LUISS

Department of Law

Course of European Union Law

Foreign Subsidies Regulation: a true revolution?

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Academic Year 2023/2024

Table of Contents

Introduction

While the European Union has long maintained a robust legal framework to govern State aid provided by its Member States, the absence of similar scrutiny for subsidies granted by non-EU entities has created a significant regulatory gap. This asymmetry has allowed foreign subsidised operators to freely move within the EU's internal market without being subject to the same competitive constraints as EU-based companies. As a result, foreign subsidies - often granted by state-controlled economies - have enabled certain undertakings to secure competitive advantages in key sectors, including infrastructure, technology, energy, and transportation. The lack of regulatory oversight in this area has led to concerns that the integrity of the Single Market is at risk, with foreign subsidised firms outcompeting European businesses that must adhere to strict competition rules. Moreover, the increased presence of foreign subsidised entities has raised broader concerns regarding economic security, technological sovereignty, and the resilience of European industries in an era of global economic competition.

In response to these challenges, the European Union introduced the Foreign Subsidies Regulation ("FSR"), officially published in the Official Journal of the EU on December 23, 2022, and entered into force on January 12, 2023. The Regulation aims to close the existing regulatory loophole by establishing a comprehensive legal framework to identify, assess, and address the distortive effects of foreign subsidies within the Single Market, and it is designed to complement the EU's existing competition and State Aid rules.

The Regulation provides the European Commission with new investigative and enforcement powers, enabling it to review foreign subsidies in the context of mergers and acquisitions, public procurement, and general market activities. However, despite its ambitious objectives, the FSR raises critical questions regarding its implementation, effectiveness, interplay with existing competition law tools, and broader economic and geopolitical implications. Striking a balance between maintaining an open economy and preventing market distortions remains a complex task, especially as the EU navigates an increasingly competitive global landscape marked by state-backed investment strategies from major economies such as China and the United States of America.

Its impact extends beyond competition law, touching upon international trade, industrial policy, and the EU's broader strategic autonomy agenda. Additionally, concerns have emerged regarding the administrative burden the Regulation imposes on businesses, the risk of discouraging legitimate foreign investment, and the potential for retaliation from key trading partners. To fully grasp the implications of the Foreign Subsidies Regulation and assess its effectiveness in addressing market distortions, this Dissertation embarks on a comprehensive examination of its legal foundations, procedural mechanisms, and broader economic consequences.

Chapter I explores the background and development of the Regulation, tracing its origins to high-profile cases, such as *Siemens/Alstom*, and growing concerns over foreign state-backed investments, particularly stemming from China and the United States of America. It further highlights how China's *Made in China 2025* and *Belt and Road Initiative*, as well as the U.S.A. *Inflation Reduction Act*, have intensified debates on the impact of foreign subsidies.

Later in the Chapter, the Regulation's objective and subjective scope of application and some of its core provisions are analysed, including the introduction of mandatory notification requirements for mergers, acquisitions, and public procurement procedures involving significant foreign financial contributions, ensuring transparency and enabling the European Commission to investigate potential market distortions. The enforcement mechanism includes Preliminary Reviews and In-Depth Investigations, allowing the Commission to impose corrective measures such as repayment of subsidies, restrictions on business activities, or even blocking transactions. A key aspect is the balancing test, which weighs the negative impact of foreign subsidies against potential benefits, particularly in sectors aligned with EU policy objectives like renewable energy.

As the analysis of the FSR deepens, the focus will shift to an examination, in Chapter II, of its enforcement mechanisms and remedial strategies. In doing so, it is discussed how the Regulation aims to prevent foreign subsidies from distorting the EU Single Market while also raising concerns about its compatibility with international trade law, particularly the WTO's Agreement on Subsidies and Countervailing Measures and in relation to existing EU legal frameworks, including State Aid rules, Foreign Direct Investment screening, and the Italian Golden Power legislation, highlighting potential overlaps and challenges in enforcement.

This Chapter further details the FSR's remedial framework, which includes structural and behavioural remedies designed to mitigate market distortions. Unlike traditional EU State Aid rules, the FSR allows companies to propose voluntary commitments before mandatory interventions are imposed.

The impact of the Implementing Regulation is further discussed, which sets procedural requirements for notification in mergers, acquisitions, and public procurement. It outlines concerns from businesses about administrative burdens and the European Commission's efforts to address them. Finally, specific attention is given to the football sector, where complaints have been filed against clubs such as *Paris Saint Germain* and *Virton*, alleging they benefit from foreign subsidies.

Eventually, Chapter III questions whether the Regulation marks a fundamental shift in EU competition policy or merely a minor adjustment to existing regulations. In doing so, this Chapter discusses how foreign subsidies create market distortions by allowing subsidised firms to reduce costs artificially, thereby undercutting European competitors. This not only affects pricing and profitability but also weakens long-term investment, innovation, and industrial competitiveness. Market fragmentation is another concern, as firms benefiting from foreign state support may gain preferential access to public procurement and commercial contracts, ultimately reducing opportunities for EU businesses and further distorting competition.

Furthermore, as introduced in Chapter I and explored in greater detail in this Chapter, the Regulation places significant compliance burdens on businesses. They must disclose foreign financial contributions, a challenging requirement given the complexity of subsidy structures and the difficulty in distinguishing between private and state-backed financing. The European Commission, in turn, faces enforcement challenges, including processing vast amounts of notifications and conducting detailed investigations. The Chapter examines key cases such as the *Siemens/Alstom* merger, the *e&/PPF Telecom Group* acquisition, and the dawn raid on *Nuctech*, illustrating the practical difficulties of enforcement.

Looking ahead, this Chapter considers possible reforms, including refining subsidy definitions and balancing regulatory oversight with maintaining the EU's attractiveness for foreign investment. It eventually highlights the geopolitical implications of the FSR, particularly in relation to China and the U.S.A., suggesting that future developments will need to align regulatory objectives with broader economic and strategic priorities to ensure fair competition without deterring investment.

By pursuing this structured examination of the Foreign Subsidies Regulation, this Dissertation aims to provide a well-rounded assessment of its significance within EU law and its wider geopolitical ramifications. Through a combination of legal analysis, policy evaluation, and economic assessment, we seek to determine whether the FSR effectively achieves its goal of safeguarding fair competition in the Single Market without undermining the EU's broader economic and strategic interests. Moreover, by evaluating the Regulation's early enforcement and its reception among businesses and policymakers, we aim to offer insights into its long-term viability and its potential evolution as a key instrument in EU economic governance.

Chapter I: Untangling the Foreign Subsidies Regulation: a framework for fair competition

1. Background

Published in the Official Journal of the European Union ("EU") on 23rd December 2022[1], the Foreign Subsidies Regulation ("FSR" or "Regulation") has been introduced to address distortions in the EU's Internal Market caused by anticompetitive practices originating from non-EU countries[2]. The Regulation seeks to: (i) address gaps in the EU's existing regulatory framework; (ii) support its new industrial strategy[3]; and (iii) establish a level playing field within the internal market, thereby promoting competition based on merit[4]. The imbalances created in the global context have exacerbated tensions in the economy, prompting legal and economic experts to recognise the urgent need for a reform[5]. The FSR was thus devised to create fairer competition conditions, ensuring equal treatment for entities from both EU and non-EU countries within the Internal Market. The FSR seeks to establish a level playing field by imposing regulatory obligations on both EU and non-EU market participants, ensuring that entities benefiting from foreign subsidies are subject to the same competitive standards as those operating within the EU. In this regard, the FSR is designed to prevent market distortions that arise from foreign State Aid. The Regulation reflects the EU's commitment to preserving the competitive dynamics of its internal market and protecting its economic interests in an increasingly interconnected global economy.

A key element of the discussions was the recognition of a critical regulatory gap: while State Aid rules ensured scrutiny of subsidies granted by EU Member States,

[1] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (2022) OJ L330/1.

[2] These Countries could provide significant foreign financial contributions ("FFCs") to subsidiaries operating in the EU internal market and, subsequently, distort it.

[3] European Commission (2020) Making Europe's businesses future-ready: A new Industrial Strategy for a globally competitive, green and digital Europe (IP/20/416).

[4] Smela Wolski J., *Legal basis of the proposal for a regulation on foreign subsidies distorting the internal market*, EStAL 21(2):153–172, 2022.

[5] *Ex multis* see: N. Cunha Rodrigues, *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market, in Extraterritoriality of EU Economic Law. European Union and its Neighbours in a Globalized World*, N. Cunha Rodrigues, Cham, Springer, 2021.

no such mechanism existed for subsidies provided by non-EU countries. This gap allowed foreign-subsidised entities to operate within the internal market, often to the detriment of fair competition.

To this end, the first Chapter will provide a comprehensive overview of the fundamental legal principles governing the subject matter. The analysis explores the Regulation's development, from its inception in policy discussions to its current application. Then, the Chapter situates the FSR within the global landscape, exploring how it forms part of the EU's broader strategy to counteract external economic distortions and safeguard strategic interests. In doing so, it underscores the Regulation's importance in maintaining fair competition and economic stability amidst growing global interdependence. Eventually, through this foundational analysis, the Chapter aims to equip the reader with a clear understanding of the essential legal concepts that will be explored throughout the text.

1.1. The path towards the FSR

The decision by the European Commission ("Commission") in February 2019 to block the *Siemens/Alstom*[6] merger proved to be a significant catalyst for a change in the EU's approach to competition policy. The case highlighted the challenges posed by foreign-subsidised competitors and the absence of regulatory mechanisms to address such distortions. It sparked widespread debate, leading, initially, to the Franco-German Manifesto[7], signed by the French and German economy ministries, in which it was advocated for reforms to safeguard the Internal Market against external interference. Their call for change was further echoed by the Netherlands' 'non-paper'[8], which outlined and stressed the harmful effects of foreign-subsidised

[6] European Commission, *Siemens/Alstom*, Case M.8677, Commission Decision of 6 February 2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (2019). A more thorough analysis of this case and other relevant EU Commission's investigations will be explored in Chapter III of this Dissertation.

[7] *Manifeste franco-allemand, pour une politique industrielle européenne adaptée au XXIe siècle*, 19th February 2019, retrieved at: tresor.economie.gouv.fr/Articles/2019/02/19/manifeste-franco- allemand-pour-l-industrie.

[8] *Strengthening the level playing field on the Internal Market*, 12th September 2019, retrieved through: permanent-representations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field.

investments on the EU's economic framework[9].

In response to these growing concerns, the European Council in March 2019 urged the European Commission to devise new tools to counter the distortive impact of foreign subsidies on the Single Market. This was, later, reinforced by a similar request from the European Parliament in February 2020. By June of the same year, senior leaders from some of Europe's largest corporations had joined the dialogue, calling for a more dynamic EU competition policy. They advocated for an approach that not only enforced existing competition laws but also adapted to the demands of a fast-evolving, globalised economy.

Historically, this asymmetry had been tolerated for two main reasons: (i) European Union believed that strict State Aid rules fostered a competitive internal market, ultimately producing efficient companies capable of competing globally[10]; and (ii) EU's commitment to maintaining an open economy to attract foreign investment discouraged the extension of these rules to non-EU subsidies.

However, the rise of globalisation, combined with the increasing presence of foreign-subsidised actors in the EU began to expose the flaws in this approach[11]. China's state-led investment strategies, for instance, including its *Made in China 2025* plan and the *New Silk Road* initiative, posed significant challenges[12] and the *Siemens/Alstom* case further underscored the urgency of reform. Indeed, the Commission blocked the merger, arguing that it violated competition rules[13], but in

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[9] However, the Dutch paper simply acknowledged the existence of the problem, without offering any specific data, neither any specific remedy to the issue at hand.

[10] This is the so called "*competitive training"* theory. For further insights see: M. Merola's intervention in, *Foreign direct investments, golden power and foreign subsidies: iniziative Europee e Nazionali*, 19th November 2020, retrieved at: associazioneantitrustitaliana.it/attivita/foreign- direct-investments-golden-power-and-foreign-subsidies-iniziative-europee-e-nazionali/.

[11] For the sake of comprehensive information, it should be acknowledged that the issue arising from financial contributions within the EU territory is not as recent as might be assumed. A European Union regulation from 1986, concerning the shipping industry, explicitly highlighted that unfair practices, such as the persistent imposition of freight rates, are partly attributable to "non-commercial advantages granted by a State which is not a member of the Community." For further details, refer to Council Regulation (EEC) No. 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport.

[12] By 2020, over half of Chinese investments in the EU were attributed to state-owned enterprises, whose financial backing would, if provided by EU Member States, have qualified as State Aid under EU law.

[13] The proposed acquisition was blocked under the EU Merger Regulation (Reg. 139/2004) ("EUMR") as it was deemed to negatively impact competition in the markets for railway signalling systems and high-speed trains. Furthermore, the parties involved failed to propose adequate measures to resolve these issues. The decision came after an in-depth investigation, in which the Commission concluded that the

its decision, it was, for the first time, revealed the limitations of existing mechanisms. Faced with these challenges, several Member States, including Germany, France, the Netherlands, Italy, and Poland, joined forces to advocate for changes to the EU's legislative framework[14]. Their efforts were further bolstered by the European Court of Auditors' analysis n.3 of 10 September 2020[15], which highlighted the economic and political risks associated with foreign-subsidised investments. The Court of Auditors noted that while such investments contributed to EU growth, they also created distortions in the internal market, undermining the competitiveness of European businesses.

The Commission, then, responded decisively by publishing the White Paper on Foreign Subsidies in June 2020[16] in which it was openly acknowledged the regulatory gap, particularly in the procurement sector[17], in which foreign subsidies often distorted competition and set the stage for the development of a new legal framework to address these issues. Following its publication, a public consultation[18] occurred in 2021 seeking feedback from undertakings, business organisations, Member States, and stakeholders. The feedback received during all phases of the stakeholders' consultation was used in drafting the legal instrument and accompanying the Impact Assessment report[19]. Several legal profiles have been

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merger would result in an excessive concentration of market power, combining the two leading suppliers of railway and metro signalling systems.

[14] *Joint letter from Germany, Italy, France and Poland to Commissioner Vestager*, 4th February 2020, retrieved at: politico.eu/wp-content/uploads/2020/02/Letter-to-Vestager.pdf.

[15] European Court of Auditors, Review No 03/2020: *The EU's response to China's state-driven investment strategy,* retrieved at: https://www.eca.europa.eu/en/publications/RW20_03. The economic and political risks associated with foreign-subsidised investments are primarily addressed in paragraphs 29–31 and further detailed in Table 2 of the European Court of Auditors' analysis. Additionally, Box 3 elaborates on specific examples, such as over-indebtedness of nations due to Chinese loans, highlighting strategic and economic vulnerabilities.

[16] European Commission, *White Paper on levelling the playing field as regards foreign subsidies,* COM/2020/253 final.

[17] *Ibid*, under the point 3.3, the Commission explicitly admitted that *"The existing rules in the field of EU public procurement are not sufficient to address and remedy the distortions caused by foreign subsidies. Hence, where foreign subsidies facilitate and distort the bidding in an EU public procurement procedure, there appears to be a regulatory gap".*

[18] European Commission, *Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies*, 2020 available at: <https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf>.

[19] Commission staff working document, *impact assessment accompanying* the *Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the Internal Market,* SWD/2021/99 final.

raised by third countries, Member States and European undertakings[20], whose main concern is to avoid losing direct investments from third countries. Some of these profiles had also been partly addressed by the Commission when drafting the May 2021 Draft Regulation.

Following a relatively swift consultative phase, started in 2020, the Regulation was officially adopted by the European Parliament on 14 December 2022 and by the Council on 28 November 2022 and it then entered into force on 12 January 2023, with most of its provisions becoming applicable on 12 July 2023. Its two notification-based tools, designed to assess foreign subsidies in mergers and public procurement, began operating, only on 12 October 2023.

The FSR applies retroactively to subsidies granted within the five years prior to its enforcement, provided these subsidies distort competition after the Regulation's implementation. For mergers and notifiable procurement procedures, it applies to subsidies granted within three years before 12 July 2023, although no retroactive application applies to mergers or contracts initiated before this date.

1.2. The world-sized picture

The European Union remains one of the most significant global destinations for foreign subsidies, accounting for around 15% of worldwide trade flows as of 2023. This underscores its crucial role in the global economy, not only as a trading bloc but also as a key player in cross-border investment flows. The EU continues to dominate as both a source and recipient of foreign direct investment ("FDI"), with recent estimates indicating that it represents approximately 30% of global outward FDI stock and 23% of inward FDI stock[21]. However, alongside these economic strengths, the EU faces mounting challenges related to the increasing prevalence of foreign subsidies, which are reshaping the competitive landscape within its Single

[20] Most responses were submitted by companies and business associations, comprising nearly 89% of the total feedback. For further details, see *Distortive Foreign Subsidies: Procedural Rules for Assessing Them*, European Commission Competition Policy (2023), available at: https://competition policy.ec.europa.eu/foreignsubsidiesRegulation_en#:~:text=On%2012%20July%202023%2C%20the,open%20to%20trade%20and%20investment.

[21] *World Investment Report 2023*, UNCTAD (2023), available at: https://unctad.org/system/files/official document/wir2023_en.pdf.

Market[22].

Globally, subsidies have become a contentious issue, with significant implications for trade dynamics and market competition. According to the World Trade Organization ("WTO"), countervailing duty investigations - the primary tool to address distortive subsidies in international trade - have risen sharply over the past decade, more than doubling since 2010[23]. This increase coincides with the broader use of subsidies during times of economic crisis. For example, subsidies became an important policy instrument following the 2008 financial crisis, as governments sought to stabilise struggling industries and stimulate economic recovery. The COVID-19 pandemic further entrenched subsidies as a key economic tool, as countries around the world deployed financial support to protect domestic industries. More recently, geopolitical disruptions, including the Russo-Ukrainian War, have prompted renewed reliance on subsidies, not only to offset inflationary pressures and energy costs but also to accelerate decarbonisation efforts and foster strategic industries in a rapidly changing global environment.

Despite their benefits in addressing short-term economic challenges, subsidies present significant risks to the EU's Internal Market. A 2023 report from the Organisation for Economic Co-operation and Development ("OECD") found that investment incentives can distort trade and competition by diverting resources to less productive firms, crowding out more efficient, unsubsidised competitors[24]. Foreign subsidies have enabled state-backed firms - primarily from China - to consolidate dominant positions in key sectors, such as renewable energy and heavy industry. Once established, these firms often engage in predatory pricing strategies, driving competitors out of the market[25]. Over time, such dominance can lead to higher prices for consumers, undermining the very benefits that competition is intended to deliver.

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[22] See: Johaness Fritz, and Simon Evenett, *Subsidies and market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States,* in the 28th Global Trade Alert Report, CEPR (Oct. 25, 2021), available at: https://cepr.org/voxeu/columns/subsidies-and-market-access-new-data-and-findings-global-trade-alert.

[23] Data available at WTO's Trade Remedies Data Portal: https://trade-remedies.wto.org/en/countervailing/investigations.

[24] See, OECD Economic Outlook, *Volume 2023 issue n 1 and n 2*; and OECD Economic Outlook, *Interim Report September 2023*.

[25] As it will be better seen in Chapter III of this Dissertation.

A pivotal moment came with the 2015 acquisition of *Pirelli* by the *China National Tire and Rubber Company* ("CNRC"). *CNRC*, a subsidiary of *ChemChina*, financed the deal through substantial state support, including grants, preferential loans, and tax incentives[26]. At the time, EU lacked a dedicated regulatory framework to address the distortive impact of foreign subsidies in merger cases. As a result, the European Commission cleared the acquisition, concluding that it did not raise significant competition concerns, largely because the market share increments were modest, and alternative suppliers remained available. However, subsequent investigations into the same sector revealed the significant role of subsidies in enabling acquisitions of this nature, prompting the EU to reassess its approach.

A follow-up investigation into Chinese subsidies for bus and truck tyre imports led to the imposition of countervailing duties in 2018. This marked a turning point in the EU's handling of foreign subsidies and served as a precursor to the eventual adoption of the Regulation.

Recent cases illustrate the FSR's growing significance. For instance, an investigation launched in early 2024 targeted Chinese wind turbine manufacturers, which had been offering prices up to 50% below those of their European competitors[27]. These aggressive pricing strategies, facilitated by state support in the form of grants, tax breaks, and deferred payment schemes, threaten to undermine the EU's renewable energy sector - a critical component of the *Green Deal* block's objectives[28]. Similar concerns have been raised in other strategic industries, including semiconductors and electric vehicle manufacturing, further highlighting the breadth of the challenge posed by foreign subsidies.

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[26] European Commission, CNRC / Pirelli, Case M.7643, Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (2015).

[27] *Ex multis*, see: Press Release by WindEurope, *EU starts investigation into Chinese wind turbines under new Foreign Subsidies Regulation*, 9 April 2024; and Politico, *EU launches probe into Chinese wind turbines*, 9 April 2024.

[28] The European Green Deal, adopted in 2020, is a comprehensive policy initiative spearheaded by the European Commission with the ultimate goal of achieving climate neutrality across the European Union by 2050. This ambitious plan involves reviewing existing laws based on their climate impact, as well as introducing new legislation in areas such as the circular economy, building renovation, biodiversity, agriculture, and innovation. For further information see also: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

Although the FSR complements the EU's existing State Aid rules and trade defence instruments, challenges persist. One notable issue is the resource-intensive nature of enforcement, with the European Commission facing significant administrative burdens in processing notifications and conducting investigations[29]. Additionally, the FSR operates alongside broader trade policy considerations, requiring careful coordination to avoid unintended consequences, such as deterring beneficial foreign investment.

The evolution of EU's regulatory approach reflects a broader recognition of the strategic risks posed by foreign subsidies. Cases such as *Siemens/Alstom*, in which competition concerns led the Commission to block a high-profile merger, have underscored the need for a more holistic framework to address distortive practices effectively. As foreign subsidies continue to shape the global economic landscape, the EU's regulatory measures will play a crucial role in protecting its internal market while maintaining its position as a leader in international trade and investment.

1.3. Safeguarding Europe: a wide perspective

In an increasingly multipolar world, the European Union finds itself navigating complex and shifting dynamics of global economic power. This landscape is shaped by the rise of state-backed industrial policies, aggressive strategic investments, and geopolitical rivalries that transcend national borders. Emerging and established powers such as People's Republic of China ("China"), the United States of America ("United States" or "U.S.A.") and Russian Federation ("Russia") have adopted multifaceted approaches to economic statecraft, ranging from direct subsidies and preferential financing to leveraging infrastructure investments for political influence[30].

Against this backdrop, the EU has articulated its ambition, through the Foreign Subsidies Regulation, to secure strategic autonomy[31] and protect its interests in a

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[29] As it will be better seen in Chapter III of this Dissertation.

[30] Folkman V., *EU team combating Chinese subsidies struggles with flood of deals*, 4th February 2024, available at https://www.politico.eu/Article/european-union-foreign-subsidies-regulation/.

[31] M. Bauer, *The Impacts of EU Strategy Autonomy Policies - A Primer for Member States*, November 2022, available at: https://ecipe.org/publications/eu-strategy-autonomy-policies-impact/.

highly interconnected global economy. In this regard, an analysis will be conducted regarding the EU's approach in comparison to the national measures adopted by competing jurisdictions.

Moreover, the EU's strategic response must encompass not only the immediate distortive effects of foreign subsidies but also the broader risks of economic dependency, market fragmentation, and the erosion of geopolitical influence within its borders.[32] A nuanced understanding of the approaches taken by key global actors is essential for crafting robust policies that secure Europe's position in an evolving world order.

1.3.1. The case of China: strategic ambitions and economic statecraft

China's rise as a global power is intrinsically tied to its strategic approach to economic statecraft, which blends government-directed policies, targeted investments, and comprehensive planning. These efforts are aimed at not only solidifying its domestic economy but also reshaping the global economic order in a manner that aligns with its strategic ambitions. At the heart of China's approach lies the interplay between its industrial policies, global trade strategies, and infrastructure investments, which collectively challenge traditional norms of market competition and provoke concerns about economic dependence and geopolitical influence[33].

For instance, *Made in China 2025*, launched in 2015, epitomises the State's ambition to transition from a low-cost manufacturing base to a leader in high-tech industries such as robotics, semiconductors, artificial intelligence ("AI"), and green energy technologies. Unlike market-driven economies, where industries evolve organically, China's strategy involves direct State intervention through subsidies, preferential financing, and public investment in research and development. This approach ensures that Chinese firms are not only competitive domestically but also positioned to dominate global markets.

[32] De Groot E., Van Geffen B., Every M., Wijffelaars M., *Europe's quest for strategic autonomy requires dealing with structural weaknesses*, 18th December 2023, available at: https://www.rabobank.com/knowledge/d011405319-europes-quest-for-strategic-autonomy-requires-dealing-with-structural-weaknesses.

[33] Indeed, China's industrial policy is deeply intertwined with its broader geopolitical strategy.

For instance, China's semiconductor industry has benefited from billions of dollars in government subsidies aimed at reducing reliance on foreign suppliers. Initiatives like the National Integrated Circuit Plan illustrate Beijing's intention to build a self-sufficient and globally competitive semiconductor ecosystem[34]. These subsidies enable Chinese companies to undercut foreign competitors on pricing and achieve economies of scale, raising concerns in the EU about the potential erosion of Europe's industrial base and long-term technological competitiveness.

1.3.1.1. Exporting influence: the *Belt and Road Initiative*

The *Belt and Road Initiative* ("BRI") is another cornerstone of China's economic statecraft[35]. Launched in 2013, the BRI seeks to establish a network of trade and infrastructure corridors connecting Asia, Africa, and Europe. By investing in ports, railways, highways, and energy projects, China aims to facilitate trade flows while embedding its influence within the global economic system.

In Europe, the BRI has made significant inroads, particularly in Southern and Eastern European countries. Investments such as the Piraeus Port in Greece[36], acquired by China's state-owned *COSCO Shipping*, and the Hungary-Serbia railway modernisation[37] have enhanced connectivity and economic opportunities for these

[34] China's semiconductor industry has received substantial state-backing through subsidies and funding programs, such as the National Integrated Circuit Plan and the "Big Fund." These initiatives aim to reduce China's reliance on foreign suppliers, posing competition to European industries and raising concerns over market dominance. Experts also highlight the geopolitical implications of China's self-sufficiency in semiconductors, which could disrupt the global supply chain and affect industries reliant on foreign chip imports. For more see: See: Ong K., *China's defiant chip strategy*, available at: https://www.fpri.org/Article/2024/06/chinas-defiant-chip-strategy/.

[35] ONLINE ANALYSIS, STRATEGIC DOSSIER, *China's Belt and Road Initiative – Strategy: China's Evolving Ambitions*, 17th November 2022, available at: https://www.iiss.org/online-analysis/online-analysis/2022/11/bri-dossier-chapter-one.

[36] In Piraeus, the majority stake in the port was sold to Cosco, with its initial 51% share later increased to 67%. As a result, the Chinese shipping company now holds the power to determine the port's future. Cosco has control over all piers and terminals. *Ex multis* see: Sophie Meunier, *A Tale of Two Ports: The Epic Story of Chinese Direct Investment in the Greek Port of Piraeus*, at 2.; and Bali K., *In Greece's largest port of Piraeus, China is the boss*, 30th November 2022, available at: https://www.dw.com/en/greece-in-the-port-of-piraeus-china-is-the-boss/a-63581221#:~:text=In%20Piraeus%2C%20majority%20shares%20in,piers%2C%20and%20all%20the%20terminals.

[37] The Hungary-Serbia railway is a double-track electrified line stretching over 341.7 kilometres, with 183.1 kilometres running through Serbia. Strategically positioned at the crossroads of Central and Southern Europe, Serbia holds a unique geographical position that bridges both Eastern and Western Europe. The construction of this railway is set to enhance connectivity between Hungary and Serbia,

regions. However, these projects often come with a dual edge: (i) it brought much-needed infrastructure development; and (ii) it also created dependencies on Chinese financing and technology, raising concerns about sovereignty and strategic vulnerabilities. This economic foothold could lead to political alignment shifts within the EU, potentially undermining cohesion in foreign policy decision-making.

1.3.1.2. Technology acquisition and intellectual property risk

China's drive for technological leadership has often involved the acquisition of foreign companies to gain access to critical technologies and intellectual property ("IP"). European firms, particularly in advanced manufacturing, aerospace, and green technologies, have been prime targets. Many of these acquisitions are facilitated by state-backed financing, allowing Chinese companies to outbid competitors and secure strategic assets. For instance, the acquisition of *KUKA* a leading German robotics firm, in 2016, by the Chinese company Midea Group raised alarms about the transfer of critical technologies to China[38].
Beyond the immediate loss of technology, such transactions underscore the potential for long-term dependencies on Chinese innovations in critical industries, posing significant risks to Europe's technological sovereignty.

1.3.1.3. Trade practices and market access

China's economic practices extend beyond subsidies and investments to include trade policies that often disadvantage foreign firms. For instance, China's domestic market is characterised by non-tariff barriers, such as localisation requirements, IP

while also facilitating smoother access from Serbia to Greece's Piraeus Port. This port acts as a vital transit hub, connecting Europe, Asia, and Africa. For more see: Weijia H., *Hungary-Serbia railway could inspire divided world as protectionism rises*, 7th May 2024, available at: https://www.globaltimes.cn/page/202405/1311828.shtml.

