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REGULATING COMPETITION IN A WORLD OF STATE CAPITALISM(S). THE LEGAL REGIME OF FOREIGN SUBSIDIES IN THE EUROPEAN UNION

The paper analyses the legal framework established by the European Union with regard to foreign subsidies and their compatibility with the rules of the internal market. The analysis is developed on the basis of Regulation no. 2022/2560, i. e. the cornerstone of European legislation on this topic. The paper explores and assesses the legal principles and operative mechanisms laid out in the regulation, also pointing out possible structural weaknesses of the framework established by the European Union, with special regard to some countries (such as China) where public control over the economy assumes hybrid and dynamic forms. In the second place, the paper discusses some practical applications of Regulation No. 2022/2560, then interpreting the outcomes of such application in light of a general shift of European economic law towards a degree of public intervention in the economy heavily, if not mainly, motivated by security and geopolitical concerns.

Key words: *foreign subsidies, state aids, competition law, European common market, industrial policy*

INTRODUCTION

The current development trends in the private and economic law of the European Union evolve – and often clash among each other – along the line of a confrontation between two regulatory cultures.

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On the one hand, the fundamental pillars of the European economic integration, as set starting from the 1970s and sensible to neo-liberal approaches, still emphasize somewhat traditional notions of competition efficiency and consumer welfare as vehicles of market integration. Such approach implies a rather technical approach to regulation, which conceives public intervention in the economy as directed towards the enforcement of balanced competition and the empowerment of rational choices from consumers.[1]

On the other hand, as inevitable in the current historical circumstances, there have been, for years, calls for a deep restructuring of the value system of European law, in the direction of an increased social, environmental and geopolitical awareness of it.[2] This would imply, necessarily, a change in the content of the enforcement standards of competition and consumer law, by including more poignant references to common interests, strategies and policies of the Union, as well as its security concerns.

Such deep transformations in the policy orientation of European law are inevitably connected with the need for a restructuring of the Union's industrial and production systems, with the aim to strengthen the EU's competitiveness vis-à-vis the consolidation of extra-European and non-Western economic powerhouses and new geopolitical dynamics, as also highlighted by the so-called "Draghi report" on European competitiveness.[3]

The logical clash between these two approaches has been well evident not only in political debates, but also at the operative level. Notoriously, such clash was exposed by the famous decision of the Commission in the *Alstom Siemens* case in 2019,[4]

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[1] Gian Antonio Benacchio, *L'Unione Europea e il diritto privato. Fenomenologia di un'evoluzione*, CEDAM, Milano, 2024; Mark Thatcher, "Supranational neo-liberalization: The EU's regulatory model of economic markets", *Resilient Liberalism in Europe's Political Economy* (eds. Vivien A. Smith, Mark Thatcher), Cambridge University Press, Cambridge, 2013, 171–200; Alessandro Somma, "Private Law as Biopolitics: Ordoliberalism, Social Market Economy, and the Public Dimension of Contract", *Law and Contemporary Problems*, No. 2, Vol. 76, 2013, 105–116.

[2] Andrea Piletta Massaro, "Back to the Treaties: Towards a 'Sustainable' Competition Law", *Revija za evropsko pravo*, No. 1, Vol. 25, 2023, 13–39; Kathleen R. McNamara, "Transforming Europe? The EU's industrial policy and geopolitical turn", *Journal of European Public Policy*, No. 31, 2024, 2371–2396.

[3] *The future of European competitiveness*, Publications Office of the European Union, Luxembourg, 2025. On the topic see also Andrea Piletta Massaro, "Towards a Renewed Approach to the EU Single Market and its Competitiveness: Last Call for the European Integration", *Revija Kopaoničke škole prirodnog prava*, No. 2, 2024, 59–79.

