HELLENIC REPUBLIC
National and Kapodistrian
University of Athens
EST. 1837

POSTGRADUATE PROGRAM: LL.M. in International and European Legal Studies

SPECIALIZATION: Private Law and Business Transactions

ACADEMIC YEAR: 2022-2023

POSTGRADUATE DISSERTATION

Vourda C. Olga Maria
R.N.: 7340022201005

The Foreign Subsidies Regulation as an investment defense instrument and its relationship with EU Competition Law

Examination Board:
a) Dr. Georgaki Konstantina (supervisor)
b) prof Mikroulea Alexandra
c) Assistant prof Kinini Efi

Athens, October 2023

Copyright © Vourda Olga Maria, 31 October 2023
All rights reserved.

It is prohibited to copy, store and distribute this work, in whole or in part, for commercial purposes.
Reprinting, storing and distributing for non-profit, educational or research purposes is permitted, provided the source is acknowledged and the present message retained.

The views and positions contained in this paper express the author and should not be construed as representing the official positions of the National and Kapodistrian University of Athens.

To my parents,
Vourdas Christos & Karavana Angeliki,
who have always been by my side every
step of my life and,
to my forever mentor, Koukoutsi Mirella.

Abstract

This thesis examines the legislative framework established by the European Parliament and the Council with a view to combating external aid distorting the EU'S internal market. It focuses primarily on the analysis of this regulatory framework for investment protection purposes, as well as its relationship with EU Competition Law.

Concerns about fair competition and the distorting effects of these subsidies on the domestic market have arisen from the increase of foreign aid. The European Parliament and the Council have enacted regulations aimed at preserving the EU's internal market and eliminating these distortions.

The starting point of this thesis is to set out the legal framework, analyze its core provisions and assess their efficiency in dealing with challenges arising from foreign subsidies. It emphasizes the role of the European Commission in this process by examining legal instruments and procedures put in place to detect, investigate and counteract abusive subsidies.

In addition, the relationship between the EU's regulatory framework on foreign aid and competition law is also explored. Considering possible overlaps, conflicts and synergies, this review aims to examine how such two fields of law interact. The analysis deals with the impact of legislation on competition within the internal market, including its effects on stakeholders, industrial sectors and an overall competitive environment.

Furthermore, the study assesses the wider impact of the regulatory framework on foreign support for investment protection in the EU. In order to protect the interest of the EU's economy, promote investments and safeguard a level playing field with competition, it is examined whether this framework may be used as an investment defense mechanism.

The thesis draws on primary sources, including legal texts, regulations and procedural law as well as secondary sources such as articles in the field of scholarship, reports and academic writings to support its analysis.

Mainly, this research will contribute to a greater understanding of the legislative framework on Foreign Subsidies and its role on protecting investments. This thesis sheds light to the implications and difficulties associated with tackling distortions in

the Internal Market through a review of its relationship to EU competition law. The study's findings could have practical implications for policymakers, regulators and market players in dealing with the difficult situation of how to manage a complex mix of external aid, competition law and investor protection at EU level.

Table of Contents

List of Abbreviations Page 7

Introduction **Page 8**

Chapter 1: The FSR in a nutshell **Page 9**

1.1 A historical perspective on the Regulation of Foreign Subsidies Page 9

1.2 The Rationale behind the adoption of the EU regulation 2560/2022 and the aspects of Competition Law Page 13

1.3 Deciphering the complex framework: Analyzing the EU Regulation 2560/2022 on Foreign Subsidies Distorting the Internal Market. Page 15

Chapter 2: Regulatory Challenges **Page 21**

2.1 Definition of Subsidies Page 22

2.1.1 Definition of Subsidies under EU State Aid Law Page 22

a) Selectivity Criterion Page 24

2.1.2 Definition of Subsidies under SCMA Page 25

a) Specificity Criterion Page 31

2.1.3 Definition of Subsidies under Foreign Subsidies Regulation (FSR) Page 32

2.1.4 Summary Conclusion on definition of Subsidies Page 35

2.2 Assessment of Distortion or negative impact Page 36

2.2.1 Assessment of Distortion or negative impact under EU State Aid Law Page 37

2.2.2 Assessment of Distortion or negative impact under SCMA Page 39

(a) Prohibited Subsidies Page 40

(b) Actionable Subsidies Page 42

(c) Non-Actionable Subsidies Page 45

2.2.3 Assessment of Distortion or negative impact under FSR Page 45

2.2.4 Summary Conclusion on the Assessment of Distortion or negative impact Page 47

Chapter 3: Comparative analysis of the FSR with other Regulatory Frameworks **Page 49**

3.1 EU Merger Control Regulation and FSR Analysis Page 49

3.1.1 Implementation of the FSR in parallel with EUMR Page 51

3.2 FDI Screening Regulation and FSR Analysis Page 55

3.3 FTC rules and FSR Analysis Page 58

Conclusion **Page 59**

References Page 62

List of Abbreviations

AOA	Agreement on Agriculture
DOJ	Department of Justice
EC	European Commission
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
EUMR	European Merger Control Regulation
FDI	Foreign Direct Investment
FSR	Foreign Subsidies Regulation
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ITO	International Trade Organization
SCMA	Subsidies and Countervailing Measures Agreement
SMEs	Small and Medium-Sized Enterprises
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
WTO	World Trade Organization

Introduction

The changing geopolitical landscape is having a significant influence on Europe's industry, with more global competitiveness, a spike in protectionism, market distortions, and increased trade tensions. These characteristics, together with imminent global economic uncertainty, provide new challenges for Europe's industry, especially as it starts on concurrent ecological and digital revolutions. The infusion of foreign subsidies into domestic market has emerged as a significant factor, leading to legislative actions to ensure fair competition and the integrity of the internal market. As a prominent actor in the global economic scene, the European Union has acknowledged the need to address this issue effectively.

To this end, on 14 December 2022, the European Parliament and the Council signed the Foreign Subsidies Regulation (Regulation EU 2022/2560 on foreign subsidies distorting the internal market), which entered into force on 12 January 2023 and it applies since 12 July 2023.

The Foreign Subsidies Regulation (hereinafter FSR) marks a pivotal development, signifying a concerted commitment to protect the Union's economic interest from possible distortions included by foreign subsidies. The FSR incorporates the Commission's experience in enforcing EU competition rules, such as antitrust, merger control and state aid control, as well as trade defence mechanisms. This is reflected not only in the primary objective of the FSR, but also in its enforcement system, which includes both proactive and formal investigations. In addition, the FSR provides the Commission with a wide range of investigative tools to take decisions aimed at restoring fair competition in the EU single market.

Furthermore, the Foreign Subsidies Regulation incorporates well-established principles and concepts that are aligned with those of the EU and the WTO in the Agreement on Subsidies and Countervailing Measures. However, given the unique context in which they will be applied, a simultaneous analysis of key concepts is considered necessary in this dissertation in order to understand the context of their application.

As of July 12, 2023, the Commission has been endowed with the authority to conduct ex-officio investigations and from October, 12, 2023 a mandatory notification requirement has been enforced for concentrations and public procurement transactions

surpassing specific thresholds. This signifies the inaugural phase, akin to a trial period, in the implementation of the new regulatory framework. For this reason, the dissertation will focus on the analysis of the FSR, its interpretation through other regulatory frameworks that exist within and outside the European Union, and the clarification of concepts. All of this is considered appropriate to form the basis for its application. As a conclusion of this analysis we will consider the question of whether this new Regulation consists an investment defence instrument and its impact on them.

Chapter 1: The FSR in a nutshell

1.1 A historical perspective on the Regulation of Foreign Subsidies

In an era of unprecedented globalization, the regulatory landscape has become a focal point of legal discourse. The EU Regulation on Foreign Subsidies exemplifies the ever-evolving reality of international trade and competition. This chapter begins with a historical review, tracing the evolution of regulatory frameworks inside the European Union (EU) and globally. The evolution of regulations controlling subsidies that may distort domestic markets reflects the shifting sands of global economic interconnectedness. As we navigate this historical continuum, we figure out the key milestones and transformational policy shifts that have influenced the contemporary regulatory landscape.

The initial foray into regulating subsidies at the European Union (EU) level can be traced back to Article 4 of the Treaty of Paris in 1951, which establishes the European Coal and Steel Community (ECSC). It became obvious within the context of the ECSC that national subsidy policies for steelworks and coal mines may jeopardize the formation of a conflict-free common market in these vital industries, demanding centralized regulation.[1] As a result, the ECSC Treaty stated unequivocally that any type of subsidy or aid provided by Member States was incompatible with the single market for coal and steel and so had to be abolished and prohibited.[2]The key

[1] 'Chapter 2: State Aid and How the EU System Works', in Eugene Stuart and Iana Roginska-Green, Sixty Years of EU State Aid Law and Policy: Analysis and Assessment, International Competition Law Series, Volume 71 (© Kluwer Law International; Kluwer Law International 2018), pp. 7 – 90.

[2] Article 4(c) of the Treaty Establishing the European Coal and Steel Community, Paris, 18 April 1951.

difference with the current regulatory framework is that the ECSC, even though it was a public institution, was funded by companies and not by the States.

As the ECSC proved effective in its core objective of stabilizing the coal and steel sectors and developing economic cooperation among its founding members, a broader agreement among European leaders evolved on the benefits of a wider economic union. This sentiment culminated in the signing of the Treaty of Rome in 1957, which established the European Economic Community (EEC).

The EEC adopted a broader strategy, dealing with general issues rather than specific industries. The objective of market integration and the promotion of healthy competition was fundamental to the EEC Treaty. As a result, the regulation of state aid within this framework was more thorough than in the previous Treaties, establishing a delicate balance between rigor and flexibility. Articles 92 to 94 (now Articles 87 to 89 of the EC Treaty) refrained from an outright prohibition of state aid, instead of declaring it “incompatible with the common market” if it had the potential to distort competition and trade between Member States. Furthermore, these rules permitted some state aids that served certain aims. The European Commission was given the exclusive authority to assess the compatibility of state aid with the common market, and Member States were obligated to inform the Commission before disbursing such aid. In the case of noncompliance, the Commission was empowered to order the suspension or amendment of any aid in breach of the Treaty.[3] We have to mention that these articles have remained essentially unchanged over the years, and the current Treaty provisions can be found in Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU), which came into force in December 2009.

Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) impose a general prohibition on state aid to undertaking, if it confers a selective advantage to certain undertakings and has an impact on trade and competition. However may be special grounds for Member States to grant such aid in order to achieve certain objectives in the public interest, such as those outlined in Articles 107(2) and (3) TFEU. This prohibition is subject to a number of de jure and

[3] 'Regulation of Subsidies and State Aids in WTO and EC Law - Conflicts in International Trade Law, Part III: EC Rules on State Aids, Chapter 7: Evolution of the State Aid Rules in the EC', in Gustavo E. Luengo Hernández de Madrid, Regulation of Subsidies and State Aids in WTO and EC Law - Conflicts in International Trade Law, European Monographs Series, Volume 55 (© Kluwer Law International; Kluwer Law International 2007), pp. 287 – 304.

discretionary exemptions, the majority of which are granted by the European Commission.[4] In certain cases, Member States can bypass the Commission and seek a decision directly from the Council. Other Treaty provisions may, however, impede the application of state aid rules, though this has been less prevalent over time. In particular, aid measures must normally be notified to the European Commission, which determined whether the measure qualifies as state aid under article 107 TFEU and whether an exception applies. If a measure is considered notifiable, it cannot be implemented until the Commission has reached a decision. In cases where the Commission has serious concerns about a measure, it may conduct a thorough investigation and consult stakeholders such as competitors and other Member States. State aid decisions can be positive, conditional or negative, with the latter preventing implementation. The Treaty compels the Commission to assess current state aid in the context of the EU's internal market development. This mainly concerns aid that predates EU membership or that was previously approved by the Commission. If the Commission determines that current aid is no longer compatible with the Singe Market, it has the authority to impose binding measures compelling a Member State to amend or abolish an aid scheme.

As the European Union (EU) is a member of WTO, its regulatory framework on subsidies is considered to be in line with the relevant WTO guidelines.[5] For the continuation and better understanding of this research, it is of highly importance to refer to the existing regulatory framework in international trade, from the General Agreement on Tariffs and Trade (GATT) of 1947 to the Agreement on Subsidies and Countervailing Measures (SCMA) in 1994.

Over the past 50 years, both the International Trade Organization (ITO) and subsequently the World Trade Organization (WTO) have established a complex framework of norms and principles governing international trade, covering only goods. In the midst of this evolving landscape, the issue of subsidies has remained a matter of persistent contention. Initially, subsidies were seen as a lesser threat to world trade compared to tariffs and quantitative restrictions. However, this perception

---

[4] O'Regan, Matthew. "Book Review: Johan W. van de Gronden and Catalin S. Rusu, Competition Law in the EU – Principles, Substance, Enforcement." Competition Law Journal 20, no. 2 (2021): 111–12. p. 427

[5] Malte Frank, "The EU's New Foreign Subsidy Regulation on Collision Course with the WTO", in Thomas Ackermann, Loic Azoulai et al. (eds), Common Market Law Review, (©Kluwer Law International 2023, volume 60 Issue 4) pp.925-958.

evolved, leading to a refinement of subsidy provisions originally outlined in Article XVI of the General Agreement on Tariffs and Trade (GATT).[6]Initially, in 1947, the GATT had few requirements regarding subsidies. However, additional obligations regarding this matter were incorporated through various amendments in 1955, as well as through interpretations put forth by various Panels.[7] The GATT review session of 1954-1955 resulted in amendments to Article XVI, adopted by selected industrialized members, which imposed restrictive rules on export subsidies. This was followed by the first plurilateral 'Subsidies Code' at the Tokyo Round. The establishment of the WTO in 1995 was accompanied by two key agreements, both of which form part of the 'single undertaking' and are therefore binding on all WTO members: the Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Agriculture (AoA).[8]

The adoption of the Agreement on Subsidies and Countervailing Measures (SCMA), together with the new WTO dispute settlement procedures, has provided international trade law with comprehensive tools to address the challenges posed by subsidized competition worldwide. The SCMA vastly improved on the preceding Tokyo Subsidies Code by clarifying important terminology, prohibiting various types of subsidies, establishing presumptions of serious prejudice and imposing stringent standards for non-actionable government support. It also mandated developing countries, except the least developed, to phase out certain subsidies and accelerated this process in competitive industries. Furthermore, the SCMA used the WTO dispute settlement mechanism to decrease vetoes and hurdles to WTO countries' adoption of panel reports.[9]

---

[6] Ibid.