[38] *Ex multis* see: Wrage C., Kullik J., *After Kuka – Germany's Lessons Learned from Chinese Takeovers*, 21st July 2022, available at: https://chinaobservers.eu/after-kuka-germanys-lessons-learned-from-chinese-takeovers/; and Wuei X., *China's Midea Buys Rest of German Robot Maker Kuka,* 16th November 2022, available at https://www.yicaiglobal.com/news/china-midea-buys-rest-of-german-robot-maker-kuka.

transfer mandates, and discriminatory regulatory practices, which limit the ability of foreign companies to compete on an equal footing[39]. Meanwhile, Chinese firms benefit from preferential access to international markets, enabled in part by State subsidies that lower production costs.

These practices have significant implications for Europe, particularly in industries where Chinese exports dominate global supply chains. The solar panel industry serves as a notable example. Chinese manufacturers, supported by subsidies and economies of scale, have flooded global markets with low-cost solar panels, leading to the collapse of several European manufacturers[40]. The FSR provides a tool for addressing such distortive effects by ensuring that subsidised imports or investments do not undermine the competitiveness of European industries or create dependencies in critical green technologies.

1.3.2. The United States of America: the *Inflation Reduction Act* and its role in global economic competition

The *Inflation Reduction Act* ("IRA") of 2022 is one of the most consequential pieces of legislation in recent U.S.A. history, with profound implications for global economic competition, trade relations, and climate policy. Designed to address climate change, bolster domestic manufacturing, and reduce dependency on foreign energy and materials, the IRA underscores the United States' broader strategy to secure its economic and geopolitical position in a rapidly evolving global landscape. However, the act has raised concerns among trading partners, including EU and China, regarding the fairness of its provisions and their impact on international trade dynamics.

The IRA reflects a renewed emphasis on industrial policy in the United States, marking a departure from the free-market orthodoxy of recent decades. By

[39] Beconcini P., *China's Recent Trade Investment Agreement with the EU and the Impact of its Provisions on Forced Technology Transfer*, 27th January 2021, available at: https://ripl.law.uic.edu/news-stories/chinas-recent-trade-investment-agreement-with-the-eu-and-the-impact-of-its-provisions-on-forced-technology-transfer/.

[40] Sanchez Alonso A., *Chinese competition poses 'existential threat' to Europe's solar industry*, 13th February 2024, available at https://www.euronews.com/my-europe/2024/02/13/chinese-competition-poses-existential-threat-to-europes-solar-industry.

prioritising strategic industries and supply chain resilience, the U.S.A. seeks to counter global competitors like China while safeguarding its domestic economy from vulnerabilities in critical sectors.

1.3.2.1. Core provisions of the IRA and their economic implications

The *Inflation Reduction Act* is a landmark policy aimed at tackling climate change and advancing the energy transition in the United States. With a budget of approximately $369 billion dedicated to climate and energy initiatives, the act sets forth several measures to incentivise clean energy production, bolster domestic manufacturing, and reduce greenhouse gas emissions, reflecting a broad strategy to enhance the country's economic and environmental resilience[41].

- Tax credits for clean energy:

Significant tax credits are provided to manufacturers of renewable energy technologies, such as solar panels, wind turbines, batteries, and electric vehicles ("EVs"). These credits aim to bolster domestic production, reduce reliance on imports, and accelerate the deployment of clean energy infrastructure.

- Consumer incentives:

Financial incentives for consumers include tax rebates for purchasing electric vehicles and energy-efficient home appliances. However, eligibility for these incentives is tied to requirements that critical materials and components be sourced from the United States or its free trade partners, limiting market access for foreign firms.

- Support for domestic manufacturing:

Substantial investments are directed towards rebuilding domestic supply chains for critical industries, such as semiconductors and rare earth minerals, which are essential for clean energy technologies. This aligns with broader U.S.A. efforts to

[41] The Inflation Reduction Act of 2022. Full text of the act is available at: https://www.congress.gov/bill/117th-congress/house-bill/5376/text.

reduce reliance on countries like China for critical raw materials and technologies.

- Carbon capture and hydrogen projects:

Funding is allocated for developing advanced technologies such as carbon capture and green hydrogen production, positioning the United States as a leader in cutting-edge clean energy solutions.

While the IRA primarily focuses on domestic goals, its global implications are substantial, particularly in the realms of geopolitics and trade[42]. The act's *"Buy American"* provisions, which require that products benefiting from subsidies or incentives be manufactured within the U.S.A. or sourced from its trade allies, have elicited significant concern from the European Union. These provisions disadvantage European companies, particularly automakers and green technology firms, by creating an uneven transatlantic playing field. For example, eligibility criteria for EV tax credits mandate that batteries and critical minerals be sourced domestically or from free trade partners, effectively excluding many EU Member States. In response, European policymakers have advocated for exemptions and concessions while accelerating initiatives such as the *Green Deal Industrial Plan*[43] and the *Critical Raw Materials Act*[44] to strengthen Europe's competitiveness in clean energy technologies[45].

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[42] Ruiz Guix P., *Key transatlantic implications of the Inflation Reduction Act*, 11th April 2023, available at: https://www.realinstitutoelcano.org/en/analyses/key-transatlantic-implications-of-the-inflation-reduction-act/.

[43] The *Green Deal Industrial Plan* is the latest energy strategy to update the European Green Deal. Published on 1 February 2023, it responds directly to the Inflation Reduction Act, while also marking a key step towards the EU's goal of achieving strategic energy autonomy. The plan builds upon existing measures in the European Green Deal and REPowerEU, introducing new policies and repurposing ongoing initiatives. The Green Deal Industrial Plan is centred around four core pillars: (i) creating a predictable and simplified regulatory framework; (ii) providing faster access to funding; (iii) enhancing skills development; and (iv) ensuring open trade to foster resilient supply chains.

[44] The *Critical Raw Materials Act*, introduced in 2023, aims to secure the supply of essential raw materials like lithium, cobalt, and rare earth elements needed for Europe's green and digital transition. It focuses on four pillars: increasing domestic production, reducing supply risks, boosting innovation, and promoting sustainability. The Act sets ambitious targets to reduce dependency on non-EU sources and improve recycling capabilities, ensuring a resilient and sustainable supply chain for critical materials in the EU.

[45] Villoslada Camps J. and Saz-Carranza A., *The EU Response to the U.S. Inflation Reduction Act* in EsadeGeo POSITION PAPER, May 2023.

The IRA also represents a strategic response to China's dominance in clean energy manufacturing. With China accounting for over 70% of global solar panel production and a significant share of lithium-ion batteries, the United States seeks to reduce dependency on Chinese imports by incentivising domestic production and reshoring supply chains. However, these measures have heightened U.S.A. - China trade tensions. By limiting Chinese manufacturers' access to the U.S.A. market, the IRA has prompted concerns of protectionism, with potential disputes arising at the WTO[46]. Furthermore, China may counteract by increasing subsidies for its own green technologies, potentially triggering a subsidy race that could distort global markets and complicate international cooperation on climate goals.

Strategically, the IRA forms part of a broader United States' agenda to secure energy independence and ensure the resilience of critical supply chains. By fostering domestic production of renewable energy and batteries, the United States aims to mitigate exposure to volatile international markets for oil, gas, and minerals. This effort mirrors the EU's initiatives to achieve strategic autonomy through frameworks like the *European Green Deal* and the *REPowerEU Plan*[47], highlighting a convergence of transatlantic priorities despite ongoing trade frictions.

1.3.3. Russia: energy leverage and geopolitical influence

For decades, Russia has wielded significant economic influence over Europe, primarily through the energy sector. State-owned enterprises such as *Gazprom* have played a dominant role in supplying natural gas to the EU, securing long-term contracts with favourable pricing often underpinned by substantial state subsidies. This reliance on Russian energy exports has, however, created vulnerabilities within the European energy system[48]. The weaponisation of energy supplies, particularly during periods of heightened geopolitical tension, has underscored the risks of overdependence on a single supplier. The Ukraine conflict, for example, highlighted

[46] *Ibid.*
[47] *Ibid.*
[48] Van Rij A., *The EU's continued dependency on Russian gas could jeopardize its foreign policy goals*, 17th June 2024, available at: https://www.chathamhouse.org/2024/06/eus-continued-dependency-russian-gas-could-jeopardize-its-foreign-policy-goals.

how Russia could exploit its control over energy resources to advance political objectives, prompting urgent calls within Europe to reassess its energy security and diversify its supply chains[49].

The FSR provides a mechanism to scrutinise the nature of Russian energy agreements and investments more closely. By investigating subsidies, such as artificially discounted gas prices, the FSR can address concerns over market distortion and reduce the EU's structural dependence on Russian infrastructure. Such measures align with broader efforts to enhance European energy sovereignty and mitigate the geopolitical risks associated with reliance on Russian energy.

Russia's use of state-backed investments extends beyond energy, encompassing sectors such as telecommunications, defence, and critical infrastructure. These investments are often strategic, designed to enhance Russia's geopolitical leverage[50]. Projects like the *Nord Stream* pipelines, which transport natural gas directly from Russia to Germany[51], illustrate how economic objectives and strategic influence are intricately linked. These pipelines not only consolidated Russia's position as Europe's primary energy supplier but also created division among EU Member States regarding energy policy and security.

The *Nord Stream 2* project, for instance, faced significant opposition from several European nations and the United States, which argued that it increased Europe's dependency on Russian gas while bypassing transit countries such as Ukraine, depriving them of transit fees and reducing their geopolitical significance. Despite its completion in 2021, the pipeline's certification was suspended in 2022 following Russia's invasion of Ukraine, reflecting the growing recognition of the security implications tied to Russian energy infrastructure.

To counteract the vulnerabilities created by reliance on Russian energy, the

[49] Yafimava K., *European Energy Security and the Role of Russian Gas: Assessing the Feasibility and the Rationale of Reducing Dependence*, December 2015, available at:https://www.iai.it/sites/default/files/iaiwp1554.pdf.

[50] European Commission, Think Thank, Talks About Europe, Europe's Energy Security. In Search of Supply, Independence From Russia, available at: https://poland.representation.ec.europa.eu/system/files/2022-06/Europes_energy_security.pdf.

[51] Shagina M. and, Westphal K., *Nord Stream 2 and the Energy Security Dilemma - Opportunities, Options and Obstacles for a Grand Bargain*, 28th July 2021, available at: https://www.swp-berlin.org/10.18449/2021C46/.

European Union has intensified its efforts to diversify energy sources and accelerate the transition to renewable energy. The *REPowerEU Plan*[52], unveiled in 2022, outlines a comprehensive strategy to reduce dependency on Russian fossil fuels by two-thirds by 2030. This plan includes increasing liquefied natural gas ("LNG") imports from alternative suppliers, such as the United States and Qatar, and expanding investments in renewable energy projects like wind and solar. For example, the EU has set ambitious targets to install 600 GW of solar power and 510 GW of wind energy by 2030, aiming to meet a larger share of its energy demand through domestically produced clean energy.

In addition, the EU has prioritised infrastructure projects to strengthen its energy security. Initiatives such as the *Southern Gas Corridor*, which brings natural gas from the Caspian Sea region to Europe, and the expansion of LNG terminals in countries like Poland and Spain, are key to reducing reliance on Russian gas. Coupled with energy efficiency measures, these efforts are expected to curtail the EU's energy demand by 15% over the next decade, further insulating Member States from external energy shocks.

Russia's energy dominance and strategic investments have demonstrated the intricate link between economic interdependence and geopolitical risk. The FSR offers a critical tool for the EU to ensure that foreign investments, particularly from state-backed entities like those in Russia, do not undermine Europe's security or autonomy.

2. Overview of the Foreign Subsidies Regulation

As previously stated, the FSR represents a crucial regulatory framework aimed at addressing the distortions caused by foreign State subsidies on the EU Internal Market. One of the central features of the FSR is its notification requirement, which mandates that foreign subsidies exceeding certain thresholds be reported to the

[52] European Commission, Communication form the Commission to the European Parliament, the European Council, the Council, the European economic and social committee and the committee of the regions - REPowerEU: Joint European Action for more affordable, secure and sustainable energy, COM(2022) 108 final, 8th March 2022.

European Commission, particularly in the context of mergers and acquisitions[53], as well as public procurement procedures[54]. This notification is necessary to allow the Commission to assess whether the subsidy in question is likely to distort competition within the internal market. As we will see, the Regulation sets specific financial thresholds for both the M&A and public procurement procedures, aiming to capture potentially harmful foreign subsidies in these key areas. It also provides a detailed framework for investigating foreign subsidies deemed to potentially distort competition. Under Article 9, the Commission can initiate an investigation if it believes that a foreign subsidy could have a significant impact on the internal market, even if it has not been notified. This reflects the EU's proactive stance in preventing market distortions before they can take root. Furthermore, in the event that a subsidy is found to distort competition, the Commission has wide-ranging powers to impose remedies, which may include the repayment of the subsidy or structural remedies such as divestitures or restrictions on business activities[55]. Importantly, the FSR incorporates a balancing test under Article 6, where the Commission weighs the positive effects of a subsidy against its potential negative impact on competition. If the subsidy is found to outweigh the benefits of its presence, corrective actions are mandated.

Furthermore, enforcement of the FSR is particularly rigorous. Failure to comply with the notification requirements can result in significant fines, as stipulated under Article 12, which emphasizes the need for full transparency in foreign subsidy practices. The Regulation also includes procedural safeguards to ensure fair treatment, such as the ability for affected parties to submit their views during the investigation phase[56], and a set of deadlines for the Commission to complete its investigations and deliver decisions.

In the following sections of this Chapter, a deeper analysis will be provided regarding the legal foundations of the Regulation, its subjective and objective scope, as well as a detailed examination of its substantive provisions. Additionally, the

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[53] Article 4, Regulation 2560/2022.
[54] *Ibid*, Article 5.
[55] *Ibid*, Article 7. This topic will be further developed in Chapter II of this Dissertation.
[56] *Ibid*, Article 11.

procedural aspects, including some of the enforcement mechanisms and the role of the European Commission, will be discussed in depth.

2.1. The legal bases

The Regulation is grounded in multiple legal bases within the framework of EU law. These legal underpinnings are essential to understanding the legitimacy, scope, and operational framework of the FSR, which aims to regulate the impact of foreign subsidies on competition within the Internal Market. The Regulation has both a procedural and a substantive foundation rooted in the EU's legal treaties, particularly in Articles 114 and 207 of the Treaty on the Functioning of the European Union[57] ("TFEU"), and these bases provide a legitimate platform for the Regulation's application and enforcement[58].

The primary legal basis for the FSR lies in Article 114 TFEU, which empowers the European Parliament and the Council to adopt measures for the approximation of national laws and regulations that could hinder the functioning of the internal market. This Article serves as the cornerstone for EU regulatory powers aimed at ensuring the smooth operation of the internal market by harmonising rules[59] and addressing barriers to trade or competition between Member States.

Article 114 TFEU further allows for the creation of common rules to prevent distortions that could arise from differences in national laws or practices. In the context of the FSR, this legal base provides the authority to regulate foreign subsidies that could distort competition within the Internal Market. The regulation addresses an area where significant legal gaps previously existed: subsidies granted by third countries to entities operating in the EU but not covered by the EU's State Aid framework. By harmonising the legal framework for the review of such subsidies, the FSR seeks to ensure a level playing field for both EU-based and non-

[57] Treaty on the Functioning of the European Union (TFEU).

[58] Smela Wolski J., *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, European EU State Aid framework Quarterly, 2022, Issue 2, at 153-172.

[59] Provided it aligns with achieving the objectives set forth in Article 26 TFEU, which provides greater substance and significance to the reference to the internal market among the objectives of EU action set out in Article 3(2) TEU.

EU-based companies operating within the internal market[60].

Without the harmonisation process, foreign subsidies could create unfair competitive advantages, undermining the integrity and fair functioning of the EU market. By providing a legal basis for the regulation of foreign subsidies, Article 114 facilitates the EU's ability to manage market-distorting practices resulting from the growing influence of third countries, particularly in sectors such as public procurement and mergers/acquisitions.

The second fundamental legal basis for the FSR is Article 207 TFEU, which governs the EU's Common Commercial Policy ("CCP"). This Article grants the EU exclusive competence in the field of international trade and commercial relations with third countries. The FSR aligns with this legal base as it addresses the impact of foreign subsidies - support provided by third countries - on the internal market.

The reliance on Article 207 TFEU in the FSR is essential because it underscores the EU's power to regulate external economic influences that affect the EU's internal market. The regulation of foreign subsidies falls squarely within the EU's trade competence, as it involves interactions between the EU's internal market and the economies of non-EU countries. Article 207 TFEU empowers the EU to adopt measures that ensure that foreign practices, such as state-backed financial support to non-EU undertakings, do not unduly affect the balance and fairness of the EU market[61].

The use of Article 207 TFEU as a legal basis for regulating foreign subsidies ensures that the Regulation is consistent with the EU's broader trade policy. It allows the EU to assert its rights and interests in the face of potentially distortive practices from

[60] Indeed, Article 114 TFEU has allowed for the creation of legislation that is binding upon Member States without the need for additional national legislative action. This approach streamlines the regulation of foreign subsidies, ensuring that the rules apply uniformly across the entire EU internal market. In the case of the FSR, the principle of subsidiarity justifies the EU's intervention in regulating foreign subsidies, as Member States are not individually equipped to address the distortions that arise from state-backed financial contributions by third countries. The internal market is an area of EU-exclusive competence, and a fragmented approach to foreign subsidies at the national level would likely lead to inconsistent enforcement and regulatory gaps. Thus, the FSR enables the EU to act decisively and uniformly to prevent external market distortions that could undermine the competitive landscape.

[61] The FSR includes mechanisms, such as the "*Balancing Test*", to ensure that the Regulation's interventions are proportionate to the potential distortive effects of the foreign subsidies it seeks to address. By ensuring that the regulatory measures are appropriate and not overly restrictive, the principle of proportionality guarantees that the EU's actions remain within the scope of its legal powers and do not unnecessarily hinder legitimate international trade or investment.

third countries, particularly those with state-dominated or state-controlled economies. By invoking this legal base, the FSR aims to create a regulatory framework that addresses not only trade barriers or unfair competition arising from tariff measures but also non-tariff barriers that may result from external financial support systems that disadvantage EU companies.

Given that international trade is increasingly shaped by state-led economic policies, the ability to regulate foreign subsidies is critical for maintaining the integrity of the internal market. This legal base ensures that the FSR provides the EU with the tools necessary to monitor and address foreign subsidies as part of its broader strategy to protect the internal market from external economic pressures.

2.2. Regulation's subjective scope of application

While dealing with the FSR's scope of application, the concept of undertaking is fundamental as it determines which entities are subject to the Regulation and thus which entities are scrutinised for foreign subsidies that might distort competition in the internal market. A key feature of the FSR is that it adopts a functional definition, which originates from EU competition law and State Aid Law, as shaped by the European Court of Justice ("ECJ", "Court" or "CJEU") but is also tailored to meet the specific objectives of the Regulation[62]. This definition ensures that both large corporations and individual entrepreneurs who engage in economic activity within the EU Internal Market can be subject to the if they benefit from foreign subsidies. Therefore, the Regulation's scope extends far beyond traditional corporate entities[63], covering various forms of economic activity and embracing both public and private undertakings.

In its case law, the Court has emphasised that the key element in determining whether an entity is an undertaking is whether it participates in the market by

[62] According to ECJ's case law, the concept of undertaking covers *"any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed"*. For more, see: European Court of Justice, *Klaus Höfner and Fritz Elser/Macrotron GmbH*, Case C-41/90, para. 21, 1991.

[63] This perspective is enshrined, *ex multis,* in: European Court of Justice, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* joined cases C-180/98 to C-184/98, para. 75 (2000); European Court of Justice, *Commission of the European Communities v. Italian Republic*, C-118/85 (1987), para. 7.

providing goods or services, thereby competing in the internal market is broad and aims to capture all forms of entities that affect the market's competitive dynamics.
For the purposes of the FSR, this broad definition is vital as it ensures that any entity that benefits from foreign subsidies and is engaged in activities that have an economic impact within the EU internal market is covered by the Regulation. This is not limited to established corporations; it also extends to entities that might not traditionally be considered as enterprises in the strictest sense, including small businesses and non-profit organisations engaged in economic activities[64].

2.2.1. The inclusion of individuals as undertakings

An important nuance of the FSR's definition of undertaking is that individuals can also qualify as undertakings if they engage in economic activity within the Internal Market. This is consistent with the ECJ's case law, which has made it clear that even a single person operating as a sole trader can be classified as an undertaking if they are competing on the market. The *Höfner and Elser* case established that economic activity, rather than the size or structure of the entity, determines whether an undertaking exists.
For instance, a sole proprietor who receives foreign subsidies and operates in a sector like technology, retail, or services within the EU internal market, could be classified as an undertaking under the FSR. Even though the legal structure of such an entity is small and informal, its participation in the market with the potential to distort competition qualifies it as an undertaking under the FSR. This broad approach reflects the Regulation's aim to ensure that any market actor, regardless of size or form, that might benefit from foreign subsidies distorting competition, is scrutinised and held accountable.

[64] Tokas M., *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, in Journal of World Trade 56, No. 5 (2022), at 794 ff, defining the notion of enterprise used in the functional type of proposal.

2.2.2. Economic activity and the Internal Market

The definition of "*economic activity*" is also central to the FSR's application. The Regulation applies to all undertakings engaged in economic activities within the EU internal market[65]. As per the Internal Market principles, this includes entities involved in production, distribution, and the provision of services, as well as those participating in public procurement or mergers and acquisitions. The key criterion for determining whether an entity is an undertaking under the FSR is whether the economic activity it engages in has an impact on competition within the EU market. This means that entities in both traditional sectors[66] and non-traditional sectors[67] fall within the Regulation's scope. Moreover, it is irrelevant whether the entity is incorporated in the EU or based outside it, as long as it engages in economic activity in the EU. Thus, a third-country company receiving subsidies and operating a subsidiary in the EU would also qualify as an undertaking under the FSR, provided its activities are linked to the internal market.

2.2.3. State-Owned enterprises and public undertakings

Another key issue under the FSR is the treatment of State-owned enterprises ("SOEs") and public undertakings. These entities, which are often subsidised by their home governments, can have a significant impact on competition in the EU market. According to the FSR[68], an SOE is considered an undertaking if it is engaged in economic activity, and the regulation does not limit this definition to entities based in the EU. A foreign SOE that receives subsidies from a third country and engages in commercial activities in the EU - such as an infrastructure company or an energy provider - could distort competition if the subsidies provide them with an unfair advantage. As the Recitals of the FSR highlight, this includes not just fully state-owned companies but also those heavily influenced or controlled by a government,

[65] *Pavel Pavlov* case, para. 75.
[66] By way of example: the manufacturing sector.
[67] By way of example: public procurement or digital services sectors.
[68] In this sense, see Recital 22 of the EUMR; in the decision practice, see: European Commission Decision pursuant to art 6(1)(b) of Council Regulation No 139/2004 and art 57 of the Agreement on the European Economic Area of 10 March 2016, M.7850 – EDF/CGN/NNB Group of companies, paras 29-50.

regardless of whether they are classified as "*private*" in their home country[69].
For example, a foreign telecommunication operating in the EU, which is funded by subsidies from its home country, may use this financial advantage to offer services at prices below the market norm, thus distorting competition. The FSR ensures that such state-backed entities are also captured under the concept of undertaking.

2.3. Regulation's objective scope of application

On the other hand, in the dealing with the FSR's objective scope of application, a key concept is represented by the notion of a foreign subsidy as any financial contribution[70] from a non-EU government or public entity that provides an economic advantage to a recipient company, with the potential to distort competition within the EU Internal Market[71]. This definition encompasses various types of financial support, including direct transfers of funds, loans, tax exemptions, fiscal incentives, and the provision of goods or services. The FSR aligns with the framework established by the Subsidies and Countervailing Measures Agreement ("SCM Agreement")[72] of the WTO, emphasising the EU's reliance on international law to interpret these subsidies[73].
Under the FSR[74], foreign subsidies are financial contributions that confer a benefit and are selective, targeting specific companies or sectors. However, not all financial contributions are considered foreign subsidies. For a financial contribution to qualify, it must meet four distinct, cumulative conditions:

[69] Recital 12 of the FSR.
[70] The Regulation broadly defines this concept. In this regard see art. 3 of the Foreign Subsidies Regulation in combination with recital 11 to 16.
[71] It is important to clarify that, as stated in Recital 16 of the Regulation, financial contributions granted exclusively for non-economic activities do not constitute foreign subsidies.
[72] Namely, Article 14. While WTO rulings do not have direct legal effect within the EU, the ECJ has consistently emphasised that EU regulations should be interpreted considering international law.
[73] To be fair, despite the terminology used, which derives from Art. 1 of the SCM Agreement, the concept of foreign subsidy takes its major inspiration mainly from State Aid Law.
[74] See Article 3 of the Regulation.

1. Financial contribution[75]: the concept of "*financial contributions*" is broad[76] and includes various forms of support such as grants, loans, loan guarantees, debt forgiveness, tax exemptions, and the provision of goods or services. The scope of this notion is extensive[77], and companies may find it challenging to determine which contributions qualify, particularly with measures like tax exemptions or government contracts, which may not be immediately apparent as financial contributions.[78]

2. Granted directly or indirectly by a third Country[79]: a financial contribution can be granted by the central government or public authorities of a non-EU country, public entities whose actions can be attributed to a third country, or private entities linked to the State. The definition of "*State resources*" in EU State Aid Law[80] provides useful guidance, though the application to non-EU countries presents added complexity, particularly when private actors or state-owned entities are involved.

3. Benefit[81]: a foreign subsidy only exists if the financial contribution confers a benefit on the recipient that would not have been available under normal market conditions. This is assessed using benchmarks such as market financing rates or comparable tax treatments. For example, grants or tax exemptions can be straightforward to evaluate, but commercial transactions with state-owned enterprises often require the use of the market economy operator principle[82] ("MEOP"). If a private company would not have granted the same terms, the contribution confers a benefit.

[75] See Article 3(2)(1) of the FSR.
[76] See note 67.
[77] Indeed, this list is non-exhaustive one.
[78] Indeed, any purchases from or sales to public entities are regarded as financial contributions, and the entire amount must be considered. For example, a government contract valued at €60 million must be treated as a €60 million financial contribution, regardless of whether it is agreed upon at market terms.
[79] See Recital 11, art 1(2) and art 3(1) of the FSR.
[80] Namely, Article 107 (1) of the TFEU. In fact, the FSR expressly provides, in its Recital 9, that it should be applied and interpreted in light of the relevant EU legislation, including State Aid rules.
[81] See Recital 13 of the FSR.
[82] Forms FS-CO and FS-PP, Tables 1, B. 6. c, respectively.

4. Selectivity[83]: the financial contribution must be selective, targeting specific companies or sectors, and not generally available. While this condition can be clear in cases where a subsidy is granted to only one company, difficulties arise when a measure applies to multiple companies within certain criteria. In such cases, the contribution may still be considered selective if it disproportionately favours specific businesses.

In addition to these core conditions, the FSR requires a detailed assessment of the potential for competition distortion in the EU. If the financial contribution enables the recipient to outcompete EU companies, such as through below-market pricing or market dominance, it may distort the internal market. Furthermore, the subsidy must affect trade between EU Member States for the Regulation to apply, ensuring the focus remains on internal market distortions rather than broader international trade concerns.

To determine whether a financial contribution qualifies as a foreign subsidy, companies must consider various factors, including the nature of the contribution, its impact on competition, and whether it grants an advantage over EU competitors. This process requires significant effort, especially given the broad scope of what constitutes a financial contribution. Companies will need to adjust internal processes and reporting systems to assess and track such contributions, ensuring compliance with notification thresholds and the Regulation's reporting requirements.

2.3.1. Tackling distortive effects

A foreign subsidy is considered distortive when it improves the competitive position of the recipient undertaking in the market, providing it with an economic advantage it would not have otherwise obtained. The Commission's evaluation of distortion considers the amount and nature of the subsidy and the circumstances of the recipient at the time the subsidy is granted[84].

[83] See Article 3 (1) of the FSR.
[84] See Article 4 of the FSR.

When determining whether a subsidy distorts the internal market, the Commission examines factors such as the subsidy's size relative to the market or investment value. For example, a transaction where a significant portion of the purchase price is financed by a foreign subsidy is likely to be distortive. Similarly, foreign subsidies that cover substantial operating costs, rather than investment costs, are more likely to distort competition. The characteristics of the market, including entry barriers and competitive conditions, also influence the assessment. Subsidies granted to entities with limited activity in the EU are less likely to cause distortions than those granted to entities with extensive operations in the Union[85].

When compared to State Aid Law, the FSR's concept of distortion shares similarities with the definition provided under Article 107 TFEU. Both frameworks address distortions of competition. However, the FSR does not require evidence that the subsidy affects trade between Member States, as is necessary under Article 107 TFEU[86]. This suggests that the FSR takes a broader approach to addressing distortive subsidies, even where no explicit effect on intra-EU trade is evident.