[4] Case M.8677, decided on 6th February 2019.

where the argument (in favour of the scrutinized concentration) regarding the establishment of a so-called "European champion" *vis-à-vis* actual and potential competition of extra-European entities operating in the same market was rejected. The concentration was subsequently prohibited.[5]

The decision paved the way for comments and debates about a perceived struggle between the protection of competition as a value in itself within the European common economic space and, on the other hand, the promotion of competitiveness of European economic operators on a global scale.[6]

However, the policy attitudes of EU institutions have been far from uniform. For instance, in the same year 2019 the Regulation on Foreign Investment Screening (No. 452) was issued, providing a general framework for the exercise of national powers concerning the investigation into and the prohibition of foreign investment posing security concerns.[7] In most cases (such as for example in Italy) such powers have been increasingly used since 2021.[8]

Afterwards, with the outbreak of the Covid-19 pandemic and then the Russo-Ukrainian war in 2022, EU law has focused more and more on the establishment of long-term instruments for planned allocation of financial resources in the light of socio-economic development goals and (more recently) of defence concerns and military strategies. As a consequence, the planning mechanism traditionally embodied by the EU structural funds has been widely replicated and diversified.[9] State aid law has evolved as a consequence, often through emergency and temporary frameworks, cutting through the Treaty-based general prohibition

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[5] Alex Nourry, Dani Rabinowitz, "European champions: what now for EU merger control after Siemens/Alstom?", *European Competition Law Review*, No. 41, 2020, 116–124; Jacques Buhart, David Henry, "Industrial policy to trump competition? The Siemens/Alstom railway merger and its aftermath", *Concurrences*, No. 2, 2019, 11 ff.

[6] Hikaru Yoshizawa, *European Union Competition Policy versus Industrial Competitiveness*, Routledge, London – New York, 2022.

[7] Antonino Alì, "The intersection of EU and its member States' security in light of the foreign direct investment screening regulation", *La comunità internazionale*, No. 3, 2020, 439–453; Luca Belviso, *Golden Power. Profili di diritto amministrativo*, Giappichelli, Torino, 2023.

[8] Jacopo Fortuna, "L'espansione della disciplina e dei casi di applicazione dei golden powers nella dimensione europea e italiana tra crisi pandemica, eventi geopolitici e cybersecurity", *Diritti comparati*, No. 1, 2025, 157–195; Domenico Sorrentino, "Il primo esercizio del 'Golden Power' da parte del governo Draghi", *Opinio Iuris*, *https://www.opiniojuris.it/wp-content/uploads/2021/05/Il-primo-esercizio-del-Golden-Power-da-parte-del-governo-Draghi-Domenico-Sorrentino.pdf*, 24 September 2025.

[9] Gianmatteo Sabatino, *I paradigmi giuridici della pianificazione per lo sviluppo*, Editoriale Scientifica, Napoli, 2022.

of aids by allowing for more and more extensive exemptions, once again motivated by development and geopolitical objectives.[10]

Such evolutionary trends, far from being settled, all reflect a more general reconfiguration of the global economic order, an order where neo-liberal economics have now decisively ceded ground to the advancement of diverse forms of so-called state capitalism.[11]

The resurgence of such development model is not decisively connected with specific political regimes: both democratic and authoritarian countries – as they were attracted to monetarist and Reaganian politics in the 1980s – are now fascinated by a new emphasis on public coordination of economic development, often (but not always) in the light of the historical example represented by the rise of China as an economic powerhouse.[12]

Inevitably, state capitalism has also profoundly altered the institutional dynamics of global trade. Within the context of a fairly globalized capital market, a wide array of state-owned entities (e. g. sovereign wealth funds, state-owned enterprises, state-controlled companies, etc.) act now as powerful investors, as developers of special economic zones all over the world, as shareholders of multinational companies, as participants in strategic transnational procurements processes.

Such economic environment not only highlights the geopolitical component of private economic law but also poses public actors in front of a dilemma: whether or not adjust traditionally neo-liberal regulatory mechanisms to serve the purposes of lawfare or, in other words, to use legal frameworks and legal influence to project an image of political relevance.

This contribution aims at providing some remarks about legal evolutions related to such dilemma, by examining one of the most notorious and typical examples of geopolitically oriented EU legislation: Regulation no. 2022/2560 on foreign subsidies distorting the internal market.

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[10] Delia Ferri, "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis", *European Journal of Risk Regulation*, No. 12, 2020, 1–22; Cristina Schepisi, "Aiuti di Stato … o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel 'comune interesse europeo'", *Rivista della Regolazione dei Mercati*, No. 1, 2021, 110–147.

[11] Joshua Kurlantzick, *State Capitalism. How the return of statism is transforming the world*, Oxford University Press, Oxford, 2016; Paolo Piluso, "L'età (post-)globale, il nuovo 'capitalismo politico' e la disciplina del golden power. Profili di dottrina dello Stato e di diritto costituzionale", *federalismi.it*, No. 17, 2023, 203–252; Ilias Alami *et al.*, "Geopolitics and the 'New' State Capitalism", *Geopolitics*, No. 27, 2022, 995–1023.