[7] "Regulation of Subsidies and State Aids in WTO and EC Law – Conflicts in International Trade Law, Part II: The Regulation of Subsidies in the WTO, Chapter 3 Evolution of the Regulation of Subsidies in International Trade: From the GATT to the WTO", in Gustavo E. Luengo Hernandez de Madrid, Regulation of Subsidies and State Aids in WTO and EC Law – Conflicts in International Trade Law, European Monographs Series, Volume 55 ((©Kluwer Law International; Kluwer Law International 2007) pp.35-96

[8] Alan O. Sykes, "The Questionable Case for Subsidies Regulation: A comparative Perspective", Journal of Legal Analysis 2, no. 2 (2010), p. 473-523.

[9]Eugene Stuart and Iana Roginska-Green, Sixty Years of EU State Aid Law and Policy: Analysis and Assessment, 'Chapter 3: The Evolution of Treaty Rules on State Aid', International Competition Law Series, Volume 71 (© Kluwer Law International; Kluwer Law International 2018), pp. 91 – 154.

1.2 The Rationale behind the adoption of the EU regulation 2560/2022 and the aspects of Competition Law

EU State aid law has been instrumental in promoting a level playing field for enterprises within the EU, consolidating a cohesive internal market from previously fragmented national ones. However, there is one significant limitation: State aid rules only apply to subsidies granted by EU Member States, European Economic Areas (EEA) countries, the United Kingdom in Northern Ireland, and a few selected third countries under specific bilateral agreements. This allows additional third-country subsidies to go undetected, potentially affecting the single market and distorting competition. This disparity has led to growing concern within the EU about the competitive disadvantage faced by European companies compared to their counterparts subsidized by non-EU countries. This is particularly relevant in areas such as mergers, acquisitions and high-value public contracts.[10] The EU's concern about this imbalance underlines the need to analyze rationale behind the adoption of EU Regulation 2560/2022, which aims to address and rectify this pressing issue.

Initially, the European Commission played a decisive role in identifying internal market issues, which are reflected in its "New Industrial Strategy for Europe"[11]. The regulatory gap is due to a number of factors, including the inapplicability of EU State aid controls to subsidies originating in third countries, the insufficient coverage of subsidies related to trade in services under the Agreement on Subsidies and Countervailing Measures (SCMA) and the current insignificance of subsidy distortions as an assessment criterion in Foreign Direct Investment (FDI) reviews, merger control procedures and access to public procurement.[12] Indeed, the use of foreign subsidies in transactions doesn't typically trigger an FDI review, they rarely prompt a formal filing, except in cases where the subsidy grants substantial control to the State. In practice, in order to mitigate the risk of overlooking potentially

[10] Malte Frank, "The EU's New Foreign Subsidy Regulation on Collision Course with the WTO", in Thomas Ackermann, Loic Azoulai et al. (eds), Common Market Law Review, (©Kluwer Law International 2023, volume 60 Issue 4) pp.925-958.

[11] Communication from the Commission, "A New Industrial Strategy for Europe", COM(2020) 102 final, 10.3.2020.

[12] Justyna Smela Wolski, "Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market", European State Aid Law Quarterly (ESTAL) 21, no. 2 (2022): 153-172

problematic subsidies, some FDI authorities adopt a broad interpretation of the concept of control, aiming to prevent false negative assessments.[13]

Furthermore, the Commission has faced criticism for potentially impeding the competitiveness of European industries on the global arena. This criticism hinges on allegation that the Commission's reluctance to endorse macro-mergers, often referred to as European Champion, creates a disadvantage for European companies in comparison to their counterparts operating in jurisdictions with more lenient competition regulations. A similar argument can be made in the context of subsidy races, where variations in subsidy policies across different geographic regions lead to both under- and over-subsidization of companies, ultimately undermining the establishment of a level global playing field that is characterized by equality and fairness.[14]

Importantly, the rationale behind the regulation may include also the emergence of critical events such as the Green Deal, the Covid-19 pandemic and the invasion of Ukraine, that has underlined its importance in achieving wider non-economic objectives. It is worth mentioning the fact that at the same time appeared China's state-driven investment strategy, which included initiatives, presenting a challenge to the internal market.[15]

Last but not least, there are several reasons for considering that this Regulation is an instrument of competition law. Apart from the fact that it aims to achieve a level playing field in the circumstances described above, it is worth recalling the basic elements that structure competition law. In particular, Article 3 of the EC Treaty is a foundational provision that outlines the objectives of the European Union by establishing among other things the primary goals and the activities of the EU. Among

---

[13] Pablo Figueroa, "The Foreign Subsidies Regulation and Foreign Direct Investment: How to Reconcile?", Kluwer Competition Law Blog, https://competitionlawblog-kluwercompetitionlaw-com.peacepalace.idm.oclc.org/2023/01/09/the-foreign-subsidies-regulation-and-foreign-direct-investment-how-to-reconcile/ , January 9 2023.

[14] Justyna Smela Wolski, "Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market", European State Aid Law Quarterly (ESTAL) 21, no. 2 (2022): 153-172

[15] it comes in the wake of strained trade relations between the EU and China, particularly following complications with the Comprehensive Agreement on Investment and subsequent Chinese counter-sanctions, according to the Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States, and the European Union.

them it is highlighted the fundamental priority of the European Community that is the ensure that the competition is not distorted[16].

These circumstances may have led to a shift in the Commission's priorities towards accommodating these new imperatives. The White Paper of the European Commission was the first offspring of the research on subsidies granted by third countries and which distort or tend to distort the level playing field within the internal market[17]. The released document focused on how to respond to third-country subsidies granted to enterprises that eventually operate in the EU. The report suggested additional mechanisms to counter alleged unfair competition caused by foreign subsidies, as there are concerns that these subsidies undermine the EU single market. Without further delay and following extensive public consultation, the Council of the European Union and the European Parliament reached political consensus on the proposal on 5 May 2021 and adopted it.[18] The legislative procedure was eventually concluded on 28 November 2022 with the adoption of the FSR by the Council of the European Union, and on 15 December 2022 the EU Regulation on Foreign Subsidies Distorting the Internal Market was officially signed by the Presidents of the Council and Parliament of the European Union (EU).[19]

1.3 Deciphering the complex framework: Analyzing the EU Regulation 2560/2022 on Foreign Subsidies Distorting the Internal Market

Examining the intricate landscape of foreign Subsidies, the EU Regulation 2560/2022 emerges as an important starting point. Works as a cornerstone instrument intended at addressing and minimizing the distortions that prevail within the Internal Market. This Regulation enacted in response to the changing economic dynamics of a more globalized world, demonstrates the European Union's commitment to ensuring fair competition and the integrity of its economic framework. By scrutinizing the key

[16] Case C-126/79, Eco Swiss [1999] ECLI:EU:C:1999:269, [36] that the court highlighted the importance of this article and the possibility of annulment and prohibition of such these measures and decisions that violate it.
[17] European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final.
[18] Proposal for a Regulation of the European Parliament and of the Council on foreign Subsidies distorting the internal market, COM (2021) 223 final of 5 May 2021 ('FSR').
[19] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022.

provisions and underlying principles of Regulation 2560/2022, we acquire vital insights into the mechanisms used to mitigate the negative consequences of foreign subsidies, eventually strengthening the Internal Market's stability and resilience.

Prior to the extensive analysis of the Regulation, it is worth highlighting in general terms the innovations introduced. One notable innovation is considered the creation of a thorough framework for the notice and assessment of foreign subsidies, as well as a structured method for Member States to report cases that might potentially distort the Market. As we conclude from the below-mentioned analysis, the Regulation confers exclusive jurisdiction on the Commission to determine whether foreign financial contributions are considered distortive and in such a case to impose remedies. To perform this role, EU Regulation 2560/2022 equips the commission with three (3) investigative tools structured in such a way as to enable the European Commission to carry out one of its main tasks, that is to intervene both ex ante and ex post. Furthermore, the foremost being that the ability to detect subsidies is dependent on having access to foreign data.[20] For the facilitation of the process, has been given to the Commission discretionary powers to impose interim measures, to issue requests for information, take action against non-cooperation, conduct inspections both inside and outside the EU, and impose fines and periodic penalty payments.[21] The adoption of these investigative procedures enables the EU to enforce compliance and take necessary remedial actions, therefore bolstering the integrity of the Internal Market.

The beginning of the EU Regulation 2560/2022 starts with Article 1, which sets the stage by defining the Regulation's overarching aim and scope. This pivotal article lays the foundation for comprehending the regulation's intent, which is to eliminate possible distortions induced by foreign subsidies within the single market. An in-depth investigation of the defined goals, such as the promotion of fair competition and the preservation of a level playing field, lights on the Regulation's underlying principles. In order to provide a thorough analysis of the regulatory framework, Article 2 sets out the definitions that serve as a basis for understanding the key concepts and terms used throughout the Regulation. In the following articles, there are provisions about the existence of foreign subsidy, which in order to become subject to

[20] Pietro Poretti, The Regulation of Subsidies Within the General Agreement on Trade in Services of the WTO: Problems and Prospects, Alphen aan den Rijn: Kluwer Law International, 2009.
[21] Xueji Su, A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved? , Legal Issues of Economic Integration 50, no. 1 (2023): p. 74.

EU scrutiny it needs to have a distortive effect. A foreign subsidy must improve an enterprise's competitive position in the internal market and have an actual or probable detrimental impact on competition. According to article 5, the criteria to be considered are the amount and nature of the subsidy, the company's situation and the markets involved, the company's level of economic activity in the Internal Market, the purpose for which the subsidy is granted, and the extent to which it is used in the Single Market. Distortions are more likely to emerge in cases of subsidies to ailing companies (unless part of a restructuring plan). Unlimited guarantees, subsidies linked to facilitating concentrations, or obtaining of a public contract via an 'unduly advantageous' tender. In addition, the market characteristics play a significant role, resulting in different assessments for different markets.

The essence of the Regulation is that it confers on the Commission the authority to examine and balance the negative and positive effects of a foreign subsidy on the internal market. It acknowledges that foreign subsidies have the potential to encourage economic activity aligned with EU aims demanding a balanced approach to remedial action.[22] However, the precise contours of this balancing exercise remain somewhat vague. This latter could be implied that in the case whether a foreign subsidy stimulates activities that the EU itself favors, without crowding out EU-based competitors, the Commission may well take a favorable view.[23] Article 7 outlines the potential redressive measures that could be employed to rectify distortions arising from foreign subsidies. While the principle of returning non-compliant subsidies' financial benefits to the providing Member State applies, practical obstacles may arise in verifying the definitive repatriation of foreign subsidies to the third country. Alterative redressive measures, such as structural remedies, behavioral measures, and compensation payments to the EU or Member States, may thus be necessary. The choice of remedies depends on specific characteristics of the foreign subsidy and its impact on the internal market. A list of potential remedies is also provided, including

[22] Article 6 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022.

[23] "We might expect the Commission to let itself be guided by its State aid framework to some extent as well as other key policy objectives. This could be the case with foreign subsidies that contribute to reaching goals of the Green Deal without seriously affecting fair competition or preventing other undertakings from greening." Raymond Lula, "The Foreign Subsidies Regulation : Countering State Aid Beyond the European Union", (2021) European State Aid Law Quarterly (ESTAL) 2.

asset sales, investment limits, third-party access requirements, and licensing agreements.[24]

In the second chapter of the EU regulation 2560/2022, the enhanced powers of the European Commission, conferred on it by this Regulation, begin to unfold. Once the existence of a foreign subsidy has been established, the next step in the Foreign Subsidies Regulation is to determine whether it distorts the EU internal market through preliminary review process. When the European Commission has gathered sufficient evidence, through the latter review, indicating that an undertaking has received a foreign subsidy leading to a distortion of the internal market, is obliged to adopt a formal decision to initiate the so-called in-depth investigation. For this investigation to be conducted, the Regulation grants the Commission extensive authority to investigate on its own initiative from any source on alleged distortive foreign subsidies, with the potential of interim measures, information requests, and inspection both inside and outside the Union.[25] If either the undertaking under investigation or the third country provides unreliable or untimely information or refuses to be inspected, the Commission may take a decision based on the facts available. More crucially, if the undertaking fails to provide the necessary information, it may be regarded to have received a financial contribution which conferred a benefit on it.[26] Therefore, it is highlighted the significance of cooperation during the preliminary review between the European Commission and undertakings under investigation or third countries. Otherwise, as set out in the following articles of the Regulation, the actors may be subject to the procedure whereby the European Commission imposes fines and periodic penalty payments in cases of non-compliance.[27]

Chapter 3 negotiates the active notification obligation on undertakings involved in concentrations, including mergers, acquisitions of control and the creation of lasting

[24] See the justification for these redressive measures in European Commission, White Paper on Levelling the Playing Field as regards Foreign Subsidies (17 Jun. 2020) COM (2020), p. 19.

[25] Justyna Smela Wolski. "Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market" (2022) 21(2) European State Aid Law Quarterly (ESTAL) 153.

[26] article 16 par. 3 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[27] Article 17 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

joint ventures.[28] This obligation applies if the combined turnover of the EU enterprises engages in the merger or acquisition is at least EUR 500 million. In cases below this threshold, a notification obligation still arises if the acquiring company has received foreign subsidies totaling more than 50 million EUR in the last three (3) calendar years preceding the agreement, the announcement of the public bid, or the acquisition of a controlling interest. In particular, the notification requirement does not entail that the aid be directly connected to the intended concentration. Rather, the mere existence of a foreign subsidy during the relevant period, regardless of its specific purpose, is sufficient to fulfill the reporting criterion. Following the conclusion of the relevant agreement, notifications must be made prior to the actual implementation of a concentration. Early notification is acceptable where there is a clear intention to take action that would require notification in any case. There is no requirement to inform if none of the two criteria is satisfied, although the Commission retains the power to initiate an ex officio investigation.

