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**EU Control of Foreign Subsidies:
Navigating the Interplay of Trade Defense,
State Aid, and WTO Law**

Micol Saccon

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Editors: Siegfried Fina and Roland Vogl

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Abstract

This thesis analyzes the systemic transformation of subsidy control within the European Union following the adoption of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation, FSR). Its central aim is to assess whether the FSR constitutes a coherent response to the structural enforcement gap between EU State aid law and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), and to determine how it reshapes the architecture of EU external economic governance.

The study situates the FSR within the broader evolution of the EU's trade defense framework, assessing its relationship with traditional instruments such as anti-dumping and countervailing measures, as well as with more recent autonomous tools. It then undertakes a doctrinal analysis of the FSR's substantive and procedural structure, focusing on the notion of financial contribution, the distortion assessment, the integrated balancing mechanism, and the system of notification and redressive measures.

A dedicated chapter addresses the international dimension by analyzing the relationship between the FSR and WTO subsidy law. A further comparative chapter examines the interaction between the FSR and EU State aid law, identifying both conceptual parallels and structural divergences.

The thesis argues that the FSR establishes a hybrid regulatory model that bridges internal market protection and international economic law. By introducing centralized and preventive scrutiny of foreign subsidies, the Regulation reflects the Union's effort to reconcile market openness with regulatory autonomy in an increasingly state-driven and geopolitically fragmented global economy.

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Table of abbreviations

Abbreviation	Meaning
ACI	Anti-Coercion Instrument
AD	Anti-Dumping
ADNOC	Abu Dhabi National Oil Company PJSC
AS	Anti-Subsidy
AS/CVM	Anti-Subsidy / Countervailing Measures
CVM	Countervailing Measures
EEA	European Economic Area
EU	European Union
FDI	Foreign Direct Investment
FSR	Foreign Subsidies Regulation (Regulation (EU) 2022/2560)
GATT	General Agreement on Tariffs and Trade
IPI	International Procurement Instrument
MEO	Market Economy Operator
NME	Non-Market Economy
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG	Safeguard Measures
TDI	Trade Defence Instrument
TFEU	Treaty on the Functioning of the European Union
UAE	United Arab Emirates
WTO	World Trade Organization

Introduction

The regulation of public subsidies has become one of the defining challenges of contemporary economic governance. In an increasingly fragmented global economy characterised by state-driven industrial strategies, geopolitical competition, and the resurgence of strategic interventionism, subsidies have re-emerged as powerful instruments of economic policy¹. While public financial support is not inherently unlawful, its capacity to distort competitive conditions and alter market outcomes raises complex legal questions at the intersection of trade law, competition law, and public international law.

Within the European Union, subsidy control has traditionally operated on two distinct yet interconnected levels. Internally, Articles 107 and 108 TFEU establish a constitutional system of State aid control designed to preserve undistorted competition and competitive neutrality within the internal market. Externally, the multilateral framework of the World Trade Organization (WTO), in particular the Agreement on Subsidies and Countervailing Measures (SCM Agreement), provides baseline disciplines governing trade-distorting subsidies between sovereign states². These regimes reflect fundamentally different regulatory logics: the SCM Agreement is grounded in coordination and decentralised enforcement among states, whereas EU State aid law forms part of a supranational legal order characterised by centralised supervision and preventive control.

For many years, a structural asymmetry persisted between these two systems. While Member State subsidies were subject to strict *ex ante* scrutiny under EU law, and while certain foreign subsidies could be challenged through WTO procedures or countervailing duties, distortive financial contributions granted by third countries to undertakings operating within the internal market largely escaped effective control. This enforcement gap became increasingly visible in the context of subsidised acquisitions, bidding in public procurement, and expansion strategies.

Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, commonly referred to as the Foreign Subsidies Regulation (FSR), represents the European Union's response to this structural imbalance. The FSR establishes a novel and centralised enforcement regime empowering the European Commission to investigate and remedy distortions caused by foreign state support within the internal market. Conceptually inspired by EU State aid law and drawing upon the

¹ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

² Frank Malte, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60(4) *Common Market Law Review* 925-956.

definitional vocabulary of WTO subsidy law, the FSR constitutes a hybrid regulatory instrument situated at the intersection of trade defence, competition law, and internal market governance.

This thesis examines the emergence, structure, and systemic implications of the FSR within the broader architecture of EU and international subsidy control. It seeks to answer the following central question: to what extent does the Foreign Subsidies Regulation constitute a coherent and systemic response to the regulatory gap between EU State aid law and WTO subsidy disciplines, and how does it reshape the architecture of EU subsidy control within the Union's evolving trade defence framework?