[12] Gianmatteo Sabatino, "The BRICS' contribution to the development of alternative models of transnational economic cooperation. A cross-cutting analysis from the perspective of the New Development Bank", *DPCE Online*, No. 4, 2024, 2815–2829.

BASIC PRINCIPLES AND FUNDAMENTAL MECHANISMS OF EU LEGISLATION ON FOREIGN SUBSIDIES

From a purely geopolitical perspective, the debate about the introduction of a specific legislation on scrutiny of subsidies coming from extra-EU public actors was mostly driven by concerns related to Chinese investments.[13]

The perceived difficulty in ascertaining the exact degree of public (or the Party, in the sense of the Chinese Communist Party) control over Chinese enterprises investing abroad pushed forward the regulatory effort, anticipated, in 2020, by a White Paper on levelling the playing field as regards foreign subsidies.[14]

On the other hand, Chinese positions – both scholarly and entrepreneurial – have been among the most critical of the proposed intervention, highlighting how it would have meant a violation of the fundamental economic liberties enshrined in the European treaties.[15]

The Union, to some extent, answered to such claims, arguing, in the Recitals of Regulation no. 2022/2560, that restrictions on fundamental economic freedoms are justified by the need to avoid unfair competition and, in the second place, such restrictions are always subjected to the general principles of EU law, including that of proportionality, and to the respect of fundamental rights.[16]

The Foreign Subsidies Regulation (FSR) draws from the experience of previous legislative interventions, such as Regulation no. 2016/1037 on protection against subsidised imports from countries not members of the European Union. The logic underlying the FSR is to adapt fundamental notions drawn from general EU state aid law in order to fill what the Union's institutions perceived as a severe regulatory gap, i. e. the fact that under ordinary state aid rules only subsidies

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[13] Isabelle Van Damme, "Understanding the Foreign Subsidies Regulation", *University of Bologna Law Review*, No. 1, Vol. 9, 2024, 1–6.

[14] COM/2020/253 final, issued on 17th June 2020.

[15] See, for instance, the official responses of the China Chamber of Commerce to the EU to both the White Paper and the Proposal for the Regulation on Foreign Subsidies, available online at the following links: *http://en.ccceu.eu/2020-09/25/c_14.htm*; *http://en.ccceu.eu/PDF/CCCEUStatementonECproposalforregulationonforeignsubsidies.pdf*; *http://en.ccceu.eu/PDF/CCCEUfeedbackonthedraftoftheimplementationoftheforeignsubsidiesregulation.pdf*, 24 September 2025. See also Ye Bin, "欧盟《外国补贴白皮书》的投资保护问题刍议" ("A comment on issues of protection of investments in the White Paper on Foreign Subsidies of the EU"), *Guoji fa yanjiu*, No. 6, 2020, 70 ff.

[16] See in particular Recital no. 70 of the Regulation. Such argument upheld by the Union is very interesting in itself: it shows the will to connect the geopolitical necessity of controlling and limiting foreign subsidies with the more neo-liberal idea of fair and balanced competition, thus respecting the traditional attitudes in the interpretation of the Treaties' provisions about antitrust and competition.

or equivalent measures conferred by Member States may fall under the scrutiny of the European Commission.[17]

The FSR stems therefore from the awareness that as the volume of transcontinental investments within the European market rises, the possibility that critical sectors of the European economy are targeted by state-backed external economic operators also increases. The FSR, in other words, also functions as a complement to the regulatory framework concerning screening of Foreign Direct Investments.

The FSR is grounded upon two main legal bases. Article 114 of the Treaty on the Functioning of the European Union refers to procedures and interventions for the approximation of legal rules concerning the functioning of the internal market. On the other hand, Article 207 outlines the general principles of the Union's common commercial policy.[18]

Whereas the reference to Article 207 – and in particular to Paragraph 2[19] – is a quite common occurrence in European economic legislation,[20] the appearance of Article 114 as a specific legal basis for the FSR appears to denote the intention of the European legislature to promote, through the FSR, a more incisive harmonization among regulatory framework and practices of the member states with regard to evaluation of subsidies coming from third countries.