In the context of undertakings involved in a concentration, the aggregate turnover includes revenues derived from product sales and services provided by the concerned undertakings in their ordinary activities, after accounting for sales rebates, value added tax, and related taxes. This specific clause contains further exceptions, such as the case of credit institutions, financial institutions and insurance undertaking, where the turnover threshold is replaced by an assessment of the income from financial instruments or the value of the gross premiums written as far as they are received by EU branches or divisions. The phrases "aggregate financial contributions" and aggregate turnover" under the Foreign Subsidy Regulation (FSR) comprise the total financial contributions received by all enterprises within the same group. This method is based on the EU merger control regulation.

It should be emphasized that no time constraints apply to ex-officio investigations, non-notified concentrations, or tender procedures. For investigations of notified concentrations, a fixed deadline of 25 working days is set for this initial phase.[29] The Regulation includes provisions for suspending time restrictions when required information is not delivered or in cases of non-cooperation with inspections. The

[28] Article 19 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.
[29] Article 24 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

Regulation provides the suspension of a notifiable concentration before its notification. However, launching a public bid or a series of transactions to acquire control of an undertaking may still proceed if an immediate notification is provided. The acquiring party shall refrain from using the acquired voting rights throughout the investigation, unless it applies to the Commission for a derogation in order to retain the full value of its investment for the time being[30]. Last but not least, the Commission is authorized to initiate an in-depth investigation no later than 25 working days after receiving the complete notification.[31] Following the in-depth investigation, the Commission is required to adopt an implementing act, which may involve decisions with commitments, no objection decisions, or decisions prohibiting a concentration in cases where a foreign subsidy is found to distort the internal market. Further, in this latter case, the Commission obtains the authority to take measures, including the dissolution of the concentration or ordering other restorative actions. Similarly, this Chapter is being concluded with the provision for the imposition of fines and periodic penalty payments by the European Commission in cases of non-cooperation or misleading disclosure of information.[32]

For a better comprehension of the following chapter (chapter 4) of the FSR, we will quote verbatim the definition for the distortive foreign subsidies in public procurements as it is given in Article 27. According to this article: "Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned." The Regulation further appears to be struggling with what should be to be notified in the case of public tenders.[33] If the expected value of the public contract exceeds 250 million EUR, any undertaking submitting such a tender should report foreign financial contributions received. The author of the regulation expressly adds a second criterion which must be met at the same time. Particularly, if an economic operator, along with its subsidiary companies lacking independent commercial operations, its holding

---

[30] Raymond Luja, "The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union", (2021) European State Aid Law Quarterly (ESTAL) 2.

[31] Article 25 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[32] Article 26 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[33] Article 28 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

companies, and potentially its main subcontractors and suppliers participating in the same public procurement process, has collectively received financial contribution totaling EUR 4 million or more from a third country within the three years prior to the notification, it falls under the scope of this provision. The notification shall be addressed to the contracting authority or entity, which must promptly submit it to the European Commission. This requires coordination among Member States. In this case again the European Commission has been authorized to initiate a preliminary review within 20 days from the receipt of a complete notification and further can decide whether or not will initiate in depth investigation accordingly.[34] The Commission may issue three types of implementing decisions depending on the findings: decision with commitments, decision prohibiting the award of the contract or no objection decision. Similarly, in order to facilitate the conduct of the investigation, the EU regulation 2560/2022 has introduced penalties to financial contribution in cases of non-cooperation in the context of public procurement procedures.[35]

Chapter 2: Regulatory Challenges

The Foreign Subsidies Regulation is a critical component of a broader strategy intended at redressing the competitive imbalance between EU enterprises and their counterparts in non-EU Members States. As was already highlighted above these foreign enterprises escape the strict subsidy controls that EU Member States are obliged to follow under EU State Aid law. To address this, the regulation introduces three new methods for monitoring foreign subsidies. These include granting the Commission wide investigative jurisdiction, instituting a notification-based mechanism for potentially subsidized mergers and acquisitions, and adopting an analogous system for public procurement bids with potential subsidies.

While the use and procedural frameworks of these instruments differ, they all rely on essential legal evaluations under the existing Regulatory framework on subsidies. These include the determination of the existence of a ‘foreign subsidy’, the assessment of whether the subsidy distorts the EU internal market. At the same time,

[34] Article 30 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.
[35] Article 33 of the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

an in in-depth examination of the substantive legal evaluation stages under the Foreign Subsidies Regulation and how they might be interpreted by the Commission remains largely undetermined. For this reason, this chapter aims to address that issue by examining each component through the lens of two influential areas of law: EU State aid law and WTO subsidies law. In doing so, it seeks to identify critical issues and questions that may have a substantial impact on the Regulation's practical application.

2.1 Definition of Subsidies

2.1.1 Definition of Subsidies under EU State Aid Law

Initially, it is worth mentioning that Article 107(1) of the TFEU refers to "State Aid" than the wording "Subsidy" compared to the Agreement on Subsidies and Countervailing Measures (SCMA) and the Foreign Subsidies Regulation (FSR) that will further be analyzed.

Article 107(1) of the TFEU provides the notion of State Aid as follows:

"1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".[36]

Article 107(1) does not provide a concrete notion of State Aid, however sets out the principle of incompatibility, declaring that State Aid is prohibited by default. As has been highlighted from the case-law of the EU courts, there are specific elements that shall be assessed in order to examine whether or not a State measure constitutes State aid.[37] The cumulative conditions that should be met in accordance with article 107(1) TFEU as well as with jurisprudence of the European Courts are:

1. that the support is not covered by the initial clause of Article 107(1) ("Save as otherwise provided in this Treaty...");
2. The aid is provided through or by state resources;

[36] TFEU, Article 107(1).

[37] E.g. case C-345/02 Pearle, ECLI:EU:C:2004:448, par. 33.

3. It confers a selective advantage to specific recipients, usually defined as "undertakings";
4. must either distort competition or have the potential to do so;
5. it affects trade.

It is crucial to grasp the accurate meaning of categorizing aid as both an objective and legal concept.[38] Article 107 focuses on the effects of state intervention rather than the motives or goals behind it.[39] The impact of the aid is considered an objective aspect, while the intentions are subjective. The reasons behind the aid are open to interpretation and don't play a significant role in the evaluation of state aid. The Commission through a factfinding analysis thoroughly examines all criteria outlined in Article 107(1) when making State Aids decisions. The distortion of competition is automatically assumed if the measure specifically benefits a participant in a competitive market. Additionally, the impact on trade can be considered even if it's only potentially affected.[40]

Furthermore, the case-law of the CJEU focuses on the impact of national policies rather than their legal form. State aid includes all positive benefits such as subsidies and interventions that decrease the regular costs of undertakings, regardless of their form or legal designation.[41] For example, except from subsidies, tax reductions, favorable loans, real estate would be able to fall within the notion of state aid, under article 107(1) TFEU.[42]

In terms of article 107(1) it is important to assess whether the particular financial contribution is being attributed to the State, and to clarify the meaning behind the phrase "by or through State resources" included in article 107(1) TFEU. The term "State" encompasses various government authorities, including central, decentralized (provincial, departments, municipalities), autonomous regions, and subnational entities. State aid can flow within different levels of a national system, such as aid

---

[38] Case C-67/94, Landbroke Racing v Commission [1998] ECLI:EU:T:1998:7.
[39] Case C-290/83, Commission v France (1985), EU:C:1985:37, par. 13.
[40] Merola, Massimo, and Filippo Caliento. "Is the Notion of Aid Broadening or Shrinking over Time, and If so, Why? A Subjective View on the Rationale of the Case Law." EU State Aid Law, 2020.
[41] Case C-234/84, Belgium v Commission (Meura) (1986), EU:C:1986:C302, par. 13 and
Case C-40/85, Belgium v Commission (1986), EU:C:1986:305, par. 12 and
Case C-248/84, Germany v Commission (1987), EU:C:1987:437, par. 18.
[42] De, Gronden van, and Catalin Stefan Rusu. Competition law in the EU: Principles, substance, enforcement / Johan W. Van de Gronden and Catalin S. Rusu. Cheltenham: Edward Elgar Publishing, 2021.

decided by central government but delivered at a local level. This definition of "State" is comprehensive, including not only the government itself but also ministries, regional bodies, municipalities, and other public institutions. It also covers public enterprises and even private entities acting on behalf of authorized public institutions.[43]Further, financial aid given through a third party used as an intermediary can be imputable to the state under certain circumstances.[44]In this case, it is being assessed the degree of control exerted by the intermediary part.

For many years both the Commission and the Court of Justice leaned towards adhering strictly to the language of the Treaty and they considered State resources as an alternative to the direct provision of aid by the State. However, in the case of Sloman Neptun[45], the Court examined the German shipping legislation's provision allowing exemption from German employment and social security laws for foreign crews on vessels using the German flag. The court asserted that a benefit can only be considered State aid under Article 107(1) TFEU if it stems directly or indirectly from State resources.[46] The court clarified that this distinction extends to aid granted not only by the State itself, but also by public or private bodies established or designated by the State.[47]

2.1.1 a) Selectivity criterion

To be identified as aid, a benefit must specifically support "specific businesses or the production of specific goods". On the other hand, a broad measure that benefits all businesses within a national territory without discrimination, without restrictions to a specific sector or region, or a specific category of businesses, does not qualify as State aid.[48]

---

[43] Eugene Stuart and Iana Roginska-Green, "Sixty Years of EU State Aid Law and Policy", International Competition Law Series, Wolters Kulwer, 2018, p.33.

[44] Cases T-716/17 Germanwings, ELCI:EU:T:2020:181, par. 71-106; T-607/17 Volotea, ELCI:EU:T:2020:180, par. 83-98 and T-8/18 EasyJet Airline, ELCI:EU:T:2020:182, par. 117-140.

[45] Joined Cases C-72/91 and C-73/91, Sloman Neptun v Bodo Ziesemer (1993) ECLI:EU:C:1993:97

[46] Merola, Massimo, and Filippo Caliento. "Is the Notion of Aid Broadening or Shrinking over Time, and If so, why? A Subjective View on the Rationale of the Case Law." EU State Aid Law, 2020.

[47] Case C-379/98, PreussenElektra (2001) ECLI:EU:C:2001:160, para. 58.

[48] Louis Vogel, "European Competition Law", 2nd Edition, 2018, Lawlex/ Bruylant, p. 540-542.

The Commission Notice on the notion of State aid[49], provides further guidelines regarding the notion of Selectivity which governs the implementation of article 107(1) TFEU. Specifically, in its relevant chapter entitled Selectivity, the Commission distinguishes between material selectivity and regional selectivity. Material selectivity refers to measures that apply only to certain undertakings or certain fields of economy within a Member State. In addition, material selectivity can be either de jure or de facto, depending on whether it results directly from legal criteria for granting a measure that is expressly designated for certain undertakings[50] or from conditions or barriers imposed by Member States preventing certain undertakings from benefiting from the measure.[51]Last but not least, selectivity also exists in cases that a measure appears to apply broadly, however the final decision is subject to the discretion of the public administration.

There has been a significant exemption arising from CJEU judgment on the case c-143/99 Adria-Wein, in which affirms previous judgments[52]. In this case the CJEU noted that a measure which benefits its recipient but is justified by the overall design or nature of the system to which it belongs is not considered selective. This indicates that if the benefit is provided as part of a broader system and aligns with its fundamental principles, it does fulfill the selectivity criterion.

2.1.2 Definition of Subsidies under SCMA

Pursuant to Article 1 of the Subsidies and Countervailing Measures Agreement (explicitly provided here) *a subsidy shall be deemed to exist if:*

a) (1) there is a financial contribution by a government or any public body within the territory of a member (referred to in this Agreement as "government"), i.e. where:

[49] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2017, p. 27-33.

[50] Ibid, According to the Commission Notice on the notion of State aid, this might include requirements like size, involvement in specified sectors, or having a specific legal structure.

[51] Ibid, The Commission Notice on the notion of state aid provides to us an example. If a tax credit is only given to investments that exceed a specific significant threshold, it effectively benefits enterprises with substantial financial resources.

[52] see C-173/73 Italy v Commission [1974] ECR 709, para. 33 and Belgium v Commission C-75/97 [1999] ECR I-3671, para. 33.

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

Or

a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

And

b) a benefit is thereby conferred.[53]

The abovementioned definition of subsidies makes clear the three cumulative criteria that have to be fulfilled in order to be considered as state aid: (1) it has to be a financial contribution by a government or any public body of a member; (2) this financial contribution must confer a benefit; and (3) the principle of specificity in terms of the recipient shall apply.[54]

In deconstructing the provision, it seems from the outset that we will be concerned mainly with three elements: (i) government or public body, (ii) financial contribution and (iii) benefit, as we have focused on above.

It is necessary to examine what consists a subsidy by a government or public body, which specific transactions are considered to be a part of governmental initiative or under the auspices of governmental bodies. According to the wording of the provision, the legislator tried to extend subsidies beyond central and governmental

[53] Article 1 SCMA.
[54] Article 2 SCMA.

authorities. Therefore, this, is confirmed by World Trade Organization Appellate Body's repertory of reports, especially on Canada – Dairy. In this case[55], is discussed the interpretation of the term "government", emphasizing that it involves the exercise of authority to regulate, control, supervise, or restrain individuals within a society. A "government agency" is seen as an entity endowed with powers by a government to perform functions of a governmental nature, involving the regulation, supervision, control, or restraint of private citizens' conduct.[56]

Likewise, it has been explicitly expressed by the Appellate Body that "being vested with governmental authority is the key feature of a public body", "must be an entity that possesses, exercises or is vested with governmental authority"[57]. Establishing whether an entity is a "public body", elements such as government's substantial control over the entity's conduct, including the capacity to use its resources as if they were its own, can be significant evidence. Furthermore, while government ownership is not determinative on its own, it can be examined alongside other criteria. Determining whether an entity is a "public body" necessitates a fact-specific evaluation applying these standards.[58]

Regarding the financial contribution, Article 1 of the SCMA distinguishes the notion into two wider categories: a) Direct provision: when a government or public body directly supplies funds, goods, services, or forgoes expected income, and b) Indirect Participation: When a government channels payments through a private entity. Payments solely traceable to private entities, without any contribution to a government or public body, cannot be classified as a "financial contribution".[59]

Noticeable is from the definition provided in article 1 of the SCMA, "financial contribution" is set out in four categories that are being explicitly referred to the

[55] DS 113: Canada – Measures Affecting Dairy exports. In paragraph 97, it is discussed a dispute over whether provincial milk marketing boards in Canada should be considered "governmental agencies" in the context of trade agreement. The Panel determined that since all decision-making bodies in the Canadian Milk Supply Management Committee (CMSMC) are government agencies, the actions of the CMSMC itself should also be classified as such. The Panel's conclusion that the provincial milk marketing boards are government agencies is not solely based on the delegation of authority, but also considers the source of their powers and the functions they perform.
[56] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, "The World Trade Organization – Law, Practice and Policy", Oxford, 3rd Edition, 2015, p. 304-329.
[57] DS379 United States— Definitive Anti-Dumping and countervailing Duties from China (China).
[58]Lester, Simon Nicholas, Bryan Mercurio, and Arwel Davies. "World Trade Law: Text. Materials, and Commentary", p. 451-471.
[59] DS286 United States-Countervailing Duty Investigation on DRAMs (Appellate Body), para. 106-107.

provision. In order to deeply understand the definition of subsidies, it is of highly importance to analyze each of them separately.

