. Against this backdrop regulatory measures such as those seen in *Preussen Elektra*, would undoubtedly be covered by the FSR, probably expanding the scope of the Regulation beyond what is appropriate.[463]

However, as explained by Rubini, the formulation of the definition of financial contribution is not the sole factor that determines the range of governmental measures relevant for the FSR: *inter alia*, also the "origin of the resources" may play a relevant role in determining such range. Since Article 3 FSR provides no clear indication in relation to the *method of financing* of financial contributions and given its similarity to Article 1.1(a)(1) ASCM which, as explained by the Panel in *Canada—Aircraft*, does not require financial contributions to cost the government, it would seem logical to interpret it in the same way. Nonetheless, such a requirement is present in relation to State aid *ex* Article 107(1) TFEU. As we overviewed *supra*,[464] the main features of the "State resources" requirement and how, in the successive case-law, it has evolved into three distinct tests requiring, on the one hand, a "sufficiently concrete economic risk of burdens on [the State] budget"[465] and, on the other, some form of control, ascertained either through the existence of a power of disposal over certain funds or through a measure's assimilation

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[461] P Werner, H De La Barre and K Music (n. 93), 25.

[462] Ilka Oberländer and Christopher Sickinger, 'Commission Calling: "Call-in" of Transactions under the Foreign Subsidies Regulations – Uncertainty and Unpredictable Risks?' (2024) 22 Zeitschrift für Wettbewerbsrecht 103, 107.

[463] *See* Massimo Merola and Alessandro Cogoni, 'Foreign Subsidies and Financial Contributions: Much Fine-Tuning Ahead' (2023) 8 Competition Law & Policy Debate 3, 6 who explain how "the broad scope of notifiable financial contributions runs contrary to the FSR's clear objective – namely to establish 'a harmonised framework to address distortions caused, directly or indirectly, by foreign subsidies' – and to the clear-cut scope of State aid provisions".

[464] *See* Ch. 2 Section 1.2.2.

[465] Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission*, para 109.

to regular taxes.[466] Extending these tests to the Regulation, would have, in our opinion, multiple positive developments.[467] First, it would be possible to mitigate the otherwise excessive intrusiveness of the notion of "financial contribution" in the FSR, which would be able to cover regulatory measures of foreign countries and thus, in a certain way, undermine their sovereignty. Moreover, it would narrow the notion, thus easing the burden on both undertakings complying with the Regulation[468] and on the Commission enforcing it.[469] Finally, and most importantly, by mirroring the requirements of State aid under Article 107(1), this interpretation allows a better achievement of the FSR's objective, levelling the playing field. As an endnote, such an approach would also reduce legal uncertainty, insofar as economic operators, the Commission and the CJEU alike can benefit from the consolidated –albeit complex– case-law on State aid to better identify and assess financial contributions.

It is therefore now possible to define financial contributions more precisely by considering them as "every financial value received by an undertaking from a third country, directly or indirectly, actually or potentially, and which are financed through State resources".

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[466] *See* Ch. 2 Section 1.2.2.

[467] *See* in this sense P Werner, H De La Barre and K Music (n. 93), 25, who believe that "companies can rely by analogy on the extensive EC case law in State aid around the notion of "State resources". While the wording of the FSR differs from that of Article 107(1) of the TFEU ("by a Member State or through State resources" (State aid) becomes "directly or indirectly provided by a third country" (FSR)), it does not appear to also entail any deviations in terms of content. In fact, the FSR expressly provides that it should be applied and interpreted in light of the relevant EU legislation, including State aid rules", *Contra* Philipp Reinhold and Thomas Weck, 'Welcome to the Jungle!' (2024) 23 European State Aid Law Quarterly 22, 29, who contend that "different from State aid law, there is no requirement that financial contributions come from State resources and have a budgetary effect".

[468] *See*, on the relevance of the compliance stemming from the FSR, P Reinhold and T Weck (n. 466), 25 "The [foreign financial contribution] threshold represents a new challenge for companies. Until now, the required information – at least for the group as a whole – is unlikely to be available and must therefore either be collected and regularly updated as part of an internal data collection process or it must be identified anew for each application. A number of companies have already established an internal mechanism before the FSR came into force in order to identify the relevant subsidies. It goes without saying that this form of compliance entails considerable costs".

[469] M Merola and A Cogoni (n. 462), 7 "the Commission, it would be flooded with notifications and would likely be unable to handle them appropriately, which would seriously risk undermining the FSR's objective".

1.2.2. The foreign nature of financial contributions: attributability to a third country

The second element of the notion of foreign financial contributions – and the third technique listed by Rubini for the identification of the relevant forms of governmental action – is their imputability to State (or using the Regulation's terminology, to a third country). More specifically, the second indent of Article 3(2) FSR, states that a financial contribution is attributable to a third country when it is provided by: (a) the central government and public authorities at all other levels; (b) a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or (c) a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances. In particular, in this subsection, we will focus on elucidating the rules of imputability of cases *sub* (b) and (c), insofar as it is assumed that in the case of a scenario *sub* (a) a financial contribution is automatically imputed to a third country.[470]. Conversely, when public or private entities are involved in the granting of a financial contribution, a more complex analysis of the imputability to a third country is required.

Developing sound rules of imputability for the purpose of attributing to third countries public entities' financial contributions is atechnically complex and delicate exercise, insofar as it is necessary, on the one hand, to respect countries' prerogative to actively participate in the economy and, on the other, the need to avoid the elusion of anti-subsidy rules. In the preceding chapter we have commented upon the approaches endorsed by both the CJEU in the context of Article 107(1) TFEU and that of the Appellate Body in WTO law. Most notably, the CJEU developed, in *Stardust Maritime*, a series of indicators for attributing the decision of a public undertaking to the State, in an attempt to correctly balance on the one hand, the need of not excessively prejudicing public undertakings compared to private ones and, on the other, the Commission's burden of proof in relation to State influence over such entities. The Appellate Body, instead, in the *US—Anti-*

[470] *See* in the same sense for measures under Article 107(1) TFEU, C Quigley (n. 210), 38.

Dumping and Countervailing Duties (China) case, endorsed the so-called "authority to perform governmental functions approach", which to qualify an entity as a "public body", and thus allowing a certain financial contribution to be imputed to it, requires (a) the investiture and exercise of governmental authority and (b) the performance of a governmental function.

In understanding which of these two sets of rules is best for determining the "foreignty" of financial contributions, it is necessary to stress the importance of the FSR's objective of levelling the playing field and the wider context it is placed in, that of (open) strategic autonomy which mandate for SOE's measures to be attributable to their countries of origin. Against this backdrop, it is essential to consider that the Commission, as early as in 2018, already highlighted how the "authority to perform governmental functions approach" was too narrow, thus allowing most SOEs to escape the ASCM's application.[471] Nonetheless, before rejecting *tout court* the Appellate Body's approach, it is necessary to understand the reasons that cause it to be unsuitable for our purposes. Namely, these reside primarily in the second leg of the test, which requires to determine a specific governmental function which is attributed to the public entity. This characteristic of the requirement – too which we must also add the fact that the Appellate Body confirmed that there is no general definition of a governmental function, as this varies on a case-by-case basis[472] – makes its hard to establish and allows for a significant number of false negatives. Moreover, the first leg of the test has not been extensively dealt with by the case-law and, therefore, there is an absence of clear guidance on the relevant evidence for proving the investiture of a public body with or its exercise of governmental authority. In this context, therefore, it seems natural for Article 3(2), second indent, (b) to attribute the actions of public entities to third countries through the application of the indicators developed by the CJEU's case-law for establishing the imputability of aid measures to public undertakings. Indeed, not only do such rules of imputability benefit from consolidated application by the EU Courts and the Commission alike, thus adding to the

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[471] Council of the European Union 'EU's Proposals on WTO modernisation' (2018) Document WK 8329/2018 INIT, paragraph II.

