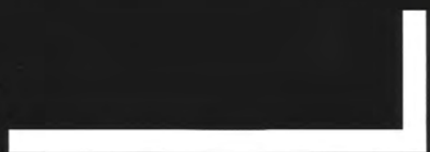


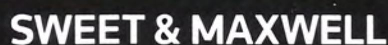
EUROPEAN COMPETITION LAW REVIEW

Volume 44: Issue 2 2023

ARTICLES

- Big Tech remedies—recent antitrust case law and legislative developments
  Thomas Hoehn, Justin Menezes and Alison Young
- A sustainable future: how can control of monopoly power play a part? Part 2. Using competition law to tackle unsustainable practices as abuses of monopoly power
  Simon Holmes and Michelle Meagher
- Sustainability and EU merger control
  Emanuela Lecchi
- Regulating foreign subsidies: legal implications under EU competition law
  Konstantina Sideri

NEWS



SWEET & MAXWELL

European Competition Law Review

2023 Volume 44 Issue 2
ISSN: 0144-3054

Table of Contents

Editorial
DEREK RIDYARD

Editorial: Issue 2 45

Articles

THOMAS HOEHN, JUSTIN MENEZES & ALISON YOUNG

Big Tech remedies—recent antitrust case law and legislative developments 47
This article identifies a close relationship between recent antitrust case law and legislative developments to regulate Big Tech in the EU and UK. We argue that the adoption of clearly-defined ex ante remedies—including more structural measures—will be sustained, notwithstanding the differentiated approaches pursued by these jurisdictions.

SIMON HOLMES & MICHELLE MEAGHER

A sustainable future: how can control of monopoly play a part? Part 2. Using competition law to tackle unsustainable practices as abuses of monopoly power 61
This is the second part of our three-part article which looks at monopoly power as a barrier to a sustainable future and asks how we can use competition policy (particularly art.102 Treaty on the Functioning of the European Union (TFEU) and merger control) more intelligently in the light of climate change and growing market concentration. This second part looks at how art.102 TFEU could be used more effectively to tackle unsustainable practices.

EMANUELA LECCHI

Sustainability and EU merger control 70
This article analyses the role that sustainability plays within the current system of European merger control. Sustainability plays a role in market definition and market appraisal. Within the context of harm to innovation competition (as a theory of harm), the European Commission has extended the boundaries of the analysis, to consideration of innovation spaces. Arguably, similar considerations should also apply to the assessment of efficiencies, and the theory of the failing firm defence. The tools for measuring sustainability used by environmental agencies could also be adopted in merger control, perhaps in co-operation between different agencies. Beyond this, it is argued that changing the framework of merger control to assess the effects of mergers on sustainability may act as a Trojan horse for consideration of other non-market related factors, opening the door to undesirable consequences. Overall, increased consumer awareness of sustainability issues suggests that the preservation of competitive markets may be one of the most important contributions to sustainability that merger control can bestow.

KONSTANTINA SIDERI

Regulating foreign subsidies: legal implications under EU competition law 81
In November 2022, after two years of back-and-forth discussion, the European Union (EU) legislators approved the "Foreign Subsidies Regulation" to tackle distortive subsidies granted by non-EU countries to companies operating in the EU internal market. This is a new regulatory layer to the EU legislation aiming at ensuring fair competition between firms active in the EU by establishing equality of opportunity.

National Reports

Czech Republic
ANTI-COMPETITIVE PRACTICES
Infringement N-31

Denmark
ANTI-COMPETITIVE PRACTICES
Infringement N-32

Finland
COMPETITION
Judgment N-33

Finland
MERGERS
Merger control N-34

France
MERGERS
Merger control N-34

Regulating foreign subsidies: legal implications under EU competition law

Konstantina Sideri

Competition law; EU law; Foreign companies; Internal market; Market investigations; Subsidies

I. Introduction

On 10 November 2022, the European Parliament adopted the new regulation on foreign subsidies distorting the internal market aiming at ensuring fair competition between firms active in the European Union (EU) by establishing equality of opportunity (Foreign Subsidies Regulation or FSR).[1] After European Parliament's approval, the Council officially adopted the agreement on 28 November 2022. The FSR will enter into force 20 days after its publication in the *Official Journal*; and it will apply six months later, i.e. around mid-2023. Since 2020, the European Commission has addressed the need for filling the regulatory gap concerning foreign subsidies. More specifically, in June 2020 the European Commission adopted a White Paper on foreign subsidies proposing new tools to address the regulatory gap concerning the subsidies granted by non-EU governments.[2] Following the White Paper, on 5 May 2021, the European Commission proposed a new regulation to address potential distortive effects of foreign subsidies in the internal market.[3] Finally, on 30 June 2022, the European Parliament and the Council agreed on the European Commission's proposed regulation, providing minor adjustments that do not change the scope of application as proposed by the European Commission.[4]