In terms of notions and operative mechanisms, the FSR mostly echoes solutions already experimented in ordinary state aid law, as well as based on the WTO Agreement on Subsidies and Countervailing Measures.[21]

In the first place, it adopts a wide notion of subsidy, including not only funds or liabilities transferred to an undertaking, but also foregoing of revenues, granting of specific rights and provisions/purchases of goods and services. Contributions from public and private entities whose actions are attributable to the government are also taken into account.[22]

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[17] See Recital no. 2 of the Regulation. See also Rens G. J. Stegink, "Comparing complements: the concept of foreign subsidy under the EU Foreign Subsidies Regulation in light of EU State Aid Law and WTO Subsidy Law", *Common Market Law Review*, No. 62, 2025, 1089–1120.

[18] Jan Blockx, Pierfrancesco Mattiolo, "The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?", *European Foreign Affairs Review*, No. 28, 2023, 53–74.

[19] "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".

[20] For instance, it is the same legal basis of Regulation no. 2016/1037 and of Regulation no. 2019/452.

[21] J. Blockx, P. Mattiolo, op. cit., fn 18.

[22] Art. 3(2) of the Regulation.

It is worth reflecting upon this aforementioned set of provisions. Indeed, ascertaining public control over an entity, for the purposes of the FSR, becomes a critical matter especially when such operation is tested against the specific legal environments of countries – such as the People's Republic of China or the Socialist Republic of Vietnam – embracing doctrines of so-called market socialism. Though the private and commercial law of such countries has now become increasingly market-oriented, there are still relevant clauses imposing the presence of branches of the ruling communist parties not only in State-Owned Enterprises but also in private business entities.[23]

Since such specific organizational settings are meant to be flexible tools in the hand of the ruling parties to ensure coordination between state policies and business operations within the context of a market economy, it can be difficult to detect the specific degree of political influence over the ordinary conduct of an economic operator. In fact, such influence, vehiculated by the presence of party branches, may intensify, soften or even disappear depending on circumstances such as the type of business operation involved, the scale of such operation, the geopolitical context.

According to the Commission, what should be taken into consideration, from a very broad and functional perspective, is the capacity of the third country to exert influence over the decisions of an economic entity.[24]

Notwithstanding such quite broad approach, the mechanism envisaged by the FSR could still be partially inadequate to address complex and dynamic forms of government influence on private enterprises.

Indeed, it all comes down to the interpretation of the notion of direct influence in light of the legal environment considered and the political circumstances affecting the intensity and scope of state interventions in the economy.[25]

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[23] See, for instance, Article 18 of the Company Law of the People's Republic of China or Regulation no. 87-QĐ/TW of 2022 of the Socialist Republic of Vietnam (this second document only concerning State-Owned Enterprises). With regard to this issue in the Chinese context, see Gianmatteo Sabatino, "The Legal Dimension of the Relation Between the Chinese Communist Party and the Private Economy. A Perspective of the Article 19 of the Company Law", *Global Jurist*, No. 2, Vol. 22, 2022, 351–373.

[24] Case FS.100011 – e&/PPF Telecom Group, Paragraph 215. This criterion is deeply connected with the reference, in the text of the regulation, to the legal and economic environments of third countries and the specific role of the government in the economy envisioned in the aforementioned environments, at Art. 3(2) – second part, letter b). Even if such criterion is explicitly only referred, in the text of the FSR, to foreign public entities, it may be reasonably argued that it holds value also with regard to private entities potentially influenced by the government, given that letter c) of the second part of Article 3 of the FSR mentions the need to verify the attributability of an entity to the government "taking into account all the relevant circumstances".

[25] If one connotes, for instance, the Chinese model of economic law as essentially state-led and combines such connotation with the aforementioned rules about the presence of party branches

The FSR provides for three methods of subsidy review and, ultimately, of enforcement.[26] In the first place, an *ex officio* review.[27] In the second place, an obligation to notify foreign subsidies received by undertakings engaging in a concentration procedure.[28] In the third place, specific obligations to notify foreign subsidies received by undertakings involved in a public procurement procedure.[29]

Each one of these review modalities is connected with deep investigative powers by the European Commission, including the possibility of carrying out – obviously with the consent of the third country involved[30] – investigations outside the territory of the Union.