1. ***Direct and Potential Direct transfer of funds or liabilities.***

In the first category of financial contribution, it is included “government practice that involves a direct transfer of funds”. It is easy to understand that it is considered a financial contribution the transfer of money from the government to private entities. The same way, this article addresses potential transfer of funds in the future, meaning that government promises the transfer of money. For a better understanding, examples are given in that provision (grants, loans and equity infusion). These examples are only indicative.

This provision delineates a “financial contribution” as necessitating a “direct transfer of funds” within a government practice. It elucidates that this entails an immediate conveyance of funds devoid of intermediaries.[60] The term “government practice” denoted customary actions by a government or public body, suggesting conduct that is potentially usual. In addition, the term "involves" implies that a government practice need not consist solely of a transfer of funds, but may include a wider range of related activities.

2. ***Government revenue that is otherwise due is foregone or not collected.***

The second type of subsidies comes again along with an example of it, that is could be considered a fiscal incentive such as a tax credit. The footnote to this provision reinforces the impression that the coverage is broad. It explicitly exempts certain scenarios, such as the exemption of duties or taxes on exported products compared to those for domestic consumption, or the remission of such duties or taxes up to a certain amount. The mention of excluding VAT reimbursement upon expropriation, which is a common practice in numerous countries, indicates that the drafters of the

[60] DS436: United States -Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India. During the procedures in Appellate Body, India posited an interpretation stipulating that Article 1.1(a)(1)(i) encompasses only transfers where action and consequence are immediately linked without intermediaries. However, the Panel countered this, asserting that even transfers mediated by intermediaries may still exhibit enough directness, contingent on the circumstances.

agreement anticipated that without this limitation, obtaining a VAT refund after goods are expropriated might be deemed a financial contribution according to the SCMA.[61]

It is noteworthy that the majority of the complaints that reached the Appellate Body had to negotiate with preferential legislation for certain industries or corporate structures rather than sort of ‘positive discrimination’.

“Foregoing” revenue “otherwise due” means that the government has collected less revenue than it would have in a different situation. The term “foregone” suggests that the government has chosen not to collect revenue it could have. However, this choice must be evaluated against a specific normative benchmark, a defined standard, to compare the actual revenue collected with that would have been collected in the “otherwise” scenario.[62] Each member state has the authority to determine its own taxation policies, including which categories of revenue to tax or not to tax. Nonetheless, regardless of the choice, a member must adhere to its WTO obligations. In essence, what is considered “otherwise due” is contingent on the taxation rules set by each member state according to its own preferences and policies.[63]

3. ***Government provides goods or services other than general infrastructure, or purchases goods.***

The third type of financial contribution as provided in Article 1.1(a)(iii) covers situations where a government provides goods or services, excluding general infrastructure, or purchase goods. From the abovementioned provision, if a government directly offers goods or services to a particular entity or industry, it can be considered a financial contribution under the SCM Agreement. This could include various forms of support, such as direct provision of equipment, resources, or services[64]. Further, shall be excluded from this rule the case of “general Infrastructure”. In this way, it means that if a government invests in projects that benefit society as a whole, it doesn’t fall under this provision. This clause narrows down the scope to goods or services with a more specific, targeted application. The

[61] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, “The World Trade Organization – Law, Practice and Policy”, Oxford, 3rd Edition, 2015, p. 304-329.
[62] DS108: United States – Tax Treatment for “Foreign Sales Corporation (Appellate Body), para. 90.
[63] DS87: Chile – Taxes on Alcoholic Beverages (Appellate Body), paras 59-60.
[64] DS257: United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada. In US-Softwood Lumber IV (short title), according to the report of the Appellate body, such transactions may lower artificially the cost of producing a product by providing, to an enterprise, inputs having a financial value.

second distinct type of transaction that is added with this clause is where a government purchases goods from a particular entity or industry. It can also be seen as a financial contribution.[65]

4. ***Government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.***

The final type of financial contribution involves the government enlisting private entities in providing financial support. According to article 1.1(a)(iv) of the Subsidies and Countervailing Measures Agreement, in order to accomplish this the government may either provide funds to a "funding mechanism", which subsequently distributes the money or "entrust or direct" a private entity to carry out one of the three specified types of financial contributions, enlisted above in the article.[66]

As emphasized by the Appellate Body in the case US-Countervailing Duty Investigation on DRAMS, "entrustment" occurs when a government assigns responsibility to a private body, while "direction" refers to situations where the government actively exercises authority over a private body. It emphasized that entrustment or direction typically involves some form of inducement or threat, which can serve as evidence of such involvement.[67] In practice, determining whether entrustment or direction exists requires a detailed examination of specific government actions to gauge the level of influence the government exerts on private industry.[68]

5. ***Income or price support.***

The last article 1.1(a)(2) defines as a subsidy alternatively 'any form of income or price support in the sense of Article XVI of the GATT. Article XVI does not define the notions "income support" and "price support", instead limiting covered support to

---

[65] Ibid. As mentioned above, in the same case the Appellate Body referred to this type of transaction that has the potential to increase artificially the revenues gained from selling the product.

[66] Article 1 SCMA: "1) Direct and potential direct transfer of funds or liabilities, 2) government revenue that is otherwise due is foregone or not collected, 3) government provides goods or services, other than general infrastructures, or purchases goods."

[67]US – Countervailing Duty Investigation on DRAMS (Appellate Body Report),paras 113-114.

[68] Simon Lester, Bryan Mercurio & Arwel Davies, "World Trade Law – Text, Materials and Commentary", 3rd Edition, 2018, Hart, p. 451-471.

anything that operates directly or indirectly to increase exports of any product from, or decrease imports of any product into a member's territory.[69]The term "price support" has both broad and narrow interpretations. Broadly, it could encompass any government measure that elevates producer prices above a set minimum level. However, Article 1.1.(a) as a whole tends to a more limited interpretation. Following the latter, "price support" primarily pertains to direct government interference aiming to set a specific price level for a good. This interpretation emphasizes that "price support" focuses on the nature of the government action rather than its effects.[70]

2.1.2 a) Specificity criterion

The last criterion for the assessment of the definition of subsidy under SCM Agreement is set out in the article 1.1 paragraph 2. A financial contribution must confer a benefit to a specific recipient. Otherwise, it should be granted to an enterprise or a group of enterprises, or to an industry or a group of industries, within the jurisdiction of the granting authority.[71] Subsidies that are only available to certain firms located within a certain geographical region are considered specific by virtue of Article 2.2 of SCMA. However, the same article states that alterations or establishment of generally applicable tax rates by authorized governmental levels do not qualify as subsidies. In addition, Specific are considered the subsidies, under article 2.3 that are prohibited and are being listed under article 3 of SCMA. [72]Under article 2.1(b) of SCMA, underlines that the granting of subsidies according to objective criteria or conditions is considered as non-specific.[73]

Another important categorization of specificity criterion is the "de jure" and the "de facto" specificity. "De jure" specificity[74] refers to situations in which a subsidy is

[69] Article XVI – Subsidies General Agreement on Tariffs and Trade (1994)
[70] DS414: China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (Report of the Panel).
[71] Article 2 of the SCMA.
[72] DS267: United States – Subsidies on Upland Cotton. In paragraph 7.1153 of the Panel's report, it is also highlighted. The panel addressed the "specificity" of user marketing payments to domestic users and exporters under Article 2.3 of the SCM Agreement.
[73] Agreement on Subsidies and Countervailing Measures (SCMA). Footnote 2 defines that: "Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."

[74] Agreement on Subsidies and Countervailing Measures (SCMA), Article 2.1(a).

expressly allocated for certain recipients by statute. “De facto” specificity[75], on the other hand, refers to instances in which an attempt is made to circumvent the prohibition of “de jure” specificity. This implies that subsidies can be regarded specific either by law (de jure) if they are legally restricted to specific industries or companies, or in practice (de facto) if, despite being generally available under law, they are effectively limited to specific group of industries or enterprises.[76] Regarding the “de facto” specificity, there are several criteria that should be taken into account in order to assess whether it applies. It should be examined whether the subsidy is used by a limited number of enterprises, predominantly used by certain enterprises, the grant of exceptionally large sums to certain enterprises, and the granting authority’ s use of discretion in providing the subsidy.[77]

2.1.3 Definition of Subsidies under Foreign Subsidies Regulation (FSR)

Article 3 of the Foreign Subsidy Regulation (FSR) defines the Foreign Subsidies as follows:

“1. For the purposes of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.

2. For the purposes of this Regulation, a financial contribution shall include, inter alia:

- *a. the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;*
- *b. the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or*

[75] Agreement on Subsidies and Countervailing Measures (SCMA), Article 2.1(c).

[76] Mavroidis, Petros. The regulation of International Trade: Volume 2: The WTO agreements on trade in Goods. Cambridge, MA: The MIT Press, 2016, p. 240-248.

[77]DS-353: United States- Measures Affecting Trade in Large Civil Aircraft. In US-Measures Affecting Trade in Large Civil Aircraft, in paragraph 7.116, the Panel argued that there is no need to fall under all these criteria, at least one criterion shall be met.

c. the provision of goods or services or the purchase of goods or services.

A financial contribution provided by third country shall include a financial contribution provided by:

a. the central government and public authorities at all other levels;
b. a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or
c. a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.[78]

This article outlines the criteria for identifying a foreign subsidy. It states that a foreign subsidy is considered to exist when a third country provides, directly or indirectly to a business operating in the internal market. This benefit must be restricted, either in law or in practice, to one or more specific businesses or industries.

A first reading of this article of the regulation makes it clear very quickly that the legislator was mainly inspired by the Subsidies and Countervailing Measures Agreement (SCMA).

The first key element that renders a 'foreign subsidy' according to the FSR is that there must be a 'financial contribution' provided by the public authorities of a third country. The new regulation has taken into account and included all the possible forms that could constitute a financial contribution provided by public authorities, as it has emerged after interpretation and opinions in various cases. Therefore, it is expressly stated that a financial contribution can be attributable to: the central government and government authorities at all other levels, foreign public entities whose actions can be attributed to the third country and any private entity, whose actions can be attributed to the third country.[79]

---

[78] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, article 3.

[79] European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final. According to para. 2.2 of the White Paper, "Foreign States may also give a subsidy to a parent company located outside the EU (e.g., corporate tax regimes providing selective incentives), which then in turn finances the subsidiary located in the EU through intragroup transactions. An undertaking in the EU may also receive financing at preferential terms from foreign banks directly

Furthermore, it must be noted that the legislator of the regulation has included all types of financial contribution laid down in SCMA along with the Panel's and CJEU's widest interpretations on this matter. In this way, taking as a concrete basis the examples listed in the SCMA, the new Regulation in its definition of the concept of "financial contribution" mentions the same types and in order to become more inclusive and descriptive, names a few more examples.[80]

The second key element in order to define "foreign subsidies" is that this financial contribution shall confer a benefit to an undertaking engaging in an economic activity in the internal market. This element was a prerequisite under both existing frameworks, Article 107 TFEU and article 1 SCMA. In order to determine whether a financial contribution confers an advantage on an undertaking operating in the internal market, it is important to compare the benchmarks (such as the investment practices of private investors, marketable financing rates, similar tax treatment or appropriate remuneration for a specific good or service) under which the contribution was made with what would be considered normal in a competitive market.[81]

Third, the benefit is limited, in law or in fact, to one or more undertakings or industries. This criterion refers to the selectivity of the measure. Selectivity refers to when a measure favors specific sectors or economic activities, and can also encompass measures that benefit undertakings with certain characteristics or are applicable in limited geographic areas of a Member State.[82]

---

upon instruction of foreign states. Furthermore, third countries might have cooperation arrangements with EU local authorities or EU development banks, and may thus channel foreign subsidies through these authorities or banks to undertakings in the EU."

[80] Article 1.1(a)(1) of the SCMA refers to a subsidy where a government practice involves a direct transfer of funds and potential transfers of funds or liabilities. As we mentioned above it lays down several examples. To this specific clause the EU 2560/2022 added more forms of subsidies: capital injections, fiscal incentives, setting off of operating losses, compensations for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling, tax exemptions or the granting of special or exclusive rights without adequate remuneration.

[81] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, recital 13. It should be noted that a financial contribution shouldn't be seen as conferring a benefit if the benchmark assessment demonstrates that the undertaking would have obtained the same benefit under normal market conditions.

[82]Kociubiński, J. "The Proposed Regulation on Foreign Subsidies Distorting the Internal Market:" European Competition and Regulatory Law Review 6, no. 1 (2022): 56–68.

2.1.4 Summary Conclusion on definition of Subsidies

Having analyzed the definitions of subsidies in these three main regulatory frameworks, it is of highly importance to highlight the differences between them and to further examine the influence they had on the terminology used in the Foreign Subsidies Regulation. Notably, the WTO definition of "subsidy" excludes the "State recourses" condition included in EU State Aid Law. In WTO law, it is sufficient if state authorities direct a private body to contribute financially from its own resource. This means that even in the absence of direct state funding, initiatives employing private resources might be called subsidies, in contrast, EU State Aid Law requires resources to be under "public control" in order to qualify as "State aid".