II. Scope of the FSR

The current economic crisis has increased the subsidised investments in the EU which will raise the impact of foreign subsidies on the Single Market and, due to the lack of a regulatory regime to control the distortive effects of the foreign subsidies, the level playing field in the EU is harmed. More specifically, when Member State authorities provide economic support to companies, this support is subject to EU State aid control, in contrast to economic support granted by non-EU governments, which faces no control. This situation favours the undertakings that receive foreign subsidies while putting the EU industry in a disadvantageous position. With this new legal instrument, the European Commission will expand the State aid regime to the world.[5]

Furthermore, the FSR aims at addressing foreign (non-EU) subsidies that provide beneficiaries with an unfair advantage, cause distortions and harm the level playing field in the EU. The FSR will empower the European Commission to investigate foreign (non-EU) subsidies granted to beneficiaries engaging in activities relating to concentrations (acquisitions or mergers), participating in public procurement procedure, or engaging in any other "economic activity" in the EU.

i. The existing regulatory gap in the EU

So far, the European Commission scrutinised the subsidies under the State aid control regime. Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) mentions that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market. In addition, other EU rules on competition, public procurement and trade defence have been developed to ensure the fair conditions for undertaking operating in the internal market. However, the existing rules do not apply to subsidies granted by non-EU governments to undertakings operating in the EU. This regulatory gap is summarised as follows:

- The EU State aid rules assess only the support given by the EU Member States to companies operating in the EU and they are not applicable to support given by non-EU governments to companies operating in the EU.
- The EU merger and antitrust rules do not give the European Commission the power to assess whether companies have been awarded foreign subsidies that might cause harm to internal markets.

[1] European Parliament Press release, "Parliament approves new tool to ensure fair competition on the single market" (10 November 2022), available at: *https://www.europarl.europa.eu/news/en/press-room/20221107IPR49609/parliament-approves-new-tool-to-ensure-fair-competition-on-the-single-market*.
[2] European Commission Press release, "Commission adopts White Paper on foreign subsidies in the Single Market" (17 June 2020), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1070*.
[3] European Commission Press release, "Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market" (5 May 2021), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982*; Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market COM(2021) 223 final, Brussels, 5 May 2021, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0223&from=EN* (The Proposed Regulation).
[4] European Parliament, Provisional Agreement Resulting from Interinstitutional Negotiations COM(2021) 0223.
[5] Sophie Bertin, Senior Advisor at Covington & Burling in Brussels, said, "The new regulation essentially expands the principles of EU state aid to the world, as those willing to play in the internal market will have to ensure they comply with the foreign subsidy regulation" as she was quoted by Global Competition Review in the article "EU reaches agreement to tackle foreign subsidies" (1 July 2022), available at: *https://globalcompetitionreview.com/article/eu-reaches-agreement-tackle-foreign-subsidies*.

- The EU public procurement rules do not apply to distortive foreign subsidies that facilitate bidding in a public procurement procedure.
- The World Trade Organization (WTO) rules on subsidies and the EU anti-subsidy trade defence instrument concern only the trade of subsidised goods and they do not apply on foreign subsidies relating to services, investments, acquisitions or bids in public procurement procedures.

Therefore, the European legislators intend to develop a multinational legal instrument which will control and scrutinise the foreign subsidies and fill in the current regulatory gap.[6]

ii. Notion of foreign subsidy

According to the FSR, a foreign subsidy exists "where a third country provides a financial contribution which confers a benefit to a recipient in the EU and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries".[7]

Under the FSR, a "foreign subsidy" exists where the following cumulative conditions are met: (a) there must be a "financial contribution" (b) provided by the public authorities of a third country, i.e. a non-EU country, (c) which confers a "benefit" to an undertaking engaging in an economic activity in the EU internal market; and (d) it is limited to an individual undertaking or industry or several undertakings or industries.