In terms of remedies, the FSR – once again drawing from EU competition and state aid law – provides both for redressive measures and for commitments decisions taken by the Commission in case it finds that a subsidy exerts a distortive effect upon the internal market.[31]

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in enterprises, one would have to conclude that every operation of every Chinese enterprise could be potentially influenced by the ruling party, thus making potentially illegitimate every subsidy or financial contribution provided by a Chinese enterprise. On the other hand, if one connotes Chinese economy as essentially market-oriented and accepts the view according to which the role of party branches in the enterprises does not concern business operation, one would assume the risk of severely underestimating the influence of such branches.

[26] J. Blockx, P. Mattiolo, op. cit., fn 18.

[27] Articles 9 and following of the FSR. This mechanism is designed to create a vast space of discretion for the Commission, unbounded by specific thresholds, but depending only on the preliminary consideration that a subsidy may distort the internal market.

[28] Articles 20 and following of the FSR. In this case, the obligation to notify is activated only when certain thresholds are reached.

[29] Articles 27 and following of the FSR.

[30] Article 15 of the FSR.

[31] Lena Hornkohl, "The EU Foreign Subsidy Regulation: Why, What and How?", *Weaponising Investments* (eds. Jens Hillebrand Pohl, Thomas Papadopoulos, Janosch Wiesenthal, Joanna Warchol), Springer, Cham, 2024, 1–39. See also Article 7 of the FSR, which includes a list of exemplary commitments or redressive measures, among which "(a) offering access under fair, reasonable, and non-discriminatory conditions to infrastructure, including research facilities, production capabilities or essential facilities, that were acquired or supported by the foreign subsidies distorting the internal market unless such access is already provided for by Union legislation; (b) reducing capacity or market presence, including by means of a temporary restriction on commercial activity; (c) refraining from certain investments; (d) the licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies; (e) the publication of results of research and development; (f) the divestment of certain assets; (g) requiring the undertakings to dissolve the concentration concerned; (h) the repayment of the foreign subsidy, including an appropriate interest rate, calculated in accordance with the method set out in Commission Regulation (EC) No. 794/2004; (i) requiring the undertakings concerned to adapt their governance structure".

Such investigative and remedial framework may very well amount to a case of extra-territorial application of European law,[32] which might directly affect the exercise of public intervention powers by governments or government-controlled entities pursuant to state capitalist legal regimes, thus raising serious political problems.[33]

Similar, if not worse conflicts may arise from the provisions concerning investigation activities. It appears quite unlikely that, especially in cases involving strategic economic entities or sectors, third countries' governments will always accept hosting European officers on their own territory, without viewing such circumstance as a violation of their economic sovereignty. The fact that the Commission is empowered to take decisions also taking into account the fact that a foreign undertaking or a third country refuses to submit to an investigation only reinforces potential political conflicts stemming from the FSR.[34]

Another relevant element is the explicit mention of a balancing test,[35] pursuant to which the Commission may decide to balance market distortions induced by subsidies with positive outcomes stemming from them, such as the development of an economic activity, or the positive effect of the subsidy on the fulfillment of policy objectives set by the Union itself.[36]

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[32] It is a well-known phenomenon, especially in antitrust law, and has been described as one of the epiphanies of the so-called Brussels Effect, i. e. the circulation of EU regulatory standards outside the borders of the Union. On the topic, see Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, Oxford, 2020; see also Gian Antonio Benacchio, op. cit., fn. 1, 74 ff.

[33] Taking once again China as reference, its outward investment regulatory framework specifically provides that Chinese entities, when investing abroad, must comply not only with laws and regulations, but also with state plans and policies (Article 26 of the Measures for the Administration of Enterprises' Outward Investments (企业境外投资管理办法) issued in 2017). The potential conflict between vastly different approaches to public role in the economy appears crystal clear.

[34] Article 16 of the FSR.

[35] Lena Hornkohl, Pierfrancesco Mattiolo, "Weighing the Scales: The Balancing Test of the Foreign Subsidies Regulation", 20 July 2025, available on SSRN at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5487826*, 25 October 2025.

[36] Article 6 of the FSR. It has been noted how the industrial policy tool represented by such balancing test is partially different from that envisaged in the 2020 White Paper, which, drawing from trade law, introduced the notion of a "EU interest test", where the "EU interest" should have been referred to specifically social or environmental outcomes of subsidies, such as creation of jobs, ensuring digital transition, enhancing environmental protection (Lena Hornkohl, op. cit., fn 31). From such perspective, the mechanism incorporated in the FSR still emphasizes the purely economic dimension of possible positive effects of subsidies; on the other hand, by referring, in general, to the Union's policy goals, it creates a space to take into consideration other instances.