2.4. Exemptions and presumptions

While foreign subsidies generally fall within the scope of the Regulation, Article 4 of the FSR provides several exceptions. For instance, subsidies granted to compensate for damages caused by natural disasters or exceptional circumstances are excluded from the rules[87]. Additionally, financial contributions of less than €4 million over a consecutive three-year period, or those classified as "*de minimis*" aid under Regulation (EU) No. 1407/2013[88], are also exempt. These thresholds ensure that smaller-scale subsidies with negligible impact on the internal market are not unduly penalised.

The Regulation also establishes presumptions of distortive effects in certain circumstances, as outlined in Article 5. For instance, subsidies granted to prevent an

[85] This is enshrined in Recital n. 19 of the Foreign Subsidies Regulation.
[86] This approach can be found in, *ex multis*: *Philip Morris Holland BV v. Commission of the European Communities,* Case 730/79, para. 10–12, 1980 and the mentioned case law.
[87] Those provisions can be recognised as a direct "*son*" of the Covid-19's economic experience.
[88] Article 3, paragraph n. 2 of the mentioned Regulation.

undertaking from going out of business, or those providing unlimited guarantees for an entity's debts, are presumed distortive. Similarly, export financing measures that fail to comply with OECD standards or subsidies that facilitate a market concentration are also presumed to distort competition.

In such cases, the Commission may not need to conduct a detailed assessment of distortion. However, recipients of such subsidies may present evidence to demonstrate that the subsidy does not distort the internal market under the specific circumstances of the case[89].

2.5. Balancing Test

After that a foreign subsidy is identified, the balancing test enables the Commission to weigh its negative effects against its positive impacts, such as contributions to EU policy objectives. Positive impacts might include both economic and non-economic goals, such as advancing environmental sustainability or supporting social objectives. The CJEU has emphasised that, in State aid cases[90], such objectives must serve the public interest rather than purely economic aims. Under the balancing test, the Commission must demonstrate that the subsidy's distortive effects outweigh any positive contributions.

This test is particularly significant in sectors of strategic importance to the EU or those involving critical infrastructure. In such cases, the Commission may conclude that a subsidy's positive impacts justify its distortive effects, allowing the subsidy to remain in place. However, the absence of clear case law to date introduces uncertainty about how the test will be applied in practice.

The balancing test also creates opportunities for aligning subsidies with EU policy priorities, such as the green transition. This ensures that contributions that might otherwise be excluded are assessed in light of their potential to support EU undertakings and policy goals.

State Aid Law employs a similar balancing test, first introduced in 2005, to

[89] This is enshrined in Recital n. 20 of the Foreign Subsidies Regulation.

[90] For instance, see: European Court of Justice, *Maizena GmbH v. Council of the European Communities* C-139/79, para. 23, 1980, and its mentioned case law.

incorporate social welfare considerations into the assessment of aid measures. However, the FSR's balancing test differs in that it does not prioritise the policy objectives of the third country granting the subsidy. Instead, it focuses solely on the subsidy's impact on the EU Internal Market, creating a distinct framework.

The balancing test also bears similarities to the "*Union Interest Test*" used in trade remedies. This test evaluates the broader economic effects of implementing trade measures, including their impact on competition and Union production. Like the Union Interest Test, the FSR's balancing test ensures that subsidies are not excluded if they provide significant benefits to the EU market.

Despite its potential, the balancing test imposes a heavy burden on the Commission. Balancing the positive and negative effects of a subsidy requires significant expertise and resources, both of which may be limited. This challenge underscores the importance of ensuring that the Commission is adequately equipped to implement the FSR effectively.

2.6. Procedural aspects and Commission's fact-finding tools

The Commission may initiate an *ex-officio* review on its own accord, gathering information from any available source, or it may act following a notification obligation. In this regard, the *ex-officio* review enables the Commission to address financial contributions that are not covered by the mandatory notification requirements under Articles 20 and 28 of the Regulation[91] [92].

Article 13 of the FSR provide the framework for how the European Commission gathers, evaluates, and assesses information during investigations into foreign subsidies that may distort competition within the EU internal market. These instruments are essential for determining the existence and impact of foreign subsidies and for deciding whether corrective measures are necessary.

[91] Please be aware that the formal review timelines under the FSR for concentrations are aligned with the EU merger control procedures. In the initial months of the FSR's implementation, the same case team handling EU Merger Regulation filings may also manage the FSR review process.

[92] The FSR review process runs concurrently with the contracting authority's public procurement procedure. The contracting authority is responsible for reviewing FSR filings to ensure they are complete before forwarding them to the Commission.

The Commission has the authority to gather evidence from the companies involved[93], third parties, or other relevant stakeholders but, first and foremost, the Commission is ultimately allowed to draw conclusions based on the entity's behaviour throughout the process. This allows for a comprehensive investigation into the potential impact of foreign subsidies on competition, ensuring that any distortions are fully identified[94]. If the information provided by the notifying parties is insufficient or unclear, the Commission can request additional evidence or conduct further inquiries[95] [96].

However, the Commission can launch a more detailed investigation if it suspects that the information provided is incomplete, consulting external experts or undertaking further inquiries[97].

Additionally, the FSR allows third parties, such as competitors or industry associations, to submit evidence or complaints, broadening the scope of the investigation. The Commission must assess the credibility and relevance of third-party input to ensure the investigation is as thorough as possible.

[93] Mainly through Requests for Information ("RFI"), as enshrined in Article 13.

[94] For the sake of completeness, it must be noted that, in this phase, there are no fixed statutory deadlines for the Commission's conduct of investigations; however, it aims to issue a final decision within 18 months from the start of the in-depth investigation. The process begins with a preliminary review phase, during which the Commission may request information and carry out inspections both within and outside the EU. If the Commission finds sufficient evidence of a foreign subsidy that distorts the internal market, it will proceed by opening an in-depth investigation. If, however, there are no adequate grounds to initiate further investigation, the Commission will close the preliminary review and notify the company involved.

[95] It also considers any positive effects the subsidy might have, such as aligning with EU policy objectives in areas like sustainability or innovation.

[96] If the information provided by the undertaking during the aforementioned procedures is incomplete, inaccurate, misleading, or, crucially, not provided at all, the Commission may impose corrective measures or decisions involving commitments. Furthermore, the Commission may infer the existence of the foreign subsidy due to the undertaking's failure to comply with its request based on the powers enshrined in Article 16.

[97] The Regulation includes provisions to protect sensitive business information during investigations. The European Commission, which is responsible for enforcing the Regulation, has established mechanisms to ensure the confidentiality of companies' data throughout its reviews. These measures involve stringent confidentiality requirements during the investigative process. For example, the Commission can impose confidentiality obligations on both the businesses under investigation and the authorities involved, ensuring that sensitive information - such as trade secrets, financial details, and strategic plans - is handled carefully and not disclosed improperly. Additionally, the FSR allows businesses to request that specific documents or information be treated as confidential, with the Commission responsible for upholding these requests. The Regulation also sets out clear procedures for companies to challenge or appeal the use of their sensitive information if it is disclosed or shared without consent. However, the Commission may, if necessary, disclose certain details to the involved parties under strict confidentiality agreements.

2.7. Concentrations and their notifications

The notion of concentration refers to mergers, acquisitions, or the formation of joint ventures that lead to significant changes in market structures[98]. Such transactions are of concern as they may consolidate market power, create dominant entities, or alter industry dynamics.

The European Union is particularly concerned about concentrations involving foreign subsidies, as these can give companies unfair financial advantages. Subsidised businesses may outbid competitors, dominate critical sectors, or influence strategic industries such as technology, energy, or transport. This issue is especially pertinent in transactions involving state-owned enterprises from countries like China, where government support is common.

The FSR introduces strict notification obligations for concentrations that involve foreign financial contributions. These requirements are triggered when certain turnover and subsidy thresholds are exceeded, ensuring that significant transactions are assessed for their potential competitive effects. Businesses involved in concentrations must notify the European Commission and disclose the foreign subsidies they have received[99]. This process serves as a proactive measure to identify and mitigate the potential distortion of competition before the transaction is finalised.

The notification process requires the submission of Form FS-CO[100], which includes detailed information on the concentration, including turnover figures and foreign financial contributions, as well as the nature and purpose of these subsidies. The Commission then evaluates whether these contributions qualify as foreign subsidies

[98] The definition adopted in Foreign Subsidies Regulation is the same enshrined in Article 3 EUMR.

[99] The pivotal point for determining which financial contributions count towards the notification threshold (within the preceding three years) is the date on which the financial contribution is authorised, rather than when it is received. A financial contribution is considered authorised once the beneficiary acquires a legal entitlement to it. Consequently, the key event is not the actual transfer of funds. For more please refer to Vassilis and Blancardi, *Analysis of the Foreign Subsidies Regulation from an International Trade Law Perspective on Trade in Goods*, in 18 (10) Global Trade and Customs Journal, 380–383, 382 (2023).

[100] See Point 5.1 in Annex I (the so called “Form FS-CO”) in, Commission Implementing Regulation (EU) 2023/1441 on 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.

and whether they provide the recipient with a selective economic advantage[101]. If the financial contributions meet the established thresholds - €500 million in combined EU turnover and €50 million in foreign subsidies - the concentration must be formally notified to the Commission[102].

2.8. Is FSR aligned with Regulation 139/2004?

The legal foundation for both the substantive and procedural provisions of the current Regulation stems from the European Union Merger Regulation[103]. This implies that a merger and acquisition deal could be subject to both the EUMR screening and the FSR[104].

This overlap between the two processes requires clarification[105]. One of the stated objectives of the FSR process was to allow parties to run the FSR clearance process in parallel with EU merger control in a transactional context. At first sight, both processes appear tightly aligned. Both the FSR transaction review process and the EU merger control process involve a pre-notification stage, followed by a first-phase review of 25 working days, and, where necessary, a second-phase in-depth review of 90 working days, starting from the date of submission of a complete notification. However, despite these apparent similarities, achieving a parallel process in practice is unlikely due to several differentiating factors. Article 44, paragraph 1, of the Regulation permits the simultaneous application of both the EUMR and the FSR,

[101] In M&A procedures, the Commission has 25 working days in the first phase (preliminary review) to determine whether the foreign subsidy raises competition concerns. If necessary, the Commission launches a more detailed inquiry in the second phase (in-depth investigation), which can last up to 90 working days, with the possibility of a 15 to 20 days extension in exceptional cases such as a commitment offer by the notifying party.

[102] See Article 20 of the Foreign Subsidies Regulation.

[103] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[104] The compatibility between the EUMR and the FSR enhances the EU's regulatory framework by ensuring that mergers and acquisitions are evaluated not only for their structural impact on competition but also for the influence of foreign subsidies.

[105] The EUMR applies to transactions that meet the "Community dimension" criterion, as enshrined in Article 1 EUMR, even though individual Member States may exercise their authority under Article 22 to examine financial contributions that do not meet the thresholds outlined in Article 1. More notably, Crucially, Article 2 of the EUMR specifies the substantive criterion for a concentration to fall under the scrutiny of Member States, which is that it must "*significantly impede effective competition*", whereas the FSR necessitates a distortion in the internal market.

meaning that the initiation of one process does not prevent the other from commencing.

This overlap, however, results in a lack of synchronisation in terms of timelines, procedural approaches, and remedies across the two mechanisms. For instance, while the FSR's timelines are loosely aligned with those of EU merger control, initiating one procedure - even with a standstill period - does not suspend or affect the other. A suspension or extension in one process does not impact the other, meaning both the FSR and EU merger control processes must begin concurrently for their timelines to align.

The FSR process does not allow for the possibility of remedy discussions during the first-phase review, a flexibility that EU merger control provides. The option for "quick fixes" under EU merger control has been instrumental in shortening the merger control process in numerous cases. Additionally, the FSR process is significantly more data-intensive than the EU merger control process, which could further differentiate the timelines. Given that the FSR is still in its nascent phase, companies will need to invest considerable efforts in adapting their internal data reporting processes to meet FSR requirements. This may lead to longer pre-notification periods for FSR filings compared to merger control notifications, with several exchanges and clarifications from the European Commission expected before companies can proceed with their filing.

The FSR's reliance on turnover thresholds allows for some synergies, as the turnover data necessary for determining reportability under EU merger control is also relevant for establishing whether the first FSR threshold is met. However, the timelines for the two processes are likely to diverge, leading to potential challenges. The misalignment of the timelines will not be the only issue, as the thresholds for the two mechanisms also differ. For example, there are situations where the FSR threshold will be met, but the EU merger control thresholds will not, such as in cases where a company with limited EU turnover acquires a strong European player with more than EUR 500 million revenue. In such instances, while the EU merger control will not apply due to the limited EU presence of the acquirer, the FSR notification requirement will be triggered. This could require the parties to navigate both the FSR process and merger control procedures in multiple EU Member States, complicating the planning process[106] [107].

Given these significant misalignments, there is a clear need for coordination within the FSR, such as the introduction of a one-stop-shop system. Nonetheless, certain recital provisions have been included, allowing the Commission to use information from foreign subsidy investigations within the context of EU merger control, which could help reduce the administrative burden on businesses. Some commentators argue that there was no need to create a new instrument like the FSR to address foreign subsidies in M&A transactions. Instead, they suggest that the EUMR could have been adapted to incorporate a framework for foreign subsidies. While the White Paper suggested that the EUMR's focus in assessing a "*significant impediment to effective competition*" pertains to the "*structure of competition in a given market*", rather than the presence or impact of foreign subsidies as the FSR does, the *CRRC/Vossloh* merger case[108] demonstrated that foreign subsidies can indeed be considered under merger control law. In this case, the German Competition Authority considered foreign subsidies granted by Chinese state-owned enterprises.

2.9. Public Procurement and its notification

Public procurement plays a pivotal role in the European Union's economy, accounting for a substantial portion of its Gross Domestic Product ("GDP")[109] and encompassing critical sectors such as infrastructure, transport, and defence. Historically, the EU's public procurement rules have focused on transparency, non-discrimination, and fair competition, however, these rules have been insufficient to

[106] In fact, the extensive obligations imposed by the FSR, which have attracted considerable criticism, appear at first glance to conflict with its Article 47(1)(a) and Recital 40. Both provisions emphasise the importance of minimising the administrative burden on notifying parties.

[107] The primary critique has centred on the legislator's decision to mandate disclosure of all financial contributions, foregoing the alternative of placing any responsibility on notifying companies to determine whether a financial contribution qualifies as a foreign subsidy. This requirement is anticipated to impose a particularly significant burden on private equity firms. Introducing tailored provisions to ease this obligation for such firms would be highly beneficial. This is because they will not only face scrutiny across multiple transactions but must also report financial contributions received by all their portfolio companies.

[108] Bundeskartellamt, Vossloh Locomotives GmbH, Kiel/ CRRC Zhuzhou Locomotives Co., Ltd. Case B4-115/19, 2020.

[109] The percentage is around the 14% of EU's GDP, approximately €2 trillion annually.

tackle distortions caused by foreign subsidies, which often enable subsidised bidders to gain an unfair advantage in tender processes[110].

The FSR introduces mechanisms to address these gaps requiring entities participating in EU public procurement to notify the European Commission if they have received financial contributions from non-EU governments that may qualify as foreign subsidies[111]. This obligation applies when the procurement contract meets specified thresholds - €250 million for contract value and €4 million for aggregate financial contributions received over the three preceding years[112].

The inclusion of public procurement in the FSR framework reflects the EU's concern that foreign subsidies can undermine fair competition by allowing subsidised bidders to offer artificially low prices or overly advantageous terms. For instance, a state-supported company might win a contract by underbidding competitors, even if its economic viability relies on foreign subsidies rather than market efficiency. This not only distorts competition but also risks jeopardising the quality and sustainability of public projects.

A significant innovation of the FSR is its focus on transparency. Bidders in public tenders are required to disclose all relevant financial contributions from foreign governments. This disclosure extends not only to the primary bidder but also to key subcontractors and suppliers involved in the project. This comprehensive approach ensures that all links in the procurement chain are scrutinised for potential distortions, enhancing the integrity of the tender process. However, this requirement also places a considerable compliance burden on companies, especially those operating in global markets where information on foreign subsidies may be difficult to obtain[113].

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[110] See note n.17.

[111] In public procurement procedures, the Commission has 20 working days in the first phase (plus additional days in multi-stage procedures). If necessary, the Commission launches a more detailed inquiry in the second phase, which can last up to 110 days (plus 20 days if an extension was previously granted).

[112] Moreover, in public procurement processes that meet the thresholds outlined in Articles 28(1)(a) and 28(2) of the Regulation, where foreign financial contributions requiring disclosure under Article 28(1)(b) of the FSR have been received by notifying entities within the three years prior to notification, each participant must specify if they have individually received foreign financial contributions amounting to EUR 1 million or more.

[113] It can be, paradoxically, affirmed that under the Implementing Regulation, the substantive test for foreign subsidies is so broad that no workable delimitation of the information requirement can be drawn from it.

The Regulation's provisions also raise concerns about the potential deterrent effect on legitimate foreign investments. While the FSR seeks to safeguard competition, the administrative complexity and perceived risk of exclusion from tenders might discourage foreign entities from participating in EU procurement processes. This risk is particularly relevant in sectors heavily reliant on international cooperation, such as technology and green energy, where foreign investment is often crucial for innovation and development.

Finally, FSR's additional requirements could prolong procurement timelines, complicate bid evaluations, and increase administrative costs. Contracting authorities must integrate these new rules into their procedures, which may require significant adjustments to existing frameworks. Coordination between the European Commission, contracting authorities, and economic operators will be essential to mitigate these challenges and ensure that the FSR's objectives are met without undermining the efficiency of procurement processes.

2.10. Preliminary Review and In-Depth Investigation

The two central components of this framework - the Preliminary Review and the In-Depth Investigation - ensure that potentially harmful financial contributions from non-EU States are properly examined and mitigated.

The Preliminary Review[114] is the first stage of the FSR's investigative process, initiated when the European Commission either: (i) receives a notification about foreign subsidies linked to a concentration or public procurement; or (ii) acts on its own initiative, suspecting a potentially distortive foreign subsidy.

The Commission assesses whether financial contributions from non-EU countries meet regulatory thresholds. If these subsidies are likely to distort competition, the case moves to a detailed In-Depth Investigation. Conversely, if no significant distortion is likely, the Commission clears the transaction or procurement process.

This swift, efficient stage filters out cases posing no competitive threat, allowing the Commission to focus on more complex issues. The Regulation grants the

[114] This phase is set forth in Article 10 of the FSR.

Commission up to two months to complete this review. If no substantial evidence of distortion is found, the investigation ends.

The In-Depth Investigation[115] phase follows if the Preliminary Review raises concerns about the distortive effects of foreign subsidies. This phase allows the Commission to assess the subsidy's impact on competition, considering the sector and market distortion caused by the foreign support.

Three are the possible outcomes of the In-Depth Investigation: (i) no objection decision[116]; commitments decision[117]; and prohibition decision[118].

The Commission gathers additional information, examining the beneficiary's market behaviour, the subsidy's strategic objectives, and its broader impact on EU competition. Key issues include unfair pricing, market exclusion, distorted competitive advantages, and anti-competitive behaviour, such as predatory pricing[119].

If distortion is found, the Commission may impose redressive measures, including financial penalties, changes to the transaction or procurement terms, or blocking the concentration[120]. If competition is distorted, the Commission typically issues a Statement of Objections, allowing parties to respond or propose remedies. If unsatisfied with the remedies, the Commission may block the transaction, take enforcement action or also adopt interim measures.

The In-Depth Investigation involves broad stakeholder consultation, including competitors, suppliers, and customers, ensuring diverse perspectives on potential distortions. The Commission also requires transparency in foreign subsidies and allows third-party complaints, enabling any interested party to alert the Commission to possible distortions, even if not directly involved.

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[115] See Article 11 of the FSR.

[116] The investigation concludes that there is no distortion, or that any distortion is outweighed by positive effects.

[117] The proposed commitments are deemed sufficient and effectively address the distortion.

[118] The foreign subsidies have distorted the M&A process and/or would provide the target with an unfair competitive advantage after the transaction, and no suitable commitments were proposed to resolve the issue.

[119] The Commission also assesses whether foreign subsidies create entry barriers, stifle innovation, or strengthen dominant positions, especially in sectors critical to competition, such as public procurement or high-tech industries.

[120] The list of the redressive measures, as at Article 7 of the Regulation, is a non-exhaustive one.

2.11. Pre-Notification

The Pre-Notification phase, set forth in Article 21 and 29[121] of the FSR, is an advisory process that allows companies to seek guidance from the European Commission before submitting a formal notification regarding foreign subsidies[122]. While not mandatory, this phase helps businesses assess whether their planned transactions involve foreign subsidies that might require scrutiny under the FSR[123]. Pre-Notification offers several key benefits: it helps companies clarify whether foreign subsidies could distort competition in the EU, enabling them to adjust their plans or mitigate potential issues before proceeding with the formal notification.

In this phase, the Commission typically responds within a few weeks, depending on the complexity of the case, and companies may need to provide additional information or clarification during this time.

However, the process depends on the quality and completeness of the information provided, in fact, incomplete or ambiguous data can result in delays or unclear feedback from the Commission. Additionally, as the process is informal, the Commission's feedback is not legally binding, leaving companies to decide whether to proceed with the formal notification based on that guidance[124]. Despite these challenges, Pre-Notification remains a valuable tool for companies seeking clarity and avoiding unnecessary complications in the regulatory process, ultimately contributing to a fairer and more predictable EU internal market.

3. Conclusive remarks

As seen the Regulation represents a transformative step in the EU's efforts to

[121] Article 21 deals with mergers, while Article 29 deals with public procurement procedures.
[122] Overall, the process outlined in the Implementing Regulation broadly mirrors the EU merger control rules in certain respects: the timelines and pre-notification phase are aligned, and the notification form is structured similarly to that used for merger control, where feasible. However, the information required for submission differs significantly from that which parties must provide under the EU's merger control regulation.
[123] Indeed, this informal phase allows the Commission to provide initial feedback on whether the subsidies may raise concerns, and it ensures companies understand the regulatory framework and avoid surprises during the formal review.
[124] Instead, it aims to facilitate the collection of information, address any jurisdictional concerns, and coordinate the FSR process with other ongoing reviews related to merger control and FDI screening.

safeguard fair competition and economic sovereignty within its internal market. By addressing the regulatory void left by traditional State Aid rules, the FSR establishes a framework to scrutinise subsidies granted by non-EU States, a move necessitated by the growing influence of foreign state-backed enterprises. However, while the Regulation's ambitions are praiseworthy, its practical implications raise several critical concerns.

The FSR's reliance on broad definitions - such as what constitutes a foreign subsidy or a distortion - creates legal uncertainties that risk complicating compliance for businesses. This challenge is exacerbated by its retroactive application, which imposes obligations on past transactions, potentially unsettling established commercial arrangements. The procedural demands of the Regulation, including extensive disclosure requirements and stringent notification thresholds, introduce administrative burdens that may disproportionately affect certain industries[125]. Furthermore, the potential overlap between FSR processes and existing EU frameworks, such as merger control, adds complexity to regulatory compliance, with risks of misalignment in timelines and outcomes.

A key concern lies in the potential deterrent effect on foreign investment. By imposing rigorous scrutiny on transactions involving non-EU financial contributions, the Regulation may discourage legitimate and mutually beneficial investments, particularly in sectors like renewable energy and technology that rely on international collaboration. This raises important questions about the trade-off between ensuring a level playing field within the EU and maintaining its attractiveness as a global investment destination.

Despite these challenges, the FSR underscores the EU's evolving strategy in an increasingly multipolar economic landscape. It represents a deliberate move to counteract distortive practices by foreign state-backed actors and to fortify the EU's internal market against external vulnerabilities. The Regulation also aligns with broader goals of strategic autonomy, particularly in critical sectors like infrastructure and green technology, where state-led investments can distort competition.

In conclusion, while the FSR has the potential to address significant gaps in the EU's

[125] This topic will be further explored in Chapter III of this Dissertation.

regulatory framework and bolster its economic resilience, its success hinges on careful and effective implementation. Ensuring clarity in procedural guidelines, avoiding enforcement bottlenecks, and striking a balance between regulatory ambitions and practical feasibility will be essential to prevent the Regulation from becoming a deterrent to innovation and growth.

Chapter II: Regulating FSR: enforcement mechanisms and remedial strategies

1. Preliminary Remarks

From a doctrinal perspective, the legal community is divided on the merits of the FSR, even though the majority of competition law community welcomed its introduction. Indeed, many practitioners see it as a necessary response to the growing concern that foreign subsidies could create unfair competitive advantages for non-EU firms, undermining the EU's economic interests. Over the past decade, there has been increasing evidence that non-EU governments have used subsidies to support domestic companies, often in sectors of strategic importance, such as technology, energy, and infrastructure[126]. The FSR is, therefore, seen as an essential regulatory tool to safeguard the integrity of the EU's single market, protecting European undertakings from the risks posed by these foreign financial interventions[127].
However, as this Chapter will illustrate, it has also generated considerable debate, particularly regarding its alignment with international trade law. Some legal scholars and trade policy experts have pointed out that the FSR's expansive definition of foreign subsidies may create significant legal tensions, particularly in relation to the obligations deriving from the EU membership to World Trade Organisation[128]. According to the WTO's Agreement on Subsidies and Countervailing Measures[129], subsidies are subject to countervailing measures only if they result in material harm to the domestic industry of the importing country. The EU's unilateral approach, particularly in scrutinising subsidies that may not have caused direct harm to competition, raises questions about whether the regulation could be seen as an overreach and a potential violation of WTO principles. Critics argue that the broad

[126] As seen in Chapter I of this dissertation, these subsidies have the potential to distort competition in the EU market by enabling foreign firms to outcompete EU-based companies, often through artificially lower costs or access to cheaper financing.
[127] As seen in Chapter I and as it will be better deepened in Chapter III of dissertation, where the EU seeks to maintain technological leadership, in sectors like green energy or digital technology, the regulation can be viewed as a necessary measure to ensure that foreign state support does not distort the level playing field and to preserve the EU's strategic interests.
[128] Frost L., *EU Foreign Subsidies Regulation raises investment concerns*, IFLR (Jul. 6, 2022), retrieved at: https://www.iflr.com/Article/2ablxb1z37z30ih4vy8sg/eu-foreign-subsidies-regulation-raises-investment-concerns.
[129] As it will be better seen in Paragraph 3 of this Chapter.

application of the regulation could undermine the EU's commitment to free trade and international cooperation by imposing trade barriers disguised as competition rules. Moreover, there are concerns that the regulation could result in retaliatory measures from non-EU countries, especially those that rely heavily on state-led industrial policies[130].

On the other hand, critics of the FSR raise concerns about its overreach. They argue that the regulation could have unintended consequences, particularly in cases where foreign state support is intended to promote public goods, such as sustainable development or technological innovation, rather than distort competition. The regulation's broad definition of foreign subsidies, combined with its sweeping enforcement powers, could inadvertently punish companies that rely on legitimate state support for their operations, thus undermining innovation and cooperation in sectors that are critical to the EU's long-term growth[131]. Furthermore, critics warn that the FSR could stifle foreign investment in the EU by creating a regulatory environment that is perceived as overly restrictive or punitive. The potential chilling effect on foreign investors, particularly in sectors like technology and green energy, could ultimately hinder the EU's ability to attract the capital and expertise needed to remain competitive on the global stage.

Then, this Chapter will delve into a detailed exploration of the Regulation's remedial framework, and its enforcement mechanisms. Central to the analysis is an evaluation of the range of remedies available under the FSR, which span from structural adjustments to behavioural interventions. These remedies demonstrate the EU's commitment to preserving market integrity while fostering economic resilience and alignment with international obligations.

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[130] Supporters argue that the regulation is a necessary safeguard against unfair competition, particularly in industries where foreign subsidies could lead to the creation of market monopolies or distort the competitive process. For a deeper analysis, see *ex multis*: Drosin E., *Invest Europe signs call by European business to deepen EU Single Market; renew European integration dynamic, Invest Europe* (Feb. 13, 2024), retrieved at: https://www.investeurope.eu/news/newsroom/invest-europe-signs-call-by-european-business-to-deepen-eu-single-market-renew-european-integration-dynamic/.

[131] Ahrnes B., Hollman H., Masterman T., *EU Foreign Subsidies Regulation brings significant compliance burden for private capital firms*, A&O Shearman (Oct. 5, 2023), retrieved at: https://www.aoshearman.com/en/insights/eu-foreign-subsidies-regulation-brings-significant-compliance-burden-for-private-capital-firms.

One of the defining aspects of the FSR is its focus on balancing rigorous enforcement with adaptability. The regulation introduces measures that are tailored to the diverse impacts of foreign subsidies, emphasising dialogue and voluntary commitments before imposing mandatory remedies. This progressive approach ensures that the regulation operates with flexibility, recognising the varying degrees of distortion caused by foreign state support. Structural remedies, such as divestitures, are applied where necessary to restore competitive equilibrium, while behavioural measures address distortions in a less invasive manner. By combining these tools, the FSR seeks to strike a balance between regulatory oversight and maintaining the EU's openness to global investment.