[472] *US—Anti-Dumping and Countervailing Duties (China*), paras 317-319.

legal certainty of the definition of foreign subsidy but, moreover, they allow the correct pursuance of the FSR's objectives: the levelling of the playing field, through their added convergence with State aid law and the possibility of attributing, with little to no false negatives, SOE actions to third countries – without, moreover, making the possibilities of such attribution too broad.[473]

Considering, secondly, the attributability of the actions of *private* entities to third countries, it is once again necessary to consider the rules of imputability present in both State aid and WTO subsidy law. In particular, while State aid law applies the same criteria developed for public undertakings in *Stardust Maritime*,[474] the ASCM provides, in Article 1.1(a)(1)(iv) ASCM a residual rule of imputability, aimed at assuring the imputability of two different forms of indirect action to States. The first form of indirect action refers to government payments to funding mechanisms, while the second refers to the conduct of private bodies when these have been "entrusted or directed" by a government to perform one of the forms of action provided in the other subparagraphs of Article 1.1(a)(1) ASCM. Presuming that it is logical to interpret Article 3(2), second indent, (c) FSR according to State aid rules , given our preference for such an interpretation for Article (3)(2), second indent, (b) FSR and the inconvenience of applying different standards to similar situations, it is nonetheless essential to assure that the ASCM's rules of imputability are in some way "absorbed" by State aid's indicators. This is important for two fundamental reasons. First, in relation to payments to funding mechanism, the non-attributability of such forms of action would create a significant loophole in the FSR's application, which would run counter to its objective of developing "a harmonised framework to address distortions caused, directly or indirectly, by foreign subsidies".[475] In relation to the second rule of imputability, the Commission itself showed some *favor* for the use of the criteria

[473] Indeed, the specification held in Article 3(2)(bb) that the Commission shall take "into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy", serves as a limit so as to avoid an excessive crystallization of the indicators, without considering the specific context thy are placed in.

[474] C-425/19 P *Commission v Italy and others,* paras 66-67.

[475] M Merola and A Cogoni (n. 462), 6.

of "entrustment and direction", in Q&A 15.[476] In our opinion, however, both of these rules are already exhaustively considered in the *Stardust Maritime* indicators. In particular, as has been explained by Rubini, funding mechanisms are established *ad hoc* for the purpose of redistributing resources to entitled categories.[477] In this case, we believe that the attributability of such private entities could be easily established on the basis that this "had to take account of directives issued by governmental bodies"[478] or, also, considering the nature of its activities.[479] Likewise, the indicators in question are also fully applicable to cases falling under the "entrustment and direction" rule, which were framed "entrustment" as the "action of giving responsibility to someone for a task or an object"[480] and "command" as that of direction with the "exercise of governmental authority over a private body"[481] are absorbed by the State aid rules. Indeed, the former notion clearly requires some involvement of public authorities in the decision-making process of the entity,[482] while the latter can be correlated to the provision of "directives"[483] by public authorities to the entity, which clearly have a lesser degree of compulsion than that of a command.[484] Moreover, the perplexities expressed by part of the doctrine, in the context of WTO subsidy law, in relation to the possibility of regulatory measures being unduly caught by such a "softer" interpretation of Article 1.1(a)(1)(iv) ASCM[485] are, for what pertains to our current interpretation of foreign financial contributions, unfounded.

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[476] *See* P Reinhold and T Weck (n. 466), 30 "according to the Commission's Q&A no. 13, financial contributions via private entities 'may be attributed to a third country when, for example, the private entity is directed or entrusted by the third country to undertake a certain action.' [...] At the same time, it is only mentioned as an example, which emphasizes the flexibility of this type of attribution".

[477] L Rubini (n. 221), 116.

[478] Notice, para 43 (c).

[479] Notice, para 43 (e).

[480] *US—DRAMS* , para 110.

[481] Ibid., 111.

[482] Notice, para 43 (h).

[483] Notice, para 43 (c).

[484] *See*, however, the considerations made in Ch. 2 Section 1.2.1. in relation to the *Tercas* case, in which it was explained how the CJEU applies, *de facto*, a higher standard of proof for the imputability to the State of private undertakings' decisions.

[485] *See* L. Rubini (n. 221), 115 who defines this interpretation of the terms as "loose".

Indeed, through the necessity of such financial contributions to be funded through state resources, regulatory measures such as those in *US – Export Restraints* would still be excluded from the notion.[486]

All in all, therefore, the attributability of financial contributions to third countries *ex* Article 3(2) FSR must be interpreted according to State aid rules. Nonetheless some minor differences in the application of the *Stardust Maritime* indicators are expected, if not only because of the specifications contained in Article 3(2), which explain how the attributability of a financial contribution to a third country through public or private entities must be done "taking into account all relevant circumstances". On the basis of all the foregoing, an alignment with Article 107(1) TFEU is encouraged, not only to promote legal certainty in the application of the Regulation, nor only for practical reasons, such as to avoid an excessively broad range of imputable measures, thus unduly burdening undertakings and the Commission, but also because it would allow the full achievement of the FSR's objectives, the most relevant of which, in this context, is to assure the attributability of SOE decisions to owner State.

1.3. The benefit criterion and the complexities of establishing the relevant market conditions

The Foreign Subsidies Regulation considers a financial contribution to confer a benefit on an undertaking if said contribution *would have not been obtained under normal market conditions.*[487] The definition of benefit appears to echo the one given by the EU Courts in relation to the notion of "advantage" *ex* Article 107(1) TFEU[488] and, which from a practical perspective is even more important, it appears to align the determination of a benefit with the MEOP test applied in State aid law.[489] Moreover, it should be highlighted that the relevance of the MEOP in the context of the FSR is not limited only to understanding whether a (prohibited) foreign subsidy exists in and of itself but, also, is

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[486] For more on the specific kind of regulatory measure present in the case *see supra* Ch. 2 Section 2.1.2.

[487] *See* Recital 13 FSR.

[488] *See*, inter alia, C-39/94 *SFEI and Others*, para 60; Case C-342/96 Spain v Commission, [1999] EU:C:1999:210, paragraph 41.

[489] P Reinhold and T Weck (n. 466), 31.

incredibly relevant to understand which specific foreign financial contributions must be notified to the Commission under the two notification-based tools. Indeed, the FSR's Implementing Regulation, explicitly excludes notification of foreign financial contributions when the "provision/purchase of goods/services (except financial services) [is conducted according to] market terms in the ordinary course of business, for example the provision/purchase of goods or services carried out following a competitive, transparent and non-discriminatory tender procedure".[490]

The concept seems, thus, *prima facie* unproblematic, at least in the determination of the relevant anti-subsidy provision that should be used to interpret said requirement. In truth, however, the practical implementation of the MEOP test raises some conceptual questions which must be addressed before examining the "limitation in law or in fact" of financial contributions.

As is clear, in fact, one of the most important aspect of such test – arguably, the most important – is the determination of the appropriate benchmark on the basis of which to identify what "normal market conditions" actually are.[491] While this assessment has never been a source of contention in the application of Article 107(1) TFEU – insofar as in the EU market conditions are, for the most part, homogenous – the FSR's extraterritorial reach begs the question of whether such benchmark must be determined on the basis of the market conditions generally available in the territory of the granting third country or, conversely, if the EU's market conditions are the relevant ones. This question is made more relevant by the constatation that, under WTO subsidy law, "the default definition of market benchmark is the domestic market of the financial contribution's provider"[492] and out of country benchmarks are allowed only in the exceptional case in which the conditions prevalent in the domestic market are distorted by an excessively intrusive

[490] Implementing Regulation, Annex I Table 1, B (6)(c) and Annex II Table 1, B (6)(c).

[491] L Rubini (n. 221), 204.

[492] Ding Ru and Xiang Yiqiang, 'Emerging Rules on Cross-border Subsidies: A Typological Analysis and Proposals for China's Approach' (2022) 12 Journal of WTO and China 45, 62.

presence of the State.[493] Would such an "in-country" approach be applicable in the FSR's analysis of the benefit criterion? In our opinion, this is not the case, insofar as such an approach is firmly rooted in the ASCM's trade-focused rationale,[494] which is not, instead, found in the context of the FSR.

On the basis of such a *ratio*, in applying the ASCM it is reasonable to assess the coherence of a financial contribution with the market conditions of granting's entities country of origin, because the benefit itself is functional to the production and export of products at conditions more favourable than those that would be present without the financial contribution and, thus "supposedly injuring the domestic industry of another Member".[495] Conversely, given that the Foreign Subsidies Regulation it aimed *at protecting the internal market* from undue distortions, it is logical that possible benefit deriving from foreign financial contributions be assessed considering the internal market itself as the benchmark for "normal market conditions". Indeed, it is these market conditions that would be ultimately circumvented by the foreign subsidization and it is in comparison to

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[493] *See*, in this sense, Wolfgang Müller, WTO Agreement on Subsidies and Countervailing Measures: A Commentary (1st edn, Cambridge University Press 2017), 457: "the Appellate Body emphasized already in *US – Softwood Lumber IV* that circumstances where out-of-country benchmarks can be used are very limited. In that particular case it justified the use of an out-of-country benchmark instead of private in-country prices because 'those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods'. The Appellate Body considered that, as far as market distortion and effect on prices are concerned, 'there may be little difference between situations where the government is the sole provider of certain goods and situations where the government has a predominant role in the market as a provider of those goods'. Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods. In other words, there is a situation where the government effectively acts as a price-setter and private suppliers are price-takers".