It is obvious that the definition of a "foreign subsidy" is based on the definitions of "State aid" under the EU State aid regime;[8] and of "subsidy" under the WTO Agreement on Subsidies and Countervailing Measures.[9] In particular, the definition of a "foreign subsidy" is analysed as follows:

a. Financial contribution:

The financial contribution is widely defined to capture any financial support that a foreign state provides, directly or indirectly, to a company operating in the EU. Such financial contribution may take the form of direct participation to a company's capital; or funding to acquire a company or grants, loans, equity injections, loan guarantees and fiscal incentives, as well as the supply or the purchase of goods and services.

Source of public authorities of a third country: The FSR indicates that the foreign subsidy should be provided by a non-EU state, i.e. third country. This financial contribution may be granted by the central government and public authorities at all other levels; or any foreign public entity, whose actions can be attributed to the third country; or any private entity whose actions can be attributed to the third country. Based on the EU State aid regime the financial contribution is attributable to a state when the latter is involved in the decision of granting the support which is subject to various elements such as the characteristics of the entity, the legal and economic environment prevailing in the state in which the entity operates including the government's role in the economy.

b. Benefit:

The FSR states that the financial contribution should confer a benefit to an undertaking engaging in an economic activity in the internal market. More specifically, the benefit exists when the financial contribution was not granted to an undertaking under normal market conditions. The assessment of a benefit will be based on comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service.

c. Selectivity:

The benefit should be selective, meaning limited to an individual undertaking or industry or certain undertakings or industries in law or in fact. The selectivity condition is satisfied if the financial contribution granted is based on non-objective and discriminatory criteria exclusively to a specific undertaking(s) or industry.

[6] Executive Vice-President Margrethe Vestager, in charge of competition policy and responsible for the cluster Europe Fit for the Digital Age, said: "Europe is a trade and investment superpower. In 2019 the stock of foreign direct investments was worth more than 7 trillion euros. Openness of the Single Market is our biggest asset. But openness requires fairness. For more than 60 years, we've had a system of State aid control to prevent subsidy races between our Member States. And today we are adopting a proposal to also tackle distortive subsidies granted by non-EU countries. It is all the more important to ensure a level playing field in these challenging times, to support the recovery of the EU economy"; Executive Vice-President Valdis Dombrovskis, responsible for An Economy that Works for People and for Trade, said: "Unfair advantages accorded through subsidies have long been a scourge of international competition. This is why we have made it a priority to clamp down on such unfair practices. They distort markets and provide competitive advantages on the basis of the support received, rather than on the quality and innovativeness of the products concerned. Today's proposal complements our international efforts in this regard"; Commissioner for the Internal Market, Thierry Breton, said: "Today we are closing a gap in our rule book to make sure that all companies compete on an equal footing and that no one can undermine the level playing field and Europe's competitiveness with distortive foreign subsidies. This will strengthen Europe's resilience", as they was quoted in the European Commission's Press release, "Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market" (5 May 2021), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982*; Bruno Le Maire, French Minister for the Economy, Finance and Industrial and Digital Sovereignty, said: "The French Presidency of the Council of the European Union was built on the principle of economic sovereignty. Economic sovereignty depends on two key principles: investment and protection. The agreement reached on this new instrument will make it possible to combat unfair competition from countries that grant massive subsidies to their industry. This is a major step towards protecting our economic interests", as he was quoted in the Council of the EU's press release, "Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament" (30 June 2022), available at: *https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/*.

[7] Chapter 1, art.2 of the FSR.

[8] Commission's Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1 (Commission Notice on the Notion of State Aid).

[9] WTO, "Agreement on Subsidies and Countervailing Measures", available at: *https://www.wto.org/english/docs_e/legal_e/24-scm.pdf*.

iii. Distortions and balancing test:

Under the FSR, the European Commission examines whether a foreign subsidy exists and then whether the foreign subsidy has distortive effects in the internal market.[10] The distortions in the internal market exist where a foreign subsidy is "liable to improve the competitive position of the undertaking concerned"; and the foreign subsidy "actually or potentially negatively affects competition". According to the FSR, such distortive effects shall be assessed on the basis of "indicators", which may include the amount and the nature of the subsidy; the situation of the undertaking, including its size and the markets or sectors concerned; the level and evolution of economic activity of the undertaking on the internal market; and the purpose, conditions and use of the foreign subsidy. Furthermore, the FSR provides for a de minimis threshold of EUR 4 million over any consecutive period of three fiscal years under which foreign subsidies are considered unlikely to distort the internal market. A foreign subsidy may not be distortive if it is aimed at repairing the damage caused by natural disasters or exceptional occurrences.