SOME OPERATIVE APPLICATIONS OF THE FSR

The FSR has not produced, so far, a substantial case load nor a relevant case law. Surely, this indicates that, beyond official proclaims, the highly political nature of such instrument requires utmost care as far as its concrete management is concerned.

Indeed, in a geopolitical era connoted by the presence of vast schemes of subsidies issued not only by developing and state capitalist countries but also by former "neo-liberal" powers such as the United States themselves,[37] a full application of the FSR could initiate unwanted clashes.

On the other hand, some of the few existing cases show exactly how the basic structures of the FSR ignite conflicts with the legislation of foreign countries which seem to be hardly solvable.

It has happened, for instance, with regard to the investigative powers of the Commission as laid out in the FSR. Within the context of an ongoing procedure against two companies established in the EU (in the Netherlands and Poland) wholly owned by a Hong Kong company which is turn controlled by a company of the Chinese mainland, the Court of Justice of the European Union was called to decide an appeal from the undertakings, seeking, in particular, the suspension of a request from the Commission to produce and show the content of the mailboxes of some of the undertakings' employees.[38]

During the investigation, such request had been refused on account of the circumstance that the contested email correspondence was stored in servers placed in China and that providing that correspondence without a specific authorization of the Chinese competent authorities would have amounted to a violation of Chinese laws and would have implied administrative sanctions from Chinese authorities.

The undertakings – relying on arguments clarified in previous case law[39] – claimed that penalties issued by Chinese authorities would have caused a serious and irreparable damage not limited to its financial nature, but also extended to a possible revocation of business license, to criminal liability for the individuals directly responsible of the violation and to a general and profound stigma around the undertakings.[40] As a consequence, the undertakings asked the Court to suspend the request of the Commission which would have forced them to violate Chinese law.

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[37] J. Blockx, P. Mattiolo, op. cit., fn 18.

[38] Order of the Vice-President of the Court, 21 March 2025, Case C-720/24 P(R), *Nuctech Warsaw Company Limited sp. z. o. o.*

[39] Order of the Vice-President of the Court, 11 April 2024, C-89/24 P(R), *Lagardère v Commission*.

[40] Paragraphs 26–28.

The Court dismissed the argument claiming in the first place that the undertakings had not proved the likeliness of suffering severe and irreparable damage.[41] As regards the possible issuance of further penalties – such as revocation of business license – the Court once again deemed the claim unproved, both because the claim was not properly supported by evidence and because the undertakings did not prove how a business suspension of license revocation could imperil their financial viability and could not be remedied by an action for damages against the EU institutions.[42]

In the last place, as regards criminal liabilities, the Court found that they could arise as a result of a violation of the Chinese Law on Safeguarding State Secrets, but it also pointed out that the undertakings "had failed to demonstrate that the electronic correspondence at issue actually contained State secrets or that they […] had taken the necessary steps to obtain the required authorisation for its disclosure under that law and that that request had been refused".[43]

As a result, the appeal has been dismissed.

It is worth noting that, in the case, all the relevant issues are essentially connected with the problem of the proof of the specific attitude that a foreign legal system could adopt with regard to certain violations. Such operation is not always easy, given also the profound differences in the notions of legality, of rule of law and of enforcement. When a legal system whose concept of legality is deliberately fuzzy and employs "variable geometries" especially when covering strategic matters (it is the case of China)[44], the proper assessment of both the content of the FSR and of the interim measures asked by the parties involved would necessarily imply a deep comparative effort, which the CJEU could not always be well equipped to carry out.

More detailed indications about the concrete approaches followed by the Commission in the application of the FSR come from the first final decision taken pursuant to the regulation and published by the Commission: the decision in Case FS.100011,[45] regarding the acquisition, by a telecommunication company of the

[41] Paragraphs 30 and following. The Court considered that the administrative penalties which can be issued by Chinese authorities are pecuniary in nature and cannot be considered as irreparable.

[42] Paragraphs 39–41.

[43] Paragraphs 43–44.

[44] Ignazio Castellucci, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli Studi di Trento, Trento, 2012.