[494] *See* G E Luengo Hernández de Madrid (n. 163), 473.

[495] *See* Simon J Evenett, Edwin Vermulst and Juhi Dion Sud, 'The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment' (2020) 15 Global Trade and Customs Journal 413, 421, who state how "the financial contribution should benefit directly or indirectly the production and exports of the products causing injurious subsidization from the territory of the Member granting the financial contribution. Indeed, the prohibited subsidies which are considered the worst offenders, are the export subsidies and domestic substitution subsidies and it can hardly be argued that these subsidies are not restricted to encouraging production and exports from the WTO Member incurring the financial contribution".

such conditions that the relative benefit of undertakings engaging in an economic activity in the internal market actually lies.[496]

1.4. The jurisdictional, material and regional dimensions of the "limitation, in law and in fact" requirement

It is *prima facie* evident that the last condition necessary to establish the existence of a foreign subsidy, i.e. that the benefit deriving from a financial contribution be "limited, in law or in fact, to certain undertakings or industries", mirrors the concepts of specificity and selectivity provided for, respectively, in Articles 2 ASCM and 107(1) TFEU. Therefore, generally available financial contributions (or general measures) are excluded from the scope of the Foreign Subsidies Regulation.[497] Moreover, the provision expressly contemplates two forms of limitation: *de jure* or *de facto*, both of which, as is inferable from the previous chapter, are interpreted similarly in both State aid and WTO law. Measures are *de jure* specific/selective when they directly discriminate between undertakings on the basis of their legal criteria and they are *de facto* specific/selective when, whilst formally generally available, they factually limit access to certain undertakings. Against this backdrop, the notion of "limitation" raises four, principal, hermeneutical issues. The first relates to the necessity to identify the territorially relevant reference system in relation to which limitation assessment must be carried out. The second and the third focus on trying to understand the substantive contents of the "limitation" requirement. In particular, we firstly consider the "material" aspects of the requirement and, then, its "regional" declination. Finally, we will reflect upon the interpretation of the term "industry".

In relation to the first question, it is clear that Article 3 FSR specifies that a measure is limited in law and in fact when it favors *one or more* undertakings or industries. Save for the issue of *ad* hoc aid, the existence of which is readily apparent, the crux of the limitation assessment – just as in Article 107(1) and WTO law – relates to understanding

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[496] Philipp Reinhold, 'Strategic Autonomy and Trade Defence – The Case of Cross-Country Subsidies' (2024) 58 Journal of World Trade (Pre-print, December issue forthcoming), 16.

[497] R Luja (n. 117), 189.

when "*more*" undertakings or industries[498] constitute a "sufficiently discrete segment of the economy"[499] and, thus, the limitation of access to the benefits derived from the financial contribution is effectively limited. To determine such "sufficiently discrete" character, both Article 107(1) and 2.1. ASCM use a form of comparability analysis,[500] to understand whether *other* undertakings, enterprises or industries, in a similar situation, have been unjustly excluded from the benefits deriving from the subsidy. Such an analysis must be, carried out under a more general relevant system, pursuant to which it makes sense to compare the legal and factual situation of possible recipients. Implicitly in State aid law[501] and explicitly in WTO law, this general reference system is identified in relation to the jurisdiction of the granting State.[502]

Against this backdrop, it is necessary to ask if the general reference system under which to undertake the limitation assessment *ex* Article 3 FSR must be, pursuant to State aid and WTO law the granting authority's jurisdiction or, conversely, the internal market i.e. a jurisdiction external to the granting authority? The question is worthy of being asked, insofar as we have seen that, the *ratio* underlying Article 107(1) TFEU and Article 2 ASCM is both economic and non-economic.[503] If both of these aspects of the rationale of selectivity and specificity were to be transferred to the limitation requirement – and thus this would not only have the function of discerning between general and non-general measures from a political perspective but, also, of selecting *prima facie* the most distortive financial contributions–it would be essential to use as a general reference system the internal market. Indeed, if the consideration of a measure's distortive nature "starts" with

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[498] In particular, under the ASCM a plurality of enterprises or industries are relevant only when they form a "group", whilst Article 107(1) TFEU more generally refers to "certain undertakings or the production of certain goods".

[499] M Bénitah (n. 359), 27.

[500] For a description of these comparability analyses in State aid law and WTO law, *see supra* Ch. 2 Section 1. and Section 2. respectively.

[501] Indeed, it is usually understood for the analysis to be focused on the economy of single member states, the measures impact of which must then be assessed in the whole internal market.

[502] *See* Article 2.1 ASCM.

[503] For the EU context, *see* K Bacon (n. 270), 270 and for the WTO context *see* L Rubini (n. 221), 360-363.

assessing its limited nature, this requirement must be ascertained in the context of the internal market, as only distortions *in* the internal market are relevant for the FSR.[504]

However, in our opinion, this double-rationale is not applicable to the FSR's notion of "limitation", which instead must be attributed solely non-economic nature, thus functioning as a *filter* to exclude general measures from the FSR's application. Such measures must in fact be given deference to, insofar as they represent the exercise of sovereign prerogatives. If this is indeed the case, it is then natural for the limitation requirement to be applied in the granting authority's jurisdiction and for all assessments related to the economic impact of said measures to be considered *ex post*, solely under Article 4 FSR. This interpretation seems plausible, given the fact that Article 4 FSR has autonomous importance in the Regulation, by being a self-standing provision. Such territorial identification of the reference systems appears, moreover, confirmed by the need to preserve the *effet utile* of the limitation test. Indeed, any foreign measure, if assessed in the internal market, would be limited, insofar as there is no possibility of *third* countries to emanate general measures in an area outside their jurisdiction, i.e. the internal market. Therefore, any foreign financial contribution would automatically fulfill the limitation requirement. Finally, we also find textual support for this contention. Indeed, when referring to the limitation requirement, Article 3 FSR does not specifying that the undertakings or industries must be "engaging in an economic activity in the internal market", as it instead those for the "benefit" requirement. If such analysis should have taken place under the general reference system of the internal market, the norm would have indicated so expressly.

In relation to the second and third questions, it is our opinion that the "limitation in law and in fact" requirement must be considered as having both a "material" and a "regional" dimension. This is clear both from the systematic influence that WTO and State aid law – which both have a "regional" dimension to their notions of selectivity/specificity – hold on the interpretation of the FSR and from the political *ratio* we have ascribed to the "limitation" requirement.

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[504] *See* Article 4 FSR.

On the one hand, it is interesting to ponder what methodology will be applied to the practical establishment of the "material limitation" requirement. Such a question's relevance mainly plays out in relation to foreign financial contributions granted to *more than one* enterprise or industry, insofar as in the case of *ad hoc* aid, limitation, either in law or in fact, is readily apparent. Conversely, when *more* undertakings or industries receive the measure, the specificity of a financial contribution must be established on the basis of a comparative assessment between those who receive the measure and those who do not, so as to understand whether the measure discriminates between similar situations, and thus is selective, or if the discrimination is merely apparent, insofar as the situations are not, actually, similar. In State aid and in WTO law this establishment is proved through the application of different methods. In State aid law the "three-step approach" is used, which sanctions the selectivity of measures that "favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation"[505] and which are not justified by the logic intrinsic to their reference system.[506] In the ASCM, instead, a less refined approach is applied, by which measures are deemed specific when within a "sufficiently discrete economic sector" a group of enterprises or industries –identified through a "relatedness" test[507] – have preferential access to a subsidy. Such preferential access can be proved either *de jure* or *de facto*, on the basis of the criteria established by Article 2.1 ASCM In our opinion, the ASCM's option is more logical to apply to the FSR, insofar as it excludes the more complex aspects of the three-step approach pursuant to Article 107(1) TFEU, such as the need to establish the derogation "in light of the objective of the reference system" or the application of the third step, consisting in proving the derogation's justification "on the basis of the logic of the system". Indeed, on the one hand, it may be too hard and, also, too arbitrary for the Commission and the CJEU to have to interpret foreign laws and measures so as to comprehend their "objective" or the "logic of their system". It seems therefore more practical to determine the existence of a "group" of undertakings or

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[505] Notice, para 135.

[506] Notice, para 129.

[507] *See* Ch. 2 Section 2.3.

industry and apply the tests of *de jure* or *de facto* specificity provided by the ASCM to fulfill the "limitation in law or in fact" requirement, even if it is a less refined test than that present in State aid law. Actually, the more "hard and fast" nature of the ASCM's assessment may actually be better suited to the more "political" – rather than "economic" – *ratio* of the requirement *ex* Article 3 FSR. Indeed, since applying the limitation test serves no purpose in relation to a preliminary identification of the most economically distortive financial contributions, it is better for the test to be *over-inclusive* than *under-inclusive*, so as to be able to correctly assess the distortive capabilities – in the internal market – of the largest possible number of non-general measures.