The FSR establishes a duty for the European Commission, to balance between "negative effects of a foreign subsidy in terms of distortion on the internal market" and "positive effects on the development of the relevant economic activity". Inspired by the EU State aid regime and art.107(3)(c) TFEU a "balancing test" shall be applied in the assessment of the compatibility of foreign subsidy once the distortions are established In particular, the European Commission "on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion on the internal market, with positive effects on the development of the relevant subsidized economic activity on the internal market, while considering other positive effects of the foreign subsidy such as broader positive effects in relation to the relevant policy objectives, in particular those of the Union".[11] Depending on the results of the balancing test, the European Commission will decide whether to impose redressive measures or to accept commitments.

iv. Redressive measures and commitments

The FSR provides for the European Commission to impose redressive measures or to accept commitments by the undertaking concerned in case the foreign subsidy caused, actually or potentially, distortions on the internal market.[12] The FSR mentions indicatively possible commitments and redressive measures: (i) third-party access on fair and non-discriminatory terms to a subsidised infrastructure; (ii) reduction of capacity or market presence; (iii) refraining from investments; (iv) licensing on fair, reasonable, and non-discriminatory terms; (v) publication of certain R&D results; (vi) divestment of certain assets; (vii) dissolution of the concentration; and (viii) repayment of the foreign subsidy with an appropriate interest rate; (ix) requiring the undertakings concerned to adapt their governance structure. The European Commission shall, where appropriate, impose reporting and transparency requirements, including periodic reporting regarding the implementation of the commitments and redressive measures.

The redressive measures and commitments of the FSR are obviously inspired by the EU State aid regime,[13] taking into account inter alia the measures that applied to limit distortions of competition in case of rescue and restructuring aid,[14] or in case of the capital injection to financial institutions during the financial crisis,[15] or in case of the recapitalisations during the Covid-19 outbreak.[16]

In addition, the repayment of the subsidy is also based on the EU State aid law, where the European Commission has the power to require the Member State to recover the aid from the beneficiary (recovery decision), when it considers the State aid measure is unlawful and incompatible with the internal market, aiming at restoring the situation which existed in the internal market before the aid was paid.[17]

v. Investigative tools:

The FSR provides for three investigative tools to assess foreign subsidies that have distortive effects in the internal market. The three tools consist of one ex officio investigation mechanism and two ex ante notification regimes:

a. Ex officio investigation mechanism (Tool 1):[18]

Tool 1 is a general market investigation mechanism which gives to the European Commission the power to investigate ex officio distortive foreign subsidies that affect companies operating in the internal market; and to impose remedies where appropriate (e.g., repayments, divestments, access commitments). The European Commission will have the power to investigate foreign subsidies which have been received during the past 10

[10] Chapter 1, art.3 of the FSR.
[11] Chapter 1, art.5 of the FSR.
[12] Chapter 1, art.6 of the FSR.
[13] Morris Schonberg, "The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions", EStAL (21 September 2022), p.143.
[14] Commission Communication, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C249/01.
[15] Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules [2009] OJ C195/04.
[16] Commission Communication, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01) [2020] OJ C911/1 as amended.
[17] Article 108 TFEU and Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/01.
[18] Chapter 2, arts 7–16 of the FSR.

years. The retroactive application of the FSR applies to foreign subsidies granted up to five years prior to the entry into force of the regulation.

This tool is of great importance as it can capture distortive foreign subsidies already notified and reviewed under the concentrations and public procurement regimes (Tool 2 and Tool 3) of the FSR but felt outside the thresholds of those specific tools.

Furthermore, and similarly to EU State aid control proceedings, the ex officio investigation consists of two phases:

- A preliminary review to assess whether the financial contribution granted a company operating in the internal market constitutes a foreign subsidy and whether it distorts the internal market. Where the European Commission, after a preliminary assessment, concludes that there are no sufficient indications to initiate the in-depth investigation, it shall close the preliminary review and inform the parties concerned.
- An in-depth investigation, which will be launched by the European Commission once the preliminary review indicates that the foreign subsidy may cause distortion of the internal market.