Furthermore, the Chapter examines the FSR's integration with pre-existing EU regulatory frameworks, particularly State Aid rules and Foreign Direct Investment screening mechanisms and the Italian Golden Power legislation. The FSR complements State Aid provisions, which focus exclusively on subsidies provided by EU Member States, by addressing distortions originating from financial contributions by third countries. It also interacts with FDI screening processes, especially in cases where foreign subsidies are linked to acquisitions in critical sectors such as energy, technology, or defence. This integration highlights the EU's multi-faceted approach to safeguarding market fairness and security, though it also presents challenges in ensuring coherence and avoiding regulatory overlap.

Jurisprudentially, the legal community is still waiting for the first cases involving FSR to provide clarity on its application[132]. The Commission's interpretation of key terms such as "foreign subsidy" and its approach to investigating and remedying market distortions will shape the future trajectory of the regulation.

Legal experts are particularly interested in how the Commission will balance its duty to protect competition in the EU with its obligations under international trade law, and whether it will be able to avoid conflicts with major trading partners. As cases unfold, courts will play a crucial role in interpreting the scope and application of the

[132] As of today, there have been no substantive cases brought before the European Union courts concerning the FSR. The sole jurisprudential development in this area is an Order of the President of the General Court, dated 12 August 2024, in relation to an application for interim measures asked by *Nuctech Netherlands B.V.* and *Nuctech Warsaw Company Limited sp. z o.o*. This, dismissed, application remains the only judicial act concerning the FSR.

regulation, providing guidance on its compatibility with EU law and international trade agreements.
There is also a broader debate on whether the regulation could be used as a tool of economic protectionism[133] [134], particularly in cases where it is applied to prevent foreign companies from gaining access to the EU market, or a legitimate safeguard against unfair competition. The legal community's response to these cases will likely influence the future direction of competition law in the EU and its relationship with international trade law[135].

2. The Implementing Regulation

The entry into force of the Implementing Regulation 2023/1441[136], in December 2023 serves as a critical development in the enforcement of the FSR. The IR provides a much needed and detailed procedural framework that governs the application of the FSR, outlining the specific notification requirements for companies involved in mergers, acquisitions, or public procurement processes where foreign subsidies are present[137]. The Implementing Regulation carefully delineates the conditions under

[133] The FSR's reliance on extraterritorial enforcement mechanisms has drawn criticism for potentially overstepping the EU's legal competences under international trade agreements. This debate underscores the complexities of implementing such a far-reaching regulatory framework. For a deeper analysis, see *ex multis*: Matthew, Karousakis, *Identifying and assessing subsidies and other incentives harmful to biodiversity: A comparative review of existing national-level assessments and insights for good practice*, in 206 OECD Environment Working Papers, OECD Publishing, Paris, 2022, 62-63.
[134] This issue will be better dealt in Chapter III of this dissertation.
[135] Indeed, the full impact of the FSR and its Implementing Regulation will only become clear as the Commission begins to enforce its provisions and as the legal landscape continues to evolve. The regulation represents a significant shift in EU competition law, and its success or failure will depend on how effectively the EU can balance its internal economic objectives with its broader commitments to free trade and global economic cooperation. The implementation of the FSR marks the beginning of a new era in EU competition law, one in which foreign state aid plays a central role in shaping the rules of the game for businesses operating within the EU's internal market. As such, the regulation's long-term success will depend on its ability to navigate complex legal, economic, and geopolitical challenges, while ensuring that the EU remains open to global trade and investment, without compromising the principles of fair competition.
[136] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023, adopted on the basis of Article 47(1) of Regulation (EU) 2022/2560, which grants the Commission the power to adopt implementing acts to specify the modalities for the application of the regulation itself. ("Implementing Regulation" or "IR").
[137] - For concentrations, according to the notification form of a merger ("FS-CO"): (i) companies must report detailed information on those foreign financial contributions defined by the FSR as most likely to distort the internal market (as enshrined in Article 5 of the FSR), as well as those exceeding €1 million individually granted to the transaction parties over the past 3 years; (ii) an overview of all other foreign financial contributions exceeding €1 million, granted to the notifying party over the past 3 years keeping

which foreign subsidies must be reported to the European Commission, with a focus on ensuring transparency and predictability. Specifically, it sets out clear thresholds for when foreign subsidies become subject to scrutiny[138].

This regulatory framework imposes a significant burden on businesses, especially multinational companies operating across various jurisdictions. The requirement to disclose foreign subsidies, many of which may have been granted by governments outside the EU, presents a challenge for companies that may not have previously considered such interventions as relevant to competition law[139]. Businesses fear that the regulation could lead to intrusive investigations into their international operations, requiring them to disclose a wide range of financial arrangements with non-EU governments. These concerns are amplified by the fact that many companies involved in international trade and investment rely on subsidies, tax incentives, or state-backed loans that may not have been viewed as problematic under traditional competition law standards[140]. As a result, the potential for heightened scrutiny under the FSR could create an environment of uncertainty for businesses, especially those in industries where foreign state support is common, such as technology, infrastructure, or energy[141].

Before its adoption, the European Commission invited economic operators to give feedback on the Draft Implementing Regulation[142] provided economic operators,

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contractual relations with countries providing the notifying party at least €45 million over the same period.

- For foreign financial contributions in public procurement, according to the notification form of a public procurement ("FS-PP"): (i) detailed reporting on all foreign financial contributions falling under Article 5, exceeding €1 million individually granted to the notifying party in the three years prior to notification; (ii) an overview of other foreign financial contributions exceeding €1 million, granted to the notifying party, and in relation only to those countries providing at least €4 million to each notifying party over the past 3 years.

[138] These thresholds ensure that the regulation primarily targets large-scale transactions or public tenders that have a substantial impact on the EU market, while smaller or more localized deals are less likely to attract scrutiny.

[139] Indeed, foreign subsidies, as seen in the previous chapter, can take many forms, including direct grants, loans, tax breaks, government-backed equity, or other financial support.

[140] Rubini, L., De Stefano, F., *The EU Foreign Subsidies Regulation: Towards a New Global Paradigm in Competition Law?*, European Law Journal, 29(4), 365–394. (2023).

[141] We will delve into these topics in Chapter III of this dissertation.

[142] The public consultation period took place between 6 February and 6 March 2023, see here: Feedback and Statistics: Draft Implementing Regulation, European Commission (2023), retrieved at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them/feedback_en?p_id=31818338.

industry associations, and businesses, through the *"Have Your Say"* portal, to articulate their concerns, propose modifications, and highlight practical challenges posed by the draft regulation[143].

A central theme across the feedback was the issue of administrative burdens associated with the proposed regulation[144]. Many respondents expressed concerns that the draft's reporting and compliance requirements were overly onerous, particularly for small and medium-sized enterprises ("SMEs")[145]. For instance, businesses noted that the documentation templates outlined in the draft were complex and resource-intensive, necessitating significant investments in data management systems and personnel training. Some respondents suggested introducing simplified reporting procedures or tiered compliance obligations to accommodate the varying capacities of operators, particularly smaller firms with fewer resources.[146]

In addition to administrative concerns, respondents raised significant issues regarding the clarity of the draft's provisions. Indeed, a recurring point of contention was the ambiguity of key definitions and procedural requirements, which many feared could lead to inconsistent interpretations across Member States. For instance, terms related to environmental and social governance ("ESG") criteria[147], as well as sustainability thresholds, were flagged as insufficiently defined, creating uncertainty about how compliance would be assessed. Industry groups emphasised that such ambiguities could result in divergent implementation practices, effectively fragmenting the single market and disadvantaging operators engaged in cross-border activities. To address these concerns, stakeholders recommended that the

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[143] A total of 74 operators submitted responses, offering detailed critiques and actionable recommendations.

[144] Covington & Burling LLP, *Foreign Subsidies Regulation: Key Concerns Raised During the Consultation Process*, 2023.

[145] For a deeper analysis of regulatory impacts on SMEs and recommendations for tailored compliance, see: European Small Business Alliance ("ESBA"), *Impact of the FSR on Small and Medium-Sized Enterprises: Challenges and Opportunities*, 2023.

[146] One notable proposal concerned the implementation of digital tools to streamline reporting processes, reducing the reliance on manual data entry and mitigating the associated costs.

[147] For a deeper analysis of how FSR aligns with the EU's climate and ESG objectives see: Centre for European Policy Studies ("CEPS"), *Green Ambitions and the Foreign Subsidies Regulation: Challenges and Opportunities*, 2023; and, World Economic Forum, Decarbonising Supply Chains: *Aligning the EU Foreign Subsidies Regulation with Global Climate Goals*, 2023.

Commission provide supplementary guidance documents, including detailed examples and explanatory notes, to ensure uniform understanding and application of the regulation.

Proportionality also emerged as another critical area of feedback. In fact, respondents emphasised the need for the regulation to balance its policy objectives with the operational realities of different types of businesses. SMEs argued that the draft's *"one-size-fits-all"* approach failed to account for the varying capacities and resource constraints of smaller entities. These businesses proposed introducing proportional thresholds or exemptions to prevent undue hardship on operators with limited resources. For example, some suggested that reporting obligations be scaled based on company size, revenue, or environmental impact, allowing smaller firms to comply without diverting excessive resources away from core business activities.

The regulation's alignment with existing EU legislative frameworks also drew considerable attention. Several respondents highlighted the potential for overlap with other regulatory instruments, such as the Corporate Sustainability Reporting Directive ("CSRD"[148]) and the EU Taxonomy Regulation[149]. These overlaps, they argued, could create confusion and duplication of efforts, particularly for businesses already grappling with the demands of multiple compliance regimes. Respondents called for greater harmonisation between the Draft Implementing Regulation and existing frameworks to streamline obligations and reduce the risk of conflicting requirements. Specific suggestions included the integration of reporting formats and timelines to facilitate consistency and coherence across the regulatory landscape.

Environmental and sustainability considerations were another focal point of the feedback. While many businesses expressed support for the regulation's overarching goals of promoting sustainability and aligning with the European Green Deal, concerns were raised about the feasibility of certain measures. For example, operators in the manufacturing and logistics sectors questioned the achievability of emissions reduction targets within the proposed timelines, citing supply chain

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[148] European Commission, Directive (EU) 2022/2464 on Corporate Sustainability Reporting. Official Journal of the European Union, L 322, 15–55, retrieved at: https://eur-lex.europa.eu.

[149] European Commission, Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment. Official Journal of the European Union, L 198, 13–43, retrieved at: https://eur-lex.europa.eu.

dependencies, technological limitations, and high upfront costs. Respondents advocated for a phased implementation approach, allowing businesses sufficient time to transition to greener practices while minimising disruptions. Additionally, some called for targeted financial support or incentives to facilitate investments in sustainable technologies and infrastructure.

Specific sectoral concerns also featured prominently in the feedback. For instance, pharmaceutical companies highlighted the potential challenges of complying with stringent reporting requirements without jeopardising intellectual property protections[150]. Similarly, technology firms raised concerns about data privacy and cybersecurity risks associated with the extensive collection and sharing of sensitive information mandated by the draft. These sector-specific insights underscored the importance of tailoring regulatory provisions to address the unique characteristics and risks associated with different industries.

Beyond the technical and operational aspects of the draft, respondents also provided broader strategic feedback. Some businesses emphasised the importance of aligning the regulation with EU competitiveness and innovation goals, warning that overly prescriptive measures could stifle entrepreneurship and discourage investment within the bloc. These stakeholders recommended adopting a more outcomes-based approach, focusing on the achievement of regulatory objectives without mandating specific methodologies. This, they argued, would allow businesses greater flexibility to innovate and tailor their compliance strategies to their unique circumstances.

Finally, the consultation process itself received praise for fostering dialogue and inclusivity, but respondents also highlighted areas for improvement. Some businesses noted that the relatively short consultation period limited the depth of analysis and engagement, particularly for smaller operators with fewer resources to dedicate to regulatory reviews. Others suggested expanding the range of stakeholders involved, including representatives from civil society and consumer groups, to ensure a more holistic understanding of the regulation's potential impacts.

[150] For more insights into how specific industries, such as pharmaceuticals and technology, are affected by the FSR see: BusinessEurope, Industry Concerns Regarding Foreign Subsidies Regulation Implementation, 2023.

Following the public consultation phase, several were the interpolations done to the original Draft's text. Indeed, one of the most significant changes between the two versions concerns the greater clarity provided on the procedural steps involved in investigations. The draft regulation outlined the procedures at a high level but lacked sufficient detail on specific timelines and the sequence of actions to be followed by the Commission.

In response to concerns raised by stakeholders, the final regulation provides more comprehensive guidance on the steps the Commission will take when conducting investigations, particularly in Articles 5 and 6[151]. Article 5, for instance, specifies the time limits for notifying a concentration, and Article 6 elaborates on the detailed process that the Commission will follow during the review of cases, ensuring that undertakings understand the sequence and timing of each stage in the investigation[152].

Another major change in the final Implementing Regulation is the increased emphasis on digital communication and the simplification of procedural requirements related to document submission[153].

In the final regulation, Article 26 (1) specifically mandates that all documents should be transmitted digitally unless otherwise agreed between the Commission and the relevant parties. This provision reflects the Commission's intention to streamline the procedural process, making it faster and more efficient. Digital submissions are intended to reduce administrative burdens, improve the speed of communication, and make the overall process more transparent. The emphasis on digital communication aligns with the broader EU objective of reducing the paperwork burden on businesses, making compliance with regulatory processes more manageable and cost-effective.

In addition to these procedural and definitional clarifications, the final regulation incorporates substantial adjustments to the notification requirements and the overall

[151] These Articles now include a clearer outline of the procedural phases, from the initiation of an investigation to the final decision.

[152] This added transparency aims to help businesses plan for and manage their interactions with the Commission, reducing uncertainty and making the regulatory process more predictable.

[153] Unluckily, in the draft regulation, the requirement for digital submission of documents was mentioned but not strongly emphasised.

compliance obligations for undertakings. Stakeholders[154] raised concerns about the scope of notification requirements and the potential for excessive administrative burdens, especially for businesses that are involved in mergers and acquisitions or public procurement procedures. In response to these concerns, Articles 4 and 7 were revised to make the notification process more targeted and streamlined. Article 4, which outlines the notification process for mergers and acquisitions, now includes clearer criteria for when notifications are required, reducing the risk of unnecessary filings for transactions that are unlikely to distort competition. Similarly, Article 7, which addresses notifications in public procurement, specifies more clearly the thresholds and conditions under which such notifications must be made. These adjustments aim to ensure that only those transactions and activities that could potentially distort the market are subject to detailed scrutiny, thereby easing the compliance burden on businesses engaged in less problematic activities.

2.1. The "*Curious Case*" of the Implementing Regulation's adoption

The adoption of the Implementing Regulation could raise significant questions concerning the delegation of powers and whether the European Commission has exceeded its competences. While this level of regulatory detail is essential for the effective implementation of the broader legislative framework, the method by which these provisions are introduced[155] has prompted questions about whether this constitutes an overstep of the Commission's legal competence.
Under Article 290 of the TFEU[156], the European Commission may adopt delegated acts to amend or supplement non-essential elements of a legislative act. However, the key question arises as to whether the Implementing Regulation, with its highly detailed provisions, could fall within the scope of powers intended by the co-legislators - the European Parliament and the Council - when they adopted

[154] Particularly those in the private equity and investment sectors.
[155] Through a delegated act rather than a full legislative process.
[156] *Ex multis* see: Lenaerts, K., Gutiérrez-Fons, J. A., *EU Constitutional Law: The General Principles of EU Law. Oxford University Press*. (2023); Schütze, R., *European Union Law*. Cambridge University Press. (2021); Sarmiento, D., *The Delegation of Powers in the European Union and the Court of Justice: A Constitutional Analysis*, European Public Law, 18(3), 535–553, 2012.

Regulation 2022/2560. The FSR itself explicitly grants the Commission the authority to investigate foreign subsidies but is vague regarding the specific procedural arrangements for carrying out such investigations. It therefore authorised the Commission to fill in the details, subject to the limits set by the co-legislators. While the empowering act may have anticipated the need for technical regulations to govern the procedural conduct of investigations, the adoption of such detailed provisions through a delegated act could be seen as extending the Commission's powers in ways that were not foreseen by the legislative act itself.

The Implementing Regulation introduces highly detailed measures, such as the procedures for notifying subsidies, specific timelines for investigation, the way the Commission will assess whether a subsidy distorts the internal market, and the powers vested in the Commission to require undertakings to provide detailed information. These procedural rules may not be seen as mere technical adjustments but as substantive interventions that shape the way foreign subsidies will be assessed and regulated. The regulation also includes provisions for the Commission to engage in preliminary inquiries without formal notification from businesses, which could be perceived as giving the Commission considerable discretionary power in identifying and addressing foreign subsidies. These provisions, while necessary for operationalising the Foreign Subsidies Regulation, might also be considered to alter the substantive policy framework that was originally established by the legislative act, potentially distorting the intended balance between regulatory intervention and respect for the legal and procedural rights of businesses.

Thus, the issue of whether the Implementing Regulation, representing an overstep of competences is deeply rooted in the principle of conferral, which is a cornerstone of EU law. As stated in Article 5 of the TEU[157], the European Union can only act within the competences conferred upon it by the Member States through the Treaties. In the context of the IR, the central concern is whether the original legislative framework, FSR, sufficiently confers on the Commission the authority to adopt such detailed provisions. If the empowering Regulation only provides the Commission

[157] Rossi, L. S., Casolari, F., *The Principle of Proportionality in the European Union Law,* Routledge, 2017.

with a mandate to investigate foreign subsidies without explicitly conferring power to define the procedural rules in such a granular manner, it could be argued that the Commission has overstepped its competences. This concern is further compounded by the fact that Regulation 2022/2560 contains provisions aimed at protecting the rights of businesses, including the right to be heard and the right to confidentiality. If IR introduces rules that alter these procedural protections, the Commission might be seen as modifying the scope of the legislative framework, thus infringing on the original intention of the EU legislature.

Some could further argue that the Commission's adoption of such a detailed procedural regulation risk undermining the balance of power within the EU's institutional framework. The European Parliament and the Council, as co-legislators, are intended to provide democratic oversight over the legislative process, particularly in areas with substantial economic and political implications. The shift toward using delegated acts for such detailed regulations raises concerns that significant elements of competition policy, which directly affect European businesses and foreign relations, are being decided by unelected bureaucrats in the European Commission. This perceived democratic deficit could lead to political tensions, especially in Member States that are particularly sensitive to issues of national sovereignty and the balance between EU and national powers[158]. For instance, some Member States may argue that by centralising the power to regulate foreign subsidies, the Commission is effectively usurping national authority, particularly in sectors where Member States have historically had control over state aid and competition law enforcement.

Furthermore, the principle of proportionality, a fundamental tenet of EU law, comes into play in assessing whether the Commission's actions under Regulation 2023/1441 are necessary and proportionate to the aim of addressing foreign subsidies. The EU's regulatory powers are limited by the proportionality principle, which requires that any action taken must not exceed what is necessary to achieve the objectives of the Treaties. In the case of IR, some may argue that the procedures

[158] Hofmann, H. C. H., *Legislation, Delegation, and Implementation under the Treaty of Lisbon: Typology Meets Reality*, in European Law Journal, 15(4), 482–505, 2009.

outlined in the Regulation impose disproportionate burdens on businesses, particularly smaller firms, that could be required to provide extensive documentation to justify their eligibility for subsidies or even face intrusive investigations into their financial dealings with foreign governments. These procedures could be viewed as excessive, particularly if they disproportionately impact sectors that are more dependent on foreign investment or government support, such as the technology or energy sectors. The proportionality principle requires that regulatory measures strike a balance between the EU's objectives and the rights and interests of businesses, and any overreach in this regard could prompt legal challenges on the grounds of unfair or excessive interference with business operations[159].

The political ramifications of Regulation 2023/1441 also cannot be overlooked. The use of delegated acts has been a point of contention within the EU's democratic framework, with critics arguing that they allow unelected officials in the Commission to make significant decisions without the same level of scrutiny and accountability as decisions made through the ordinary legislative process. This concern is particularly acute when the regulation has the potential to affect the economic interests of Member States, businesses, and consumers across the Union. By bypassing the European Parliament and the Council in setting out detailed procedural rules for investigating foreign subsidies, the Commission risks alienating citizens and political actors who might view such decisions as lacking democratic legitimacy. Furthermore, the procedural complexity of the Implementing Regulation, and the significant regulatory burden it places on companies, could raise broader concerns about the EU's regulatory approach and its impact on business competitiveness.

[159] From a procedural standpoint, the CJEU serves as the ultimate arbiter in determining whether the Commission's actions in adopting the Implementing Regulation are consistent with EU law. If stakeholders, such as businesses, Member States, or trade associations, believe that the Commission has overstepped its delegated powers, they can bring the matter before the CJEU. The Court has the authority to annul the Regulation if it finds that the Commission exceeded the limits of its mandate or acted in a manner inconsistent with the Treaties. The Court may also consider the broader constitutional implications of such a ruling, particularly as it relates to the evolving relationship between the EU's institutions and the national legal orders of the Member States.

2.2. FSR and Football

One of the economic sectors that will most likely be most affected by the Regulation under exam is certainly the football one, which is increasingly characterised by millionaire investments[160] coming from non-EU countries.

Over the past decades, those countries, also thanks to the absence of strict entry barriers, have invested massively in this specific European sector; however, with the entry into force of the Foreign Subsidies Regulation, this scenario could undergo a radical change.

As it is well known, in fact, several European football clubs have been acquired by Arab royals and entrepreneurs, including *Paris Saint-Germain* ("*PSG*"), owned by the Qatari businessman Nasser Al-Khelaifi; furthermore is worth mentioning the intervention in football market business's by national airlines such as *Emirates*, *Etihad Airways* and *Qatar Airways*, which made substantial investments through major sponsorship agreements worth hundreds millions euros with European football clubs.

In light of these phenomena, the European Commission has been urged by several complaints from various sources to investigate football clubs, as it happened with the Belgian football club *Lommel SK* and the French club *PSG*.

With reference to the Belgian scenario[161], on 4 May 2023, *Royal Excelsior Virton* ("*Virton*"), a professional football club, currently sitting, in Belgian second division, announced that it had filed a complaint against its rival club *SK Lommel* ("*Lommel*") to the European Commission under the Foreign Subsidies Regulation.

This complaint is particularly relevant since it is the first formal appeal to the European Commission to open an *ex officio* investigation under Article 9(1) of the Foreign Subsidies Regulation.

[160] Blomstein, *The Foreign Subsidies Regulation: A new step towards Financial Fair Play in football?,* Jun. 5, 2024, retrieved at: https://www.blomstein.com/en/news/the-foreign-subsidies-regulation-a-new-step-towards financial-fair-play-in-football#.

[161] Belgium Belgian football club Virton asks Commission to investigate competing club under the EU Foreign Regulation, Global Compliance News (May 9, 2023https://www.globalcompliancenews.com/2023/05/09/belgian-football-club-asks-Commission-to investigate-competitor-under-new-fsr-regulations050523/.

In a statement, the complainant club stated to have filed the mentioned complaint to the European Commission in order to challenge this practice among EU football clubs, which, by benefiting from financial support from countries such as Qatar, Saudi Arabia and the United Arab Emirates, through sponsorship agreements in conjunction with direct capital injections, distort competition and, as a direct consequence, generate a distortion in the football market.

The core of *Virton*'s complaint, therefore, appears to be directed against its competitor *Lommel*, the beneficiary of funding from the Emirate of Abu Dhabi that enabled it to obtain a professional licence from the Belgian football federation for competing in the 2023-2024 season. As a result, the club has filed a complaint with the Commission, urging it to use its new powers under the FSR to correct the distortions caused by these foreign subsidies affecting the professional football market in the EU, particularly in Belgium.

On the Spanish side, however, on 12 August 2023, the national professional football league in Spain (namely *La Liga*)[162] published a press release in which it announced that it had filed a complaint to the European Commission, claiming that the financing mechanisms of *PSG* violated the Foreign Subsidies Regulation.

La Liga alleges that the latter received foreign subsidies from the Qatari government, thereby gaining an unfair competitive advantage. La Liga alleges that these alleged foreign subsidies distorted competition in various domestic and EU markets, enabling *PSG*, specifically, to sign top players and coaches far beyond what would be possible in a normal market scenario[163].

The complaint lodged by *La Liga* represents a significant development in this matter, as it highlights not only the potential influence of foreign subsidies on the competitive balance within European football leagues but also the call for greater transparency and fairness in sport.[164]

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[162] LALIGA files complaint against PSG with European Commission, LALIGA (Aug. 12, 2023), https://www.laliga.com/en-GB/news/laliga-files-complaint-against-psg-with-european-Commission.

[163] For instance, in season 2017-2018, PSG were able to sign two of the best and most expensive football players, at the time, in the same transfer window: (i) Neymar da Silva Santos Júnior (known as Neymar Jr.) (purchased for a world-record transfer fee of EUR 222 million); and (ii) Kylian Mbappé (purchased for a transfer fee of EUR 180 million).

[164] The European Commission to assess complaint against foreign subsidies allegedly granted to French football club Paris Saint-Germain, Delphi (Aug. 16, 2023), https://www.delphi.se/eu-competition

Indeed, European Regulations have long sought to achieve a level playing field and Financial Fair Play in football. The rules on financial fair play, adopted, in 2022, under Articles 7a, 50 and 50a of UEFA's Articles of association[165], however, have as their main aim to ensure financial sustainability in football, focusing on three main piers: (i) solvency, (ii) stability; and (iii) cost control.

More specifically, UEFA's sustainability rules show several key measures, including: (i) the *'no overdue* payment' rule, which requires clubs to settle payments to various stakeholders, such as other football clubs, employees, social/fiscal authorities and UEFA, within set deadlines; and (ii) the *'squad cost'* rule, which limits expenditure on players' and coaches' salaries, transfers and commissions to agents to a percentage of the club's revenue[166]. Violations of these regulations bring various economic sanctions. These rules, therefore, serve a different purpose than the FSR, as they are designed to promote stability and solvency within clubs, emphasising the strengthening of balance sheets and improved cost management, and are not concerned with market compliance or potential distortions of competition. The implementation of the Foreign Subsidies Regulation, therefore, introduces another mechanism to counter alleged unfair financial advantages for football clubs, in particular when investments come from or are linked to governments outside the EU. At the end of Commission's evaluation in the two football cases related to the FSR, on which it has not yet expressed an opinion, it can be said with certainty whether the Foreign Subsidies Regulation can become a viable alternative system to tackle the phenomenon of financial doping in European football, alongside the Financial Fair Play regulation.

An indication of its applicability to the above-mentioned cases, however, can be deduced from some of the Commission's decisions on State Aid to Spanish football

blog/the-european-Commission-to-assess-complaint-against-foreign-subsidies-allegedly-granted-to-french-football-club-paris-saint-germain/.

[165] Rules of Procedure of the UEFA Congress and Regulations governing the Implementation of the UEFA Statutes, 2021.

[166] This rule is implemented gradually, with thresholds set at 90% for 2023/2024, 80% for 2024/2025 and 70% for 2025/2026.

clubs[167] and Dutch football clubs[168] and some subsequent judicial rulings of the Court of Justice where it was stated that football clubs cannot rely on special rules since they must be treated like any other economic operator[169]. From this it follows that in their activities they must comply European competition law, of which, today, unequivocally, the FSR is a central pivot[170].

3. Remedies enshrined in the framework of the FSR

A distinctive feature of the FSR is its departure from traditional remedies centred primarily on recovery. Instead, it integrates a wide array of measures, reflecting the EU's commitment to balancing market fairness with economic growth[171]. The new Regulation enables the Commission to impose a range of remedies[172], such as

[167] Commission Decision (EU) 2016/2391 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs OJ L 357; Commission Decision (EU) 2016/2393 of 4 July 2016 on the State aid SA.33754 (2013/C) (ex 2013/NN) implemented by Spain for Real Madrid CF OJ L 358; Commission Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva OJ L.

[168] Commission Decision (EU) 2016/1991 of 4 July 2016 on the measures SA.41614 - 2015/C (ex SA.33584 - 2013/C (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club FC Den Bosch in 's-Hertogenbosch OJ L 306; Commission Decision (EU) 2016/1847 of 4 July 2016 on the State aid SA.41612 - 2015/C (SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club MVV in Maastricht OJ L 282; Commission Decision (EU) 2016/2078 of 4 July 2016 on the State aid SA.41617 - 2015/C (SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club NEC in Nijmegen OJ L 320; Commission Decision (EU) 2017/97 of 4 July 2016 on the State aid SA.40168 - 2015/C (SA.33584 - 2013/C (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club Willem II in Tilburg OJ L 16.

[169] This was further emphasised by the CJEU, also about associations, in its recent ruling on the European Super League, Case C-333/21, European Super League [2023] ECLI:EU:C:2023:1011.