In contrast to WTO anti-subsidy rules, EU State aid Law is considerably more cautious regarding subsidies. It generally requires EU Member States to refrain from providing aid, with some forms of subsidies exempted. Due to the fact that EU State Aid law only applies within EU Member States, any subsidization from sources outside the EU is disregarded. As a result, European enterprises face additional limits when it comes to obtaining state aid as compared to their global rivals. To address this, the Foreign Subsidy Regulation (FSR) is being implemented, with regard to ensure fair competition for non-subsidized enterprises within the EU. It focuses on investments subsidized by third countries, an area that the EU claims is not fully covered by either WTO anti-subsidy law or EU State Aid law.[83]

In addition, in legal practice, the interpretation of equivalent features in the definitions of 'subsidy' and 'State Aid' have been varied. The treatment of the notions of "selectivity" and "specificity", which have caused significant issues in legal interpretation, is a prominent distinction. A complex methodology in EU State Aid Law examines whether a measure represents a "derogation" from the reference system, possible leading to discrimination.[84] Specificity in WTO subsidy law focuses

[83] Xueji Su, "A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?", Legal Issues of Economic Integration 50, no.1 (2023), Kluwer Law International BV, p. 67-92.

[84] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2017. This methodology, otherwise the "three-step test" or the "derogation framework" was introduced by the "Commission Notice on the Notion of State Aid" (specifically in paras 127-128). According to it, "First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives

on whether a measure exclusively benefits particular enterprises, regardless of discrimination. In this way it is given to the notion of specificity a wider scope. As a result, a measure is more likely to be considered "specific" in WTO law than "Selective" in EU State Aid Law.

Despite these differences, the Foreign Subsidies Regulation, appears to derive from both systems. It integrates EU State Aid Law principles in gauging benefits applying comparative benchmarks and assuming that state provision or purchase of goods and services through competitive, transparent, and non-discriminatory tender procedures aligns with market conditions.[85] Additionally, the FSR expressly indicates, in its recital 9, that it shall be interpreted in light of applicable EU legislation, which consists of EU State Aid Law. Nonetheless, using WTO subsidy law nomenclature allows for potential impacts from that system.[86]

2.2 Assessment of Distortion or negative impact

Another critical problem in our examination of the regulatory framework is the concept of distortion on the internal market. The existence of an internal market distortion, as discussed above, is one of the requirements that activates the Commission's jurisdiction to mandate redressive measures under the new Regulation. An important factor to consider in evaluating the Foreign Subsidy Regulation (FSR) is its articulated purpose, which is undoubtedly one of the most critical prerequisites for comparing it to existing WTO and EU frameworks.

---

intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is prima facie selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is prima facie selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system. If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) of the Treaty."

[85] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, recital 13. See also the "Commission Notice on the Notion of State Aid", s. 4.2.3.2.

[86] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, recital 9.

2.2.1 Assessment of Distortion or negative impact under EU State Aid Law

Article 107(1), providing a negative definition of State Aid, refers to what is incompatible with the Internal Market. According to this, the aid "…which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". In this way, two more elements are being added to the cumulative criteria that should be met to this prima facie rule of incompatibility: the existing or potential distortion of competition and the affection of trade between Member States. In practice, these elements are being treated inseparably, however, they constitute two distinct notions.[87][88]In order to promote a uniform interpretation of the notion of state aid and to clarify its various components, the European Commission publishes the Commission Notice on the Notion of State Aid.[89]This notice provides information on identifying illicit State aid in accordance with Treaty Standards. It is based on European court cases and the procedures of the EU Commission. Further, it supports national courts, granting authorities, and market-operating entities when determining whether subsidies constitute State aid, and if so, whether exemption must be implemented for certain policy goals.

a) Existing or potential distortion of competition

Aid, defined as a specific grant from state resources, creates a distortion in competition when it gives the recipient or a third party an advantage in the relevant market at the expense of their (potential) competitors. The Commission merely needs to prove that the aid in question has the potential to affect trade between Member States and distort competition. According to CJEU findings, it is not required to delineate the specific market or conduct an analysis of its composition and consequent

[87] Louis Vogel, "European Competition Law", 2nd Edition, 2018, Lawlex / Bruylant, p.659-660.

[88] The idea of inseparability that covers these two notions is also confirmed by several authors. Therefore, it has been observed that when there is a distortion of competition in a given market, it is likely to have an adverse effect on the trade between EU Member States, particularly whether the firms in that market compete with those from other Member States. On the contrary, if there is a negative impact on trade between Member States (adverse effect on trade), it is probable that competition will be distorted in the affected national or broader community markets. This demonstrates, as we could name otherwise, the interdependence between competition and trade within the EU.

[89] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2017.

competitive dynamics.[90][91] Furthermore, the Commission must demonstrate at least a potential damage to competition, but it is not required to give extensive proof. Instead, a concise overview of the competitive environment and a sufficiently reasonable justification for the present or potential disruption of competition should suffice.[92] For the assessment of the distortion of competition, the Court shall take into account whether a specific sector in a Member State is subject to competition.[93]

b) Affection of trade between Member States

The second criterion that requires analysis for the application of article 107 TFEU is the "adverse effect on trade between Member States" resulting from an advantage granted to an undertaking.[94]Measures that improve one enterprise's position compared to competitors in intra-EU trade have an impact on trade within the EU. Similarly, if a measure poses a risk to competition, it meets the requirement for competition distortion.[95] It has to be noted that the threshold for identifying an "effect on trade" is relatively low, and there is no specified percentage or amount below which trade can be deemed to be unaffected.[96]Another conclusion that has been drawn upon the CJEU, is that even if a recipient of State aid exports the majority of its products outside the EU, it might nevertheless have an impact on trade among Member States.[97]

c) "De minimis" threshold

In addition, the Commission has created a de minimis criterion which represents the bare minimum of aid that, in theory, should not be deemed subject to Article 107

[90] T-298/97, Alzetta Mauro vs Commission, ECR 2000, para. 95.

[91] C-730/79 Philip Morris vs Commission. It is also highlighted in this case, where the applicant argued that, in determining the compatibility of specific aid with the common market, the Commission should initially apply the criteria used to assess competition under Articles 85 and 86 EC (now articles 105 and 106 of the TFEU). This assessment includes "relevant market" which results from the analysis of the product, the territory and the period in question. However, in paragraph 13 the CJEU rejects this argument.

[92] Heidenhain, Martin H. European State Aid Law. München: Verlag C. H. Beck, 2010, p. 50-53.

[93] Ferro, Miguel Sousa. Market definition in EU competition law. Northampton, MA: Edward Elgar Pub., 2019, p. 92.

[94]Ezrachi, Ariel. EU competition law an Analytical Guide to the leading cases. Oxford: Hart, 2021.

[95] C-730/79 Philip Morris v. Commission, paras. 11-13. According to this case, the impact of a measure on trade is satisfied if it is expected, rather than it is actual demonstrated. The court also concluded that identifying market borers is nor required for assessing the impact of policy.

[96] C-280/00 Altmark Trans and Regierungspräsidium Magdeburg, paras. 75-82.

[97] C-494/06 P - Commission v Italy and Wam, paras. 50-63.

TFEU.[98] The general rule in the EU Regulation 1407/2013 states that aid to a single undertaking is excluded from the notification obligation provided it does not exceed EUR 200.000 over a three-year period. However, aid with ambiguous quantities that are difficult to measure cannot benefit from de minimis rule since there is no guarantee that the threshold will not be exceeded or there will be no overlap with other State aid. Nonetheless, aid below the de minimis threshold is able to have an influence on competition and trade among Member States in industries with strong competitive dynamics.[99]

2.2.2 Assessment of Distortion or negative impact under SCMA

The preceding section clarified that only particular types of state aid, those that fit within the criteria of 'subsidy' and are 'specific', are subject to regulation under the SCM Agreement.[100] The latter, in order to implement its standards to the aforementioned subsidies, provides a regulatory framework, which consists of three major components: rules addressing prohibited subsidies[101], rules addressing actionable subsidies[102] and rules addressing non-actionable subsidies[103]. This system is frequently compared to a "traffic-light" model. First of all, as "red light" are considered the categorically prohibited subsidies. Secondly, as "yellow light" are defined the "actionable subsidies", that are permissible unless they result in adverse trade consequences. Last but not least, the SCM Agreement categorizes the "green light" subsidies, the non- actionable subsidies, which were initially permitted in the early days of the WTO but have since expired.

This "traffic-light" model will form the basis of our research to comprehend the principles underlying the SCM Agreement and what is meant as a distortion on the internal market or otherwise as affecting it.

---

[98] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance.

[99] Louis Vogel, "European Competition Law", 2nd edition, 2018, Lawlex/Bruylant, p. 716-717.

[100] Agreement on Subsidies and Countervailing Measures (SCMA), Article 1.1.2 explicitly confirms that in case we assess the existence of a subsidy, which confers a benefit and it is specific, then this subsidy shall be subject to the provisions of Part II, III or V.

[101] Agreement on Subsidies and Countervailing Measures (SCMA), Article 3.

[102] Agreement on Subsidies and Countervailing Measures (SCMA), Article 5.

[103] Agreement on Subsidies and Countervailing Measures (SCMA), Article 8.

(a) Prohibited Subsidies

Article 3 reads as follows:

Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

a. *subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I ;*
b. *subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.*

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

From the title, Article 3.1 reveals its content, in particular it explicitly states which subsidies are considered prohibited, in other words banned in all cases[104]. Prohibited Subsidies are divided into two main categories: a) subsidies contingent upon export performance, and b) subsidies contingent upon the use of domestic. Given their immense capacity for distorting trade, these two types of subsidies are subject to stricter regulations. While all subsidies, as we will analyze later, have this potential, export and domestic content subsidies are particularly harmful. This means that, export subsidies can harm foreign competitors in global markets, while domestic content subsidies restrict foreign companies' access to a member's internal market. In some circumstances, if the precise aspects of the subsidy are validated, it falls into the "prohibited" category.[105]

a.1 subsidies contingent, in law or in fact, upon export performance

Initiating this analysis from the most obvious to the least. Article 3.1.(a) SCMA refers to Annex I, where is provided a non-exhaustive list of prohibited export subsidies,

[104] Agreement on Subsidies and Countervailing Measures (SCMA), Article 3.2 provides that Members "shall neither grant maintain" these subsidies.
[105] Simon Lester, Bryan Mercurio & Arwel Davies, "World Trade Law – Text, Materials and Commentary", 3rd Edition, 2018, Hart, p. 471-494.

indicating twelve forms of State aid that were considered inherently trade distorting and illegitimate.[106]

The principal subject matter negotiated in this provision is whether a subsidy is "de jure or de facto conditional" upon export performance. Before proceeding with the analysis and interpretation by the jurisprudence of the Appellate Body, we have to note that the wording "contingent" has been interpretated as "tied to" the export conduct [107] , meaning that it is dependent.

Generally, the difference between "de jure" and "de facto" export contingency in subsidies is determined by the sort of proof necessary for confirmation. Establishing a "de jure" export contingency is based on the explicit language of applicable law, regulations, or legal instruments. However, proving "de facto' export contingency presents a greater challenge, given there is no one legislative tool that explicitly states a subsidy's reliance on export performance.[108]. For this reason, the latter is considered worthy of further analysis. We acknowledge that meeting the criteria for establishing "de facto" export contingency, as outlined in footnote 4, requires demonstrating three distinct substantive aspects: first, the provision of a subsidy; second, its association (with actual or anticipated exportation); and third the actual or anticipated occurrence of exportation or export earnings.[109] Appellate Body's contribution on the EC and certain member states – Large Civil Aircraft case was significant regarding the interpretation of "de facto exportation. According to this, the criteria for "de facto" contingency set out in Article 3.1.(a) and footnote 4 of the SCM Agreement are met when the subsidy is granted in order to encourage the recipient to report in a way that differs from a straightforward reflection of domestic and export market conditions unaffected by the subsidy's bestowal.[110] Elaborating its reasoning in the same case the

[106] DS46: Brazil – Export Financing Programme for Aircraft. The Appellate Body noted that there is no need to prove that the requirements of the Article 3.1 SCMA are met, and if the conduct (subsidy) is listed on the Annex I then, it is considered ipso facto prohibited.

[107] DS267: United States – Subsidies on Upland Cotton (Appellate Body), para. 572.

[108] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, "The World Trade Organization – Law, Practice and Policy", Oxford, 3rd Edition, 2015, p. 329-337.

[109]Agreement on Subsidies and Countervailing Measures (SCMA), Footnote 4 Article 3.1.(a). This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[110] DS316: European Communities and certain member states – Measures Affecting Trade in Large Civil Aircraft (Appellate Body), para. 1045.

Appellate Body highlighted the objective criteria, that may be assessed in order for the existence of "de facto" contingency to be inferred. These considerations may include: (i) the design and structure of the measure granting the subsidy; (ii) the specific operational procedures outlined within said measure; and (iii) the relevant real-world circumstances surrounding the granting of the subsidy, which provide the backdrop for comprehending the measure's design, structure and modalities of operation.[111]

a.2 subsidies contingent upon the use of domestic over imported goods

Article 3.1.(b) of the SCM Agreement addresses subsidies related to domestic content. It expressly states that it prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods". Therefore, the contingency standard that we have previously analyzed, applies also to this provision. There have been limited and straightforward legal precedents related to this provision.

The Appellate Body highlighted with its report in Canada - Autos that import substitution subsidies might be based on either a legal determination to use only local content (de jure) or, factually (de facto) be geared towards achieving the same objective.[112]

(b) Actionable Subsidies

Pursuant to article 5 SCMA,

"No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member;

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;

(c) serious prejudice to the interests of another Member.

[111] Ibid. para. 1046.
[112] DS139: Canada — Certain Measures Affecting the Automotive Industry, paras. 135-143.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture."

Article 5 refers to this category of subsidies as actionable, otherwise as we introduced them earlier as the: Yellow light Subsidies". These subsidies are also known as subsidies that cause "adverse effects to the interests of other Members". The term "actionable" implies that subsidies are not fully prohibited in this case. Instead, they can be challenged if they seem to have specific negative effects on trade. If these consequences can be proved, the subsidies violate the SCM Agreement.

Further, this article lays down the following three types of "adverse effects":

a) injury to the domestic industry of another Member;

b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;

c) serious prejudice to the interests of another Member.