During the investigation procedures, the European Commission may request information and conduct inspections in and outside the internal market. In case the undertaking or the third country concerned does not cooperate, the European Commission will make a decision based on the basis of the facts that are available.

b. Ex ante notification of concentrations (Tool 2):[19]

Tool 2 is an ex ante notification-based regime and intends to address foreign subsidies that facilitate an acquisition of undertakings that are established in the internal market. More specifically, the FSR will require mandatory filings for concentrations meeting the following thresholds:

- at least one of the merging undertakings, the acquired undertaking or the joint venture (once created) is established in the EU and has in the EU of at least EUR 500 million turnover; and
- all the undertakings involved in the concentration were granted from non-EU countries combined financial contributions in the three financial years prior to notification of more than EUR 50 million.

The concentration that meets the above thresholds shall not be implemented before its notification and the European Commission's approval and clearance (standstill obligation). The investigation procedure may consist of two phases: Phase 1 when the European Commission will conduct the preliminary review and it will last 25 working days, and possible Phase 2 when the European Commission launches an in-depth investigation which will last 90 working days and which can be extended by 15 working days if the undertaking offers commitments. After the in-depth investigation, the European Commission will conclude in a decision with commitments; or (b) a no objection decision; or (c) a decision prohibiting a concentration, where it finds that a foreign subsidy distorts the internal market.

Given the existing rules and framework, this ex ante notification obligation will be applied in parallel with the EU merger control rules and the foreign investment instruments.

c. Ex ante notification in EU public tenders (Tool 3):[20]

Tool 3 is an ex ante notification-based regime under which it will assess whether foreign subsidies enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. More specifically, the companies which participate in EU public tender have to notify to the contracting authority all foreign financial contributions received in the past three years.

For the purpose of the FSR, a financial contribution should be notified where the estimated total value of that public procurement or framework agreement is equal to or greater than EUR 250 million; and the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions in the three financial years prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4 million per third country.

Where the tender is divided into lots, a notifiable foreign financial contribution shall be deemed to arise where the estimated value of the procurement exceeds the above-mentioned threshold and the value of the lot or the aggregate value of all the lots to which the tenderer applies is equal to or greater than EUR 125 million and the bidding party and its main subcontractors and suppliers received financial contributions equal to or greater than EUR 4 million per third country in the last three years.

In addition, and in the case the threshold of EUR 4 million is not met, the bidding parties still shall list in a declaration all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable. Once the notification or declaration is submitted, the contracting authority will transmit the notification to the European Commission.

[19] Chapter 3, arts 17–25 of the FSR.
[20] Chapter 4, arts 26–32 of the FSR.

The European Commission has the power to open an investigation, suspend the award and exclude a company from the tender in the event the investigation results in a distortive foreign financial support.

The European Commission's investigation procedure shall not last more than 160 working days. During its preliminary review (no later than 20 working days after the submission of the complete notification, which can be extended by 10 working days) and in-depth investigation (no later than 110 working days after the submission of the complete notification, with a potential extension of 20 working days), the contract cannot be awarded.

vi. Fines and periodic penalty payments:

The European Commission is also competent to impose fines and periodic penalties in a wide range of situations.[21] For instance, the European Commission could impose fines up to 1% of the aggregated turnover or periodic penalties up to 5% of the average daily aggregated turnover for failure to provide correct information in the notifications for both concentrations and public procurements. Moreover, the European Commission shall have the power to impose fines of up to 10% of the aggregate turnover if the undertakings fail to notify a notifiable concentration; or implement a concentration before the European Commission's approval and clearance (gun-jumping); or implement a prohibited concentration; or fail to notify a foreign subsidy in a public procurement procedure.

III. Considerations

The FSR will constitute a small revolution in the EU regulatory legal system. It will mimic the EU State aid rules to control foreign state subsidies and it will add a new regulatory layer to the EU merger and antitrust control (at EU and national levels), and foreign investment frameworks, i.e. national FDI screening procedures, which are under the umbrella of the EU FDI framework regulation.

However, the FSR, in its present form, increases the legal uncertainty and complexity of its application. There are a number of unclear points that need to be clarified:

- **What exactly is the notion of "foreign subsidy"?**

  The FSR does not precisely define when a financial contribution granted by a non-EU government qualifies as "a foreign subsidy" and furthermore whether it improves the undertaking's economic and market position; or whether it distorts competition and economic activities (including concentrations and public tenders) in the internal market. Furthermore, the FSR does not provide specific rules and explanations for the examination of the relationship between the subsidies and the future economic activity in the European Union. Despite the interference of the existing definitions (EU and WTO rules), the definition of a foreign subsidy is relatively broad under the FSR and the explanatory guidelines are to be mandatory.