On the other hand, we also believe that a "regional" dimension of limitation must be considered implicit in Article 3 FSR. However, in our reconstruction, this dimension differs from the parallel concepts in State aid and WTO law. Indeed, we have seen that under Article 107(1) TFEU, any regional differentiation between undertakings is considered selective, save from when such differentiation is justified on the basis of the power structures present in the State concerned. In particular, national measures are never selective in the case of "symmetric devolution of powers", i.e. when all local authorities have an "autonomous power in law [to implement a certain measure] independently from the central government".[508] Instead, when where only selected regional authorities have the power to autonomously adopt certain measures (the case of asymmetric devolution of powers),[509] the constitutional, procedural and financial autonomy of the authority must be assessed.[510] Similarly, under the ASCM, the only way to justify limitation to access of a subsidy on a regional basis is if the granting authority's jurisdiction is limited to the area which receives the subsidy.[511] Therefore, also this concept focuses on the powers vested in the granting authority, similarly to what happens in State aid law. Borrowing Article 107(1) TFEU' terminology the analysis of regional limitation under the FSR, we contend

[508] Notice, para 144 (2).

[509] Case C-88/03 *Azores*, para 58.

[510] Case C-88/03 *Azores*, para 58.

[511] Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7.

that regional discriminations in access to financial contributions are always relevant, save for when these are granted by an authority in the case of "symmetric devolution of powers". This is in line with the pollical *ratio* of the limitation requirement, which obligates the EU to filter out "general measures" in show deference to the sovereignty of foreign countries. In the case of symmetrical devolution of powers, when every local authority has autonomous normative power, such local authorities necessarily enjoy the same deference that must be showed to the central State. Instead, when the devolution of powers is asymmetrical, it is clear that regional autonomy is not a constituent characteristic of a third country. Thus, it is not an element that the EU should concern itself with in its external action. Moreover, assessing *in concreto*, as Article 107(1) mandates of the actual autonomy of a sub-national entity is a complex exercise, as it requires a precise understanding of the economical, constitutional, and political conditions existing in third countries. Leaving such an assessment to the Commission and the CJEU may lead to excessively arbitrary and contestable results. As a final point in favor of this interpretation of regional limitation stands the observation that *more* measures than those normally caught by Article 107(1) and Article 2.2 ASCM will be deemed regionally limited. Such over-inclusive character of regional limitation is appropriate, on the basis of the same rationale stated above in relation to the "material" dimension of limitation.

Finally, it must be admitted that the choice made by Article 3 FSR to identify the legal subject in relation to which the limitation assessment must be carried out as "undertakings or industries" is, indeed, peculiar, as it is a mixture of State aid and ASCM-derived concepts. However, it is also clear that the interpretation of such terms does not raise particularly difficult questions. On the one hand, we have commented at length on the notion of undertaking at the beginning of this section and, thus, the only relevant specification to be had in this context is that the undertakings here in question need not be "engaging in an economic activity in the internal market". Moreover, considering the notion of "industry" in the context of the ASCM, this relates to "producers of certain products".[512] Given this interpretation to the notion of industry, it can be seen that this period of Article 3 FSR perfectly mirrors Article 107(1), where it states that a measure is selective when it favors "certain undertakings or the production of certain goods".

All in all, therefore, just like selectivity and specificity, the "limitation" requirement is the most complex of the constitutive elements of the definition of foreign subsidy. In this paragraph we have clarified that the limitation test must be applied in relation to undertakings and industries *within the jurisdiction of the granting authority.*[513] Then, we explained that the material dimension of limitation in law or in fact, in relation to *more than one* undertaking or industry should be assessed on the basis of the ASCM. Conversely, we applied the principles of regional selectivity to the regional dimension of limitation in law or in fact, and, on the basis of the political *ratio* of the requirement in the FSR, concluded that regional differentiations in access to financial contributions should not be considered as "limited in law or in fact" only when third countries symmetrically attribute normative powers to local authorities. Finally, we explained the term industry as referring got the "production of certain goods".

2. THE ROLE AND FUNCTIONING OF THE "LEGAL TEST"

Once the conditions provided for in Article 3 FSR are fulfilled, a foreign subsidy exists. However, as was previously discussed, the mere existence of a foreign subsidy does not automatically lead to its prohibition.[514] Instead, it is prohibited only after the so-called legal test[515] is applied. Such test requires, first, to assess whether the foreign subsidy "distorts the internal market" as provided by Article 4 and 5 FSR. Then, if a distortion is ascertained, the negative effects brought by the foreign subsidy must be balanced against

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[512] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299 para 7 1142.

[513] Clearly, the term 'jurisdiction' is in and of itself susceptible of being interpreted broadly or narrowly. Therefore, if the FSR's scope indeed extends to "transnational" subsidies as well (*see* fn. 437), then this term would have to construed in a wider sense, not coinciding only with jurisdiction in a geographical sense. *See*, in this regard, P Reinhold (n. 495), 17.

[514] Recital 17, FSR.

[515] L Hornkohl (n. 95), 8.

its positive effects, *ex* Article 6 FSR. In the following, Section 2.1 will discuss the first prong of the legal test, while Section 2.2. will discuss the second. Throughout this analysis, we shall extensively refer to a recent Working Document published by the Commission,[516] which is incredibly useful to clarify how the legal test is thought of, and how it will be applied by the Commission. Indeed, while it is true that soft law documents such as this are not binding, they have, *de facto*, a relevant impact on how legal notions are intended and applied.[517]

2.1. Distortions in the internal market: a singular concept

In the Foreign Subsidies Regulation, the assessment of the distortive character of foreign subsidies is of central importance.[518] This is so not only because the Regulation's full application is dependent upon the determination of a distortion, but also because, as we saw, since "limitations in law and in fact" are assessed *within the granting authorities' jurisdiction*, there is no *prima facie* assessment of the distortions of foreign subsidies. Therefore, correctly applying the provisions held in Article 4 and 5 FSR is of the utmost importance for the correct functioning of the Regulation. This raises the verification of distortions in the internal market to an exacting test, quite different than its counterpart in State aid law, which is fulfilled, generally, by the mere presence of a selective advantage.[519]

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[516] Commission Staff Working Document, 'Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market' SWD(2024) 201 final (Working Document).

[517] On the power of such documents *see*, extensively, Antonios Bouchagiar, 'The Binding Effects of Guidelines on the Compatibility of State Aid: How Hard Is the Commission's Soft Law?' (2016) 8 Journal of European Competition Law & Practice, 157.

[518] *See* Xueji Su, 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?' (2023) 50 Legal Issues of Economic Integration 67, 80 "the conceptualization of 'distortion' is essential for decoding the elusive term of a level playing field. It indicates the means and ultimate goal of creating a level playing field, that is, restoring the distortive market to its natural status".

[519] *See* Working Document at Q&A 3, which, in explaining the difference between the two notions says that, differently from Article 107(1), in the FSR "the Commission cannot presume that the foreign subsidy distorts the internal market just because its beneficiary is engaged in an economic activity in a liberalised sector in the internal market. Rather, it will need to determine whether a distortion can be deemed to exist on the basis of indicators such as those listed in Article 4(1) of Regulation (EU) 2022/2560".

The notion of “distortions in the internal market” is quite interesting, already at the level of the precise terminology used by the Regulation. Indeed, this term is a *unicum* in competition law, insofar as other relevant provisions of this area of the law refer to “distortions of competition” or to “significant impediments to effective competition”.[520] The Commission’s Working Document itself recognizes the peculiar character of the notion, by explaining how this will be developed in time, through the Commission’s case practice. In particular, it explains that in fleshing out the notion, the Commission will have to have particular regard to the objective of the FSR, i.e. leveling the playing field. In stating this, however, the Commission makes an extremely interesting, declaration: it explains that “the notion of level playing field refers to the conditions in which undertakings *compete* with each other in the internal market *based on merit*”.[521]

This wording references the notion of “competition on the merits”, one of the most important – and controversial – concepts developed in the field of abuses of dominance *ex* Article 102 TFEU. In particular, a departure from competition of the merits – which in the words of the Working Document would cause the “level playing field” to be disrupted – was originally understood as “a practice [that] allows a firm to obtain advantages that it would not have been able to obtain in an effectively (or workably) competitive market”.[522] This definition suits perfectly the mechanics of receiving a foreign subsidy, insofar as a limited benefit, obtained at non-market terms is, in and of itself, an advantage non obtainable in a competitive market.[523] However, merely receiving a foreign subsidy is not enough for it to be prohibited, as has been said multiple times it must be proven that the subsidy causes distortions in the internal market.