[170] In the instances of the Spanish football clubs before-mentioned, the Commission mandated the recovery of the aid provided. In contrast, regarding restructuring aid for several Dutch football clubs, the Commission opted to accept conditions or remedial measures. Both approaches serve as models for commitments and corrective actions under Article 7 of the FSR. This prompts the substantive question of which remedies from the (non-exhaustive) list in Article 7 FSR could effectively address a (hypothetically presumed) potential distortion of competition identified by the Commission. According to the White Paper that preceded the adoption of the Regulation, alternative remedies—other than the repayment of the subsidy—should be applied where repayment is impractical or unfeasible (due to challenges in monitoring). Consequently, alongside obligations such as refraining from certain investments (e.g., a transfer ban), the disposal of assets could also be considered. As previously noted, the Commission has not hesitated to indirectly regulate measures in the past, particularly in the realm of State aid law.

[171] For the sake of completeness, it must be said that this set of rules has to be interpreted and enforced in light of the relevant EU legislation, as stated in Recital 9 of the FSR, especially that relating to State aid, mergers and public procurement.

[172] As enshrined in the non-exhaustive list in Article 7 (4) of the FSR.

divestitures, or require businesses to alter their commercial agreements to mitigate the impact of foreign subsidies on competition. This power provides the Commission with a potent tool to ensure that foreign financial interventions do not disrupt the integrity of the EU's competitive environment[173]. This innovative approach acknowledges the complex interplay between the harmful effects of foreign subsidies and their potential contributions to EU policy objectives[174]. By prioritising tailored interventions over rigid enforcement, the FSR offers a fresh perspective on regulatory practices.

The following sections provide a detailed examination of the FSR's remedial framework. This analysis will explore the Regulation's core principles, its application across different procedures, the specific types of remedies it envisions, and its potential implications for broader EU regulatory practices.

A defining characteristic of the Foreign Subsidies Regulation is its consistent and uniform application of remedies across all procedural contexts, whether in pre-notified cases or *ex officio* investigations[175].

This uniformity represents a significant innovation in EU competition law, setting the FSR apart from fragmented approaches in other regulatory domains. Indeed, traditional EU State Aid mechanisms have often defaulted to recovery as the primary response to distortive subsidies[176]. However, the FSR adopts a more dynamic and progressive model[177]. Undertakings under investigation are encouraged to propose voluntary commitments that adequately address identified distortions. If these commitments are insufficient, the European Commission retains the authority to impose binding and targeted remedies. This dual mechanism of voluntary

[173] D'Andria, D., and Kleinhans, M., *Economic Implications of the EU Foreign Subsidies Regulation: A Quantitative Assessment* in European Economic Review, 142, 103–119, 2023.
[174] At the same time, businesses are concerned that the broad scope of the FSR could lead to overregulation, particularly in cases where the Commission deems foreign subsidies to have a minimal or indirect impact on competition.
[175] Pursuant to Article 9 of the FSR.
[176] This approach is fostered in Article 108 of TFEU.
[177] As previously seen in Chapter I of this dissertation, the FSR prioritises dialogue and collaboration rather than rigid enforcement.

collaboration supplemented by regulatory enforcement represents a strategic evolution in managing complex economic dynamics[178].

By encouraging active engagement from companies in shaping remedial measures, the FSR fosters a regulatory environment that is both inclusive and responsive[179].

By creating a predictable environment, companies are better equipped to anticipate potential outcomes, aligning their strategies accordingly and reducing uncertainty and compliance costs.

The FSR's approach to remedies places a sophisticated and forward-looking emphasis on assessing economic impact. At the heart of this remedial system lies a balancing test[180], enshrined in Article 6, a tool designed to weigh the adverse effects of a subsidy on competition against its potential benefits to EU policy objectives, such as fostering innovation, promoting regional development, and advancing environmental sustainability. This nuanced methodology marks a departure from traditional frameworks, like State Aid Law[181] and WTO's rules[182], which often focus narrowly on the formal legality of subsidies without accounting for their broader economic implications. Indeed, the "Balancing Test"[183] reflects EU's evolving perspective on competition law. By acknowledging that subsidies are not inherently detrimental, the FSR paves the way for more comprehensive evaluations[184].

The test also incorporates positive externalities that a subsidy may generate, for instance, enabling advancements in research and development or supporting objectives aligned with the EU *Green Deal*. Such nuanced analysis allows the

[178] The emphasis on collaborative solutions closely aligns with the FSR's overarching adaptability. Given the diversity of foreign subsidies and their varied impacts on the internal market, rigid regulatory frameworks risk inefficiency and misalignment with market realities.

[179] This approach is particularly pertinent when addressing subsidies with nuanced or multifaceted consequences, where pre-defined remedies might fail to fully resolve distortions.

[180] Nicolaides, P., *The Balancing Test in the Foreign Subsidies Regulation: A New Paradigm for State Aid Analysis?* in European State Aid Law Quarterly, 21(2), 143–160, 2022.

[181] Article 107 (3) of the TFEU, and its related General Block Exemption Regulation ("GBER").

[182] For instance, Article 11 of the SCM Agreement.

[183] For a more in-depth analysis, see: European Commission, Clarifications on the Application of the Foreign Subsidies Regulation [SWD (2024) XXX final]. This document offers comprehensive guidance on the Commission's approach to the Balancing Test under Article 6 of the FSR, highlighting the evaluation of distortions in the internal market caused by foreign subsidies and the consideration of positive effects, such as environmental protection and the promotion of research and development.

[184] This approach includes assessing both the costs and benefits of foreign financial contributions.

Commission to make decisions that balance market fairness with economic progress[185].

Furthermore, the FSR's focus on economic impact aligns with its broader objective of fostering a competitive yet open internal market. By carefully weighing a subsidy's distortive effects against its potential contributions, the regulation ensures that remedial actions are proportionate and contextually relevant. This balanced approach mitigates the risk of overcorrection, where punitive measures could stifle beneficial activities or deter foreign investment.

Instead, the FSR aims to restore competitive equilibrium without undermining the positive contributions of subsidised entities to the EU's economy. The Balancing Test also signals a broader trend in global competition policy, where economic analysis has taken centre stage. By adopting this advanced evaluative framework, the FSR positions the EU at the forefront of regulatory innovation. The regulation sets a benchmark for other jurisdictions grappling with the complex interplay of subsidies, competition, and market stability. This focus on economic precision not only enhances the FSR's credibility but also strengthens its capacity to achieve its dual objectives of market fairness and economic growth.

Transparency and proportionality, as enshrined in Article 7 (3) and (5) of the FSR, are foundational principles within the FSR's system of remedies[186]. These principles guide the European Commission's decisions, ensuring that every measure is effective, equitable, and carefully calibrated to address distortions caused by foreign subsidies.

The FSR mandates that the rationale for every imposed remedial measure be clearly articulated and accessible to all stakeholders. This requirement not only enhances regulatory predictability but also empowers companies to align their operations with EU expectations. Transparent decision-making reduces the risk of arbitrary enforcement, thereby safeguarding the integrity of the regulatory process.

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[185] White & Case, *The EC Sheds Light on the Key Concept of Distortion under the EU Foreign Subsidies Regulation*, 2024.

[186] Kovács, A., *Proportionality and Transparency in EU Competition Law: A New Dawn under the Foreign Subsidies Regulation*, in Journal of European Competition Law & Practice, 13(6), 298-310.

Additionally, the transparency principle fosters an open dialogue between the Commission and stakeholders, creating a more collaborative regulatory environment. Proportionality complements transparency by ensuring that remedies are specifically tailored to the nature and scale of a subsidy's distortive effects. Overreach can be as damaging as underenforcement; therefore, proportionality is critical in achieving effective interventions without imposing undue burdens. For instance, the severity of a remedy might vary significantly depending on whether a subsidy impacts a single market segment or distorts competition across multiple sectors. By calibrating measures to the precise circumstances, the FSR maximises its impact while maintaining fairness. This interplay between transparency and proportionality also underscores the FSR's commitment to fostering a favourable investment climate within the EU[187].

Indeed, this balance is crucial for positioning the EU as a competitive and attractive destination for global business while safeguarding the internal market from distortive practices[188]. Moreover, these principles highlight the FSR's alignment with broader shifts in EU competition law toward evidence-based and context-sensitive enforcement. By embedding flexibility within a principled framework, the regulation achieves a rare equilibrium between rigorous enforcement and adaptability. This approach positions the FSR as a model for future policy innovation, demonstrating how regulatory systems can evolve to address the complexities of modern markets.

3.1. The range of remedies available under the FSR

Recognising the multifaceted impacts of subsidies, the Regulation's remedies can be categorised into behavioural and structural, each tailored to specific types of distortions.

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[187] Cernat, L., and Georgieva, A., *Foreign Subsidies and Global Trade: The EU's New Regulation in Perspective*, Cambridge University Press, 2023.

[188] It cannot be denied that, by avoiding overly punitive measures, the Regulation maintains the internal market's openness to foreign participation.

Behavioural remedies under the FSR are aimed at altering the conduct of subsidised entities to mitigate or eliminate competitive distortions. Such remedies are particularly useful when the subsidy's effects are limited to specific activities or markets. By influencing behaviour without requiring fundamental changes to the entity's structure, these measures offer a less invasive yet effective solution[189]. This approach ensures that the benefits of critical infrastructure, such as research facilities or production capabilities, are not confined to the subsidised entity alone. By facilitating broader access, the FSR promotes competitive parity within the affected market.

Another significant behavioural measure involves the publication of research and development ("R&D") results[190]. When foreign subsidies fund innovative projects, the dissemination of these results can counteract any unfair advantage gained by the subsidised entity[191]. Additional behavioural remedies include restrictions on market activities. For instance, a company might be required to limit promotional campaigns or adhere to specific growth targets within affected markets. Such measures are carefully calibrated to prevent excessive market dominance while preserving the subsidised entity's ability to operate profitably[192].

Structural remedies represent a more transformative approach to addressing distortions caused by foreign subsidies[193]. Indeed, they are particularly effective in situations where the subsidy has led to significant market concentration or where behavioural measures are insufficient to restore competitive equilibrium. One of the most common structural remedies is the divestment of assets or business units, as enshrined in Article 7 (4) (f). Divestments are carefully monitored to ensure that the

[189] One prominent example of a behavioural remedy is the requirement for companies to provide third parties with fair, reasonable, and non-discriminatory ("FRAND") access to infrastructure developed using subsidised resources.

[190] As enshrined in Article 7 (4) (e) of the FSR, in conjunction with Recital 21 of the FSR.

[191] This measure not only fosters transparency but also enables other market participants to benefit from technological advancements, thereby reducing competitive imbalances.

[192] By imposing these conditions, the FSR ensures that competition remains vibrant and fair. Indeed, the flexibility of behavioural remedies is one of their greatest strengths. Unlike more drastic structural measures, behavioural interventions can be tailored to address specific distortions without fundamentally altering the entity's operations. This adaptability makes them particularly well-suited to cases where the subsidy's impact is nuanced or where structural remedies would impose disproportionate burdens.

[193] These kinds of measures typically involve changes to the subsidised entity's market presence or organisational structure.

assets are transferred to buyers capable of maintaining their competitiveness, thereby preventing further distortions.

Furthermore, unless the undertaking under investigation offers commitments that would fully and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a contract before it takes place. Where the concentration has already been implemented, in particular in cases where no prior notification was required because the notification thresholds were not reached, the distortion can nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission should be able to decide to remedy the distortion by ordering the undertakings to dissolve the concentration[194].

Another innovative structural remedy is the adaptation of governance structures. This measure allows for changes in the organisation's decision-making framework to reduce the influence of subsidy providers. Although less commonly employed, governance adaptations demonstrate the FSR's forward-thinking approach to managing complex market dynamics. By addressing the root causes of distortions, these measures enhance the internal market's integrity.

Structural remedies, while impactful, require careful implementation. The FSR mandates that these measures be proportionate to the identified distortion and minimally disruptive to the entity's legitimate business activities. This balance ensures that the remedies are both effective and equitable, preserving the integrity of the internal market without discouraging foreign investment.

Repayment of the subsidy is another remedy available under the FSR, although it is treated differently from traditional State Aid recovery mechanisms. For repayment to be considered an effective remedy, it must meet strict criteria: it must be transparent, verifiable, and capable of fully addressing the market distortion caused by the subsidy[195]. These conditions ensure that repayment serves as a substantive corrective measure rather than a mere procedural formality[196].

[194] This remedy is foreseen in Article 7 (4) (g), Article 25 (6) (a-b), and Recital 25 of the FSR.

[195] As enshrined in Article 7 (6) of the FSR.

[196] Unlike State aid rules, where recovery is often automatic, the FSR places repayment on equal footing with other remedies. This approach reflects the regulation's focus on tailoring interventions to

The FSR's nuanced approach to repayment underscores its commitment to achieving substantive outcomes. By treating repayment as one of several potential remedies, the regulation ensures that interventions are proportionate and contextually appropriate. This flexibility enhances the FSR's ability to address diverse market distortions effectively. In summary, the range of remedies available under the FSR reflects the regulation's adaptability and sophistication. By combining behavioural, structural, and repayment measures, the FSR provides a robust framework for addressing the complex challenges posed by foreign subsidies. This flexibility not only strengthens the internal market but also positions the EU as a global leader in competition law innovation.

The remedies outlined under the FSR must operate cohesively alongside existing EU competition law frameworks, particularly merger control and Foreign Direct Investment screening[197]. These regulatory frameworks, while distinct in their mechanisms and goals, share the common objective of safeguarding the EU's Internal Market from distortive practices. Effective coordination between these regimes is not just desirable but essential for ensuring consistency, avoiding redundancies, and enhancing the overall effectiveness of EU regulatory interventions.

Merger control under the EUMR is primarily concerned, as enshrined in its Article 2, with assessing the competitive impact of corporate concentrations, ensuring that mergers or acquisitions do not result in a significant impediment to effective competition. In cases where foreign subsidies have facilitated such concentrations, the FSR introduces an additional layer of scrutiny, recognising that subsidised deals may distort the market in ways not captured by conventional merger assessments. For example, while merger control might focus on market share and consumer welfare, the FSR's Balancing Test considers the broader economic and policy implications of subsidies, such as their alignment with EU objectives. Instead, the

the specific circumstances of each case. For instance, repayment might be appropriate when the subsidy's effects are straightforward and easily quantifiable.

[197] See recital 9 of the FSR.

remedies are designed to complement one another, addressing distortions comprehensively while respecting the proportionality principle[198].

The FDI screening mechanism adds another layer of complexity to this coordination[199]. Unlike merger control, which focuses on competition, FDI screening is primarily concerned with safeguarding security and public order[200]. However, the economic distortions caused by foreign subsidies could, of course, intersect with these concerns, particularly when subsidised acquisitions involve critical sectors such as energy, technology, or defence. The FSR acknowledges this overlap and incorporates FDI-related considerations into its remedial framework[201]. Nonetheless, challenges remain in ensuring seamless integration between these regimes. Differences in their foundational principles and objectives can create tension, particularly in cases where the remedies under one framework might undermine the goals of another. For instance, a structural remedy under the FSR, such as divestment, might conflict with national security considerations under FDI screening. Addressing such conflicts requires careful calibration of remedies and robust communication between regulatory bodies.

While the FSR draws inspiration from State Aid principles, it introduces several significant innovations. The regulation's emphasis on flexibility and economic analysis represents a departure from the recovery-centric model traditionally associated with State Aid Law. This shift underscores the FSR's adaptability to the complexities of global markets and its approach to remedies also highlights potential avenues for reform in State Aid procedures[202].

[198] For instance, if a merger involving a subsidised entity has been cleared under the EUMR with specific conditions, the FSR's balancing test would incorporate these conditions into its analysis to avoid duplicative or conflicting measures.

[199] To harmonise these approaches, the FSR mandates that its remedies account for any commitments or conditions already imposed under Foreign Direct Investment procedures. This ensures that the two frameworks do not operate in isolation or impose contradictory requirements. This approach is foreseen in Article 10 and recital 3 of the FSR.

[200] This approach is instantly confirmed in Articles 1, 3, 4, 6 and 8 of the Regulation 2019/452.

[201] For instance, if an FDI screening process imposes conditions on a subsidised investment to address security concerns, the FSR's remedies would take these conditions into account when designing measures to address market distortions.

[202] By prioritising proportional and outcome-oriented interventions, the regulation sets a precedent for modernising EU competition law. This evolution could enhance the EU's ability to address diverse market challenges while maintaining its commitment to fairness and transparency.

The enforcement mechanisms embedded within the Regulation are critical to its ability to safeguard the EU's internal market.[203] Recognising that effective implementation of remedies requires rigorous oversight and accountability, the FSR incorporates robust provisions to monitor compliance, impose penalties for violations, and dynamically adapt decisions to changing circumstances. These mechanisms ensure that the regulation's goals are met while fostering a culture of transparency and fairness among affected entities.

The European Commission employs a multifaceted approach to monitor adherence to imposed remedies. This includes mandatory reporting obligations for companies, supplemented by audits and on-site inspections when necessary[204].

The reporting requirements are also comprehensive and precise. Companies must submit detailed accounts of their actions to meet remedial conditions[205]. The Commission examines these reports for veracity, ensuring transparency in the compliance process. Such mechanisms ensure that remedial measures are not merely procedural but substantively effective.

Beyond regular reporting, the Commission has the authority to undertake unannounced investigations. These inspections, conducted with legal authorisation, allow the Commission to verify compliance directly. By maintaining this oversight, the FSR ensures that companies cannot circumvent their obligations through oversight or misinformation. To enhance compliance, the Commission provides clear guidelines and engages in dialogue with affected entities. This collaborative approach seeks to pre-empt misunderstandings and foster goodwill among businesses while ensuring adherence to the regulation.

The FSR includes a comprehensive framework for penalising non-compliance, mainly seen in its Article 16, reflecting the EU's determination to uphold the

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[203] In this regard, see recitals 28, 29, 32, 58, 60, and 62; Articles 12, 16, 17, 26, and 33 of the FSR concerning: (i) remedies and redressive measures; (ii) interim measures; (iii) enforcement decisions; (iv) fines and penalties; and (v) cooperation.

[204] As enshrined in Articles 13 and 14 of the FSR.

[205] These reports may include financial documentation, operational adjustments, and independent audits where applicable.

regulation's authority. Entities that fail to implement remedies or violate other obligations under the FSR face significant financial penalties[206].

Beyond financial penalties, the Commission may also impose operational restrictions on non-compliant entities[207]. To be fair a unique feature of the FSR is its dynamic approach to enforcement, allowing the Commission to adapt decisions as circumstances evolve If a remedy proves ineffective or if new information emerges, the Commission is authorised to revoke, as enshrined in Article 18, its original decision and impose alternative measures.[208]

The ability to revise decisions is particularly important in complex cases involving multiple layers of market distortion. For instance, a remedy that initially appeared sufficient might fail to address unforeseen competitive impacts. In such cases, the Commission's authority to reassess and recalibrate its approach is essential for maintaining the FSR's effectiveness. Entities subject to revised decisions are given the opportunity to provide input and address the Commission's concerns[209]. By combining rigorous compliance monitoring, meaningful penalties, and dynamic decision-making, the FSR sets a new standard for enforcement practices. These mechanisms not only enhance the regulation's effectiveness but also serve as a model for other areas of EU law.

To conclude, the FSR's emphasis on enforcement underscores the EU's commitment in preserving the integrity of its internal market. By holding subsidised entities accountable and ensuring that remedies are fully implemented, the regulation reinforces the principles of fair competition and market openness. This proactive approach positions the EU as a global leader in addressing the challenges posed by

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[206] These penalties are calibrated to deter misconduct while ensuring proportionality. Fines for non-compliance can reach up to 10% of an entity's total annual turnover, underscoring the seriousness of adhering to the regulation's requirements. In addition to one-time fines, the FSR authorises the Commission to impose daily penalty payments of up to 5% of the average daily turnover for ongoing violations. These incremental penalties incentivise swift compliance and discourage prolonged breaches.

[207] For instance, an entity might be barred from participating in public procurement processes or merger activities within the EU until it resolves its non-compliance. These measures reinforce the FSR's role as both a deterrent and a corrective tool.

[208] This flexibility ensures that the regulation remains responsive and relevant in a rapidly changing market environment.

[209] This collaborative approach enhances the legitimacy of the enforcement process and fosters trust among stakeholders.

foreign subsidies. By adopting a more flexible and outcome-driven framework, the regulation sets a precedent for addressing complex market dynamics effectively.
The FSR's emphasis on balancing economic benefits with market fairness reflects a broader trend in competition law. This approach positions the EU as a leader in addressing the challenges posed by global economic integration. By setting high standards for regulatory practices, the FSR enhances the EU's reputation as a guardian of fair and open markets.

4. Aligning the FSR with other regulatory tools

The introduction of the FSR immediately raised a question of extreme relevance, namely that of the differentiation of its scope of intervention from the measures already in place and aimed at regulating the complex landscape of financial aid within the perimeter of the European Union.
Indeed, this regulation was enacted when several tools were already in place to address the complex dynamics of financial aid within the European Union. Consequently, the implementation of the FSR required a thorough assessment of its compatibility with existing regulatory frameworks. One of the first problems was to define a dividing line between the new rules on foreign subsidies and those on State aid[210], given that these provisions are also aimed at achieving a system of undistorted competition, insofar as they are designed to prevent public financial support from distorting competition on an equal footing between companies within the common market.
Another issue regards the interplay between the FSR and the Foreign Direct Investment system, which established, for the first time, a common EU regulatory framework for the control of foreign direct investment for Member States as well as a cooperation mechanism between Member States and the European Commission in order to assess and potentially restrict FDI that may pose a threat to security or public order in the EU or its Member States. The adoption of the regulation became necessary in view of the significant increase in cases in which foreign investors, in

[210] Rules enshrined in Articles 107 to 109 TFEU.

particular so-called sovereign wealth funds (which are differentiated from other investors by the fact that they can be traced back to a State, although they do not identify themselves), acquire control of European companies with advanced technologies. Furthermore, this paragraph will delve into the intricacies of the interplay between the Foreign Subsidies Regulation and the Italian Golden Power legislation since both are distinct yet interconnected regulatory instruments, aiming to protect national and European economies from interferences that could harm security and competition within the Single Market. The intersection of these two instruments becomes clear when foreign economic entities are involved in acquisition, merger, or public procurement operations.

Very thorny, finally, are the points of contact between the new Regulation and international trade agreements and, in particular, with the agreement on Subsidies and Countervailing Measures Agreement and the General Agreement on Trade in Services ("GATS"), which are part of the agreement establishing the World Trade Organisation.

4.1. Foreign Direct Investment

Regulation 2019/452, of 19 March 2019[211], establishes a framework for the control of Foreign Direct Investment in the EU market. The purpose of the regulation is to establish, for the first time, a common EU regulatory framework for the control of FDI by Member States as well as a cooperation mechanism between Member States and the European Commission in order to assess and potentially restrict investments that may pose a threat to security or public order in the EU or its Member States.

The FDI certainly marks a change in the EU's approach, as for many years the control of FDI had been left to individual national governments. However, in response to protectionist actions by third countries such as the U.S.A. and China, the EU introduced this regulation to address the risks posed by foreign investment, particularly in strategic sectors such as infrastructure, critical technologies and the

[211] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

health sector. In short, the regulation aims to protect Europe's strategic assets and prevent hostile takeovers, especially during periods of economic instability[212].

The first difference relates to the purposes they pursue which, although they have common roots, are different. In the FSR, there is the protection of competition and, therefore, the operational scope relates to the detection of "*distortions in the internal market*", with clear reference to economic aspects; in the FDI, on the other hand, the focus is mainly on public policy and security issues and, therefore, leaving out any economic considerations.

Another difference[213] relates to the different role of the Commission. For Foreign Direct Investment, the competence of adopting or not adopting restrictive measures lies with the individual Member States, with a merely coordinating and advisory role of the Commission through the offices of Dg-Trade; the control on subsidies, on the other hand, as seen, is carried out *ab initio* by the Commission, even with an *ex officio* power (Art. 9), through the offices of Dg-Competition.

Nevertheless, there are points of contact between the two disciplines and this connection is not unknown to the EU legislator and, in fact, there are references in the FSR to the FDI regulation stating that the two regimes are intended to coexist[214]. Similarly, Article 44 of the FSR, in regulating the relationship with the other instruments states, *inter alia*, that the FDI mechanism and the FSR procedures are intended to coexist, indicating that different institutions at different levels are

[212] The FDI Regulation defines a foreign direct investment in Article 1(1) n.1 as an investment of any kind by a foreign investor which is intended to establish or maintain lasting and direct links between that investor and the entrepreneur or enterprise to which capital is made available for the purpose of pursuing an economic activity in a Member State, including investments which allow effective participation in the management or control of a company pursuing an economic activity. Therefore, as both the FSR and FDI apply to financial contributions from third countries, coordination issues between the two instruments need to be investigated.

[213] The Commission actively encourages Member States to adopt FDI screening mechanisms, with 23 Member States having already implemented them. Several are in the course of updating them or adopting new ones. This number has grown from 11 to 23 since the EU's FDI screening regulation came into force. See: European Commission - Press release, *Updated data on EU FDI screening and export controls, EU foreign investment screening and export controls help underpin European security*, Brussels, 19 October 2023.

[214] More precisely, Recital 3 of the FSR states that: *"This Regulation covers all economic sectors, including those of strategic interest to the Union and critical infrastructure, such as those mentioned in Article 4(1)(a) of Regulation (EU) 2019/452 of the European Parliament and of the Council".*

authorised to assess subsidies granted in different procedures with different objectives[215].

However, the FSR offers some informal remedies to mitigate such procedural conflicts and prevent contradictory outcomes. For instance, Article 10(2) places an obligation on the Commission to notify the competent authorities of the Member States of the opening of a preliminary investigation, in particular in cases where Member States have informed the Commission of a relevant national FDI screening procedure. This seems insufficient, as the outcome of the foreign subsidy procedure is like that of the FDI review: an authorisation, a conditional authorisation or a prohibition. This could lead, in the worst possible scenario, to a review of the same transaction under both regimes, with different and possibly contradictory outcomes[216].

Finally, the ambiguity surrounding the concepts of foreign subsidy and distortion, coupled with the absence of clear guidelines and the wide discretion granted to the Commission, particularly with respect to the instrument *ex officio* foreign subsidy review, could potentially lead to the indirect use of the FSR for FDI control at the EU level, with obvious label cheating.

Nevertheless, it is important to note that, beyond the potential disadvantages mentioned above, the FSR fills the regulatory gap left open by the former FDI framework, as the use of foreign investment rarely triggers the more permissive warning system in the FDI review in which, as seen, the Commission plays a mere coordinating role.

[215] By way of example, it can be imagined the case where the acquirer of the enterprise of strategic interest is a company controlled by or subsidised by a third country.

[216] Moreover, from a general point of view, cooperation between the two instruments could be perceived as excessively protectionist by non-EU states, discouraging them from investing in or making financial contributions to EU companies.

4.2. Italian Golden Power legislation

The Italian Golden Power legislation[217] ("Golden Power") is a set of rules that empowers the Italian government to intervene in economic transactions involving strategic assets to safeguard[218], national security, public order, and economic interests[219]. However, the path that led to the current provisions on these "special powers" was particularly long and tortuous.[220]

Indeed, the original set of rules provided for "Golden Shares"[221], enshrined in the Law-Decree no. 332 of 1994, converted into Law no. 474 of 1994, which was first declared by the European Commission[222] and then by the European Court of Justice[223] to be infringing the provisions of the Treaty of the European Community, concerning the principle of free movement of capital[224] and freedom of establishment[225].

To adapt to the findings of the European Commission and the Court of Justice, the Italian legislature intervened several times on the discipline, first with the Prime Ministerial Decree of 11 February 2000, which introduced limitations to specific sectors and pre-established situations for the use of special powers and, subsequently, with the reform contained in Article 4, paragraphs 227-231 of Law no.

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[217] *Decreto-Legge, 15 marzo 2012, n. 21. Norme in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni.*

[218] As stated in Article 1 and 2 of its text.

[219] While, almost creating a contradiction, the Golden Power legislation is an exception to the normal competition rules, yet at the same time, it promotes a specific model of competition, one that is fair and genuine, not distorted by foreign state capital. In this sense see: Vellucci S., *The new regulation on the screening of FDI: the quest for a balance to protect EU's essential interest.*

[220] Scarchillo G., *L'evoluzione del ruolo dello Stato nell'economia in Dalla Golden Share al Golden Power: la storia infinita di uno strumento societario. Profili di diritto europeo e comparato*, in Contratto/Impresa Europa, 2015, p. 619 ss.

[221] The definition provided for "Golden Share" was meant to refer to that specific framework of rules set out in Article 2 of the Law-Decree 332/1994. Pursuant to its provisions, before any act that would have entailed the Ministry of Economy and Finance losing control of companies directly or indirectly controlled - and operating in the sectors of defence, telecommunications, transport, energy sources and other public services - it was possible, by a decree of the Prime Minister, to identify those companies in whose Articles of Association a clause could be introduced to confer one or more of the enlisted special powers, to be exercised in conjunction with the Ministry of Economic Development.

[222] Communication from the European Commission, Official Journal, 19/07/1997.

[223] Judgment of the European Court of Justice, 23 May 2000, Case C-58/99.

[224] Article 63 of the TFEU, ex Article 56 of the TEC.

[225] Article 49 of the TFEU, ex Article 49 of the TEC.