[45] The decision was taken on 24th September 2024 and published by the Commission on 4th April 2025, in the form of a provisional public version. For a thorough analysis of the decision see Lena Hornkohl, Pierfrancesco Mattiolo, "The Concept of 'Distortion in the Internal Market' in the Foreign Subsidies Regulation – From the Legacy of State Aid Law to the First Case Practice", *Estali Spring Forum*, available on SSRN at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5247472*, 25 October 2025.

United Arab Emirates (UAE), of sole control of another telecommunication business group operating in several eastern EU countries.[46]

The Commission initiated a procedure after receiving notification of the proposed concentration pursuant to the FSR. The notifying party (i. e. the UAE entity) is majority-owned and thus controlled by the Emirates Investment Authority, i. e. the UAE sovereign wealth fund.

On the basis of the preliminary elements her disposal, the Commission found indications that the notifying party had received foreign subsidies especially in the form of: i) an unlimited guarantee derived from an exemption from bankruptcy laws for entities owned by the government of UAE; ii) a loan obtained by a syndicate of five state-controlled banks.[47] The Commission decided therefore to open an in-depth investigation.[48]

In the final decision, the Commission develops a highly complex reasoning, examining in detail the legal system of the UAE with regard to special exemptions granted to state-controlled entities.

For instance, the Commission noted that UAE bankruptcy law applies to state-controlled entities only as far as the articles of association of such entities provide for their subjection to the law. Indeed, the articles of association of the notifying party exclude the application of some provisions of UAE bankruptcy law.[49] The sovereign wealth fund of the UAE enjoys a veto over any liquidation proposal of the notifying party, it has the right to take control of the board of directors and oversee any liquidation process, and it enjoys a right of preference to purchase the notifying party's assets. Furthermore, dissolution of the notifying party is possible only "in the event of the loss of all or most of its funds such that it cannot invest the remaining funds in a worthy way".[50]

The Commission then hypothesizes how the notifying party would operate in case of financial difficulties, and concludes that it would be very unlikely for it

[46] Among those countries, Bulgaria, Hungary and Slovakia. The group is also active in Serbia and another of its branches is active in Czech Republic, but it was not involved in the acquisition.

[47] Pursuant to Article 5(1)(b) of the FSR, unlimited guarantees are considered a form of subsidy which is most likely to distort the internal market. Furthermore, the Commission also points out that the loans received by the notifying party could have directly facilitated the proposed concentration, thus falling within the scope of Article 5(1)(d) of the FSR as another one form of subsidy "most likely" to distort the market.

[48] C/2024/3951 of 21st June 2024.

[49] Decision FS.100011, paragraph 78–79.

[50] Decision FS.100011, paragraph 86. In the decision, the Commission makes direct reference to the articles of association of the notifying party.

to default on its debts, due to extensive support by the government pursuant to the special legal regime it is subjected to.[51]

Such situation fits within the notion of state aid according to EU law.[52]

The Commission also dismisses the argument of the notifying party, according to which, in spite of the existence of a legal regime allowing for wide state support to specific enterprises in the UAE, there are several instances of UAE government not intervening to support enterprises. The Commission examines in detail the examples presented by the notifying party and concludes that they either did not correspond to the specific financial situation of the notifying party or they concerned enterprises which were explicitly subjected to ordinary bankruptcy proceedings, unlike the notifying party.[53]

As regards the distortive effects on the internal market, the Commission takes into account several benchmarks and financial indicators in order to hypothesize the impact of the concentration upon the position of the notifying entity in the European market.[54]

The Commission also notes that the unlimited availability of financial resources would allow the notifying party, after the proposed concentration, to pursue aggressive commercial strategies and "discipline competitors".[55]

Thus, the Commission points out that the proposed concentration is affected by foreign subsidies exerting a distortive effect on the functioning of the internal market. However, at the same time, the Commission takes into account several commitments proposed by the notifying party and adjusts them in order to elaborate a final set of commitments functioning as conditions for the final approval of the proposed concentration .[56]

Such commitments touch upon different regulatory and financial aspects and, by all means, represent a deep restructuring of the notifying party's governance structure. For instance, it is provided that the notifying party modifies its articles

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[51] Paragraphs 95 and following of the Decision.

[52] See the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20. 6. 2008, Section 1.2.

[53] Paragraphs 110 and following of the Decision.

[54] For instance, it notes that as a result of the unlimited guarantee supported by the UAE, the notifying entity would enjoy, as a result of the concentration, credit ratings more favorable than under normal market circumstances, so that is competitive position in the European market would improve (Paragraphs 323 and following of the Decision).