Indeed, this is the same for abuses of dominance under Article 102 TFEU, insofar as no notion of abuse of dominance “by object” (or *per se* abuse) has ever been recognized by

[520] This term is used in the context of merger control, pursuant to the EUMR.

[521] Working Document at Q&A 1 emphasis added.

[522] Pablo Ibáñez Colomo, ‘Competition on the Merits’ (2024) 61 Common Market Law Review 387, 396.

[523] Such similarity is even more evident if considering that the same Author, in explaining one of the instances through which it can be ascertained that a firm is not competition on the merits, cites the “use of assets that have not been acquired on the merit” cf P Ibáñez Colomo (n. 521), 403.

the jurisprudence.[524] However, this does not necessarily imply that all deviations from competition on the merits are subject to the same standard of proof. Indeed, Ibáñez Colomo groups in four categories the most relevant forms of conduct that dominant firms can practice and, in doing so, attaches to each of them a different standard of proof for establishing an abuse of dominant position. In particular, he lists: (a) conduct that is deemed a legitimate method of competition as it presumptively coincides with competition on the merits rivals; (b) conduct which is a lawful expression of competition on the merits absent exceptional circumstances; (c) "practices the legality of which hinges on an analysis of their actual or potential anticompetitive effects" and (d) "conduct that is, by its very nature, at odds with competition on the merits".[525]

Such four categories perfectly coincide with the ways in which a distortion in the internal market can be proved according to Article 4 and 5 FSR. Indeed, as will be better explained *infra*, the FSR divides foreign subsidies in different categories, which reflect the different standard of proof that the Commission must adhere to to establish distortions in the internal market. On the one hand, certain subsidies are deemed presumptively undistortive, either irrebuttably or rebuttably. On the other hand, the distortiveness of certain subsidies must be established through certain indicators and, thus must be exhaustively analyzed. Finally, certain subsidies are deemed "most likely to distort the internal market". However, even for these, there is always a possibility – however difficult – to prove that in practice they have no distortive effects.

All of this said, therefore, and granted that the use of a notion elaborated in the context of Article 102 TFEU is apparently at odds with the FSR's subsidy-based focus, departures from competition on the merits and distortions of the internal market caused by foreign subsidies share much in common. While it would, to say the least, be daring to posit any possible influence between the two concepts, which are still seas apart, the specification made by the Commission in its Working Document was not made casually. In our opinion,

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[524] *See ex multis* Richard Wish, 'Intel v Commission: Keep Calm and Carry on! ' (2015) 6 Journal of European Competition Law & Practice, 1.

[525] P Ibáñez Colomo (n. 521), 403.

it signals the conceptual closeness of the FSR's notion of "distortions of the internal market" to the "more-economic" approach introduced by the Commission in its Guidance on its enforcement priorities in applying Article 102 TFEU to exclusionary abusive conduct.[526] It also marks the distance between such notion and the "loose" approach under which distortions of competition are assessed under Article 107(1) TFEU.[527]

2.1.1. Distortions in the internal market: conditions, safeguards and presumptions

Considering, more specifically, the way in which the existence of a distortion of the internal market can be assessed in practice, Article 4(1) states two general conditions which must be fulfilled for a distortion to exist.[528] Then, Article 4(2) - 4(4) lists certain cases in which distortions are presumptively excluded. Finally, Article 5(1) lists certain forms of aid which are deemed, *prima facie*, distortive. We shall examine these elements in turn.

The first of the two general conditions is that, for the establishment of a distortion. It is necessary a foreign subsidy to improve "the competitive position of an undertaking in the internal market". As explained by the Commission's Working Document, this condition must be interpreted as requiring establishing a link, or a relationship, between the foreign subsidy and the undertaking's activity.[529] This condition is therefore composed of two elements: first it is necessary to establish a causal link between a foreign subsidy and a certain, economic activity. Then, in second place, it is necessary for that activity to take place in the internal market. When these conditions are fulfilled, the competitive position

[526] Communication from the Commission (2009/C 45/02), Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7. The Guidance "was the end-product of a review process announced by the then Competition Commissioner, Neelie Kroes, in a speech in New York in 2005,19 and was presented as a 'more economic' and 'effects-based' approach to Article 102 TFEU. According to the Priorities Paper, the Commission will normally only intervene against exclusionary conduct by dominant undertakings if, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to foreclosure leading to harm to consumers" as explained by Wouter PJ Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 World Competition 405, 408.

[527] For the same description of the 107(1) assessment of distortions as "loose" *see* X Su (n. 517), 86.

[528] Working Document ae Q&A 1.

[529] Ibid.

of the undertaking is improved. However, the Working Document clarifies that the relationship between the subsidy and the activity is not relevant only when it is *direct*, for example, when a German undertaking receives a direct transfer of funds from the Congolese government but can also be *indirect*, i.e. when a Chinese company located in Egypt receives a foreign subsidy and, then, such subsidies are used at a consolidated level to affect competition in the internal market. Indeed, the Commission can examine "whether a certain subsidy with no apparent relationship with an activity in the internal market is used by a group to cross-subsidize activities in the internal market".[530] The improvement of an undertaking's competitive position through the receival of a foreign subsidy is, however, not enough for there to be a distortion in the internal market. It is also necessary that, through such improvement, the foreign subsidy is able to "actually or potentially negatively affect competition".[531] In practice these two conditions are assessed on the basis of indicators, which are illustratively listed in Article 4(1)(a)-(e).[532] While it is mandatory to prove such distortions on the basis of "indicators", insofar as "the lack of transparency concerning many foreign subsidies and the complexity of the commercial reality make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market"[533], the list provided for in the norm is not exhaustive and, moreover, it is not necessary to use *each* of them *for every case*.[534]

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[530] Ibid. This, moreover, confirms what was said *supra* (*see* fn. 437) in relation to so-called "transnational subsidies". However, it is still unclear how, indeed, such cross-subsidization can be proved in practice. In fact, when a financial contribution is received by a component of a single economic entity, located outside of the internal market, it would be quite difficult to establish that *precisely* that financial contribution was then used to alleviate the charges normally burdening the activity that takes place in the EU, once it has entered a group. More guidance is necessary.

[531] Article 4(1), FSR.

[532] Specifically, the indicators listed in the norm are: (a) the amount of the foreign subsidy; (b) the nature of the foreign subsidy; (c) the situation of the undertaking, including its size and the markets or sectors concerned; (d) the level and evolution of economic activity of the undertaking on the internal market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

[533] Recital 18, FSR.

[534] Recital 19 FSR provides further specification on such indicators, such as: (a) the need to consider the size of the foreign subsidy not only in absolute terms but also in relation to the size of the market or to the value of the investment (b) the fact that a foreign is granted for operating costs, seems more likely to cause distortions than if it is granted for investment costs (c) that foreign subsidies to SMEs could be considered less likely to cause distortions than foreign subsidies to large undertakings (d) the need to consider the competitive conditions on the market, such as barriers to entry and (e) the competitive conditions of the beneficiary – if it shows low degree of activity in the internal market.

Secondly, Article 4(2) – (4) FSR lists certain categories of aid which are "safeguarded" from the regular application of Article 4(1). Indeed, these provisions must be understood as being "negative presumptions" to the existence of distortionary effects. These categories are defined in relation to specific characteristics of foreign subsidies. In particular, the presumptions provided for in paragraphs 2 and 4 – concerning subsidies less than EUR 4 million over three consecutive years, or subsidies for the purposes of reintegrating damages caused by natural disasters or exceptional occurrences – appear to be rebuttable[535] and, therefore, the Commission could, by providing extraordinarily convincing evidence, establish a distortion. Conversely, the presumption contained in paragraph 3, is irrebuttable, as the text clearly provides that, a foreign subsidy *shall not* distort the internal market when its amount is, over a period of three consecutive years, below or equal to the threshold provided for in the Regulation on *de minimis* aid.[536]

Thirdly, Article 5(1) considers those subsidies that are *most likely* to distort the internal market. In particular, these are (a) subsidies granted to an ailing firm, (b) unlimited guarantees, (c) export financing measures, (d) subsidies directly facilitating a concentration and (e) allowing an undertaking to submit an unduly advantageous tender.[537] When such foreign subsidies are present, the Commission is not required to undertake a detailed assessment of the distortive effect of the subsidies in the internal market by applying the indicators listed in the preceding norm and, in general, such subsidies will automatically be deemed distortive "unless the facts specific to the case

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[535] This is clear from the use of the words "unlikely to" and "may be" in the respective provisions.