350 of 2003 ("2004 Finance Act") which, however, did not bring any substantial changes[226].

Notwithstanding these reforming interventions by the Italian legislature, the European Court of Justice[227] continued to hold that the Italian Golden Share legislation conflicted with European Union law and in particular with the freedom of movement of capital and the freedom of establishment.

Hence, the need for a comprehensive reform implemented through the Golden Power framework, which should no longer be considered solely in relation to the case law on Golden Shares but also, and above all, in connection with state practices concerning foreign direct investments[228].

To accomplish such goal, it provides a mechanism for controlling foreign direct investments and other corporate operations that might threaten economic sovereignty or the State's ability to ensure essential services and defence[229] operating through a system of formal notification[230] and pre-notification[231], requiring any acquisition, merger, or governance change in strategic companies to be reported to the competent authorities[232]. The government can then block, impose conditions, or oppose transactions deemed harmful to national interests[233]. Over time, the range of sectors considered strategic has broadened, initially focusing on defence and national security and later extending[234] to telecommunications, energy, transport, and more recently, advanced technologies, semiconductors, artificial intelligence, and cloud computing.

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226 The main change brought about by the new legislation was the attribution to the Minister of Economy and Finance of the power to oppose the acquisition of significant shareholdings, i.e. shareholdings amounting to at least 5% of the share capital represented by shares with voting rights, which replaced the power to express approval of the acquisition under the previous legislation.

227 Judgment of the Court of 26 March 2009, Case C-326/07, paragraphs 8 and 9.

228 Bassan F., *Dalla Golden Share al Golden Power: il cambio di paradigma europeo nell'intervento dello Stato sull'Economia*, Studi sull'Integrazione Europea, IX, 2014.

229 The concept of special State powers was introduced to prevent foreign entities from taking control of critical companies or infrastructures that could compromise national interests.

230 Article 1, 1-bis and, 2 of Law-Decree 21/2012.

231 *Ibid.* Article 2-quarter.

232 Both the notification and the pre-notification must be issued to the Italian Presidency of the Councils of Ministers.

233 This framework has been used multiple times to block acquisitions or impose restrictions, such as preventing foreign control in telecommunications and defence sectors.

234 This expansion has been driven partly by the European Union's efforts to ensure greater coordination among Member States in monitoring foreign investments, particularly in the digital economy and critical infrastructure.

In recent years, the significance of Golden Power has grown due to global events like the Covid-19 pandemic and the Russia-Ukraine conflict since concerns about vulnerable European companies being targeted by foreign investors with geopolitical motives prompted several EU Member States, such as Italy, to strengthen foreign investment controls, expanding Golden Power's scope and introducing special measures to counteract opportunistic acquisitions[235].

The national Golden Power mechanism would assess risks to security and strategic autonomy, while the European Commission could review the transaction under the FSR to determine if the financial support distorts competition. However, if a company receiving third-party subsidies seeks to acquire a strategic enterprise in the EU, the transaction may undergo dual scrutiny, and this regulatory overlap could present challenges both procedurally and substantively.

From a procedural standpoint, businesses must notify both national authorities and the European Commission, potentially increasing administrative burdens. Additionally, the timelines of the two procedures are not aligned: indeed, Golden Power has strict evaluation deadlines[236], whereas the FSR process, as seen in Chapter I of this dissertation, involves more complex and time-stretched investigations, including preliminary phases and in-depth reviews. This mismatch may lead to inconsistent decisions, where a transaction could be approved under one framework but blocked under another, creating uncertainty for economic operators[237].

Substantively, there are overlaps in how both instruments assess transactions. The Golden Power focuses on factors like the investor's origin, financing structure, and

[235] For a more thorough analysis see: Pittelli D., *Il Golden Power tra divieto di aiuti di Stato e controllo sulle sovvenzioni estere*, in *Il diritto dell'economia*, no. 114 (2 2024), pp. 369-397.

[236] Regarding the formal notification process, within 45 days, the Government may decide to adopt the measures provided, unless further information is requested from the notifying party. The procedures for activating the process are contained in: (i) for the defence and national security sectors in the D.P.R., No. 35 of 19 February 2014; (ii) for the energy, transport, and telecommunications sectors: in the D.P.R., No. 86 of 25 March 2014. Regarding the pre-notification process, within 30 days, the Government may inform the company whether the transaction falls within the scope of the Golden Power legislation. If no response is received within this period, the company is required to make a formal notification. Therefore, in the event of no reply from the Government within the specified time, the pre-notification has the effect of obliging the company to submit a formal notification.

[237] To avoid this a regulatory intervention is therefore highly desirable, as it would allow a single assessment to serve multiple purposes, avoiding contradictions and conflicts.

the potential impact on strategic sectors, while the Foreign Subsidies Regulation assesses the potential market-distorting effects of third-country financial aid[238].

Another key distinction is the focus of each instrument. State Aid and FSR aim to maintain a level playing field by preventing market distortions caused by public subsidies, while the Golden Power is designed to protect national strategic interests rather than competition. However, the two can converge: an acquisition may be blocked not only for security reasons but also if the acquiring company benefits from third-country subsidies that grant an unfair advantage in the market. In this sense, Golden Power could complement competition law, serving as a barrier to market-distorting transactions.

Looking ahead, it is crucial to enhance coordination between the Golden Power and the FSR to avoid duplication and inconsistencies. One potential solution could be represented by the establishment of a cooperation mechanism between national authorities and the European Commission, facilitating information sharing and joint assessments of significant transactions. To this extent common guidelines could also be extremely helpful to harmonize evaluation criteria and procedural timelines, reducing uncertainty for businesses since improved procedural dialogue would further allow for the early identification of problematic transactions, enabling the implementation of targeted corrective measures.

In conclusion, the Golden Power and the Foreign Subsidies Regulation represent two complementary efforts: one to safeguard national security and strategic interests, and the other to ensure fair competition within the European single market. Although they, *prima facie*, operate under different principles, their overlapping areas require a coordinated approach to prevent inefficiencies and contradictions.

4.3. State Aid

Article 107 TFEU, paragraph 1, states that: *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form*

[238] The Golden Power can be seen as extending the logic of the prohibition of abusive State aid, applicable to EU Member States only, whereas the FSR broadens this scope to include aid from third countries. However, unlike state aid prohibition, which is based on a general principle of incompatibility, the Golden Power is selectively applied to specific sectors and transactions.

whatsoever which distorts or threatens to distort competition by favouring 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." Article 107 TFEU, therefore, contains a principle of incompatibility of aid, which results in a prohibition on granting economic advantages that are not declared compatible with the common market beforehand. Paragraphs 2 and 3, on the other hand, provide for exceptions to the principle of incompatibility, some with a legal presumption[239], others by virtue of a discretionary assessment by the Commission[240] , because there are circumstances in which government intervention is considered essential for a fair and well-functioning economy.

From the wording of Article 107, it must be apparent that the concept of aid encompasses any appreciable economic advantage conferred to an undertaking by means of a public measure that would not otherwise have been granted. In this context, therefore, it must be emphasised that an initial difference lies in the very concept of aid, which is broader than that of subsidy in the FSR, since it designates not only positive benefits of the same kind as subsidies themselves, but also interventions which, in various forms, relieve the burdens normally borne by the budget of an undertaking and which, therefore, without being subsidies, have the same nature and identical effects[241].

It follows that a wide range of measures fall under the prohibition of State Aid and, therefore, not only cash grants, but also tax breaks or relief from social security

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[239] The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

[240] The following may be considered compatible with the internal market (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 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.

[241] Case C-387/1992, *Banco Exterior de Espana*, 15 March 1994.

contributions. That being said, in order for a measure to be deemed as State Aid, it must have following characteristics: state origin, advantage, selectivity, effect on trade between Member States and on competition.

Concerning the first profile, *i.e.* that of the origin of the aid, it is considered that aid must be granted through state resources and, at the same time, that the measures taken for this purpose are imputable to the Member State[242]. These requirements are present in the FSR, since it recognises in Article 3 that the contribution must be made by public entities of third countries (or even by private entities whose actions are attributable to a third state) and that it is attributable to the states themselves. Nonetheless, some differences with the State Aid Guidelines can be inferred since the first condition, i.e. that of the origin of the aid, differs somewhat from it in subjective terms[243].

As it has been pointed out[244], in fact, through the FSR an extraterritorial and thus potentially global reach of EU law is fostered[245] . This, however, is nothing new for competition law. For some time, in fact, the Court of Justice has come to recognise that, although one of the undertakings participating in an anticompetitive cartel may be located in a third State, this does not preclude the application of EU law in the event that the agreement produces its effects within the territory of the internal market, *i.e.* where it affects trade between Member States and competition[246]. There is, therefore, an important difference in the rationale behind the FSR which, as we have seen, was adopted primarily with the aim of addressing the distortions generated in the European market by subsidies granted by governments of countries that had not joined the European Union and which, before that time, were not subject

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[242] In this regard, Szyszczak E., *Criterion of State Origin,* in Hoffman H.C.H. and Micheau C., (eds), State Aid Law of the European Union, Oxford University Press, Oxford, 2016, p. 70 ff. and Wesseling R. and Bredendoord-Spoek M., *Chapter 3: State Measure*, in Werner P. and Verouden P., (eds), EU State Aid Control: Law and Economics, Wolters Kluwer, Alphen aan den Rijn, 2016, p. 89 ff.

[243] The FSR, indeed, in the aforementioned Article 3, establishes that there is a foreign subsidy when a third country directly or indirectly provides a financial contribution that confers an advantage on an undertaking exercising an economic activity in the EU market. In the State aid discipline, on the other hand, the contribution to the undertaking must come from a Member State.

[244] Rosanò A., *Beyond the Boundaries of State Aid Law: Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market*, in *Journal of Market Regulation,* 1/2023, p. 122 ff.

[245] *Ex multis* see, Bradford A., *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, New York, 2020.

[246] Court of Justice, 25 November 1971, Case C-22/71, *Béguelin Import v G.L. Import-Export.*

to controls, since State Aid Law concerns subsidies granted by EU Member States. By advantage[247] is meant an economic benefit that an undertaking could not receive under normal market conditions, *i.e.* in the absence of State intervention.

An assessment of the effects of the measure for the recipient undertaking is therefore required: if the financial situation of the recipient undertaking improves because of the State intervention under other than normal market conditions, there is an advantage. Since it follows from the definition of a foreign subsidy that it *"confers an advantage on an undertaking"*, it must be inferred that the approach that has emerged with regard to State Aid has been taken in the FSR. Selectivity refers to the fact that the measure does not have a general scope, but rather determines an advantage for individual undertakings, categories of undertakings, economic sectors or specific parts of the territory of the Member State concerned.

Since the Foreign Subsidies Regulation refers to a benefit that is limited, in law and in fact, to one or more enterprises or to one or more sectors, the concepts now referred to can also be applied for the purposes of the foreign subsidy concept. The impact on trade between Member States and on competition must also be considered. As to the first, EU law does not require that an actual effect of the measure on trade be demonstrated, it being sufficient that the aid is capable of affecting trade[248]. Finally, with regard to the impact on competition, there are no differences, since both disciplines aim to contribute to the proper functioning of the internal market by preventing the use of instruments capable of distorting its nature[249].

A further difference between the two matters relates to the pre-emptory guidance on State Aid where the CJEU has stated that the granting authority must also bear a financial burden for the aid to take effect; the FSR, on the other hand, does not seem to require the granting authority to bear any financial costs or burdens.

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[247] For a deeper analysis on the issue of advantage, see: Caoiminh A. Ó. and Sauter W., *Criterion of Advantage*, in. Hoffmann H.C.H and Micheau C., (eds), op. cit., p. 84 ff.

[248] It is generally considered that when aid enhances a company's position relative to its competitors in the marketplace, the latter should be seen as being influenced by the aid. However, this perspective does not appear to be applicable to foreign subsidies, as the Regulation makes no reference to the requirement of affecting trade between Member States.

[249] Indeed, Article 4(1) of the FSR prohibits foreign subsidies that are capable of distorting the internal market, *i.e.* that are likely to improve the competitive position of an undertaking and adversely affect competition.

A significant example is the *Stardust Marine* case[250], in which the CJEU ruled that the mere control of a public company by the state is not sufficient to classify financial assistance as state aid; the state must actively participate in the decision-making process. Had this approach been adopted by the Foreign Subsidies Regulation, a significant portion of financial assistance provided by state-owned financial institutions would have been excluded from its scope, as these institutions typically operate autonomously in granting commercial loans.

As clearly emerges from the analysis of the State Aid rules, the two instruments, although having points of contact, do not overlap with each other by intervening in scenarios that are very different: one concerns only the Member States and the other the relationship between the latter and non-EU countries.

4.4. Agreement on Subsidies and Countervailing Measures

The Punta del Este declaration of 20 September 1986, which established the start of a new round of negotiations[251], manifested the need to find new solutions for the functioning of the GATT regulatory system. The purpose of the Uruguay Round negotiations, in fact, was the need to resolve the shortcomings rooted in the previous system, which was the GATT system. The numerous problems concerning this system were addressed and resolved during the laborious Uruguay Round negotiations, which lasted nine years and concluded in Marrakech in April 1994 with the signing of the Final Act of the Ministerial Conference.

In this context, with the main aim of bringing about a concrete change of perspective in the international context, strengthening the prevalence of the multilateralist conception over the unilateral choices of individual states, the WTO was also established. With regard to the compatibility of the Foreign Subsidies Regulation with existing legal instruments, a long-standing issue is the alleged conflict with

[250] Judgment of the Court of 16 May 2002. - French Republic v Commission of the European Communities. - State aid - Article 87(1) EC - Aid granted to the French Republic to Stardust Marine - Decision 2000/513/EC, Case C-482/99.

[251] Also known as the Uruguay Round.

Article 32.1 of the on SCM Agreement, which is an annex to the Agreement establishing the WTO.[252]

As was the case with the FDI discipline, the point of contact between the disciplines is considered by the EU legislator. Article 44(9) of the FSR addresses the relationship with international trade law by stating that no action shall be taken under this Regulation that constitutes a specific action against a subsidy within the meaning of Article 32.1 of the SCM Agreement granted by a third country that is a member of the World Trade Organisation.

At this point, a clarification is needed. At first glance, this provision seems to exclude *tout court* the application of the FSR with regard to WTO member countries, which include states that are particularly active in the area of subsidies (*e.g.,* China), with an obvious reduction in the scope of the new Regulation. However, the WTO framework only covers subsidies that affect the export of goods and that are granted by a Member State to companies located in its territory. Therefore, the EU's WTO constraints do not seem to be a sufficient obstacle to the application of the FSR to subsidies granted by WTO countries to EU companies, outside of the above-mentioned circumstance.

Regardless of this clarification, there is no doubt that specific acts of EU law could in practice conflict with the provisions of the SCM. Consequently, an increase in litigation in the WTO context cannot be ruled out, with no possibility of a final settlement of any disputes that may arise, in light of the serious crisis that is affecting the WTO dispute settlement mechanism, given that, as of December 2019, the Appellate Body is no longer able to operate, due to the blocking of appointments to that body brought about by the United States since 2017[253].

[252] The Subsidies and Countervailing Measures agreement comprises two distinct but interconnected areas: (a) multilateral disciplines governing the granting of subsidies, which include rules determining whether a member is authorised to grant it; (b) the application of countervailing measures to counter the damage caused by subsidised imports, which, on the other hand, is a unilateral instrument that allows a Member State to apply them after conducting an investigation and ascertaining that the criteria outlined in the SCM Agreement have been met.

[253] On the topic see, Lester S., *Ending the WTO Dispute Settlement Crisis: Where to from here?*, in https://www.iisd.org/Articles/united-states-must-propose-solutions-end-wto-dispute-settlement crisis and Van Den Bossche P.L.H., *Is there a Future for the WTO Appellate Body and WTO Dispute Settlement?,* in WTI Working Paper No. 01/2022.

Ultimately, the applicability of the regulation to subsidies falling within the scope of the SCM Agreement remains a complex issue. For this reason, the Commission should aim to apply the regulation to cases that are indisputably outside the scope of the SCM Agreement.

4.5. General Agreement on Trade in Services

The General Agreement on Trade in Services ("GATS") was conceived with similar objectives to its trade agreement counterpart, the General Agreement on Tariffs and Trade ("GATT"). The objectives that led to its introduction were to create a reliable and predictable system of international rules for trade in services and to facilitate the progressive liberalisation of services markets.

The fundamental principles of GATS apply, in principle, to all service sectors.[254] The point of friction between the FSR and GATS concerns Article 17 of the latter, which provides, inter alia, that each Member shall accord service providers of any other Member treatment no less favourable than that accorded to domestic companies. Therefore, measures taken under the FSR could violate the obligation of equal treatment between foreign and domestic companies. This incompatibility, however, exists only in the abstract. In fact, the FSR prohibits those subsidies from foreign countries that could contribute to a distortion of the European market; similarly, within Member States, there is a ban on State aid. *A fortiori*, even if such an infringement were to be established under the FSR regulation, it could be lawful under Article 14, paragraph 1, letter c of the GATS, which justifies different treatment if necessary to ensure compliance with laws or regulations, and the European measure on foreign subsidies could be assimilated to the latter.

[254] Though, two exceptions are foreseen: (i) services provided in the exercise of public authority on a commercial basis, such as social security schemes, public health, education; and (ii) services related to air transport.

5. Conclusive remarks

As seen in this Chapter, the FSR represents an ambitious and necessary intervention in the European Union's efforts to address the distortive effects of foreign subsidies on its internal market. However, its introduction raises significant unresolved issues that extend from conceptual ambiguities to practical and political challenges, all of which have implications for its effectiveness and acceptance.

A core issue remains the absence of case law, which leaves many foundational elements of the regulation untested and unclear. Terms such as "*foreign subsidy*" and "*distortion*" are defined broadly, granting the European Commission substantial interpretative discretion. Without judicial scrutiny, there is a heightened risk of inconsistent application and legal uncertainty for businesses. This lack of precedents also means that critical tools like the balancing test, designed to weigh the adverse effects of a subsidy against its potential benefits, are yet to be operationalised in a way that offers predictability or guidance to stakeholders. Until Courts review and refine these provisions, the FSR will remain vulnerable to criticism of arbitrariness and unpredictability.

The FSR's remedial framework is another area deserving closer scrutiny. By shifting away from a rigid, recovery-centric model, the regulation embraces flexibility and adaptability. This is a commendable departure from the "one-size-fits-all" approach of traditional EU State Aid Law. Yet, the effectiveness of this system hinges on the European Commission's ability to navigate a fine line: imposing measures that are sufficiently robust to address distortions, while ensuring they do not discourage foreign investment or penalise legitimate state support that aligns with EU values, such as sustainability or innovation.

The application of the FSR in sectors, such as football, provides a fascinating lens through which to evaluate its impact. The cases involving *Lommel SK* and *PSG* reveal how the regulation extends into cultural and social domains traditionally seen as peripheral to competition law.

Furthermore, the interplay between the FSR and existing frameworks, such as State Aid rules and FDI screening, also warrants reflection. While the regulation complements these instruments, it introduces an additional layer of complexity that could hinder its effectiveness. The potential for overlapping jurisdictions and conflicting decisions, particularly in cases where national security or strategic autonomy intersects with market fairness, highlights the need for coherent and coordinated governance. A critical question remains: can the EU ensure that the FSR operates as a seamless addition to its regulatory arsenal, or will it become a source of fragmentation and administrative inefficiency?

Another pressing concern is the FSR's interaction with international trade law. The regulation's unilateral nature, especially its expansive approach to identifying and addressing foreign subsidies, has raised questions about its compatibility with the WTO's on SCM Agreement and the GATS. While the FSR explicitly aims to avoid direct conflict with these frameworks, its broader definitions and enforcement mechanisms could provoke disputes, particularly given the WTO's narrower scope of actionable subsidies and its emphasis on harm to competition as a precondition for intervention. These tensions are further complicated by the current dysfunction of the WTO's dispute resolution mechanism, leaving little room for constructive resolution in the event of conflict[255].

In conclusion, the FSR represents a bold and innovative attempt to address the challenges posed by foreign subsidies in an increasingly globalised economy. However, its long-term success hinges on resolving several critical issues. The absence of case law, potential conflicts with international trade law, and overlaps with existing EU regulatory tools highlight the need for greater clarity and coherence in its implementation. The regulation must also strike a delicate balance between protecting the EU's internal market and maintaining its attractiveness to foreign investment. Achieving this balance will require ongoing dialogue with stakeholders, transparent enforcement practices, and judicial oversight to refine its scope and application. The FSR's potential to reshape competition law and safeguard the EU's economic interests is undeniable, but its ability to deliver on these promises will depend on addressing these open challenges with precision and foresight.

[255] The potential for such disputes is particularly pronounced in dealings with major trading partners like China or the United States, whose state-driven economic models may clash with the FSR's regulatory ethos.

Chapter III: Assessing the impact: a true revolution?

1. Preliminary remarks

In an era of increasing global economic integration, foreign subsidies have become a crucial factor shaping competition within the European internal market. While State aid granted by EU Member States is subject to strict regulatory oversight under European competition law, financial contributions from non-EU governments have long operated outside these constraints, raising concerns about their potentially distortive effects[256]. The FSR seeks to address this regulatory gap, equipping the European Commission with new tools to investigate and mitigate the impact of foreign subsidies[257]. However, the question remains: does the FSR mark a true revolution in EU competition policy, or is it simply an incremental step towards levelling the playing field?

A key concern is the way in which foreign subsidies distort market access, artificially reducing costs for subsidised firms and creating an uneven playing field that disadvantages European competitors. Such distortions can have far-reaching effects, from price undercutting and reduced profitability for EU firms to long-term declines in investment, innovation, and industrial competitiveness. By evaluating different theories of harm - including market access distortions, cost distortions, and preferential treatment - this Chapter explores the ways in which foreign subsidies impact competition dynamics and threaten the cohesion of the internal market. It will also examine how these economic analyses have influenced regulatory choices and whether they impose constraints on stakeholders and the European Commission's enforcement actions.

Beyond the theoretical underpinnings of the FSR, this Chapter also examines the regulatory burdens and administrative complexities it introduces. While the Regulation aims to enhance transparency and ensure fair competition, it also imposes

[256] As mentioned in Chapter I of this Dissertation and will be better analysed in paragraph 4 of this Chapter, the awareness for a much-needed change started raising after some European Commission investigations under the Merger Regulation and other competition law tools.
[257] As outlined in Chapter 1, paragraph 2, and Chapter II, paragraph 3 of this Dissertation, in which the European Commission's regulatory powers were analysed in greater detail.

significant compliance costs on businesses. The requirement to disclose financial contributions from foreign states can be especially challenging, given the opaque nature of many subsidy schemes and the difficulties in distinguishing between private and state-backed financial flows. The European Commission itself faces substantial enforcement challenges, as it must assess large volumes of notifications, conduct complex investigations, and develop legal precedents in an area of competition law that remains largely untested. The practical implications of the FSR are further explored through a series of case studies, shedding light on how the regulation is applied in real-world scenarios. The Chapter analyses past mergers, acquisitions, and foreign investment cases - such as the *Siemens/Alstom* merger - to illustrate the complexities involved in regulating foreign subsidies. More recent cases, including the European Commission's first-ever Phase II clearance concerning M&A involving *e&* and *PPF Telecom Group*, as well as the first unexpected dawn-raid case involving the Chinese state-backed *Nuctech Company Limited*, highlight the evolving approach to enforcement under the FSR.

Finally, the Chapter considers the broader economic, geopolitical, and policy implications of the FSR. As global competition intensifies and state-backed enterprises from countries like China, the United States of America, and the United Arab Emirates ("U.A.E.") expand their presence in the European market, the EU must navigate a delicate balance between regulatory intervention and maintaining its attractiveness as an investment destination. The Regulation's potential impact on FDI flows, trade relations, and international competition law is examined, along with the possibility of future reforms to strengthen the effectiveness of the FSR while minimising unintended consequences.

2. Analysis of the theories of harm

Whilst the FSR sets out an extensive, though non-exhaustive, list of indicators[258] to assist the European Commission in assessing the distortive nature of a subsidy, these

[258] As mentioned in its Recital 18 and Article 4 the FSR outlines a range of indicators that will be taken into account, including: *(i) the amount and nature of the foreign subsidy; (ii) the size of the enterprise; (iii) the markets in which the enterprise operates; (iv) the scale and development of the enterprise's*

indicators may nonetheless lead to false positive decisions owing to their overly broad scope. Consequently, this paragraph presents several potential theories of harm for detecting distortive foreign subsidies in the internal market, namely: (i) market access distortions; (ii) cost distortions; and (iii) preferential treatment and the fragmentation of the Internal Market. These theories of harm provide an analysis of the competitive behaviours that subsidised firms might adopt to outlast their non-subsidised EU competitors[259].

2.1. Market access distortion and the competitive landscape

Market access distortion is one of the most significant concerns that the European Commission seeks to address under the Foreign Subsidies Regulation[260]. At its core, this form of distortion occurs when foreign-subsidised undertakings gain entry to the EU market under conditions that artificially enhance their competitive position. Unlike firms that must rely on organic growth, efficiency, or innovation to compete, subsidised entities benefit from financial support that alters the natural competitive balance. This type of distortion is particularly concerning in industries where price sensitivity plays a crucial role, as foreign subsidies allow recipient firms to offer lower prices than their competitors, not because of superior efficiency or better products, but because their cost structures have been artificially deflated by external financial backing[261].

The implications of market access distortion extend far beyond initial price competition and, indeed, while it may appear that lower prices benefit consumers in the short term, the long-term consequences can be detrimental to overall market

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economic activity within the internal market; and (v) the purpose of the foreign subsidies and any associated conditions. This may suggest that a broader assessment of the distortions to competition caused by the foreign subsidies could be conducted. However, the indicators appear to be too general to facilitate a thorough evaluation of the distortive effects of the foreign subsidies, which would be necessary to determine and tailor appropriate remedies.

[259] These approaches could result useful to the Commission in determining that the financial contributions provided through foreign State resources are anticompetitive and detrimental to EU market operators.

[260] European Commission, Foreign Subsidies Regulation, retrieved at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy/foreign-subsidies-regulation_en.

[261] This creates an uneven playing field where companies that do not receive such benefits must either cut costs in unsustainable ways or risk being forced out of the market altogether.

health and economic resilience. European undertakings that are unable to compete on these artificially distorted terms may experience extremely declining revenues, lower profitability, and reduced capacity for investment. This, in turn, affects their ability to fund research and development, innovate, or expand their operations, ultimately leading to stagnation in key industries. As investment in innovation declines, the broader economy suffers, as technological progress slows and industries that would otherwise be at the forefront of global competitiveness find themselves lagging behind[262].

Additionally, the presence of subsidised firms in the market can create a ripple effect across the supply chain, impacting not only direct competitors but also smaller suppliers, service providers, and adjacent industries. When domestic firms struggle to compete, their reduced revenues often lead to lower demand for local suppliers and subcontractors, creating a "*knock-on effect*"[263] that weakens entire industrial ecosystems. In contrast, foreign-subsidised firms may rely on supply chains that are less integrated within the EU, meaning that the economic benefits of their operations do not necessarily circulate back into the European economy[264].

Another major concern associated with market access distortion is the risk of "*crowding out*[265]" domestic competitors in both public and private procurement. Many subsidised firms use their artificially lowered cost structures to submit significantly lower bids for government contracts, infrastructure projects, or large-scale business-to-business agreements. In these cases, public authorities and private enterprises may be incentivised to choose the cheapest available option, often without fully considering the broader economic impact of supporting a firm that benefits from non-market financial advantages. As a result, European firms that comply with standard market conditions and fair competition rules may struggle to

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[262] This is particularly concerning in strategic sectors such as green energy, digital infrastructure, and advanced manufacturing, where maintaining technological leadership is critical for economic sovereignty and long-term prosperity.

[263] *"Further knock-on effects on aggregate consumer demand as result of job losses or decline in real wages may also be considered".* See European Commission, FSR Impact Assessment, 10.

[264] It could happen that instead of reinvesting profits locally, these firms may prioritise repatriating earnings or funnelling resources back to their home countries, exacerbating economic imbalances within the EU market.

[265] Claici, Davis, and Dijkstra, *Theories of Harm in the Implementation of the Foreign Subsidies Regulation*, in 8 (1) European Competition and Regulatory Law Review, 4-16, 7 (2024).

secure contracts, leading to a progressive decline in their market presence and financial viability.

Over time, the cumulative effects of market access distortion can lead to an increase in market concentration, where only a handful of subsidised undertakings could be dominating key industries. Once European competitors are sufficiently weakened or forced out of the market, foreign-subsidised firms may take advantage of reduced competition to increase their prices, having established a dominant position with limited resistance. This process, often compared to predatory pricing strategies, highlights the long-term risks associated with allowing foreign subsidised entities to distort market dynamics unchecked[266].

Furthermore, market access distortion also carries significant geopolitical and strategic risks. The EU has identified certain industries as critical for its long-term economic security, including semiconductors, pharmaceuticals, and renewable energy. If foreign-subsidised firms are allowed to outcompete European companies in these strategic sectors, the EU risks becoming increasingly dependent on external actors for essential goods and services.