To address this question, the thesis proceeds in four stages.

The first chapter situates the FSR within EU's existing trade defence framework. It provides an overview of traditional trade defence instruments, including anti-dumping, anti-subsidy and safeguard measures, and outlines their legal basis and enforcement logic. The chapter also briefly introduces the Union's more recent autonomous trade instruments in order to contextualise the FSR within the evolving architecture of EU trade and economic governance.

The second chapter provides a detailed analysis of the FSR's objectives, substantive elements, enforcement architecture, distortion assessment, balancing mechanism, and remedial powers, including an examination of emerging decisional practice such as the ADNOC/Covestro case.

The third chapter examines the international dimension, analysing the SCM Agreement and assessing its structural differences and potential points of tension with the FSR.

The fourth chapter conducts a comparative analysis between EU State aid law and the FSR, highlighting both conceptual convergence and structural divergence.

Through this comparative and systemic analysis, the thesis argues that the FSR does not constitute a rejection of multilateral subsidy disciplines nor a mere external extension of EU State aid control. Rather, it represents a calibrated response to the limitations of existing regimes, integrating elements of State aid doctrine, competition law methodology, and trade defence logic into a hybrid framework aimed at preserving competitive neutrality within an increasingly complex and geopolitically contested global economy.

Chapter I - Overview of the EU Trade Defence Mechanisms

1. Overview of EU Trade Defence Mechanisms

Trade defence instruments (TDI) constitute a central component of the European Union's common commercial policy and a key element in the multilateral framework of international trade regulation³. They represent the legal and institutional mechanisms through which the EU safeguards its industries against unfair trading practices and unforeseen import surges, thereby ensuring that competition within the internal market remains fair and undistorted. Rooted in the rules of the World Trade Organization (WTO), TDIs are designed not as instruments of protectionism, but as legitimate remedies to counteract practices that distort trade and injure domestic producers⁴.

The European Union (EU), in fact, has long been a central actor in global trade, its influence anchored in the vastness of its single market and the collective economic strength of its Member States⁵. At the core of the EU's economic strategy lies the protection of the internal market's integrity and the preservation of fair and undistorted competition. However, in recent years, the Union has increasingly been confronted with external pressures arising from global market distortions, persistent industrial overcapacity in key sectors, and the growing weaponisation of trade through economic coercion amid heightened geopolitical tensions⁶.

In this complex environment, the importance of the EU's trade defence arsenal has become ever more pronounced⁷. This arsenal can broadly be divided into two complementary categories: on one hand there are the EU's traditional trade defence instruments (TDIs), grounded in multilateral trade rules originating from the 1947 General Agreement on Tariffs and Trade (GATT) and subsequent legislation⁸. The traditional TDIs enable the EU to deter and counteract unfair trade practices such as dumping and subsidisation carried out by companies or public authorities of third countries⁹. In doing so, TDIs aim to shield EU industries and employment from injury, restore

³ Van Bael & Bellis (Firm) (eds), *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn, Kluwer Law International 2019).

⁴ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (CUP 2014) 50–57; Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011).

⁵ Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011).

⁶ European Commission, '43rd Annual Report on the EU's Anti-Dumping, Anti-Subsidy and Safeguard Activities and the Use of Trade Defence Instruments by Third Countries Targeting the EU in 2024' COM(2025) 428 final.

⁷ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

⁸ General Agreement on Tariffs and Trade 1994 (GATT 1994) (15 April 1994).

⁹ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

competitive balance within the internal market, and uphold the principle of fair competition¹⁰. Typically, such measures take the form of additional duties on imports of goods found to be dumped, subsidised, or imported in such quantities and conditions as to cause, or threaten to cause, serious injury to Union producers.

On the other hand, there are more recent autonomous trade instruments, most of which have emerged between 2019 and 2024 as a response to the evolving global trade landscape and regulatory voids at the international level¹¹. These instruments extend beyond the traditional multilateral framework and are designed to address new forms of market distortion, particularly those linked to state-driven economic models and foreign subsidies. A key example is the Foreign Subsidies Regulation (FSR), adopted in 2022, which is at the core of this work and which equips the European Commission with the power to investigate and remedy distortions caused by non-EU subsidies in the internal market¹².