The first category of actionable subsidies is the one that causes "injury to the domestic industry of another Member". Article 5(a) of the SCM Agreement provides its explanation to footnote 11. According to the latter injury is interpreted in the sense in which it is given in part V, the part that regulates the conditions for imposing countervailing duties.[113]According to Article 15 SCMA, contained in part V, a member's Investigating Authority (IA) must decide which type of injury took place, based its assessment on positive evidence. This determination entails evaluating (a) the volume of subsidized imports and their influence on domestic market pricing for similar items, as well as (b) the subsequent impact of these imports on domestic producers of such products. As a result, in order to assert that a member utilized an actionable subsidy under Article 5(a) SCMA, the domestic industry in direct

[113] Agreement on Subsidies and Countervailing Measures (SCMA). In part V, and especially Article 15 is accompanied by footnote 45: "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article. "

competition with the subsidized products of similar kind must experience injury that can be attributable to the subsidization. [114]

As regards the second category of actionable subsidies, Article 5(b) refers to "nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994". In US-Offset Act Dispute, there was an extensive analysis based on previous jurisprudent regarding the interpretation of this clause.[115] This report along with the footnote 12 explain that this condition provided in article 5(b) SCMA is presumed where a violation has been shown under the GATT.

The last category, article 5(c) SCMA, mentions as an actionable subsidy "the serious prejudice to the interests of another Member". Generally, we have to admit that SCM Agreement has offered relative interpretation to crucial elements by utilizing footnotes. For the analysis of this category, it is important to consult the footnote 13. According to it, the term "serious prejudice to the interest of another Member" shall be interpreted in accordance to paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice. For the integrity of this definition, and due to the unity offered by the SCMA, we will notice that the meaning of the concept "serious prejudice" is explained for our convenience in the very next article.[116]

In brief, we shall focus on paragraph 3 of the above-mentioned article as has been argued that it is considered as the determinant legal basis. Therefore, the assessment of this category of actionable subsidy should be based on the effects of subsidization rather than its a priori nature.[117]

---

[114] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, "The World Trade Organization – Law, Practice and Policy", Oxford, 3rd Edition, 2015, p. 337-354.

[115] DS217: United States — Continued Dumping and Subsidy Offset Act of 2000 (Panel), para. 7.120 et seq.

[116] Agreement on Subsidies and Countervailing Measures (SCMA) Article 6.1: "6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of: (a) the total ad valorem subsidization14 of a product exceeding 5 per cent; (b) subsidies to cover operating losses sustained by an industry; (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems; (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.

[117] DS267: United States – Subsidies on Upland Cotton (Panel), para. 7.1392, Article 2.15-(Brazil)(Panel), para. 10.18 et seq. and Panel, paras. 7.1368-7.1390.

(c) Non-Actionable Subsidies

Non-Actionable Subsidies were introduced by the provision in Article 8 of the SCMA. However, we agree that there is no need for an extensive analysis on this category due to the fact that these provisions are no longer in force. According to Article 31, entitled as "provisional application" the drafters of the Agreement provided the 5-year application after the WTO's entry into force. The elimination of the "non-actionable" classification of subsidies does not indicate that these policies cannot be implemented. Instead, it implies that when governments provide such subsidies, they must do so in a way that prevents them from being classified as "prohibited". Furthermore, they should ensure that these subsidies do not have "adverse effects" on trade or lead to detrimental imports that could be countered.[118]

2.2.3 Assessment of Distortion or negative impact under FSR

Article 4 of the FSR is entitled as "distortions in the internal market" and thus we are also aware of its content. According to it:

"1. A distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market. A distortion in the internal market shall be determined on the basis of indicators, which can include, in particular, the following:
(a) the amount of the foreign subsidy;
(b) the nature of the foreign subsidy;
(c) the situation of the undertaking, including its size and the markets or sectors concerned;
(d) the level and evolution of economic activity of the undertaking on the internal market;
(e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.
2. Where the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over any consecutive period of three years, that foreign subsidy shall be considered unlikely to distort the internal market.

[118] Simon Lester, Bryan Mercurio & Arwel Davies, "World Trade Law – Text, Materials and Commentary", 3rd Edition, 2018, Hart, p. 494.

3. Where the total amount of a foreign subsidy to an undertaking does not exceed the amount of de minimis aid as defined in Article 3(2), first subparagraph, of Regulation (EU) No 1407/2013 per third country over any consecutive period of three years, that foreign subsidy shall not be considered to distort the internal market.
4. A foreign subsidy may be considered not to distort the internal market to the extent that it is aimed at making good the damage caused by natural disasters or exceptional occurrences."
Early on,[119] the European Commission pointed to the need for a balanced regulatory framework and the inadequacy of international rules on these matters, which led to an inability to address the distorting effects of foreign subsidies. In accordance with the above quoted article of the FSR, once we have identified the existence of a foreign subsidy, it is time then to examine whether and the extent to which it distorts the internal market. The primary effect-based indicators of this distortion are when this foreign subsidy is likely to strengthen an undertaking's competitive position in the internal market and, by doing so, whether would be able to actually or potentially negatively affect competition. In addition, the application of this assessment is reinforced by the provision in the same article of the criteria that could be taken into account. These are therefore the amount and nature of the foreign subsidy, the situation of the undertaking (including its size and the markets concerned), the level and evolution of economic activity of the undertaking on the internal market and the purpose for which the subsidy was granted and its conditions, as well as its use on the internal market. Due to the complexity of this issue and the ever-evolving character of subsidies we consider these indicators as non-exhaustive. Besides, as we have noted above in the analysis of the basic concept that dominated the Regulation, the purpose of the Regulation (and its intentional vagueness) aims to render it as concise as possible. The likelihood of an actual market distortion may vary, according to article 5[120]. Subsidies to struggling companies (unless part of a restructuring plan),

[119] European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final. The European Commission, in its White Paper, lists extensively examples of cases involving foreign subsidies, such as cheaper financing by foreign states to EU undertaking, intragroup transactions as intermediaries to funding in the EU, preferential terms from foreign banks etc. These cases may pursue various objectives possibly distorting the internal market. However, it is highlighted that the effort to address this issue, through regulatory regimes and implications, appeared to have failed.
[120] the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, article 5. These types of subsidies, that lay down in article 5, are considered as most likely to distort the internal market. At the same time, the

unconditional guarantees (regarding amount or duration), and subsidies directly tied to mergers or securing a public contract through an exceptionally favorable bid all increase the likelihood of distortion.[121][122]Given the high risk of distortions resulting from these specific types of foreign subsidies, the Commission may not need to perform a full-indicator -based assessment, but will be considered as per se distortive. Nevertheless, an initiative might theoretically establish that the specific foreign subsidy in question would not lead to an internal market distortion under the peculiar circumstances of the instance.[123]

In addition, in order to conclude this chapter on the distortion of the internal market under the FSR regulation, it is considered crucial to mention the balancing test so as we have an overall picture. Thus, the European Commission is empowered to conduct the balancing assessment before deciding upon possible redressive measures or commitments. According to article 6 of the FSR, the European Commission must take into account and review any positive effects of the foreign subsidy on the development of the relevant subsidized activity and compare and contrast against the negative effects of the distortion.[124]

2.2.4 Summary Conclusion on the Assessment of Distortion or negative impact

The Foreign Subsidies Regulation's methodology accords with evaluations of distortion in competition under EU state aid law and WTO subsidy law. Both these

---

drafters of the regulation have included in the previous article the type of subsidies that are thought to be unlikely to distort the internal market. Regarding the latter. This happens in case that the overall amount of a foreign subsidy to an entity does not exceed EUR 4 million in any three-year period.

[121] Raymond Luja, "The Foreign Subsidies Regulation: Countering State Aid beyond the European Union," European State Aid Law Quarterly (ESTAL) 20, no. 2 (2021): 187-199.

[122] the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, Recital 19. We consider it useful to highlight other examples listed in recital 19: Distortion is more probable when subsidies are used toward operating expenditures rather than investment expenses, foreign subsidies in overcapacity markets, or those that contribute to them by supporting economically unviable assets or encouraging capacity that would not otherwise occur and subsidies directed to recipients with limited activity.

[123]the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, Recital 20.

[124]European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final. According to it, in this assessment, the EU's public policy objectives, such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience, would be taken into account. It is also mentioned that, If on balance, the distortion on the internal market caused by the foreign subsidy is sufficiently mitigated by the positive impact of the supported economic activity or investment, the ongoing investigation would not need to be pursued further.

regimes recognize some types of subsidies as inherently objectionable. Notably, the Regulation identifies rescue and restructuring subsidies to an undertaking in difficulty without a restructuring plan and unlimited guarantees as distortive by nature. These subsidies would always be declared incompatible with the internal market according to EU State aid law.

The broader evaluation of distortions using indicators in the Foreign Subsidies Regulation doesn't have a direct equivalent in EU State aid law or WTO subsidy law. This appears to be a unique feature that exists only in this regulation. The assessment of distortions is not a major aspect of defining State aid under EU State aid law, but it becomes increasingly important during the compatibility examination, which varies based on the case's circumstances and potential distortions. The latter examination, provided by EU state aid law, takes into account the current and potential effects of aid on key product markets, as well as potential implication on location and trade through economic activities.

Similarly, under WTO subsidy rules, negative impacts are evaluated in great detail, with a focus on whether there is "injury" to local industry or "serious prejudice" to another Member State's interests, and once again focuses on the subsidy's actual and foreseeable effects.

The examination based on indicators in the Foreign Subsidies Regulation appears to focus on utilizing proxies to estimate the likely impacts of subsidies rather than actually assessing such effects. The regulation explains this approach by stating that the complexities and lack of openness surrounding foreign subsidies might make it difficult to precisely identify or qualify influence on the domestic market. While this approach goes beyond the initial, relatively surface-level assessment of distortions in EU State aid law, it may not be as thorough as the in-depth systematic evaluation of effects carried out during the compatibility stage of EU State aid law and under WTO subsidy law.

It is also very important to note that due to the fact that it is based on the simultaneous evaluation of two consequences, EU State aid law inevitably contains distortion to both trade and competition. However, the standards stated in EU State aid law for analyzing trade implications do not apply to the execution of the Foreign Subsidies Regulation. The EU State aid law is intended to prohibit intra-EU competition that

might impede the operation of the single market. Since the single market agreement only applies to EU Member States, the trade impact is not directly relevant to the Foreign Subsidies Regulation, which primarily deals with non-EU subsidies. It is also important to highlight that while the FSR may have an effect on trade, its primary target is to control market access.

Chapter 3: Comparative analysis of the FSR with other Regulatory Frameworks

3.1 EU-Merger Control Regulation and FSR Analysis

The Foreign Subsidies Regulation includes in its assessment potential distortions related to mergers introducing concentrations' notification above certain thresholds. This mechanism which has been added to the European Commission's toolbox, constitutes a new instrument which operates as a complement[125] to the Merger Regulation.[126] In addition, it is explicitly stated in its recitals, that FSR should be interpreted in accordance with, among other regulations and with the EU Mergers Control regulation.[127] Many authors also characterize the new regime and its notification system as analogous to the EU Merger Regulation.[128]In order to reach a conclusion about the interaction of these rules, it is essential first to identify the points where they intersect.

A substantial part of the text of the Foreign Subsidies Regulation is already acknowledged, including the definition of "concentrations that require notification", as well as the examination methods and timetables. In the preceding analysis, carried out in the chapter entitled "Deciphering the complex framework: Analyzing the EU Regulation 2560/2022 on Foreign Subsidies Distorting the Internal Market", a

---

[125] European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final, p.40.

[126] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.

[127]Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022, see Recital 9.

[128] Jay Modrall, "Anti-Subsidy" Regulation – A New Big Stick in the EU Regulatory Arsenal (https://competitionlawblog-kluwercompetitionlaw-com.peacepalace.idm.oclc.org/2021/05/06/anti-subsidy-regulation-a-new-big-stick-in-the-eu-regulatory-arsenal/).

thorough examination of Chapter 3 of the FSR was provided. At this point a brief reference is allowed.

First and foremost, the Foreign Subsidies Regulation provides an ex-ante clearance of notifiable concentrations. Article 20 lists the concentrations that are obliged to be notified. According to it, in order for this obligation to apply the European Commission takes into consideration the following: a) the undertaking's total turnover in the EU and b) the fact that any of the relevant undertakings perceived a specific level of subsidies from foreign subsidies within the preceding three years. If a concentration falls below the thresholds set out in article 20, then the Commission is empowered to request a notification prior to the implementation at any case suspects that foreign subsidies may have been granted to the undertakings concerned in the three years leading up to the concentration.[129]

Similarly, article 1 of the 1394/2004 EU regulation[130] provides that applies to concentrations having a Union dimension. The Merger regulation is applicable to activities according a two-part test.[131] The first criterion that should be met is that the operation should qualify as a concentration according to article 3. As concentration with a community dimension can be considered the concentrations that take the form of the undertakings concerned, concentrations consisting of the acquisition of control (exclusive or partial) over another undertakings and concentrations leading to the creation of functionally autonomous enterprises (joint ventures)[132]. The second criterion involves the turnover criteria given in Article 1, which are designed to identify operations that have a considerable impact on the EU market and may be classified as having a "Community dimension". According to article 1, A concentration has a "Community dimension" if the combined global revenue of all affected ventures exceeds EUR 5.000 million, and if the combined EU revenue of at least two of the involved ventures exceeds EUR 250 million, unless each merging

[129] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022, Article 21 par. 5. Note that under article 22 of the EUMR, unlikely, this competence of the Commission is based on a referral by a Member State.

[130] The EU regime of merger control is contained in the EU Merger Regulation, the 139/2004 (the EUMR) Regulation, which has been effective from 1 May 2004 and the procedural Regulation 802/2004 supplementing it.

[131] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008.