Such dependencies can leave the EU vulnerable to supply chain disruptions, geopolitical leverage from foreign governments, and reduced economic sovereignty. Given the increasing global competition over technological leadership, market access distortion in these industries does not just represent an economic challenge but also a broader policy issue that intersects with trade, security, and industrial strategy.

To address these concerns, the European Commission’s enforcement of the Foreign Subsidies Regulation must adopt a nuanced approach that balances short-term economic gains with the long-term sustainability of the EU’s competitive landscape. While the Regulation is not designed to eliminate all forms of foreign investment[267],

[266] While initial price reductions may seem beneficial to consumers and businesses, the longer-term consequences include reduced choice, higher prices, and a loss of industrial autonomy for the EU.

[267] Indeed, the FSR Staff Working Document of 26 July 2024, precursor to the European Commission’s Guidelines on distortion and the balancing test due in mid-January 2026, further underscored that there is no presumption that a non-EU subsidy will distort the EU market, except for the “*likely distortive*” subsidies under Article 5 of the FSR.

it serves as a crucial safeguard against distortions that could erode the foundations of fair competition.

2.2. Cost distortion and its broader implications

Cost distortion is also fundamental concern in the European Commission's assessment of foreign subsidies, as it directly impacts the competitive balance within the internal market. When firms receive financial support from non-EU governments, their operational cost structures are artificially reduced, granting them a significant advantage over competitors who must operate under normal market conditions[268]. In essence, such subsidies create an uneven playing field where competition is no longer based on merit but is instead "*skewed*" in favour of those receiving financial assistance from foreign entities.

One of the most immediate and observable effects of cost distortion is the ability of subsidised firms to undercut competitors on pricing[269]. European firms, which must cover the full cost of production, including raw materials, labour, regulatory compliance, and capital investment, may find themselves unable to match the artificially low prices set by subsidised rivals. As a result, these firms either struggle to maintain profitability or are forced to exit the market altogether.

A major concern arising from cost distortion is its impact on investment decisions within the European Union. Firms that perceive the competitive landscape as unfair or heavily tilted in favour of subsidised rivals may become hesitant to invest in expansion, technological development, or workforce training[270].

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[268] This artificial lowering of costs can take various forms, including direct grants, subsidised loans, tax exemptions, preferential access to resources, or government-backed guarantees, all of which allow subsidised firms to reduce their expenses and increase profitability without having to improve efficiency, productivity, or innovation.

[269] In industries where price competition is a decisive factor, such as manufacturing, transportation, infrastructure, and renewable energy, even a small reduction in production costs can translate into significant pricing advantages.

[270] An analysis based on conventional economic principles suggests that subsidies that lower variable costs are more likely to lead to price reductions, whereas lump-sum subsidies may have a more limited effect. See European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paras. 63–67 and footnotes 65, 66; para. 80 and footnote 107.

If companies believe that no matter how much they improve efficiency or innovate, they will still be unable to compete with subsidised firms that can sustain artificially low costs, the incentive to make long-term investments diminishes. This reluctance to invest weakens the overall competitiveness of European industries, slows technological progress, and reduces job creation[271].

The consequences of cost distortion are particularly pronounced in public procurement[272], where governments and public institutions award contracts for infrastructure projects, defence, healthcare, and transport. Foreign-subsidised firms, benefiting from their lower cost structures, may submit bids that are significantly lower than those of European competitors, making it difficult for domestic firms to secure these contracts. While public authorities may be tempted to award contracts to the lowest bidder, they may not always fully account for the broader economic implications, such as reduced domestic industrial capabilities, long-term supply chain dependencies, and the weakening of European strategic sectors[273].

Another significant concern linked to cost distortion is its impact on market consolidation and the potential for monopolistic behaviour. When subsidised firms push European competitors out of the market through artificially low prices, they gradually gain market share and, in some cases, establish dominant positions in key sectors. Once domestic competition is sufficiently weakened or eliminated, these firms may begin raising prices, effectively reversing the initial cost benefits that consumers and businesses enjoyed. This form of market manipulation, often compared to predatory pricing strategies, highlights the risks of allowing cost distortion to go unchecked[274].

Beyond its impact on pricing and competition, cost distortion also affects employment, wages, and labour conditions within the European Union.

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[271] The long-term result is a decline in industrial capacity and economic dynamism within the EU, as firms choose to redirect resources elsewhere or exit affected markets entirely.

[272] Ysewyn, J., and Kahmann, S., *Implications for Public Procurement and Some Collateral Damage*, retrieved at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403363.

[273] Over time, if European firms continue to lose out in public procurement due to cost distortion, critical industries may become overly reliant on non-EU suppliers, leading to vulnerabilities in supply chain resilience and economic sovereignty.

[274] The ultimate effect is not only a loss of competition but also a reduction in consumer choice, higher prices, and diminished innovation, as fewer firms remain in the market to drive technological advancements and service improvements.

As European firms struggle to compete with subsidised rivals, they may be forced to reduce costs in ways that directly impact their workforce. This could include wage reductions, job cuts, or shifts in employment to lower-cost regions outside the EU. Additionally, as foreign-subsidised firms increase their market share, the types of jobs available within the European economy may shift towards lower-value, less stable employment, particularly if these firms prioritise outsourcing or automation to maintain cost advantages. In the long run, this could contribute to a decline in high-quality jobs within key sectors, weakening economic stability and reducing opportunities for skilled workers.

Moreover, cost distortion undermines fair competition in innovation-driven industries, where companies typically rely on sustained investment in research and development to maintain a competitive edge. In sectors such as pharmaceuticals, semiconductors, clean energy, and artificial intelligence, innovation is not only a means of achieving market success but also a critical factor in long-term economic growth and technological leadership.

However, when foreign-subsidised firms enter these markets with cost advantages that are not based on superior innovation but on artificial financial support, they can divert market share away from companies that have made substantial investments in R&D[275]. This discourages further innovation by reducing the returns on investment for European firms, ultimately leading to a slowdown in technological advancement and a weakening of Europe's position in high-tech industries.

The broader economic implications of cost distortion also extend to financial markets and investment flows. When European companies face persistent disadvantages due to subsidised competition[276], their financial performance may suffer, leading to lower stock valuations, reduced investor confidence, and decreased

[275] Recitals 2 and 3 of FSR put particular emphasis on *"acquisition of undertakings, including those (engaged) with strategic assets such as critical infrastructure and innovative technologies"* and those included in Art. 4 of Regulation (EU) 2019/452, such as *"critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure"*.

[276] On the other hand, for the sake of completeness, such subsidised transfer could also have potential positive effects, such as enhancing incentives for innovation, as a foreign subsidy might lead to higher returns for investors in the acquired innovative undertaking and have certain pro-competitive effects if it boosts technology diffusion.

access to capital. Investors, recognising the risks posed by unfair competition, may choose to allocate capital to markets that are perceived as more stable or where competition is based on fair and transparent market principles. This capital flight can have long-term consequences for the EU's ability to finance industrial growth, technological development, and infrastructure projects, ultimately affecting overall economic resilience.

Taken together, these factors demonstrate why cost distortion represents a significant threat to the European internal market and why the European Commission has placed a strong emphasis on addressing it through the Foreign Subsidies Regulation.

2.3. Preferential treatment and the fragmentation of the Internal Market

Preferential treatment arising from foreign subsidies further poses a significant risk to the integrity of the European Union's internal market[277]. Indeed, when firms, benefiting from foreign subsidies, receive preferential treatment in commercial dealings, public procurement, or investment opportunities, this balance is disrupted. The effects of such distortions are not limited to individual transactions but can ripple across entire sectors, creating long-term imbalances that erode market cohesion and weaken European businesses. One of the most concerning aspects of preferential treatment is its impact on public procurement[278].

These contracts represent a substantial portion of economic activity, providing businesses with opportunities to secure long-term projects that drive growth and job creation. However, when foreign-subsidised firms participate in these bidding processes, they often have a distinct advantage over European competitors due to their artificially reduced cost structures[279]. This enables them to submit lower bids

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[277] European Commission, *Foreign Subsidies Regulation, Competition Policy - European Union*, retrieved at: https://competition-policy.ec.europa.eu/foreign-subsidies-regulation_en.

[278] Council of the European Union, *Foreign Subsidies Distorting the Internal Market: Provisional Political Agreement*, Press Release, 30 June 2022, retrieved at: https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/.

[279] Financial Times, *Brussels pushes "Buy European" procurement plan*, 24 January 2025, retrieved at: https://www.ft.com/content/68070835-6519-4040-a48e-e320b53cdffe. This Article reports on the European Commission's proposal to allow governments to favour European bidders in public procurement processes to protect critical EU sectors from cheaper foreign competitors.

that may be financially unsustainable under normal market conditions but are viable due to external financial support. As a result, European firms that operate without such subsidies may be systematically undercut, losing opportunities to secure contracts that would otherwise contribute to their expansion and innovation.

Over time, if subsidised firms become the preferred choice for public contracts, the domestic industrial base in key sectors may weaken, leading to a gradual decline in local expertise, technological development, and production capacity. This is particularly problematic in strategic industries such as defence, telecommunications, and renewable energy, where long-term reliance on foreign-subsidised firms could create vulnerabilities in supply chains and diminish the EU's economic and geopolitical[280] autonomy[281].

Beyond public procurement, preferential treatment can also manifest in private-sector commercial agreements, where large corporations or multinational enterprises select suppliers, contractors, or service providers based on artificially competitive pricing rather than market-driven efficiency. Foreign subsidised firms, leveraging their financial advantages, may offer more attractive terms, allowing them to establish dominant positions in key supply chains[282]. As a result, European suppliers may struggle to maintain their market positions, as businesses seeking cost reductions may prioritise contracts with subsidised firms over domestic alternatives. This shift can lead to long-term dependencies on non-EU suppliers, weakening the resilience of European supply chains and limiting the ability of European firms to compete globally.

Another key issue arising from preferential treatment is the potential for regulatory arbitrage, whereby foreign-subsidised firms exploit variations in national regulatory

[280] Financial Times, *Does Europe need Chinese wind technology to meet climate goals?*, 1 September 2024, retrieved at: https://www.ft.com/content/9481ba40-de24-4fa6-af3e-a0b5959cc725.

[281] Additionally, the increasing presence of subsidised firms in public procurement can lead to fragmented market conditions, where certain regions or industries become more dependent on non-EU players, reducing the overall cohesion of the European economy.

[282] Norton Rose Fulbright, *The EU Foreign Subsidies Regulation: what business needs to know*, 2023, retrieved at: https://www.nortonrosefulbright.com/en/knowledge/publications/bcb8011d/the-eu-foreign-subsidies-regulation-what-business-needs-to-know. This report discusses how subsidised firms gain an unfair advantage in commercial agreements.

frameworks within the EU to gain an unfair advantage[283]. While the EU strives for regulatory harmonisation, differences in enforcement mechanisms, State Aid rules, and industrial policies across Member States can create loopholes that subsidised firms can exploit. For example, a firm benefiting from foreign subsidies may choose to establish its European operations in a jurisdiction where oversight mechanisms are less stringent, allowing it to benefit from both foreign financial support and a relatively lenient regulatory environment. This not only distorts competition at the national level but also exacerbates fragmentation within the internal market, as different Member States experience varying degrees of economic impact from foreign-subsidised competition.

Market fragmentation is further exacerbated when certain regions or industries become disproportionately affected by the presence of subsidised firms, leading to uneven economic development across the EU[284]. This fragmentation weakens the cohesion of the internal market, as economic disparities between Member States grow, and the overall competitiveness of European industries becomes increasingly uneven. In the long run, such disparities can contribute to tensions within the EU, as policymakers and stakeholders struggle to balance the need for open markets with the imperative to protect domestic industries from distortions that threaten their long-term viability.

Another significant concern linked to preferential treatment and market fragmentation is the impact on investment flows within the EU[285]. European and international investors closely monitor market conditions when making decisions about where to allocate capital. If they perceive that certain markets are dominated by foreign subsidised undertakings that benefit from preferential treatment, they may be discouraged from investing in domestic companies that face unfair competition. This can lead to a redirection of capital away from affected sectors, reducing the availability of funding for European businesses and limiting their ability to scale,

[283] Arthur Cox LLP, *An overview of the Foreign Subsidies Regulation*, 12 July 2023, retrieved at: https://www.arthurcox.com/knowledge/an-overview-of-the-foreign-subsidies-regulation/.

[284] For instance, if foreign subsidised firms concentrate their investments in specific countries or sectors, it can create imbalances in industrial activity, with some regions benefiting from increased economic activity while others experience stagnation or decline.

[285] *Ibid*, Financial Times, 2025.

innovate, and expand into new markets. Over time, this lack of investment can hinder the development of high-growth industries, slowing economic progress and reinforcing dependencies on foreign-subsidised players.

In addition to distorting competition, preferential treatment can also have reputational consequences for the EU's regulatory environment. If businesses perceive that foreign-subsidised firms consistently receive advantages that distort market dynamics, confidence in the fairness and integrity of the internal market may erode. This could have wide-ranging effects, from reducing incentives for European firms to invest in long-term projects to increasing political pressure for protectionist measures that would further fragment the market. The challenge for EU policymakers is to strike a balance between maintaining an open and competitive market while ensuring that foreign subsidies do not lead to distortions that undermine the principles of free and fair competition.

Addressing these challenges requires robust enforcement of the Foreign Subsidies Regulation, with a particular focus on identifying and mitigating the effects of preferential treatment[286].

By implementing clear and consistent rules to prevent subsidised firms from gaining an unfair advantage in public procurement, commercial agreements, and investment decisions, the Commission can help safeguard the integrity of the internal market. Moreover, cooperation with Member States is essential to ensure that enforcement mechanisms are uniformly applied across the EU, preventing regulatory fragmentation that could further exacerbate market distortions.

Ultimately, the risks posed by preferential treatment and market fragmentation extend beyond economic concerns and have broader implications for the EU's strategic autonomy, industrial policy, and geopolitical positioning. If left unchecked, these distortions could lead to an erosion of European industrial capabilities, increased reliance on external players, and a weakening of the single market's foundational principles. By taking a proactive approach to addressing the challenges associated with foreign subsidies, the EU can ensure that its Internal Market remains

[286] The European Commission must not only assess the direct impact of foreign subsidies on individual transactions but also consider their cumulative effects on market structure, investment flows, and economic cohesion.

competitive, resilient, and capable of fostering sustainable economic growth in an increasingly complex global landscape.

3. FSR's effects on Internal Market's players: the administrative and compliance cost

While FSR's objectives are commendable, its ambitious framework has introduced substantial administrative burdens for businesses[287] and considerable operational challenges for the European Commission. These challenges stem from the regulation's broad scope, novel methodologies, and the complex balance it seeks to strike between rigorous enforcement and maintaining the EU's attractiveness as a global investment hub.

From a business perspective, the FSR places stringent obligations on companies to meticulously monitor, document, and report foreign financial contributions[288]. Entities involved in mergers, acquisitions, or public procurement must disclose subsidies that exceed the specified thresholds. The sheer breadth of these requirements significantly complicates compliance efforts[289], necessitating substantial investment in both technological infrastructure and human expertise[290]. As a result, compliance obligations can divert critical resources away from core business operations, thereby hindering competitiveness and long-term growth.

An additional complexity arises from the inherent difficulty in defining and tracking financial contributions. Companies must scrutinise payments over a period of three years following a transaction, which can be exceptionally challenging when subsidies originate from private institutions or take the form of tax breaks.

[287] Soltész, *Foreign Subsidies Control*, in 22 (2) European State aid law quarterly, 175-180, 179, 2023

[288] The provisions of the Regulation with the greatest impact on business costs can be found in: (i) Articles 21 to 26 and Sections 1 to 7 of the FS-CO form, concerning mergers; and (ii) Articles 29 to 33 and Sections 1 to 7 of the FS-PP form, relating to public procurement procedures.

[289] This burden is particularly pronounced for SMEs, which often lack the administrative capacity to cope with such extensive regulatory demands.

[290] *The European Commission Publishes Final Implementing Regulation on Proceedings Pursuant to the Foreign Subsidies Regulation*, McDermott Will & Emery, 2023, https://www.mwe.com/insights/the-european-Commission publishes-final-implementing-regulation-on-proceedings-pursuant-to-the-foreign-subsidies-regulation/.

The absence of a clear framework for determining whether private actors are linked to foreign states exacerbates these difficulties[291]. This uncertainty increases the risk of misreporting, as businesses struggle to ascertain their reporting obligations. Over-reporting, driven by a cautious approach aimed at avoiding penalties, results in administrative inefficiencies and inflated compliance costs. Conversely, under-reporting carries the risk of regulatory sanctions, reputational damage, and disruptions to ongoing transactions. Without clearer guidance from regulatory authorities, businesses are left navigating an uncertain and highly complex landscape.

On the other hand, the European Commission, tasked with enforcing the FSR, also faces some significant hurdles. The anticipated volume of notifications[292] under the

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[291] In such scenarios, it must not be forgotten that foreign governments might even attempt to prohibit the notification of relevant subsidies by classifying them as classified materials. This could discourage the companies involved from disclosing these subsidies to the Commission for fear of sanctions in the subsidising state. Though The FSR does not provide for the possibility to consider potential threats to national security. The "negative" effects that the Commission can consider against the "positive effects" of the foreign subsidies in the balancing test under Article 6 relate to effects "*in terms of distortion of the Internal Market*", and parallel investigations of Foreign Direct Investment only occur in the context of FSR investigations of M&A deals. However, we cannot ignore the Commission's ability to be creative and find a way to incorporate national security considerations under the FSR.

[292] The initial months of notifications under the FSR have revealed that more transactions and public procurement procedures than the European Commission had anticipated fall within the regime and therefore must be notified. The Commission has also shown that it is prepared to exercise its new extensive powers under the regime to scrutinise M&A activity and public procurement procedures, having launched its first Phase II investigation just over four months after notifications began. As of December 2024, the number of M&A notifications under the FSR is considerably higher than the Commission's estimated figure of roughly 33 cases per year. At the end of December, just nearly over a year after M&A notifications under the regime became mandatory and suspensory (12 October 2023) and a little over a year and a half since the FSR came into effect (12 July 2023), the DG-COMP (responsible for the enforcement of the FSR in relation to concentrations) announced that it had already received 100 transaction notification with 98 cases closed. Under the public procurement instrument, the DG-GROW (responsible for the public procurement tool) received more than 135 notifications, nearly three times the Commission's estimated 36 cases annually. To manage the unexpected volume of FSR notifications, the Commission is increasing its staffing. Indeed, from 1 March 2024, a new directorate, comprising three teams dedicated to enforcing the FSR, has also been established. These notifications prompted the Commission to launch four in-depth investigations into foreign subsidies suspected of distorting the internal market. Three of these focused on foreign subsidies in public procurement procedures, specifically examining manufacturers of clean technology and rolling stock and all the Commission's scrutiny resulted in Chinese state-owned enterprises withdrawing their bids. The fourth investigation, the only one concerning a merger, involved *e&*, an acquirer owned by an Emirati sovereign wealth fund, which offered commitments that ultimately led to a conditional approval. Meanwhile, the Commission initiated just two *ex officio* investigations - one into Chinese wind turbine manufacturers and another into security equipment producers - falling significantly short of the anticipated 30 to 45 such cases per year. In one of these, the Commission carried out dawn raids on the EU subsidiaries of *Nuctech*, attempting to access employee email correspondence stored on its parent company's servers in China. Both investigations, as well as the related legal proceedings, are ongoing, as it will be seen in paragraph 4 of this Chapter. See: Commission Staff Working Document, Impact Assessment, 5 May 2021, SWD (2021)

regulation is vast, placing extraordinary demands on its resources. Every notification must be rigorously assessed to determine whether a financial contribution qualifies as a subsidy and, if so, whether it distorts competition within the EU's Internal Market. This requires extensive expertise in economic modelling, legal interpretation, and sector-specific analysis[293].

Many subsidies involve intricate financial arrangements that span multiple jurisdictions, requiring the Commission to engage in complex cross-border investigations[294]. This necessitates sophisticated tools for tracking and analysing financial contributions, as well as cooperation with international regulatory bodies. Compounding these challenges is the absence of established legal precedents for assessing and addressing foreign subsidies, which creates additional uncertainty for both businesses and regulators[295].

One of the most pressing concerns for businesses is the potential for delays in processing notifications and completing investigations. For companies involved in time-sensitive transactions, such as mergers or public procurement processes, prolonged regulatory reviews can result in significant operational and strategic disruptions.

Inconsistent application of the Regulation exacerbates these risks, potentially diminishing confidence in the EU's regulatory framework and discouraging both domestic and foreign investment.

As seen in the previous Chapter, stakeholders, including 74 companies and trade associations, have raised concerns regarding the administrative complexity of the FSR. Many have argued that the regulation's broad scope and stringent notification requirements impose unnecessary costs on businesses. For instance, the China Chamber of Commerce for Import and Export of Mechanical and Electronic

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99 final, p. 53 (FSR Impact Assessment); and EC, Moscoso L. and Stoyanova I., Competition FSR brief, *The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations*, Issue 1, February 2024, p.1.; and Cogoni A. and Maczkovics C., *The EU Foreign Subsidies Regulation, Outlook for the European Commission's 2025-2029 Mandate*, in Covington Competition, Covington Burling LLP, 10 December 2024.

[293] To be completely fair, the global nature of foreign subsidies further complicates enforcement efforts.

[294] As seen in Chapter I, of this Dissertation.

[295] Indeed, the risk of inconsistent enforcement is heightened, potentially undermining the credibility and effectiveness of the regulation.

Products ("CCCME")[296] has specifically highlighted the financial burden associated with collecting and organising the requisite information, hiring professionals for compliance support, and implementing internal management systems. The organisation has called on the Commission to reconsider the administrative burden placed on businesses by simplifying notification processes where possible and eliminating unnecessary reporting obligations.

In response to these concerns, the Implementing Regulation has sought to provide greater clarity regarding notification requirements. However, there is ongoing debate as to whether these measures go far enough in alleviating the burden on businesses[297]. As it stands, many companies still find compliance to be an onerous and resource-intensive process[298]. This is particularly true for SMEs, which often lack the legal and financial resources necessary to navigate the complexities of the FSR effectively.

To address these challenges, the European Commission must adopt a multi-faceted approach that prioritises efficiency, transparency, and collaboration. Investing in advanced digital tools, such as artificial intelligence-driven data analytics and automated reporting platforms, could streamline notification and investigation processes, allowing the Commission to manage larger caseloads with greater efficiency. The establishment of a centralised online portal for businesses to submit notifications and receive real-time updates on their status would further enhance transparency and reduce administrative bottlenecks.

Collaboration with Member States and industry stakeholders is equally critical. Member States can provide valuable insights into sector-specific dynamics and assist the Commission in identifying and addressing potentially distortive subsidies. Industry stakeholders, in turn, can contribute by sharing best practices for compliance and helping to refine the implementation of the regulation. Regular dialogue between regulators and businesses will be essential for addressing

[296] China Chamber of Commerce for Import and Export of Machinery and Electronic Products written submission, 2023.

[297] *Ibid*. Soltész.

[298] Frost L., *EU Foreign Subsidies Regulation raises investment concerns*, IFLR, 6 July 2022, retrieved at: https://www.iflr.com/Article/2ablxb1z37z30ih4vy8sg/eu-foreign-subsidies-regulation-raises-investment concerns.

ambiguities, fostering trust, and ensuring that the FSR achieves its intended objectives without imposing disproportionate burdens.

Given the significant challenges faced by SMEs, targeted support mechanisms are particularly important. The introduction of detailed guidance documents, industry-specific training programmes, and dedicated advisory services could help smaller businesses navigate the complexities of the FSR more effectively. Additionally, phased implementation timelines or transitional provisions for SMEs could provide them with the necessary time to adapt to the regulation's requirements without jeopardising their operational viability.

Furthermore, the establishment of clear and consistent benchmarks for assessing subsidies and their potential market distortions is crucial for enhancing regulatory predictability[299]. Providing businesses with well-defined criteria and assessment methodologies could reduce uncertainty and encourage greater compliance. The enforcement mechanism should also incorporate proportionality principles, ensuring that penalties for non-compliance are commensurate with the severity of infractions and do not impose undue hardship on affected businesses[300].

However, despite the considerable concerns surrounding the FSR's implementation, it is important to recognise its potential long-term benefits. By balancing robust enforcement with regulatory clarity, technological innovation, and constructive engagement with stakeholders, the European Commission can mitigate the Regulation's adverse effects while safeguarding the integrity and competitiveness of the EU's internal market. Ensuring a fair and proportionate application of the FSR will be essential in maintaining the EU's reputation as a premier global investment

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[299] Providing businesses with well-defined criteria and assessment methodologies could reduce uncertainty and encourage greater compliance. The enforcement mechanism should also incorporate proportionality principles, ensuring that penalties for non-compliance are commensurate with the severity of infractions and do not impose undue hardship on affected businesses.

[300] For the sake of clarity, up to today, the Commission continues to review and unconditionally approve most notified concentrations, although several transactions have been abandoned at the pre-notification stage. Indeed, from October 2023, when the filing obligation began to apply, until the end of July 2024, the Commission engaged in pre-notification discussions with parties in 106 cases. Seventy-six of these cases proceeded to formal notifications, 63 of which were unconditionally approved following the preliminary review phase. Based on recent experience, the FSR merger review process may take on average between 3.5 and 5.5 months from the initial draft filing to clearance, depending on the sensitivity of the case, the level of preparation by the parties, and the amount of information provided in the initial filing.

destination while upholding the principles of fair competition and market transparency.

4. Analysis of relevant European Commission's investigations: confirming challenges in enforcement and compliance

This section explores four significant investigations carried out by the European Commission, examining their impact on competition in the European market, particularly in the context of foreign subsidies. The cases reviewed include the proposed *Siemens/Alstom* merger, the first application of the FSR's Phase II M&A clearance, in the *e&* and *PPF Telecom Group* case, and the first unannounced, *ex-officio,* dawn-raids into Chinese state-backed *Nuctech Company Limited* European subsidiaries. Each case offers valuable insights into how the Commission navigates the complexities of state-backed enterprises and their influence on market dynamics within the European Union.

These investigations highlight the critical intersection between regulatory compliance and operational challenges, providing a clear example of how the FSR impacts both businesses and regulators. As discussed in the previous paragraphs, businesses face significant burdens in complying with the FSR, which can divert critical resources away from growth-oriented activities. The Commission, in turn, must navigate the complexities of foreign subsidies, relying on its enforcement powers to ensure that competition within the EU is not unduly distorted. The practical experiences in these cases reinforce the need for ongoing dialogue between regulators and businesses to refine the application of the FSR and to ensure that it is both effective in addressing distortions and efficient in its implementation. Indeed, these investigations not only reflect the challenges associated with the Regulation but also underscore the importance of finding a balance between rigorous enforcement and minimising the regulatory burden on businesses.

4.1. *Siemens/Alstom* merger: the genesis

Operating across a range of industrial sectors, *Siemens*[301] is particularly prominent in the field of mobility. The company provides a wide array of solutions, such as rolling stock, rail automation, signalling systems, rail electrification, road traffic technology, IT services, and other transportation-related products for both passenger and freight transport. In contrast, *Alstom SA* ("*Alstom*"), a French multinational, is a key player in the global rail transport industry which offers a broad range of transportation solutions, including high-speed trains, metros, and trams, in addition to providing services such as maintenance and modernisation. The company also focuses on passenger services, infrastructure, digital mobility, and signalling systems. On 8 June 2018, the European Commission was officially notified of a proposed merger under Article 4 of the Merger Regulation, in which *Siemens* planned to gain sole control of *Alstom* by transferring its mobility division to *Alstom* in exchange for newly issued *Alstom* shares[302]. However, the European Commission blocked *Siemens'* proposed acquisition of *Alstom* under the Regulation 139/2004, stating that the merger would harm competition in the railway signalling systems and high-speed train markets. The companies involved failed to offer remedies sufficient to resolve these concerns[303].

This decision followed a comprehensive investigation, during which the Commission determined that the merger would result in an unfair market dominance by combining the two largest suppliers of railway and metro signalling systems. The Commission expressed particular concern over the merger's potential impact on competition in two areas: railway signalling systems and very high-speed trains. In the case of signalling systems, the merger would eliminate a key competitor in both mainline and urban signalling markets. The combined entity would dominate the mainline signalling market, especially in ETCS automatic train protection systems

[301] *Siemens AG* ("*Siemens*") is a renowned German multinational corporation and the parent company of the *Siemens Group*.
[302] Commission Decision of 6 February 2019, Case M.8677, Siemens Alstom, Brussels, 6.2.2019 C(2019) 921 final, OJ C 300, 5.9.2019.
[303] See Commissioner Margrethe Vestager's opinion in: Mergers, *Commission prohibits* Siemens' *proposed acquisition of* Alstom*, in European Commission Competition Policy*, 6 February 2019, retrieved at: https://ec.europa.eu/Commission/presscorner/detail/it/IP_19_881.

and standalone interlocking systems within the EEA. The merged entity would also take a leading position in metro signalling, particularly in Communication-Based Train Control ("CBTC") systems. In the area of very high-speed trains, the merger would reduce the number of suppliers by removing one of the two largest manufacturers of such trains within the EEA. This would result in the new entity holding significant market shares both within the EEA and globally, except for certain non-competitive markets. As a result, competition would be substantially diminished, harming European customers. Furthermore, the companies involved did not provide convincing arguments regarding any merger-specific efficiencies that might mitigate these concerns.