[536] *See* Article 3(2) Regulation (EU) 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1 (no longer in force).

[537] The forms of foreign subsidies "most likely to distort the internal market" according to Article 5(1) FSR are: (a) a foreign subsidy granted to an ailing undertaking, namely an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and that plan includes a significant own contribution by the undertaking; (b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee; (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) a foreign subsidy directly facilitating a concentration; (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.

show that there is unlikely to be any negative effect on competition in the internal market".[538] In this context, Article 5(2) grants the undertakings concerned with the chance to prove that the subsidies aren't distortive and, thus, it appears as the provisions sets forth a rebuttable (positive) presumption of distortion, and, therefore, a reversal of the burden of proof. From this perspective, it appears evident that this provision is the most similar to the understanding of "distortions of competition" present under Article 107(1) TFEU and, we feel justified to extend to this case the reasoning elaborated *supra* in relation to that requirement.[539] Therefore, it can be said that, in the context of this inversion of the burden of proof, the "unlikeliness of negative effects on competition in the internal market", the *thema probandum*, must be understood as "the practical and theoretical exclusion of competition", a very high standard of proof indeed. However, the rigidity of the consequences of such a categorization are in some form mitigated by the fact that, as Recital 21 points out, such subsidies are still subject to the balancing test provided for in Article 6 FSR, even though its positive outcome is less likely. Thus, their granting does not automatically lead to prohibition, even though the scales of the balance are definitely tipped in favour of it.

2.1.2. Distortions in the internal market: the case of concentrations and public procurement

The final aspect of "distortions in the internal market" that we will consider is the way it applies in the context of the two notification-based tools detailed in the Regulation. Indeed, Articles 27 and 19 FSR provide that the distortion assessment in relation to public procurement procedures and concentrations must be limited to such procedures and concentrations. Given the importance of these specifications, the Commission's Working Document also considers them extensively. We shall now comment on their principal aspects.

Considering, first, public procurement procedures, we have seen that Article 27 FSR states that the relevant subsidies for assessing actual or potential distortions in the context

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[538] Working Document at Q&A 6.

[539] *See* Ch. 2 Section 1.5.

of the procedure are those "that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned"[540] and that, for the purposes of public procurement, the distortions caused by the subsidy must be assessed limitedly to the public procurement. According to the Working Document such condition is satisfied in the presence of two elements: first, the existence of a link between a foreign subsidy and a tender and, second, that the tender be "unduly advantageous".[541] The first element mirrors one of the components of the first condition provided for by Article 4(1) FSR, i.e. a causal link between the subsidy and a certain economic activity. Clearly, the Commission will be able to ascertain the existence of such a link through the information provided by the undertaking concerned or through its own powers.[542] Then, the Working Document exhaustively explains the notion of an "unduly advantageous tender". This comprised of two smaller components: "the advantageousness" of the tender and its undue character. The first is determined by the Commission by comparing the tender under exam and the other with other bids and, moreover by consider the contracting authority's own estimate.[543] Then, its undue character is considered by the absence of any other justifications for the advantageous price.[544] In our opinion, the need to establish the presence of an unduly advantageous tender reflects the first condition required by Article 4(1), i.e. the "improvement of the competitive position" of the undertaking concerned, which is usually presumed. However, the peculiar nature of public procurement procedures willed the Regulation into requiring – through Article 27 FSR – explicit proof of such improvement. Indeed, it is not the tender itself that causes the distortions in the internal market, but it is the means through which such distortions can materialize. The second condition provided for by Article 4(1) FSR mustn't, instead, be verified in relation

[540] Ch. 1 Section 2.2.3.

[541] Working Document at Q&A 6.

[542] Such as those provided in Articles 35-37 FSR, relating to the communication of information, market investigations and third-country dialogues.

[543] Working Document at Q&A 6.

[544] In particular, the Working Document at Q&A 6 and Recital 53 FSR consider: "the elements listed in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU to justify abnormally low tenders for example the particular cost-effectiveness of a production process, innovations or novel technical solutions, or exceptionally favourable conditions from which the economic operator benefits in the supply of goods or services".

to Article unduly advantageous tenders, as these are one of the forms of foreign subsidies listed in Article 5(1) FSR and, thus, are presumptively distortive.

Secondly, in relation to concentrations, the Commission's Working Document begins by clarifying that the requirement that distortions assessments must be "limited to the concentration concerned" must be interpreted as meaning that the internal market must be distorted "through the concentration".[545] Foreign subsidies able to fulfill this requirement are clearly a variety, and their precise contours may be determined only on a case-by-case basis. This is clear from the Working Document's explanation that foreign subsidies directed not only at the acquirer, but also at the target and the seller.[546] Moreover, the requirement is also fulfilled by distortions that materialize *after* the concentration, in relation to the merged entity's activities.[547] On the basis of the foregoing, we are however particularly interested in foreign subsidies *directly facilitating a concentration* which are deemed most likely to distort the internal market by Article 5(1)(d). In particular, we believe that this form of subsidy is structurally equivalent to unduly advantageous tenders under Article 27 FSR, as both are listed in Article 5(1) and both must be assessed limitedly to the economic activity concerned. While there is a relevant difference between the regime set forth by Article 19 FSR in relation to concentrations, because even *other* categories of subsidies are relevant, and that of Article 27 FSR, it here contended that its interpretation can be useful when assessing subsidies directly facilitating a concentration, insofar as even these subsidies are most likely to be distortive. Structurally, therefore, we can affirm that, just as for "unduly advantageous tenders", to establish that a subsidy "directly facilitates a concentration", two conditions must be met. First, there must be a "direct facilitation" (which would allow for the improvement of the competitive position of an undertaking) and, second, the foreign subsidy and said facilitation must be causally linked (insofar as the subsidy enabled or likely enabled an economic operator to achieve the concentration). While the latter condition is easily understood and, just as the same link in the context of Article 27 FSR,

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[545] Working Document at Q&A 7.

[546] Ibid.

[547] Ibid.

it will be able to be established through the information provided by the undertakings concerned or by investigations carried out by the Commission, understanding how to interpret the former is more complex. Indeed, there are a variety of different subsidies that could theoretically enable a concentration, however both the use of the term "directly" and the categorization of such subsidies under Article 5(1), which provides a special regime for distortions under the FSR, suggest that the condition be interpreted restrictively. Would for example the deduction of goodwill for the merged entity – which would be considered a "foregoing of revenue" under Article 3 FSR – be considered as directly facilitating the concentration? Could the same be said for a reduction of charges connected to employment in a certain country? Both of these examples could in some way facilitate a concentration, insofar as they represent a reduction of costs which, in turn, would make a concentration more appealing. A possible solution in this context, given the need for a restrictive interpretation of the provision, would be to consider subsidies "directly facilitating of a concentration" as only those received by the acquiring undertaking, which would allow it to present an "unduly high bid" compared to other potential acquirers. A similar solution may be supported by a point made, *incidenter tantum*, by the Commission it its Working Document, where it states that "foreign subsidies received by the acquirer are particularly relevant as they provide an advantage in the acquisition process, which the acquirer could use, for example, to outbid or discourage potential competitors".[548]

2.2. The "balancing test": weighing foreign subsidies' effects

The second part of the legal test, and the final component of the definition of prohibited foreign subsidy, is the balancing test provided by Article 6 FSR. The norm requires that the negative effects of distortive foreign subsidies[549] be balanced against their positive effects in relation to "the *development of the relevant subsidised economic activity* on the internal market, while considering other positive effects of the foreign subsidy such as

[548] Ibid.

[549] Needless to say, the relevant negative effects are only those produced on the internal market, just as is the case for compatibility *ex* Article 107(1) TFEU. Cf C-594/18 P *Hinkley Point*, para 100: "examination of the second condition laid down in Article 107(3)(c) TFEU entails the Commission taking into account the negative effects of the State aid on competition and trade between Member States but does not require any negative effects other than those to be taken into account".

the broader *positive effects in relation to the relevant policy objectives*, in particular those of the *Union*". The similarity of this provision with the compatibility assessment of aid under Article 107(3) and, in particular, Article 107(3)(c) is striking. In the following we shall, therefore, consider this similarity – and the possible influence of "compatibility" on the balancing test – in relation to the two principal elements of the balancing test: the identification of the relevant positive effects and the actual of the balancing of the positives and the negatives. In conclusion, we shall overview the different consequences that can follow from the application of such a test to a distortive foreign subsidy.