Together these mechanisms, both traditional and autonomous, form a comprehensive trade defence toolbox that enables the EU to safeguard its economic interests and reinforce the resilience of its internal market¹³. As international trade becomes increasingly shaped by geopolitical competition and state interventionism, the EU's evolving trade defence framework represents not only a mean of protection but also an affirmation of its commitment to open, fair, and rules-based global trade.

After this preliminary outline of the EU's trade defence instruments, the two categories that structured the EU's defensive trade framework will be examined.

1.1. The traditional trade defence instruments

The traditional trade defence instruments derive their legal foundation from multilateral trade agreements negotiated under General Agreement on Tariffs and Trade (GATT) 1947 and subsequently incorporated into the WTO framework in 1994¹⁴. These instruments fall into three main categories: (i) anti-dumping measures (AD), (ii) anti-subsidy or countervailing measures (AS/CVM), and (iii) safeguard measures (SG). While all three aim to preserve a level playing field for EU companies and

¹⁰ Ibid.

¹¹ Van Bael & Bellis (Firm) (eds), *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn, Kluwer Law International 2019).

¹² Edwin De Smijter, 'There's a New Kid in Town: The Foreign Subsidies Regulation' (2022) 13(8) *Journal of European Competition Law & Practice* 529, 529–530.

¹³ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

¹⁴ General Agreement on Tariffs and Trade 1947 (15 April 1947); Marrakesh Agreement Establishing the WTO (15 April 1994).

workers, each operates under distinct legal frameworks and targets specific types of trade distortions¹⁵. The basic EU Anti-Dumping Regulation (Regulation (EU) 2016/1036) implements the WTO Anti-Dumping Agreement, while the Anti-Subsidy Regulation reflects the principles of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)¹⁶. Safeguard measures are governed by the WTO Agreement on Safeguards and transposed into EU law through instruments such as Regulation (EU) 2015/478 on common rules for imports and Regulation (EU) 2015/755 concerning imports from certain third countries¹⁷.

The first category, the anti-dumping measures, is designed to counteract the practice of dumping, which occurs when goods are exported to the EU at prices lower than their normal value in the exporting country¹⁸. Under the article VI of the GATT 1994 and the WTO Anti-Dumping Agreement, AD measures may be only imposed following an investigation demonstrating both the existence of dumping and a causal link between the dumped imports and the material injury to the EU industry¹⁹. The EU's Anti-Dumping Regulation establishes procedural rules governing the calculation of dumping and injury, the definition of domestic industry, the initiation and conduct of investigations and the imposition of provisional and definitive duties. Investigations typically commence upon receipt of a complaint from EU industry and proceed through an evidence review, a determination of dumping and injury margins, and an assessment of the overall Union interest. Provisional duties may be applied for six months, followed by definitive duties for up to five years, which can be extended following an expiry review confirming persistent injury. Furthermore, the Anti-Dumping Regulation includes several WTO-plus provisions, obligations that go beyond the WTO discipline, such as the lesser duty rule, the Union interest test, the anticircumvention measures, which strengthen the effectiveness of EU trade defence beyond the minimum standards require under WTO law²⁰. Special methodologies exist for non-market economies (NMEs) such as China, where domestic prices are often distorted by state intervention²¹. Under the NME methodology, normal

¹⁵ Van Bael & Bellis (Firm) (eds), *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn, Kluwer Law International 2019).

¹⁶ Regulation (EU) 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the EU; WTO, Agreement on Subsidies and Countervailing Measures (15 April 1994).

¹⁷ WTO, Agreement on Safeguards (1994); Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports; Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries.

¹⁸ In the European Union, the determination of dumping is set out in Regulation 2016/1036, art. 2.

¹⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994.

²⁰ Regulation (EU) 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the EU.

²¹ Mirek Tobiáš Hošman, 'China's NME Status at the WTO: Analysis of the Debate' (2021) 20 *Journal of International Trade Law and Policy* 1.

value is constructed using prices from comparable market economy countries, typically resulting in higher AD duties. Exporters from NMEs may, however, claim market economy treatment if they satisfy criteria set out in the regulation, thereby benefitting from lower duties²². Recent reforms to the AD Regulation have also introduced the concept of significant market distortions, considered when determining normal value, and take into account environmental and labour compliance costs²³.