- **How will the balancing test be applied?**

  The FSR does not explicitly indicate how the European Commission will assess and balance the negative effects of a foreign subsidy with positive effects on the relevant economic activity, which may lead to legal uncertainty. Will the European Commission apply the relevant principles as in the EU State aid control? It is not easy to answer. The EU State aid law provides that the State aid can be "compatible with the internal market" when the caused distortions can be counterbalanced by the positive effects of the granted aid. As it is has already been assessed and defined by the European Commission and the EU case law, the compatibility of the State aid is based on the following principles: the aid should facilitate economic activity; it is necessary because it brings improvement in the market; it is appropriate because it addresses the objective common interest; it has an incentive effect on the beneficiary; it is proportionate to achieve its positive objective; and in that way it can overcome the undue the distortions of competition and trade. It has to be noted that under the EU State aid law the compatibility grounds are developed by the notifying Member State which awards the aid to the beneficiary; and, in most cases, other common assessment principles are also considered in order that the positive effects outweigh the distortions of competition and trade.[22] However, under the FSR the European Commission shall apply the balancing test based on the available information possibly provided by the beneficiary or any other interested party. It is not clear whether the European Commission will apply the same principles under the FSR assessment and whether it is really going to take into consideration the positive effects the foreign subsidy may have outside the internal market. This may also increase the possibility of assessing

[21] Chapter 2, art.15, Chapter 3, art.25 and Chapter 4, art.32 of the FSR.

[22] Morris Schonberg, "The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions", EStAL (21 September 2022), p.143.

the foreign subsidies based on more political grounds rather than general objective justification.

- **Is there an overlap or ramification of the EU merger control rules?**

  While the FSR provides a new layer for concentrations in the EU internal market, it repeats the rules of the EU Merger Regulation (EUMR), which increases the danger of two parallel investigations, one under the FSR and one under the EUMR. We have to wait until the future case law and decisional practice may clarify this complexity.

- **Should the present EU State aid regime be updated?**

  The FSR creates a debate for the adequacy of the present EU State aid regime. The FSR imposes more constraints on undertakings subsidised by foreign companies in comparison with those undertakings subsidised by EU Member States.[23] More specifically, when an undertaking receives State aid by a Member State, (a) it does not have to be examined under the merger control and public procurement principles; (b) it can be benefited by the exceptions of arts 107(2)(b) and 107(3)(b) TFEU; and (c) it is not obliged to a commitment instead of the recovery of the State aid. In addition, under the FSR, the recipients of foreign (non-EU) support are direct addresses of the European Commission decisions which gives them broader procedural rights in contrast with the recipients granted aid by a Member State, who have limited procedural rights as the Member State authority is the direct addresses of the European Commission decision and not the undertakings in question.

- **How will the FSR affect the other jurisdictions?**

  Non-EU jurisdictions facing the high level of scrutiny mentioned in the FSR, which include merger control and public procurement rules, may try to adapt or update their rules in order to protect their market. However, the FSR mentions that any measure contrary to the European Union's obligations emanating from any relevant international agreement will not be entered into.[24] This may also create debates with the WTO and its existing or future rules.

IV. Final remarks

Under the new regulatory tool, a unique new antitrust regime is created. A large proportion of the regulatory gap will be covered and the distortions of competition in the EU caused by subsidies granted to undertaking by non-EU countries will be captured. However, there is still a plethora of unclear points that arise and which are worth being subjected to further assessment, analysis and clarifications.

The new ex ante and ex post tools grant to the European Commission and the competent authorities significant investigatory and sanction powers, under which the funding of undertakings that intend to operate or already operate in the EU internal market will be intensively scrutinised. Although the FSR will not prohibit the foreign subsidies per se, it might drive the economic activities and investments away from the EU internal market.

[23] Cleary Gottlieb, "The European Commission Proposes A Far-Reaching Regulation To Tackle Foreign Subsidies", Alert Memorandum (19 May 2021), available at: *https://www.clearygottlieb.com/-/media/files/alert-memos-2021/the-european-commission-proposes-a-far-reaching-regulation-to-tackle-foreign-subsidies.pdf*.

[24] Chapter 6, art.40(7) of the FSR.