2.2.1. Understanding the relevant positive effects of foreign subsidies

The Regulation attempts to distinguish neatly between two different categories of "positive effects": those connected to the development of an economic activity and those connected to the achievement of relevant policy objectives. It is clear, however, that in this respect the most important question is *which* positive effects are indeed relevant for the balancing test.[550] In this context, the Commission's Working Document clarifies that, while such a determination is dependent on the experience that will be gathered through the FSR's application, positive effects acknowledged in the State aid rules will be likely be taken into account under the Regulation.[551] This specification blurs the distinction drawn by the Regulation between the two different categories of positive effects which, as explained *supra*, could have been reasonably interpreted as, on the one side, purely economic and, on the other, purely policy related.[552] Instead, both through our analysis of compatibility and through the Working Document's specification, it is now clear that the positive effects on the development of the subsidised economic activity must be coordinated with those identified through the application of Article 107(3)(c), which are not only economic, but mostly policy related.[553] Indeed, Article 107(3)(c) has, more than

[550] M Schonberg (n. 113), 150.

[551] Working Document at Q&A 9.

[552] M Tokas (n. 433), 787.

[553] Indeed, the two provisions are substantially identical, cf Article 107(3)(c).

any other provision, been the gateway through which the Commission approves aid functional to the EU's policy objectives.[554]

However, notwithstanding some degree of conflation between the two categories of positive effects relevant to the Article 6 FSR, these maintain differences in relation to their scope, which can be of aid to better understand their substantive contours. Indeed, the first category's scope is more limited, as only positive effects (be they economic or policy-related) on the *development* of a *certain activity* are to be considered. Given the similarity of this provision with Article 107(3)(c) TFEU, we believe it is possible to extend to Article 6 FSR the corollaries elaborated in the State aid context in relation to the limits that foreign subsidies must respect for their positive effects to be relevant. First, the notion of development relates to the economic activity and, therefore, aid granted to an individual undertaking must aim at improving the conditions of a certain economic sector as a whole.[555] Consequently, aid given to individual undertakings in difficulty cannot be justified when the market conditions prevailing in the sector in question are sufficiently good as to assure normal development.[556] Lastly, operating aid is generally considered to be outside the notion of development, insofar as it aims at reducing "normal" costs and does not, instead, actually improve the way the economic activity is carried out.[557] These limits do not, conversely, apply to the second category of relevant positive effects stemming from aid measures. Therefore, the relevance of these in the balancing test seem limited to the achievement of a policy objective deemed sufficiently worthy by the Commission, in the exercise of its discretion. In particular, Recital 21 lists several, including " a high level of environmental protection and social standards, and the promotion of research and development". Such objectives closely echo those listed in Article 3 TEU, which establishes the policy priorities of the EU.[558] However, the range

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[554] *Ex multiis see* Communication from the Commission (2022/C 80/01), Guidelines on State aid for climate, environmental protection and energy [2022] OJ C 80/1 or the TCTF (n. 53).

[555] C Quigley (n. 210), 268.

[556] Ibid.

[557] Ibid.

[558] Cf Article 3(3) TEU: "[the Union shall aim at] a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".

of relevant objectives may be even wider, insofar as the norm contemplates policy objective external from those of the Union, as can be seen by the use of the words "in particular".[559]

In relation to the relevant positive effects, therefore, it is clear that the net cast by the Regulation is incredibly wide and requires better guidance by the Commission, especially in relation to the second category of positive effects, which is correlated to vaguely defined policy objectives. The first category of positive effects, instead, is more circumscribed thanks to the reference to the "development of certain activities" and thus is a lesser source of legal uncertainty. Moreover, from a practical point of view, the Commission and undertakings alike can and likely will make reference to the numerous Guidelines that have been published in relation to Article 107(3)(c) to better determine such effects.[560]

2.2.2. The balancing test in practice: an even darker box?

In the preceding chapter, we depicted the balancing between positive and negative effects *ex* Article 107(3) TFEU was lucidly described as a "black box",[561] insofar as it has never been particularly clear *how* the different effects must be balanced, absent an obligation to quantify such effects.[562] It is here posited that, in the context of Article 6 FSR, the practical application of such balancing test is even more uncertain and, thus, can be characterized as an even "darker" box.

In fact, whilst analysing compatibility pursuant to Article 107(3), it was pointed out that a true "balancing that can lead to authorization of aid implies that the positive effects must be larger than the negative effects and that if the negative effects are large, the positive

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[559] In this sense *see* M Schonberg (n.), 150 who however explains that "[the provision] suggests that while positive effects outside the internal market may be taken into account, in particular, those that align with EU public policy objectives, they might be given less weight than those effects within the internal market.

[560] R Luja (n. 117), 191.

[561] P Nicolaides (n. 341), 12.

[562] P Nicolaides (n. 348), 136.

effects must be even larger".[563] This, in turn, requires for such effects to be quantifiable.[564] However, in the application of Article 6 FSR, the positive and negative effects that must be weighed against each other are unsuitable for quantification. On the one hand, positive policy effects, which as has been seen are expressly relevant under the FSR; are *qualitatively* different than economic effects and, thus, difficultly measurable. On the other hand, negative effects on the internal market are also inherently difficult to quantify.[565] If this weren't enough, as noted by Schonberg, the requirement that foreign subsidies' positive effects must, as a general proposition, either take place in the internal market or align with EU values "significantly reduce[s] the potential for the overall balancing assessment ever to be positive, as governments generally only grant subsidies with a view to generating the major benefits in their own national economies - indeed, a subsidy would be considered as being badly designed if it were otherwise".[566] The Commission itself, in an almost apologetic tone explains, in its Working Document, that it still doesn't really know how this test will be carried out in practice.[567]

Against this backdrop, it is clear that the balancing test is, for now, the most uncertain and problematic element of the definition of "prohibited foreign subsidy". While far from being a satisfying or definitive solution, a possible mitigation of such uncertainties could be for the Commission to openly rely, in the application of the balancing test, on some the "common assessment principles" that are used in the State aid context to determine, in practice, the compatibility of aid measures notified under Article 107(3) TFEU. In particular, in our opinion, the most relevant of these principles for this assessment are:

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[563] P Nicolaides (n. 341), 11.

[564] Ibid.

[565] *See* P Nicolaides (n. 348), 137 who lucidly explains how "negative effects on actual and potential competitors are more difficult to identify or measure. This is because they depend on the cost, technological or knowledge advantages they may already enjoy and on how they may react for he aid granted to their competitors".

[566] M Schonberg (n. 113), 150-151. *See* also X Su (n. 517), 88 who explains that the State aid balancing test is irrelevant in the FSR's context, as it "is constructed, among other things, to ensure that government expenditures are not wasted. Accordingly, it asks why an aid is granted and whetehre it I seffective for its alleged objective. When confronted with a foreign subsidy, the EU could hardly care whether the subsidy can achieve its desired policy objective".

[567] Working Document at Q&A 9.

first, for the State intervention to be necessary, thus achieving an objective that the market could not achieve in and of itself and for there to be an incentive effect, thus that the aid would change the behavior of an undertaking for the purposes of carrying out an activity that it would have otherwise not carries out. Also, the measure need be appropriate, thus negative effects should be limited and, finally, that the aid be proportional, i.e. the minimum amount required for the objective.[568] Indeed, applying such conditions would equate to assessing foreign subsidies under a proportionality test, thus understanding whether each measure's negative effects are necessary, appropriate and *stricto sensu* proportional in relation to the achievement of the desired policy effects.[569] This approach, moreover, is not completely unheard of in the context of Article 107(3), neither in the case-law,[570] nor in the scholarship, even though these limited the scope of the Commission assessment to the sole condition of "appropriateness" of aid fulfilling a certain positive condition.[571]

Clearly, this option is a mere refinement and re-direction of the balancing test and not, instead, a clear understanding of what Article 6 precisely requires. Nonetheless, such an approach could have some benefits. On the one hand, from a legal certainty perspective, the Commission and the CJEU have a considerable experience in applying the proportionality test, in contrast to the complete lack of experience in applying the test provided for in Article 6 FSR.. However, it must be said that such increased legal certainty is more *procedural* than *substantive*, insofar as the outcomes of proportionality tests

[568] For the full list of common assessment principles, *see supra* (n. 341). In particular, the reason for which only three of these assessment principles are in our opinion useful for the assessment of aid concerns, mainly, the extra-territorial nature of the FSR, which makes the other principles irrelevant. Think, for example, of the impossibility of assessing the transparency of aid measures granted from a third country.

[569] For more on the principle of proportionality *see*, again, T Tridimas (n. 295).

[570] As was seen in Ch. 2 Section 1.6.2., commenting upon T-162/13 *Magic Mountain Kletterhallen v Commission*, para 110.