[132] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, Article 3 par.1.

party generates two-third of its EU revenue in a single Member State.[133]The main aim of the "Union Dimension" is to avoid investigating a single merger under various legal systems since it creates inefficiencies, redundancy, delays, expenses, ambiguity, and the possibility of contradicting decisions. The EUMR highlights the notion of "one-stop merger control"[134], which states that mergers coming under the jurisdiction of the EU should be evaluated solely by the European Commission.[135]

Furthermore, the general rule that is being introduced in the FSR, as for the timelines, is that concentrations must be notified before their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. These mechanisms come with extensive authority to demand data, penalize undertakings for failing to comply, and enforce corrective actions to address any distortions to fair competition. In addition, the notification procedure follows a timeline similar to the EU Merger Regulation process, with an initial 25-day review period followed by a thorough 90-day review period beginning on the day of official notice. In the same way, under EUMR there is an initial 25-day review, within which the European Commission has to decide whether the transaction does not fall within the scope of the EU Merger Regulation. However, this timeline can be extended to 35 working days in case the Commission, taking into account the commitments offered by the parties, has to assess possible competition concerns.[136]

The provision in both regulations regarding the calculation of turnover confirm the correlation between the two regulations. The article 22 of the FSR and the article 5 of the EUMR have exactly the same wording.

3.1.1 Implementation of the FSR in parallel with EUMR

In a significant development, the Commission adopted the Implementing Regulation (EU) 2023/1441[137], which came into effect on 10 July 2023. This Regulation outlines

[133] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, Article 1 par. 2.

[134] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, Article 21(2).

[135] Richard Whish & David Bailey, "Competition Law", 9th Edition, Oxford, p. 864-867.

[136]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, Article 4.

[137] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the

the notification procedures and the content of notifications for both concentrations and public procurement bids, as well as criteria for computing deadlines. It also sets out procedural processes for both preliminary and in-depth investigations in cases involving alleged distortive foreign subsidies. This regulation functions alongside the current EU Merger Regulation (EUMR), offering new processes and principles explicitly designed to handle likely distortions in mergers and acquisitions resulting from foreign subsidies.

Moreover, the implementing Regulation specifies the procedural features of the FSR in extensive detail. This includes the implementation of specific deadlines, protocols for conducting interviews and delivering verbal statements during inspections, and guidelines for information disclosure by contracting authorities in public procurement processes. In addition to these, specifies precise standards concerning confidential data and access to the Commission's documents.

The main objective underlying this implementing regulation is the simplification of the notifications and the Commission's competences with which it is empowered. For this reason, it is expressly referred in its recital the provision and the application of standardized forms for the implementation of the procedural part of the FSR, set out in the Annexes.[138]

According to the article 4 of the implementing regulation, notifications of concentrations, as described in Article 21 of Regulation (EU) 2022/2560, must be made using the Annex I form.

The Annex I included in the implementing regulation refers to the notification of concentrations (named after FS-CO). This is a very informative annex on the regulatory framework of the EU Regulation 2560/2022, progressively and simultaneously informs as well as requests the necessary information. The first part of the annex is mainly explanatory regarding the sections following in the second part. The FS-CO outlines the information that the notifying party (or parties)[139] must

European Parliament and of the Council on foreign subsidies distorting the internal market, OJ L 177, 12.7.2023.

[138] Ibid, Recital 4.

[139] Ibis, according to paragraph 9 of Annex I of the Implementing Regulation No 1441/2023, the notifying party (or parties) are all the parties to a concentration and, in the case of acquisitions, all the undertakings acquiring joint or sole control of a target. For the purposes of this Regulation, a target

include when submitting a notification to the Commission regarding an upcoming concentration within the framework of the Union's foreign subsidies control system. This information includes a description of the concentration (Section 1), information about the parties (section 2), details of the concentration (according to section 3 this part could include information about the ownership and control of the parties to the concentration before and after completion of the concentration, the value of the transaction, sources of finance, assessment of the existence of acquisitions the last 3 years). The notifying parties must provide their turnover information to ensure that the notification thresholds are met. The turnover shall be calculated in accordance with article 22 of Regulation (EU) 2022/2560. In the same section (section 4), they must also confirm (with a tick the box form) whether the transaction's parties have received more than EUR 50 million in foreign financial contributions in the last three years. The Foreign Subsidies Regulation (FSR) mandates detailed reporting of foreign financial contributions exceeding EUR 1 million received in the previous three years, particularly those that are likely to distort the market. Notifying parties have to specify the form, amount, granting entity, purpose, economic rationale, and whether the contribution benefits specific enterprises or industries. Section 5 lays down these categories that have to be assessed and directs the respondent accordingly.[140] Furthermore, Section 6 specifies the information needed for the Commission's substantive review.[141] In section 7 offers the notifying parties the opportunity to submit information on potential positive impacts on the progress of the subsidized economic activity within the EU market. Section 8 and Section 9 refer to the supporting documentation and to the attestation that should accompany the submission of the notification.

The implementation of the Foreign Subsidies Regulation (FSR) alongside the existing European Merger Regulation (EUMR) introduces a distinct set of considerations and procedures. The EUMR assesses concentrations that they do not considerably impair

undertaking is any undertaking or part of an undertaking in which a controlling interest is being acquired or which is the subject of a public bid.

[140] For the section 5.3, regarding foreign financial contributions of EUR 1 million or above received by the notifying parties in the three preceding years, a summary in the form of a table shall be provided. Guidance and a sample of it is attached at the end of the FS-CO.

[141] This includes information regarding any organized bidding procedure conducted for the target, an explanation of the target's various business lines or activities, and if the acquirers are involved in comparable or related business lines or activities. It also provides information on the global and EU turnover generated by each, as well as the percentage of EU revenue in relation to the overall relevant turnover.

effective competition within the internal market. Although subsidies may be considered in evaluating aspects such as the merged enterprises' financial status relative to competitors, their presence or impact is not the primary focus. The emphasis is instead on the competitive landscape within a single market. For this reason, FSR was introduced in order to complement the Merger Regulation.[142]

Unlike the EUMR, which operates under predefined criteria, the FSR evaluates how a foreign subsidy impacts the internal market on a case-by-case basis. This gives the European Commission significant latitude, requiring a nuanced response to each unique situation. The Foreign Subsidies Regulation (FSR) introduced a new method, the possibility of taking into account positive effects aligned with broader policy goals. Furthermore, in contrast to the conventional remedies in EUMR, the FSR allows for a broader range of potential remedies. These may include the reduction of capacity or market presence, burden on concluding certain investments, submission to changes to an enterprise's governance structure, or repayment of the foreign subsidy to the third country with interest. As we have described above, the deadlines that sets out the FSR show significant resemblance to the EUMR's deadlines. While both procedures can potentially operate concurrently, aligning the timelines of FSR and EUMR reviews may prove challenging due to the distinct nature of the issues examined. According to article 11 of the FSR, it is explicitly stated that commitments can be offered when conducting an in-depth investigation by the European Commission. Unlike EUMR, both the FSR and its implementing regulation do not directly address the possibility of offering commitments by the parties during the preliminary review. This would give the chance to the parties to have the chance to address issues proactively, demanding further explanation of procedural steps. Along

[142] European Commission, "White Paper on levelling the playing field as regards foreign subsidies" COM (2020) 253 final. According to the White Paper, if a given acquisition has to be notified under both FSR and the Merger Regulation, the notification and possible assessment would be dealt with in parallel, but separately from each other under the respective instruments.

the same line, the FSR does not provide for a pre-notification consultation,[143] as the one applied in the EUMR known as "briefing paper"[144].

3.2 FDI Screening Regulation and FSR Analysis

In their attempt to analyze all the complex aspects and issues that the FSR seeks to address, the drafters of the Regulation proceed with a detailed analysis of the existing regulatory regimes in the European Union in the documents that precede it. Therefore, in order to investigate the matter, launch a public debate, and propose potential remedies, the Commission issued a White Paper on leveling the playing field in terms of foreign subsidies that, in my opinion, constitutes the key document for the interpretation and the need behind the adoption of the Regulation. According to the latter the European Union uses an array of trade policy measures to provide a level playing field for trade in goods and investments. Unilateral measures[145], such as trade defence mechanisms, enable the EU to effectively respond to unfair competition by imposing additional import levies on products benefiting from foreign subsidies.

The 2019/452 EU Regulation[146], hereinafter FDI Screening Regulation was adopted in March 2019 and became fully operational as of 11 October 2020. The above-mentioned regulation plays a crucial role in addressing security and public order threats posed by foreign investments in critical assets. In other words, and for better comprehension, the Regulation requires Member States to implement a national screening mechanism for FDI from outside the EU based on public order or security, establish a cooperation mechanism with the European Commission, and allow the European Commission to make non-binding recommendations on cases of Union

[143] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022, recital 38. FSR states that "undertakings should be able to request prenotification consultations with the Commission based on good faith, with the aim of receiving guidance on whether the thresholds for notification are met". However, this is not applied as we understand from the provisions of both FSR and its implementing regulation.

[144] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C (2021) 1959 final.

[145] According to the White Paper on leveling the playing field, these mechanisms have limitations and do not comprehensively address all foreign subsidies affecting the internal market.

[146] 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, OJ L 791, 21.3.2019.

interest[147]. This Regulation, in particular, establishes specific standards for foreign investment control, with which each Member State's mechanism must comply. The required factors outlined in the Regulation pertain to the nature of the target asset or infrastructure, technologies and dual-use items, the supply of critical inputs, access to sensitive information and the freedom and pluralism of the media.[148]The same article of the regulation proceeds with the second category of factors. This category encompasses factors regarding the identity of the foreign investor. These include determining whether the foreign investor is controlled by a foreign state or is substantially financed by the latter, such as through subsidies or other ways. Furthermore, the foreign investor's involvement in actions that affect security or public order is taken into account. Last but not least, there is consideration given to determining the presence of a significant risk that the foreign investor would participate in unlawful or criminal activity[149]. In article 6 is introduced a notification mechanism, that is something quiet familiar to the FSR. The Regulation requires a Member State conducting a screening on a FDI to notify both the European Commission and the other Member States. This notification must include a minimum set of facts stipulated in the Regulation addressing the details of the FDI. It is worth noting that the same notification may include a list of other Member States whose security or public order is expected to be impacted by the completion of the FDI[150]. Further, the Regulation establishes a two-tier cooperation mechanism for FDIs, which applies to all Member States, regardless of whether they have an existing screening process. Therefore, in any case where a Member State considers that an FDI is likely to impact its own security or public order, it can either provide comments to the host Member State and the latter must then relay the comments to the Commission, or request an opinion from the Commission or other Member States.[151]

[147] Jong, Bas de, and Wolf Zwartkruis. "The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?" European Business Law Review 31, no. Issue 3 (2020): 447–74.
[148] 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, OJ L 791, 21.3.2019, article 4.
[149] Ibid.
[150] 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, OJ L 791, 21.3.2019, article 6.
[151] 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, OJ L 791, 21.3.2019, articles 6, 7 and 8.

As noted above, and as can be concluded from the Regulation itself[152] and the texts that comprise it, the FSR was designed to fill the gaps left by the previous regulatory framework. The complementary nature of this relationship between the two regimes is highlighted by the fact that the FDI Screening Regulation primarily addresses threats to security and public order, while the FSR assesses potential distortions within the internal market. This implies that the FSR consists of a broader scope for regulatory consideration beyond security concerns.[153] Furthermore, our comparative analysis leads to the conclusion that the FDI Screening Regulation emphasizes on critical assets such as infrastructure, technologies and supply inputs. In contrast, FSR has a broader applicability encompassing various economic sectors, critical areas and strategic interests of the Union. This co-existence and coordination between the two regimes aim at achieving a more holistic approach to foreign direct investment oversight, incorporating consideration of strategic importance. In addition, the scope of this alignment is to enhance the effectiveness and coverage of regulatory measures, contributing to a more robust and integrated approach to managing foreign investments within the EU.

Another important factor that has led to the adoption of the FSR is that the occurrence of foreign subsidies in transactions seldom serves as a triggering event for FDI screening. In other words, while foreign subsidies may factor into the substantive assessment of FDI, they typically do not independently prompt a filing, except in cases where the subsidy grants control to the State. It is also noted that in many cases and due to the fact that each Member State has its own mechanism, it is observed that not all Member States have the same interpretation and implementation approaches. As a result, there is no uniform and common application to provide the legal certainty needed for investment. The analysis of the above-mentioned regulations leads to a paradoxical situation, as many authors have mentioned. A transaction may be subject to examination under both the FDI and FSR regimes for the same cause, potentially

[152] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022, recital 3. In recital 3, it is outlined that the new legal regime complements the exiting FDI Screening Regulation.

[153] Figueroa, Pablo, Julia M. Böhme, Stephen Dnes, Joe Day, and Konstantin Voropaev. “The Foreign Subsidies Regulation and Foreign Direct Investment: How to Reconcile?” Kluwer Competition Law Blog, January 9, 2023.

leading to divergent or even opposing conclusions.[154] Further, dissimilarities in concerns, such as those relating to national security versus internal market distortion, might result in an intricate and challenging reconciliation of remedies.

3.3 FTC rules and FSR Analysis

In addition to the numerous and extensive European Union legislative initiatives mentioned above, the United States legislators early on became extremely concerned about the distortive effects foreign subsidies may have on M&A transactions. The Hart-Scott-Rodino Antitrust Improvements Act[155] constitutes the milestone of the federal premerger notification program. This Act passed in 1976 and is a key piece of US legislation aimed at curbing anti-competitive behaviour in the business sector. The Act focuses on significant mergers and acquisitions and requires companies to notify the Federal Trade Commission (FTC) and the Department of Justice (DOJ) before completing transactions that exceed certain financial thresholds.[156] This premerger

---

[154] Figueroa, Pablo, Julia M. Böhme, Stephen Dnes, Joe Day, and Konstantin Voropaev. "The Foreign Subsidies Regulation and Foreign Direct Investment: How to Reconcile?" Kluwer Competition Law Blog, January 9, 2023. The results of the foreign subsidy review mirror those of the FDI review, which includes authorization, authorization with restrictions, and prohibition. Notably, as stated in article 1(2) of the Foreign Subsidy Regulation (FSR), the evaluation includes "foreign subsidies granted to an undertaking, including a public undertaking, which is directly or indirectly controlled by the State". This type of investors constitutes an ambiguous situation.

[155] The Hart-Scott-Rodino Antitrust Improvements Act of 1976: Premerger Notification Source Book (n.d.).