[55] Paragraphs 366 and following of the Decision.

[56] Paragraph 378 of the Decision.

of association so to fully subject itself to the ordinary bankruptcy rules of the UAE.[57] It is provided (with exceptions) that the notifying party, after the acquisition, shall not provide financing to any member of the Target group and shall ensure that its affiliated undertakings also do not provide such financing.[58]

It is also mandated that a monitoring trustee is appointed (upon approval from the Commission) to supervise and ensure respect of the commitments. The characteristics of such monitoring trustee as well as his work conditions are detailed in the text of the decision.[59]

Such first relevant application of the FSR by the Commission fully shows how great its potential incidence over foreign regulatory frameworks is. The concrete application of the commitments, obviously, will have to be monitored. Generally speaking, it is worth noting that, depending on the legal system involved, it could be sometimes hard – even after ascertaining the existence of a foreign subsidy distorting the market – to elaborate commitments which neutralize the distortive effect while preserving the management autonomy of the economic operator involved. Once again, it all comes down to a political negotiation among the parties, i.e. among the European Commission and the state-backed foreign entity.

CONCLUSIONS

In spite of its highly technical language and its constant references to ordinary rules on state aids, it would be misleading to conceive the FSR as a "simple" instrument to ensure a level playing field among economic operators within the European market.

The FSR is, by all means, a geopolitical tool, which fully reflects a general global tendence in the development of economic laws towards the reinforcement of public control over economic activities and, especially, cross-border movements of capitals.

As a consequence, the evaluation of the effectiveness of the FSR will also have to be measured according to geopolitical criteria rather than purely economic ones. Much of this new instrument's role will depend on the Commission's capabilities to make it "interact" with foreign legal systems in a viable way to serve the general interests and policies of the European Union. The provision about the

[57] Commitments, Section B(II).

[58] Commitments, Section B(III).

[59] Commitments, Section D.

interest balancing test or the specific operative attitude displayed by the Commission in evaluating the impact of foreign subsidies in the market and in elaborating commitments leaves much space for a flexible and dynamic application of the FSR. So, for instance, to subsidies coming from different countries could correspond different intensities in the application of the FSR, depending on geopolitical and geoeconomic implications. The FSR could then be used as an instrument to promote the integration of some players in the common market or, on the other hand, to exclude other players. Obviously, such approach is inextricably linked with the problem of the geopolitical autonomy of European institutions, especially when the FSR could target subsidies coming from "allied" countries, such as the United States.

Overall, it should be emphasized that, from the perspective of comparative economic law, the FSR is not only a valuable but also a potentially effective tool to foster a more coherent EU industrial policy and, ultimately, to promote further integration, provided that it is used in a balanced way and interpreted in light of European common interests, also from a geopolitical point of view.

Much of its fate will ultimately depend on the attitudes and capabilities of the decision-makers who shall be in charge of applying it in exceptionally difficult political circumstances.

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REGULISANJE KONKURENCIJE U SVETU DRŽAVNOG KAPITALIZMA: PRAVNI REŽIM STRANIH SUBVENCIJA U EVROPSKOJ UNIJI

Rezime

Rad analizira pravni okvir koji je uspostavila Evropska unija u vezi sa stranim subvencijama i njihovom usklađenošću sa pravilima unutrašnjeg tržišta. Analiza se zasniva na Uredbi br. 2022/2560, koja predstavlja kamen temeljac evropskog zakonodavstva u ovoj oblasti. U radu se razmatraju i ocenjuju pravni principi i operativni mehanizmi utvrđeni ovom Uredbom, uz isticanje mogućih strukturnih slabosti okvira koji je postavila Evropska unija – naročito u odnosu na pojedine zemlje (poput Kine), u kojima javna kontrola nad privredom poprima hibridne i dinamične oblike. U drugom delu, rad se bavi praktičnim primenama Uredbe br. 2022/2560, tumačeći rezultate te primene u svetlu opšteg zaokreta evropskog ekonomskog prava ka većem stepenu javne intervencije u privredi koji je u velikoj meri, ako ne i pretežno, motivisan bezbednosnim i geopolitičkim razlozima.

Ključne reči: strane subvencije, državna pomoć, pravo konkurencije, zajedničko tržište EU, industrijska politika

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