[571] *See* P Nicolaides (n. 348), 141, who states that "it seems to me that a more credible and transparent methodology would be for the Commission simply to stat that compatible aid must fulfill all the criteria in the first condition and have no unnecessary restriction or manifest negative effects in the second condition".

remain uncertain.[572] Moreover, since the proportionality test is, by its nature, flexible, it could allow the Commission and the CJEU to adopt a nuanced approached in understanding whether foreign subsidies are, indeed, "balanced" or not. Such nuanced approach is ever more valuable when considering, as we did above in chapter 1, that from an internal perspective the rules on compatibility have been considerably relaxed, mainly thanks to the introduction of frameworks and guidelines such as the TCTF and those related to IPCEI. If the objective of the FSR is truly that of reaching a level playing field, interpreting its Article 6 as a proportionality test would allow in the internal market foreign subsidies that have the same characteristics as those allowed internally, thus avoiding imbalances which would, on the contrary, un-even the playing field.[573]

In any case, the truth of the matter is that balancing tests (and we include the proportionality test here as well) are, by their very nature, discretional and value-led judgments, which can lead to diametrically different outcomes depending on the perspective adopted in each case. The only way in which true legal certainty and predictability can be reached is to wait for the Commission to gain the necessary experience on the application of this test. Provided that this form of balancing is conducted in a transparent, consistent and exhaustive manner, legal operators will be able to infer from the Commission's decisions the relevant principles which inform Article 6 FSR. Moreover, the Commission Guidelines, which are due to be published before the 12th of January 2026,[574] will certainty provide greater clarity on the interpretation of the norm.

CONCLUSIONS

In the light of all the foregoing considerations, we can attempt to give a complete definition of a prohibited foreign subsidy. Namely, a foreign subsidy exists when the

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[572] *See*, Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 Journal of Environmental Law 185, 197, who explains how "true proportionality is a flexible tool and, by its very nature, can be assessed only on a case-by-case basis in the light of the specific circumstances, arguments and possibly also scientific and other evidence submitted by the parties. Clearly, where the submissions are insufficient, serious scrutiny is not possible".

[573] For more on this *see* Ch. 1 Section 1.6.2.

[574] Article 46 FSR.

following conditions are met: (a) a financial value is received by an undertaking, directly or indirectly, actually or potentially; (b) such financial value is attributable to a third country, either by definition or through the use of the non-exhaustive list of indicators developed by the CJEU in *Stardust Maritime*; (c) the financial value is granted through State resources; (d) the recipient of a financial value is an undertaking engaging in an economic activity in the internal market, which means that it must be in some sort of way established in one of the Member States –keeping in mind that the "single economic entity doctrine" applies to the concept of "undertaking" with all its consequences; (e) such financial value must grant the recipient an advantage not in line with the market terms prevailing in the internal market; (f) the measure from which the financial value derives is limited, in law in fact or regionally, within the jurisdiction of the granting authority.
After such conditions are cumulatively fulfilled, a foreign subsidy exists. However, it is not automatically prohibited. Rather, such prohibition is dependent upon the fulfillment of other two conditions –the "legal test"– detailed in Articles 4, 5, and 6 FSR. First, the legal test requires that a foreign subsidy must produce distortions in the internal market which, in line with Article 102 TFEU, can be proved in one of four ways, depending on the specific type of foreign subsidy considered. In general, the distortiveness of subsidies must be established *in concreto*, through the application of certain indicators set out in Article 4(1) FSR. However, when subsidies have the characteristics set out in Article 4(2) FSR they are considered, by their very nature, undistortive. Moreover, foreign subsidies in line with the requirements set out by Article 4(1) and 4(3) FSR are deemed presumptively undistortive, but such presumption can be rebutted through the production of extraordinarily convincing evidence. Finally, subsidies listed in Article 5(1) are "most likely" to be distortive, save the possibility for undertakings of proving the contrary.

The second and last part of the legal test takes the form of a balancing test, which must weigh, on the one hand, the positive effects and the negative effects of the foreign subsidy under exam. If the balancing is positive, it is possible for foreign subsidies to be allowed in the internal market despite their negative effects or, also, for the Commission to mitigate the commitments or the redressive measures that would have otherwise been applied absent the positive effects. This being said, we also explained how the balancing is, at least as the law now stands, a source of uncertainties for legal operators, as it is not clear how or on the basis of which criteria this test would be carried out. A possible solution that was offered was to apply certain "common assessment principles" – i.e. principles that the Commission uses to determine whether State aid is compatible with the internal market under Article 107(3) – to the balancing test, thus transforming it into a more traditional "proportionality test". However, this solution is still liable to create uncertainties in the balancing test's practical application. Indeed, given the discretionary nature of any form of balancing or proportionality, true legal certainty can be obtained only through a consistent and transparent application of the provision by the Commission, from which it will be possible to extrapolate general rules.

CONCLUSION

The Foreign Subsidies Regulation, and more specifically the definition of (prohibited) foreign subsidy, much resembles the Roman god Janus, the two-faced deity of transitions, which had one face turned to the past and one to the present. Depending on the way in which the terms we attempted to analyse in this dissertation will be interpreted, the Regulation could unilaterally reinforce the imperatives of the level playing field in a time in which multilateralism is in a deep crisis or, conversely, mark a new era of protectionism in the EU, inspired by a possibly open, but surely strategic, autonomy.

Indeed, we decided to interpret the main elements of the definition of foreign subsidy in a moderate and balanced manner, keeping in mind the two fundamental requirements mentioned by Tullio Ascarelli in one of his works on the subject of legal interpretation: on the one hand, it is essential for the interpretation to be "just" and, on the other hand, it is essential for it to harmonize itself with precedents. The former is dependent upon the foundations of law itself and, the other, on the necessities of legal certainty and uniformity.[575] In particular, in relation to the latter requirement we tried to interpret the conditions of the notion of foreign subsidy in line with the interpretation given to them in the context of Article 107(1) TFEU, when this was possible. In relation to the former, instead, we attempted to achieve a "just" interpretation of the norm by, on the one hand, not burdening excessively neither undertakings nor the Commission, thus restricting the scope of the single components of the definition when these were drawn to widely – such as by adding the State resources requirement to financial contributions – and, on the other hand, by interpreting the single conditions more expansively when a stricter interpretation would have run counter to the *ratio* and the objectives of the Regulation. This was, for example, the case of the "limitation in law or in fact" condition, in relation to which we argued in favour of an "over inclusive" nature of the norm, given the difficulty of strictly applying Article 107(1)'s three-step approach to foreign laws and the inability of the requirement to function as a threshold for a *prima facie* assessment of the distortive nature of foreign subsidies – unlike what happens in State aid law and in WTO law with selectivity and specificity.

[575] T Ascarelli (n. 5), 189.

However, citing Ascarelli once more, the way in which these two requirements must be balanced is clearly a discretionary exercise, which varies according to each interpreters sensibilities.[576] As a way of example, were a more protectionist application of the FSR to be preferred, the notion of financial contribution could be very likely interpreted as perfectly coinciding with that provided for in Article 1.1(a)(1) ASCM and, thus, as not requiring a cost to government – or, in State aid terms, to be "granted through State resources". Also, the "limitation in law and in fact" requirement could be established under a different reference system than that of the "jurisdiction of the granting authority", thus considerably widening the financial contributions that could fall into the notion. Conversely, a more liberal approach would interpret the notions more restrictively by, for example, narrowing the scope of the notion of "undertaking" relevant for the FSR's application, or by considering the "single economic entity" inapplicable. Moreover, the coherence with market conditions of financial contributions could be assessed in comparison to the market conditions existing in the granting authority's jurisdiction, with only limited exceptions, as happens in the context of Article 1.2 ASCM.

All in all, as is normal with such novel pieces of legislation, there are definitely more question than answers in relation to the way in which the notion of foreign subsidy will be interpreted. While we sincerely hope that the reflections we provided in this work will, in some fashion, coincide with the way in which foreign subsidies will be understood by the Commission and by the CJEU, there is no such certainty, regardless of their correctness. Against this backdrop, therefore, the most we can hope is for the future interpretation of the notion to be, at least, predictable in its application and legally certain in its substance, given the burdensome nature of its obligations and the breadth of its scope. To say it with Draghi, indeed, "to avoid the pitfalls of protectionism, trade policy should be governed by a clear set of principles".[577] Nonetheless, regardless of the direction in which the notion of foreign subsidy is facing, the FSR will bring incredible new changes to the international system of subsidies control. A new era of global trade has begun.

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[576] Ibid., 190.

[577] M Draghi (n. 1), 16.

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