Anti-Subsidy measures, also referred to as countervailing measures (CVM), address distortions arising from financial contributions provided by non-EU governments or public bodies that confer a benefit on exporters²⁴. Unlike AD measures, which target the pricing practices of individual companies, AS measures focus on state action and its impact on EU industries²⁵. Investigations follow procedural steps similar to AD cases, including evidence gathering, determination of injury, and the imposition of provisional and definitive duties²⁶. However, they require constructive cooperation from the non-EU government which is not always guaranteed. The EU's Anti-Subsidy Regulation has evolved to remove the automatic application of the lesser duty rule, allowing for the calculation of duties to reflect the Union interest²⁷. Additionally, the Commission may investigate newly identified subsidies during the course of AS probes. Recent examples include AS duties imposed on imports of battery electric vehicles from China which reportedly safeguard over 115,000 jobs²⁸.

Safeguard measures differ fundamentally from AD and AS measures in that they do not require the existence of unfair trade practices²⁹. They are applicable only in response to a sudden, unforeseen surge in imports causing, or threatening to cause, serious injury to the EU industry³⁰. Safeguards are designed to provide temporary protection, giving industries time to adjust to market changes. SG investigation can last from seven to eleven months, with provisional measures imposed up to 200 days and definitive measures for up to four years, extendable to a maximum of eight years

²² Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

²³ Ming Du, 'From Non-market Economy to Significant Market Distortions: Rethinking the EU Anti-Dumping Regulation and China's State Interventionism' (2022) 41 *Yearbook of European Law* 314.

²⁴ WTO, *Agreement on Subsidies and Countervailing Measures* (15 April 1994).

²⁵ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ European Commission, 'EU Imposes Duties on Unfairly Subsidised Electric Vehicles from China' (Press Release, 12 December 2024).

²⁹ European Commission, 'Safeguards' (Trade and Economic Security, webpage) https://policy.trade.ec.europa.eu/safeguards_en accessed on 24, November 2025.

³⁰ WTO, *Agreement on Safeguards* (1994); Regulation (EU) 2015/478; Regulation (EU) 2015/755.

in exceptional cases³¹. Unlike AD and AS measures, SG measures are applied *erga omnes*, covering imports from all countries.

Historically, the EU has been a frequent user of AD and AS measures and a more selective user of SG measures³². In recent years, the EU has increased its attention to anti-circumvention investigations, addressing attempts by exporters to evade duties through transshipment or establishing production in third countries³³. At the end of 2024, the EU had 192 definitive TDIs in force, the majority being AD measures with China remaining the principal target of these instruments³⁴. The EU commission estimates that these measures protect over 625,000 direct jobs across various industrial sectors, including steel, aluminium, solar glass, wind towers and critical components for digital infrastructure³⁵. Despite these protections, studies have highlighted potential trade-offs, such as higher prices for consumers and downstream industries, and limited evidence that protected EU producers have regained market share³⁶. In response, the Commission is scheduled to conduct a comprehensive evaluation of TDI effectiveness in 2025, in line with recommendations from the European Court of Auditors³⁷.

1.2. Further protection: foreign direct investment (FDI) screening, dual-use export controls, and competition policy

In parallel with the traditional TDIs, the EU has progressively developed a range of autonomous trade instruments to address emerging challenges in global trade governance and to fill regulatory gaps left by multilateral system. These instruments aim to address regulatory and geopolitical challenges that fall outside the scope of the WTO system, reflecting a broader transformation of the Union's trade policy towards what the objectives set out in the 2021 Trade Policy Review, *An Open, Sustainable and Assertive Trade Policy*³⁸. Unlike the traditional TDIs which focus primarily on unfair

³¹ European Commission, 'Commission Initiates Review of Steel Safeguard to Protect EU Steel Industry' (Trade and Economic Security, 17 December 2024) https://policy.trade.ec.europa.eu/news_en Accessed on 24, November 2025.

³² Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

³³ Ibid.

³⁴ Ibid.

³⁵ European Commission, 43rd Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard Activities and the Use of Trade Defence Instruments by Third Countries Targeting the EU in 2024 COM (2025) 428 final.

³⁶ Andreas Maurer, Zaker Ahmad and Jan Hagemeyer, *Shortening and Simplifying EU Anti-Dumping and Anti-Subsidy Investigations with a View to Practices Favourable for SMEs* (Study requested by the INTA Committee, European Parliament, PE 754.470, June 2025).

³⁷ Ibid.