[156] Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if-
(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person-
(A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19(a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or
(B)(i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published); and
(ii)(I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;
(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

notification process allows the agencies to review potential antitrust issues and take appropriate action to preserve competition in the marketplace. By providing regulatory oversight of large corporate transactions, the Hart-Scott-Rodino Act assists to promote fair business practices and maintain competition in the marketplace. In 2023, the United States, driven by and in parallel with recent developments, approved a legislative measure incorporating amendments known as the HSR Amendments. This legislation mandates the US Federal Trade Commission to establish a rule necessitating submissions under the HSR Act to encompass details regarding subsidies received from specific foreign governments or entities[157]. On 27th of June 2023 FTC published the notice on the proposed amendments to the HSR. We recognize that this proposal is on the same track as the general European thinking nowadays, however has not been ultimately finalized and implemented. The proposed changes to the HSR aim to improve the Commission's efficiency in screening transactions for possible competition issues. Similarly with the FSR, the proposed amendment wishes to extend the screening of a merger or acquisition by including information regarding the analysis of the deal, board member, customers, suppliers, market, the rationale for the transaction or even prior transactions. Undoubtedly, both US and EU are at this transitional stage in an almost new situation, as they are now aware of the current conditions and are gradually adapting.

Conclusion

In conclusion, the preceding analysis was conducted in order to ascertain and furnish a response to the query of whether the new regulation (the FSR) serves as an investment defence instrument and whether it contributes to their protection.

In recent years, the surge in outbound investments from state capitalist nations has resulted to significant concerns regarding the subsidized foreign investment. At the same time, maintaining openness to trade and investment is critical for economic robustness in today's intricate global economic landscape. The Internal Market within

(III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

[157] According to the Congress, foreign subsidies can distort the competitive dynamics or alter a firm's incentives in manners that erode competition post-acquisition, posing a significant concern when originating from entities or nations identifies as strategic or economic threats to the United States.

EU attracts both domestic and international investors, encouraging them to engage in fair competition based on the quality of their offered goods or services.

Nonetheless, enterprises who attempt to mislead the EU's open market still exist. We mainly refer to the undertakings who through anti-competitive practices, such as bid rigging, market foreclosure or unjustified State, tend to distort competition. Further enterprises that receive financial support from a non-EU state are able to gain an advantage over competitors. Under the pre-existing regime, specifically under EU state aid law, state aid granted by EU countries was being controlled, whether was distortive or not, and at the same time, regarding non-EU state aid there was no control obligation. Therefore, this significant loophole existed within the legislative structure established to maintain merit-based competition in the EU, notably with enterprises who used foreign subsidies to obtain an unfair advantage in the EU Single Market.

In the face of these issues, the introduction of a new instrument was Europe's answer in order to level the playing field and prevent undue advantages to selected undertakings to a selected few. True competitiveness demands the promotion of competition both domestically and globally, allowing entrepreneurs to put their ideas into action and allowing firms of all sizes to prosper and develop.

The Foreign Subsidies Regulation (FSR) introduced an extra layer of regulatory measures to current merger control regulation, FDI standards, and trade defense mechanisms. As a result, enterprises investing in the EU will need to alter their transactional and bidding procedures, as well as adjust schedules, risk allocations, and documentation standards to meet the newly imposed regulations. Given the FSR's ability to lengthen transaction and bidding timeframes and its thorough demands for reporting and information disclosure from all involved parties, it is possible that this new regime will may favor undertakings that do not meet the FSR's requirements. Thus, from the latter along with the thresholds provided by the Regulation, we conclude that FSR intends to support SMEs and undertakings that have been affected by large enterprises. This is also confirmed by the fact that subsidies to large enterprises are scrutinized more than those to SMEs, or enterprises with limited internal market activity, which tend to be less likely to be distortive.

Last but not least, although the new regulation requires detailed reporting to the European Commission, which will initially add complexity and delay transactions, especially for large companies, it will soon introduce new players into the single market and will create a level playing field. At the same time, the transparency required for the application of the Regulation is considered as an important incentive for future investments within the European Union.

References

Articles

Achleitner, Ranjana Andrea. “The Interplay between the European Commission, National Authorities An.” European State Aid Law Quarterly, January 1, 1970. https://estal.lexxion.eu/article/ESTAL/2022/2/7.

Collins, David, and Tae Jung Park. “Deafening Silence or Noisy Whisper: Omission Bias and Foregone Revenue under the WTO Agreement on Subsidies and Countervailing Measures.” Journal of World Trade 51, no. Issue 6 (2017): 1069–88. https://doi.org/10.54648/trad2017042.

De Smijter, Eddy. “There’s a New Kid in Town: The Foreign Subsidies Regulation.” Journal of European Competition Law & Practice 13, no. 8 (2022): 529–30. https://doi.org/10.1093/jeclap/lpad001.

Figueroa, Pablo, Julia M. Böhme, Stephen Dnes, Joe Day, and Konstantin Voropaev. “The Foreign Subsidies Regulation and Foreign Direct Investment: How to Reconcile?” Kluwer Competition Law Blog, January 9, 2023. https://competitionlawblog.kluwercompetitionlaw.com/2023/01/09/the-foreign-subsidies-regulation-and-foreign-direct-investment-how-to-reconcile/.

Frank, Malte. “The EU’s New Foreign Subsidy Regulation on Collision Course with the WTO.” Common Market Law Review, August 1, 2023. https://kluwerlawonline.com/JournalArticle/Common+Market+Law+Review/60.4/COLA2023070.

Guest post: “the EU gives foreign subsidies its best shot”: One take on ... Accessed October 31, 2023. https://ielp.worldtradelaw.net/2020/10/guest-post-the-eu-gives-foreign-subsidies-its-best-shot-one-take-on-white-paper-on-levelling-the-pla.html.

Gulotty, Robert. “WTO Subsidy Disciplines.” *World Trade Review* 21, no. 3 (2022): 330–41. https://doi.org/10.1017/s1474745622000118.

Heimler, Alberto. “State Aid Control: Recent Developments and Some Remaining Challenges.” EU State Aid Law, 2020.

Jong, Bas de, and Wolf Zwartkruis. “The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?” European Business Law Review 31, no. Issue 3 (2020): 447–74.

Kociubiński, J. “The Proposed Regulation on Foreign Subsidies Distorting the Internal Market:” European Competition and Regulatory Law Review 6, no. 1 (2022): 56–68.

Luja, R. “The Foreign Subsidies Regulation:” *European State Aid Law Quarterly* 20, no. 2 (2021): 187–99. https://doi.org/10.21552/estal/2021/2/3.

Mavroidis, Petros C. The regulation of International Trade. Cambridge, MA: MIT Press, 2016.

Merola, Massimo, and Filippo Caliento. "Is the Notion of Aid Broadening or Shrinking over Time, and If so, Why? A Subjective View on the Rationale of the Case Law." EU State Aid Law, 2020.

Modrall, Jay, Anita Banicevic, Alysha Manji-Knight, Mark Katz, Nathalie Jalabert-Doury, and Sarah Wilks. "The EU Foreign Subsidies Regulation: Start Your Engines." Kluwer Competition Law Blog, July 13, 2023. https://competitionlawblog.kluwercompetitionlaw.com/2023/07/14/the-eu-foreign-subsidies-regulation-start-your-engines/.

Modrall, Jay, Jacquelyn MacLennan, Strati Sakellariou-Witt, Tilman Kuhn, Peter Citron (Editor), Vishal Rajvansh, and Saumya Sinha. "'Anti-Subsidy' Regulation – a New Big Stick in the EU Regulatory Arsenal." Kluwer Competition Law Blog, May 6, 2021. https://competitionlawblog.kluwercompetitionlaw.com/2021/05/06/anti-subsidy-regulation-a-new-big-stick-in-the-eu-regulatory-arsenal/.

Modrall, Jay, Lena Hornkohl (Deputy Editor), Thomas Wilson, Sally Evans, and Athina Van Melkebeke. "Foreign Subsidies Regulation – EU Publication of Notification Forms Launches Compliance Efforts." Kluwer Competition Law Blog, February 16, 2023. https://competitionlawblog.kluwercompetitionlaw.com/2023/02/16/foreign-subsidies-regulation-eu-publication-of-notification-forms-launches-compliance-efforts/.

Nicolaides, Phedon. "Competition and Advantage under Internal Market and State Aid Rules: Is There a Gap in the Law?" Legal Issues of Economic Integration 40, no. Issue 3 (2013): 271–90. https://doi.org/10.54648/leie2013014.

Schonberg, M. "The EU Foreign Subsidies Regulation:" European State Aid Law Quarterly 21, no. 2 (2022): 143–52. https://doi.org/10.21552/estal/2022/2/5.

Smela Wolski, J. "Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market." *European State Aid Law Quarterly* 21, no. 2 (2022): 153–72. https://doi.org/10.21552/estal/2022/2/6.

Su, Xueji. "A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation." Legal Issues of Economic Integration. Accessed October 31, 2023. https://scholars.cityu.edu.hk/en/publications/publication(bbb72ef0-5224-4fa6-8285-92fadf9e8808).html.

Sykes, Alan O. "The Questionable Case for Subsidies Regulation: A Comparative Perspective." Journal of Legal Analysis 2, no. 2 (2010): 473–523.

Whish, Richard, and David Bailey. Competition law, 2018, Oxford.

Books

de, Gronden Johan van, and Catalin Stefan Rusu. *Competition law in the EU: Principles, substance, enforcement/ Johan W. van de Gronden and Catalin S. Rusu*. Cheltenham: Edward Elgar Publishing, 2021.

E., Luengo Hernández de Madrid, Gustavo. Regulation of subsidies and state aids in WTO and EC LAW: Conflicts in international trade law. Alphen aan den Rijn: Kluwer Law International, 2007.

Ezrachi, Ariel. EU competition law an Analytical Guide to the leading cases. Oxford: Hart, 2021.

Ferro, Miguel Sousa. Market definition in EU competition law. Northampton, MA: Edward Elgar Pub., 2019.

Heidenhain, Martin H. European State Aid Law. München: Verlag C. H. Beck, 2010.

Jaeger, Thomas. "Eugene Stuart and Iana Roginska-Green: Sixty Years of EU State Aid Law and Policy: Analysis and Assessment." *IIC - International Review of Intellectual Property and Competition Law* 49, no. 7 (2018): 882–85.

Lester, Simon Nicholas, Bryan Mercurio, and Arwel Davies. "World Trade Law: Text, Materials, and Commentary.", 3rd Edition, Hart, 2018.

Louis Vogel, "European Competition Law", 2nd Edition, 2018, Lawlex/ Bruylant, p. 540-542.

Messenger, Gregory. "The World Trade Organization: Law, Practice, and Policy. by Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn." *Journal of International Economic Law*, 2017.

Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, "The World Trade Organization – Law, Practice and Policy", Oxford, 3rd Edition.

O'Regan, Matthew. "Book Review: Johan W. van de Gronden and Catalin S. Rusu, Competition Law in the EU – Principles, Substance, Enforcement." *Competition Law Journal* 20, no. 2 (2021): 111–12.

Poretti, Pietro. *The regulation of subsidies within the General Agreement on trade in services of the WTO: Problems and prospects*. Alphen aan den Rijn: Kluwer Law International, 2009.

Rubini, Luca. "The International Context of EC State Aid Law and Policy: The Regulation of Subsidies in the WTO." *The Law of State Aid in the European Union*, 2004, 148–88.

Werner, Philipp, and Vincent Verouden. EU State Aid Control: Law and Economics. The Netherland: Kluwer Law International BV, 2017.

Legal resources

European Commission, “White Paper on levelling the playing field as regards foreign subsidies” COM (2020) 253 final.

European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 330, 23 Dec. 2022.

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, OJ L 791, 21.3.2019.

Treaty establishing the European Coal and Steal Community, Paris, 18 April 1951.

European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

Proposal for a Regulation of the European Parliament and of the Council on foreign Subsidies distorting the internal market, COM (2021) 223 final of 5 May 2021 (‘FSR’).

Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2017.

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008.

Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C (2021) 1959 final.

General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

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

Treaty establishing the European Community, OJ C 325, 24.12.2002, p. 33–184

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.

Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004.

Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance.

Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 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, OJ L 177, 12.7.2023.

Communication from the Commission, “A New Industrial Strategy for Europe”, COM (2020) 102 final, 10.3.2020

The Hart-Scott-Rodino Antitrust Improvements Act of 1976: Premerger Notification Source Book (n.d.).

Cases

Case C-173/73 Italy v Commission [1974] ECR 709.

Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg.

Case C-494/06 P - Commission v Italy and Wam.

Case C-730/79 Philip Morris vs Commission.

Case C-75/97 Belgium v Commission [1999] ECR I-3671.

Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke ECLI:EU:C:2001:598.

Case C-234/84, Belgium v Commission (Meura) (1986), EU:C:1986:C302.

Case C-248/84, Germany v Commission (1987), EU:C:1987:437.

Case C-290/83, Commission v France (1985), EU:C:1985:37.

case C-345/02 Pearle, ECLI:EU:C:2004:448.

Case C-379/98, PreussenElektra (2001) ECLI:EU:C:2001:160.

Case C-40/85, Belgium v Commission (1986), EU:C:1986:305.

Case C-67/94, Landbroke Racing v Commission [1998] ECLI:EU:T:1998:7.

Case C-126/79, Eco Swiss [1999] ECLI:EU:C:1999:269

Case T-607/17 Volotea, ELCI:EU:T:2020:180.

Case T-716/17 Germanwings, ELCI:EU:T:2020:181.

Case T-8/18 Easyjet Airline, ELCI:EU:T:2020:182.

DS 113: Canada – Measures Affecting Dairy exports.

DS108: United States – Tax Treatment for "Foreign Sales Corporation.

DS139: Canada — Certain Measures Affecting the Automotive Industry.

DS217: United States — Continued Dumping and Subsidy Offset Act of 2000.

DS257: United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada.

DS267: United States – Subsidies on Upland Cotton.

DS296 US-Countervailing Duty Investigation on DRAMs.

DS316: European Communities and certain member states – Measures Affecting Trade in Large Civil Aircraft.

DS-353: United States- Measures Affecting Trade in Large Civil Aircraft.

DS379 United States— Definitive Anti-Dumping and countervailing Duties from China.

DS414: China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States.

DS436: United States -Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India.

DS46: Brazil – Export Financing Programme for Aircraft.

DS87: Chile – Taxes on Alcoholic Beverages.

Joined Cases C-72/91 and C-73/91, Sloman Neptun v Bodo Ziesemer (1993) ECLI:EU:C:1993:97.

T-298/97, Alzetta Mauro vs Commission, ECR 2000.