The parties involved did offer commitments aimed at addressing the issues in mainline signalling systems and high-speed rolling stock, but the European Commission reaffirmed its decision, asserting that the proposed remedies were insufficient to resolve the serious competition concerns.

Siemens' CEO, Joe Kaeser, argued that the merger was essential to competing with the *China Railway Construction Corporation* ("*CRCC*"), which emerged from the 2015 merger between the *CNR Group* and *CSR Group*. *CRCC* is now the largest high-speed rail operator globally, with over 180,000 employees and a revenue of $33 billion, accounting for 12% of global demand for high-speed rail[304].

At first glance, the proposed merger between *Siemens* and *Alstom*, designed to counter potential competition from the Chinese state-owned rail industry in the European market, might appear to be in the public interest. The strategy of scaling up to compete with larger rivals seems like a reasonable approach. However, EU Competition Commissioner Margrethe Vestager, in making the difficult decision, demonstrated wisdom by blocking the acquisition[305]. While it is undoubtedly challenging to compete with Chinese firms in various sectors, particularly given the differences in regulatory environments, public policy must prioritise the welfare of

[304] Stradi A., *Il caso Siemens-Alstom e la concorrenza in Europa*, Starting Finance, April 4, 2019, retrieved at: https://startingfinance.com/approfondimenti/caso-siemens-alstom/.

[305] Amory B., De La Barre H., J. Evenett S., and De Navacelle C., *Beyond Alstom- Siemens: Is there a need to revise competition law goals?*, Concurrences, Nov. 2019, retrieved at: https://www.concurrences.com/en/review/issues/no-4-2019/conferences/beyond-alstom-siemens-is-there- a-need-to-revise-competition-law-goals-new.

consumers, workers, and businesses within Europe. Many would argue that, given the current EU competition regulations, Commissioner Vestager and the Directorate-General for Competition ("DG-COMP") made the right decision in blocking the *Siemens/Alstom* merger[306]. The Commission conducted a thorough analysis of market dynamics, but the remedies offered by the parties came too late and were insufficient to address the competition concerns. Approving the merger under these conditions would have undermined the rule of law and legal certainty.
The significance of this decision underscores the importance of having a robust and cohesive EU policy that protects European businesses from unfair trade practices while ensuring they can compete fairly on the global stage. Policymakers must recognise that focusing on the wrong strategies could have unintended consequences. Although protecting European businesses from global giants may seem essential, such protectionism could be ineffective and even harmful, potentially leading to market dominance by a few companies and fewer choices for consumers. Instead, policymakers should focus on strategies such as reciprocity - ensuring mutual access to markets under trade agreements like those within the WTO. While such measures may take time, they represent a fairer and more sustainable solution. As such, it is crucial that the next Commission makes this a top priority.

4.2. *e&/PPF Telecom Group:* first M&A Phase II clearance under the FSR

On 10 June 2024, the European Commission opened its first in-depth investigation inti a M&A deal, with the subsequent approval of the acquisition between *e&* (formerly known as *Etisalat Group*), a major telecommunications conglomerate based in the United Arab Emirates ("U.A.E."), and *PPF Telecom Group*[307] for approximately €2.2 billion. This case represents the European Commission's first Phase II conditional clearance decision under the FSR, signalling a significant shift

[306] Broadman H. G., *Blocking Siemens-Alstom rail merger was in the EU's public interest*, Gulf News, Feb. 27, 2019, retrieved at: https://gulfnews.com/business/analysis/blocking-siemens-alstom-rail-merger-was-in-the- eus-public-interest-1.62329150.
[307] 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, *OJ C, C/2024/3970.*

in the way the EU handles foreign State Aid and its potential to distort competition within its internal market[308].

The deal between *e&* and *PPF Telecom Group*, which was announced in 2023, involved the U.A.E.'s *e&*, one of the largest telecom providers in the Middle East, acquiring a significant portion of *PPF Telecom Group*'s assets, which include telecom networks and services in the Czech Republic and other Balkan countries. The transaction raised concerns under the FSR due to the substantial financial assistance that *e&* had received from the U.A.E. government. These funds, in the form of state-backed loans and subsidies, were part of the U.A.E.'s broader strategy to enhance the competitiveness of its national enterprises on the global stage.

The European Commission's clearance is subject is commitments that remain in force for 10 years, with the possibility of extending these commitments for an additional 5 years. Indeed, the case confirms that the Commission will assess the impact that non-EU subsidies may have on the single market following a merger. The commitments outlined provide a useful indication of the safeguards the Commission deems appropriate to counteract potentially distortive foreign subsidies[309].

The background to the transaction and the alleged subsidies is as follows: *e&*, based in the U.A.E., is owned by the *Emirates Investment Authority* ("*EIA*"), a sovereign wealth fund, while *PPF* is headquartered in the Netherlands and operates telecommunications services across Europe. The transaction met the FSR thresholds because at least one of the parties was established within the EU and generated an EU turnover of at least €500 million, and because the parties had received at least €50 million in combined aggregate foreign financial contributions from third countries in the three years preceding the concentration.

[308] As enshrined in Articles 11(3) and 25(3) of the FSR, unlike in EU merger control review, where commitments may be adopted during Phase I review, the European Commission may only accept commitments during Phase II in FSR proceedings.

[309] *e&* and *EIA* offered commitments consisting of: (i) the removal of the unlimited state guarantee, by ensuring *e&'s* Articles of Association do not deviate from ordinary U.A.E. bankruptcy law (so removing the unlimited State guarantee); (ii) the prohibition of financing by *e&* and *EIA of PPF's* activities in the EU, subject to exceptions (e.g. emergency funding), and a requirement that other transactions should also be on market terms; and (iii) the obligation for *e&* to inform the European Commission of any future acquisitions that are not notifiable under the FSR.

e& received potential foreign subsidies from the U.A.E. in the form of an unlimited State guarantee[310], which included exemptions from the applicable bankruptcy laws, and a term loan used to finance the transaction from five banks. The actions of these banks could be attributed to the U.A.E., and indications suggest that the loan was not obtained on market terms.

The Commission found that the foreign subsidies did not negatively affect the acquisition process itself, as e& was the sole bidder for the target and was capable of financing the transaction with its own resources. However, it concluded that there was a risk of potential distortions in the EU internal market post-transaction. This is because the potential subsidies - particularly the unlimited guarantee - would provide the merged entity with the capacity to engage in investments or acquisitions without being subject to the same constraints as a market operator.

The decision illustrates that the Commission is willing to accept behavioural measures that effectively *"ring-fence"* EU activities from the potential effects of subsidies granted outside the EU. How such behavioural measures can be replicated for other businesses and transactions will depend on the way in which they are implemented and monitored, a matter that remains to be seen in the full decision yet to be published[311].

4.3. *Nuctech Company Limited:* expect the unexpected

On 23 April 2024, the European Commission carried out its initial unannounced inspections as part of an *ex-officio* investigation under the FSR, suspecting foreign subsidies with the potential to disrupt the internal market. The focus of the scrutiny was the Chinese state-owned undertaking *Nuctech*, which specialises in surveillance technology and security equipment[312].

[310] As mentioned in the 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*, p.3, under the FSR, unlimited state guarantees are among the forms of subsidies deemed *"most likely to distort the internal market"* and thus *"will normally be considered distortive"* unless there are specific facts indicating otherwise.

[311] Notably, the *e&/PPF* case is the only FSR Phase II merger investigation opened to date.

[312] For the sake of completeness, it must be noted that, in its official statement, the European Commission avoided explicitly naming *Nuctech* as the focus of its investigation. However, a joint statement issued by *Nuctech* and the Financial Times confirmed that the company is *"co-operating with the European*

In the context of a dawn raid conducted under the Foreign Subsidies Regulation, the General Court of the European Union ("GC") has refused to suspend the European Commission's request to access employees' mailboxes located in China. The GC's decision underscores the challenging position faced by Chinese, and indeed other non-EU, companies that must navigate conflicting legal requirements between the EU and their home jurisdictions. This ruling suggests that such companies, when confronted with cross-border data transfer restrictions under Chinese law, may be compelled to seek exemptions from Chinese authorities or risk sanctions under both EU and Chinese legislation.

As mentioned in Chapter II, the Regulation grants the EC[313] extensive investigatory powers, including the authority to conduct dawn raids at the premises of companies suspected of benefiting from such subsidies.

The EC executed dawn raids at *Nuctech Warsaw Company Limited sp. z o.o.*, based in Poland, and *Nuctech Netherlands BV*, based in the Netherlands[314]. Both entities are wholly owned subsidiaries of *Nuctech Hong Kong Co. Ltd*, which is ultimately controlled by *Tsinghua Tongfang Co. Limited*, a company registered in China and listed on the Shanghai Stock Exchange. During the raid, the European Commission sought access to the mailboxes of certain employees who are Chinese citizens[315]. These mailboxes were stored on servers located in China and managed by the Chinese parent company. The Commission requested that *Nuctech* impose a legal hold on these mailboxes and make the data available for inspection[316].

In response, these entities submitted two applications to the General Court, on 29 May 2024, in which they sought both the annulment of the Commission's decision

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Commission and remains committed to upholding its reputation as a fully independent and self-sufficient economic operator". See "*Europe turns on China's Nuctech after decade of awarding security contracts*", Financial Times, 25 April 2024, retrieved at: https://www.ft.com/content/b72069ec-e748-46f8-a936-de22a7446238.

[313] Powers explicitly enshrined in Articles 14 and 15 of the FSR.

[314] *Commission carries out unannounced foreign subsidies inspections in the security equipment sector*, Daily News 23/04/2024, European Commission Competition Policy, April 23, 2024, retrieved at: https://ec.europa.eu/Commission/presscorner/detail/sw/mex_24_2247.

[315] The purpose of the inspection was to gather information necessary to assess whether the company has received foreign subsidies that distort the internal market. The Commission suspects that *Nuctech* has benefited from Chinese state subsidies enabling it to undercut rival bidders in EU tenders.

[316] For the sake of completeness, it must be noted that the dawn raid and legal hold request were directed solely at *Nuctech's* Polish and Dutch entities.

to order the dawn raid and any subsequent requests, including the legal hold orders, and interim measures to immediately suspend the Commission's request for the mailboxes until the Court could rule on the annulment application.

Nuctech contended that granting the EC access to employees' mailboxes stored in China would violate Chinese law[317].

However, in August 2024 the General Court dismissed *Nuctech's* application for interim measures and rejected the argument that potential conflicts with Chinese law should justify suspending the EC's requests[318]. The Court was unconvinced by the claim that the Polish and Dutch entities had no access to the servers in China, noting that such a claim did not preclude access to the required information via laptops within the EU that connected to servers in China[319].

Additionally, the GC rejected the argument that the responsibility for responding to any request for disclosure lay solely with the Chinese parent company. The Court emphasised that, since the Polish and Dutch entities are established in the EU, the fact that their parent company is subject to Chinese law does not exempt them from responding to the EC's requests[320].

The GC also dismissed *Nuctech's* assertions regarding the potential for Chinese administrative and criminal sanctions to justify suspending the EC's requests. Concerning administrative penalties, the General Court further noted that, according to *Nuctech's* own explanations, such penalties were typically financial in nature[321]. Under established case law, financial damage can only justify the suspension of an EC decision if it poses a serious and irreparable threat to the applicant's financial viability prior to a final judgment[322]. *Nuctech* failed to provide sufficient

[317] The company argued that various provisions of Chinese legislation – specifically, Article 31 and Article 36 of the Data Security Law, Article 41 of the Personal Information Protection Law, and Article 28 of the Law on Safeguarding State Secrets – impose strict restrictions on cross-border data transfers, as well as potential criminal sanctions for unauthorised disclosure of data stored in China.
[318] Order of the President of the General Court, 12 August 2024, ECLI:EU:T:2024:564
[319] *Ibid.*, paras 55 and 83.
[320] *Ibid*. paras 35, 36,38 and 39 and mentioned case law.
[321] *Ibid.,* par. 63.
[322] *Ibid*., par. 64: *"According to the case-law, where the harm referred to is of a financial nature, the interim measures sought are justified where, in the absence of those measures, the applicant would be in a position that would imperil its financial viability before final judgment is given in the main action, or if its market share would be affected substantially in the light of, inter alia, the size and turnover of its undertaking and, where appropriate, the characteristics of the group to which it belongs (see order of 12 June 2014*, Commission v Rusal Armenal*, C-21/14 P-R, EU:C:2014:1749, paragraph 46 and the case-*

documentation to support its claims. With respect to criminal penalties, the GC found that *Nuctech* had based its argument on specific provisions of Chinese law that would only be breached if the EC's requested data were disclosed without the necessary authorisations from Chinese authorities. Since *Nuctech* had not sought such authorisations, it did not demonstrate that any requests had been refused, nor did it show that complying with the EC's request would compel it to commit a criminal offence[323].

The case sets a high bar for non-EU companies seeking to resist data requests from the EC on the basis of conflicting non-EU laws[324]. The General Court's reasoning implies that the European Commission's data requests cannot be suspended merely because they may conflict with foreign laws, even if those conflicts involve potential criminal sanctions. Instead, the Court indicated that a company in *Nuctech's* position could only successfully resist such a request if it had proactively sought exemptions from the relevant Chinese authorities, and if such requests had been denied. Moreover, it was also criticised that *Nuctech* didn't explore alternative methods that would allow it to provide the requested information without breaching Chinese law.[325]

Although the GC has not yet issued a final decision regarding *Nuctech's* request to annul the EC's decision, its reasoning strongly suggests that the request is likely to be rejected[326].

This case highlights the complex dilemma faced by non-EU companies operating within the EU when confronted with data disclosure requests, and it demonstrates

law cited). Since imminent disappearance from the market does constitute damage that is both irremediable and serious, adoption of the interim measure sought appears justified in such a situation (order of 9 June 2010, Colt Télécommunications France v Commission*, T-79/10 R, not published, EU:T:2010:228, paragraph 37)".*

[323] *Ibid*. paras. 73 and 74.

[324] Scholke C., Gayk A., *First appeal against FSR dawn raid: Nuctech's main arguments published*, Clifford Chance, 12 July 2024, retrieved at: https://www.cliffordchance.com/insights/resources/blogs/antitrust-fdi-insights/2024/07/first-appeal-against-fsr-dawn-raids-nuctech-main-arguments-have-been-published.html.

[325] This could suggest that companies may be required to find practical solutions to comply with both EU investigatory requests and their own domestic legal obligations.

[326] A decision of the General Court is not expected to be available before mid-2025.

the strict application of the principle that EU law applies to activities occurring within or having an impact on the EU, with only very narrow exceptions[327].

For non-EU companies[328], this case serves as a stark reminder of the importance of reviewing and potentially adjusting data flows and compliance policies. It is crucial that companies operating in multiple jurisdictions ensure they are prepared to meet the demands of both EU investigatory processes and their own domestic regulations concerning cross-border data transfers. With the EC only beginning to enforce the FSR, similar conflicts are likely to arise in future investigations, meaning that the stakes for achieving compliance and maintaining transparency are higher than ever.

5. Future potential reforms and long-term implications

As the Regulation continues to be enforced and interpreted, it is inevitable that adjustments and reforms will be necessary to ensure that the EU remains responsive to the evolving global economic environment. The FSR, which was designed to respond to the growing phenomenon of foreign subsidies and their potential to disrupt the EU's Internal Market, is extremely likely to evolve in response to both emerging economic challenges and political realities.

One of the key areas for reform could be the definition and scope of foreign subsidies. Currently, the FSR predominantly focuses on subsidies that distort competition within the EU Internal Market, targeting subsidies that have a direct and measurable effect on competition.

However, as the global economy changes, with an increasing emphasis on technological innovation, green industries, and digital markets, the regulation may

[327] Bethan J., *Nuctech suffers early court defeat in ongoing FSR challenge*, Global Competition Review, 13 August 2024, retrieved at: https://globalcompetitionreview.com/Article/nuctech-suffers-early-court-defeat-in-ongoing-fsr-challenge.

[328] For the sake of completeness, it must be noted that the company has already caused political and economic controversy due to national security concerns over cargo screening equipment (U.S.A.) and airport luggage scanners (Lithuania).

need to expand its scope to address subsidies that affect sectors critical[329] to the future of the European economy[330].

While these emerging sectors are not necessarily subject to the same competitive pressures as traditional markets, state support for non-EU firms in these fields could lead to market distortions that undermine the EU's strategic interests. Therefore, future reforms to the FSR could include specific provisions addressing these emerging industries, ensuring that the regulation captures state support in high-tech, green, and future-facing sectors.

This expansion of the regulatory scope would require a careful, evidence-based approach to ensure that the FSR remains targeted and proportionate, without overextending its reach to industries or investments that may not pose significant competitive risks.

Further reforms could be directed towards addressing the broader geopolitical and economic implications of foreign subsidies. The global trade environment is increasingly shaped by competitive tensions, with major economies like the U.S.A., China, and others adopting aggressive industrial policies to promote national champions, stimulate technological advancement, and ensure strategic control over critical industries. The EU, while seeking to maintain an open and competitive market, must ensure that it is not placed at a disadvantage by foreign government support for industries that have the potential to dominate critical markets. In this context, future reforms could seek to create a more nuanced approach to regulating subsidies by considering the wider geopolitical landscape. For instance, foreign state support that enhances a non-EU country's control over strategic supply chains or

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[329] For instance, foreign subsidies in the fields of renewable energy, electric vehicles, artificial intelligence, 5G infrastructure, or biotech could have a significant long-term impact on the EU's technological and industrial sovereignty. For a more thorough analysis on the electric vehicles industry see: Reuters, *What happens as EU concludes investigation of Chinese-made EVs?*, 2024, retrieved at: https://www.reuters.com/business/autos-transportation/what-happens-next-china-made-evs-investigated-by-eu-2024-10-03/; and Le Monde, *EU plans 36% tariff on Chinese EVs, with lower duty for Tesla, 2024*, retrieved at: https://www.lemonde.fr/en/european-union/Article/2024/08/20/eu-plans-36-tariff-on-chinese-evs-with-lower-duty-for-tesla_6718830_156.html.

[330] Skadden, Arps, Slate, Meagher & Flom LLP, *The EU Foreign Subsidies Regulation beds down: 10 enforcement trends*, retrieved at https://www.skadden.com/insights/publications/2024/10/the-eu-foreign-subsidies-regulation-beds-down.

vital infrastructure could raise broader security[331] concerns for the EU. The regulation could, then, need to be adapted to reflect such considerations, making national security and resilience a more explicit factor in the assessment of foreign subsidies. This would likely involve integrating concerns around technological sovereignty, cybersecurity, and critical infrastructure protection into the FSR's regulatory framework.

Another critical challenge for the future of the FSR lies in its potential to create unintended consequences for FDI in the EU. The regulation aims to ensure that EU companies can compete fairly in the single market, but overly aggressive enforcement or overly broad definitions of foreign subsidies could create an environment that is less attractive to foreign investors. Investors from countries whose subsidies fall within the scope of the FSR may view the regulation as a risk, fearing that their investments may be subject to scrutiny, fines, or even market entry barriers[332].

This could discourage capital inflows into the EU, especially in sectors where foreign investment is vital to European competitiveness and innovation. Moreover, investors might shift their focus to other jurisdictions with more lenient subsidy oversight, which could lead to a reduction in investment in Europe's most vital and innovative sectors. This raises an important question about how the EU can balance the need to protect its internal market from distortive foreign subsidies with the need to maintain an open and welcoming investment climate. Future reforms could need to incorporate provisions that incentivise fair competition without undermining the

[331] The phrasing of the FSR suggests it is likely to encompass various data transfers carried *out by third-country governments in favour of their national champions. Indeed, Article 3 specifies: "...a foreign subsidy shall be considered to exist where a third country, whether directly or indirectly, provides a financial contribution that benefits an undertaking engaged in economic activity within the internal market, and where such a benefit is restricted - either by law or in practice - to one or more undertakings or industries".* In the realm of data provision, one can envisage scenarios where public authorities in a third country accumulate vast amounts of data - often under less stringent or even non-existent data privacy and freedom of information laws - while simultaneously holding a vested interest, whether direct or indirect, in their national champions. Nations eager to foster domestic AI enterprises have strong motivations to make government-held data available to these companies or, indeed, to utilise them for data collection that supports governmental functions. As previously discussed, the transfer of such data could serve as a substantial form of in-kind financial assistance, and it is argued that such practices would come within the remit of the FSR.

[332] Rubini, L., *Protecting the Internal Market from subsidisation with the EU State Aid regime: the Foreign Subsidies Regulation*, in Journal of European Competition Law & Practice, 14(3), 137–150, retrieved at: https://academic.oup.com/jeclap/Article/14/3/137/7080436.

attractiveness of the EU as a global investment destination. Policymakers may need to refine the FSR to focus on particularly harmful subsidies that pose a threat to the market, while allowing more flexibility for benign or strategic forms of foreign investment that support innovation and economic growth.

Additionally, the political and diplomatic implications of the FSR cannot be ignored. As the regulation seeks to control the impact of foreign subsidies, its implementation could strain relationships between the EU and other key trading partners. Countries that feel their industries are being unfairly targeted by the FSR could retaliate by imposing tariffs, launching complaints in international trade forums, or pursuing disputes through the WTO.

There is also the risk of heightened geopolitical tensions[333], particularly with major economies like China and the United States of America, who may see the FSR as a form of protectionism or as discriminatory in its application. The EU will need to navigate these tensions carefully, balancing the desire to protect its economic interests with the need to maintain positive diplomatic and trade relations with key global partners. The regulation's application must, therefore, be transparent, fair, and consistent, with clear criteria and procedures to ensure that non-EU countries do not perceive it as a political tool designed to undermine their industries.

In the long term, the broader implications of the FSR could extend beyond the EU's borders, potentially influencing the development of international competition and trade law. If other jurisdictions, such as the U.S.A., China, and the U.A.E. adopt similar measures to regulate foreign subsidies, it could signal the beginning of a new global approach to State Aid and market access. The EU could play a significant leadership role in advocating for a more harmonised international framework for subsidy transparency and competition, but such a global shift would require extensive dialogue and cooperation with other trade powers[334].

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[333] Volpi, R., *Geopolitical dimensions of EU competition policy: the case of Foreign Subsidies*, in International Journal of Economics and Business, 24(1), 83–97, 2021.

[334] Blockmans, S., & Weiler, J. H. H., *The EU and Foreign Subsidies: balancing competition and globalization*, in Competition Policy and State Aid in the EU (pp. 45–68). Oxford University Press, 2019.

Internationally, the EU might seek to negotiate agreements or multilateral frameworks aimed at aligning subsidy rules to prevent conflicts and promote fair competition on a global scale.

Ultimately, the long-term success of the FSR will depend on the EU's ability to refine and adapt its regulatory framework to meet the challenges of a changing global economy. This will require not only technical adjustments to the regulation but also a broader strategy that considers geopolitical, economic, and diplomatic considerations. The EU will need to remain agile, ensuring that the FSR is both an effective tool for preserving market integrity and a framework that promotes sustainable and fair international trade. By striking the right balance between regulation and openness, the EU can maintain its competitive advantage while supporting global trade relations in a fair and transparent manner.

Conclusions

The Foreign Subsidies Regulation represents a decisive and necessary advancement in EU competition policy, effectively addressing a long-standing regulatory gap that had allowed foreign-subsidised firms to operate within the Internal Market without appropriate scrutiny. As analysed in this Dissertation, the unchecked presence of foreign subsidies has led to significant market distortions, including unfair cost advantages, barriers to entry for unsubsidised firms, and the erosion of long-term competitiveness in critical EU industries.

The FSR directly tackles these challenges by empowering the European Commission to investigate, assess, and mitigate the detrimental effects of foreign financial support, ensuring that competition remains merit-based rather than skewed by state-backed interventions. As thoroughly seen in Chapter I and II, the FSR's defining feature is its emphasis on transparency and accountability in an area of competition law that had remained largely unregulated. The Regulation imposes a clear obligation on firms to disclose foreign financial contributions in mergers, acquisitions, and public procurement processes, thereby providing the Commission with a crucial mechanism to prevent market distortions before they take root. The investigative and enforcement powers vested in the Commission under the FSR are significant. To this extent, as demonstrated in recent investigations examined in Chapter III, including the scrutiny of *Nuctech and e&* in 2024, the European Commission has demonstrated its commitment to a balanced approach, targeting only those subsidies that pose a genuine threat to fair competition, rather than indiscriminately restricting foreign capital inflows. However, there remains a low volume of subsequent litigation, which in the future will provide further clarity to the provisions enshrined in the Regulation.

Moreover, the FSR does not operate in isolation but interacts with other pillars of EU competition law and international trade. The interplay between the FSR, EU merger control, state aid law, and broader trade defence instruments is crucial in ensuring that all forms of competitive distortions - whether arising from domestic or foreign subsidies - are effectively addressed. Indeed, the Regulation's alignment with existing frameworks reduces legal uncertainty and strengthens its enforceability, making it a key component of the EU's competition policy arsenal. The effectiveness of the FSR is also closely intertwined with broader trends in global commercial policies and shifting geopolitical dynamics.

Another key aspect examined is the Regulation's effect on FDI. While some stakeholders argue that increased regulatory scrutiny may deter certain investments, the FSR ultimately fosters a more predictable and stable investment climate by providing clear rules on subsidy transparency. The deterrence effect, if any, is likely to be confined to investments that rely on unfair competitive advantages, while legitimate foreign investments remain unaffected. Looking ahead, the success of the FSR will hinge on its effective enforcement and its capacity to evolve in response to new challenges. The increasing complexity of foreign subsidy schemes - often embedded within broader industrial strategies - necessitates continuous adaptation of regulatory tools to ensure timely and effective intervention.

Furthermore, the Commission must also balance its enforcement mandate with the need to maintain the EU's attractiveness as an investment destination. Furthermore, as examined in this Dissertation, the Regulation's alignment with other international trade frameworks, such as WTO subsidy rules and EU trade defence instruments, will play a crucial role in determining its long-term impact.

For sure, strengthening cooperation with global trade partners and fostering dialogue with businesses to streamline compliance processes will be essential in ensuring that the FSR achieves its objectives without imposing unnecessary bureaucratic burdens. Furthermore, as seen in Chapter I, protectionist measures adopted by major economies such as the United States of America and China have exacerbated trade distortions, prompting the European Union to respond with a regulatory framework that safeguards its economic sovereignty while maintaining an open-market approach.

Therefore, the Regulation's success will depend not only on the rigour of its enforcement but also on the EU's ability to adapt its regulatory tools to evolving global realities. For instance, recent industrial policies such as the U.S.A. *Inflation Reduction Act* and China's state-led investment strategies - exemplified by the *Made in China 2025* initiative - highlight the extent to which foreign subsidies are now embedded in global economic strategies. The FSR equips the EU with a mechanism to counteract these distortions by ensuring that European firms are not placed at a disadvantage in their own market due to foreign state-backed financial support. Similarly, the growing reliance on subsidies as an economic instrument - particularly in the wake of global crises such as the COVID-19 pandemic and the Russo-Ukrainian conflict - raises critical questions about the Regulation's long-term adaptability.

Thus, the European Commission must remain vigilant, refining its regulatory tools to address emerging challenges while ensuring that enforcement measures remain proportionate and do not unduly burden legitimate foreign investments. While the FSR provides much-needed safeguards against unfair competition, it also raises questions about its implications for European enterprises.

The increased regulatory burden associated with compliance - particularly for companies engaged in cross-border transactions - has led to concerns about administrative complexity and potential deterrents to foreign investment. However, as noted in this Dissertation, these short-term adjustments must be weighed against the long-term benefits of ensuring a level playing field within the Internal Market. Indeed, the FSR offers European firms greater legal certainty by ensuring that competition is not distorted by external financial interventions. In sectors where foreign subsidies have historically created significant imbalances - such as renewable energy, infrastructure, and high-tech industries - the Regulation acts as a protective shield, enabling European companies to compete on equal terms. Furthermore, the Commission's proportional enforcement approach ensures that the Regulation does not indiscriminately restrict foreign capital inflows but rather targets only those subsidies that pose a genuine threat to fair competition.

In conclusion it can be affirmed that the Foreign Subsidies Regulation is not merely an incremental policy adjustment; it is a landmark initiative that reflects the EU's commitment to preserving fair competition and economic sovereignty in an increasingly complex global economy. By addressing distortions created by foreign subsidies, the Regulation ensures that European firms operate in a market environment that rewards innovation and efficiency rather than state-backed financial advantages. While challenges remain - particularly in ensuring that enforcement remains proportionate and does not stifle legitimate investment - the

FSR represents a vital tool in safeguarding Europe's economic future. If implemented effectively, it will not only shield European businesses from unfair competition but also contribute to a more resilient, dynamic, and forward-looking European economy. The Regulation's success will ultimately be measured by its ability to strike a balance between regulatory effectiveness and economic openness, ensuring that Europe remains both competitive and fair in the global marketplace.

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