³⁸ European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final.

pricing and subsidisation in goods trade, the autonomous instruments operate in a broader regulatory space encompassing investment, procurement, technology and security. Collectively they seek to safeguard the Union's strategic autonomy, preserve a level playing field within the internal market and strengthen the EU's capacity to act unilaterally when international mechanisms fail to deliver effective remedies. Among these there are: (i) the Foreign Direct Investment Regulation (Regulation (EU) 2019/452), (ii) the Dual-Use Export Control Regulation (Regulation (EU) 2021/821); (iii) the International Procurement Instrument (IPI, Regulation (EU) 2022/1031); (iv) the Foreign Subsidies Regulation (FSR, Regulation (EU) 2022/2560) and (v) the Anti-Coercion Instrument (ACI, Regulation (EU) 2023/2675). Each of these instruments contributes to reinforcing to EU's economic resilience and strategic autonomy by ensuring that non-EU actors operate under fair and transparent conditions when accessing the EU market. The EU's trade defence policy exemplifies the balance between openness and assertiveness that characterises its contemporary trade strategy. It reaffirms the Union's role as a defender of fair competition, a guardian of multilateralism and a proactive actor in shaping the norms of global trade governance³⁹. Before moving to the detailed analysis of the FSR Regulation, the instruments will be briefly examined in order to contextualise their emergence and clarify how they collectively reshape the Union's defensive trade architecture.

The Foreign Direct Investment Regulation established the first EU-level framework for screening foreign direct investment on grounds of security and public order⁴⁰. Adopted in March 2019 and applied since October 2020, this regulation emerged in response to the global tightening of investment screening regimes and increasing concerns over acquisitions by state-backed foreign investors in strategic EU sectors⁴¹. The FDI Screening Regulation represents a compromise between EU's traditional commitment to open markets, and the recognition of the potential risk certain investment may pose, particularly in relation to critical infrastructure, advanced technologies and the transfer of sensitive data or know-how⁴².

The Dual-Use Export Control Regulation constitute another essential pillar of the autonomous trade defence architecture. It aims to ensure that export of sensitive technologies does not contribute

³⁹ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

⁴⁰ Regulation (EU) 2019/452.

⁴¹ UN Conference on Trade and Development (UNCTAD), *The Evolution of FDI Screening Mechanisms: Key Trends and Features* (Investment Policy Monitor No 25, 2025) <https://unctad.org/topic/investment/investment-policy-monitor> accessed on 24 November 2025.

⁴² European Commission, Evaluation of 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 SWD (2024) 23 (24 January 2024).

to the proliferation of weapons of mass destruction, human rights abuses or threats to international peace and security⁴³. The regulation update was particularly driven by the emergence of cyber-surveillance technologies which pose new risks to privacy and human rights. The 2021 regulation strengthened information-sharing mechanisms between member states and the Commission, improved coordination with international partners, and introduced enhanced transparency obligations regarding licensing decisions. Implementation remains primarily the responsibility of the Member States, yet the Commission plays a coordinating and reporting role. In 2022, dual-use exports authorised by EU Member States were valued at approximately 57.3 billion euros, about 2% of the total EU exports, while export denial on security grounds reached nearly 1 billion euros⁴⁴. Recent developments also point to the increasing geopoliticisation of export controls⁴⁵. The Commission's 2024 White Paper on export controls acknowledged the unilateral use of export restrictions by major economies, notably concerning semiconductors and related technologies, and announced an advanced review in 2025 to assess the effectiveness and coherence of EU export control policy⁴⁶.

Regulation (EU) 654/2014, known as the Enforcement Regulation, provides the EU with legal means to enforce its rights under international trade agreements when dispute settlement mechanisms fail to function effectively. Initially adopted in 2014, the Regulation empowered the Commission to suspend concessions or adopt countermeasures in response to adverse rulings under the WTO or bilateral agreements. Its scope was substantially broadened in 2020 following the paralysis of the WTO Appellate Body which left the EU unable to secure final, enforceable rulings even in cases it had won at panel stage⁴⁷. The revised Enforcement Regulation now allows the EU to adopt countermeasures when dispute is effectively appealed into the void or when a trading partner obstructs the functioning of a dispute settlement system. Its scope has been extended to cover trade in serviced and intellectual property rights, in addition to trade in goods and public procurement. The Commission's implementing powers under this regulation are subject to the comitology examination procedure⁴⁸. In practice, the regulation has been applied in several high-profile disputes, including

⁴³ Regulation (UE) 2021/821.

⁴⁴ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of Regulation (EU) 2021/821 Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items* COM (2025).

⁴⁵ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of Regulation (EU) 2021/821 Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items* COM (2025).

⁴⁶ European Commission, *White Paper on Export Controls*, (Brussels, 24 January 2024).

⁴⁷ Jana Titievskaja, 'International trade dispute settlement: World Trade Organisation Appellate Body crisis and the multi-party interim appeal arbitration arrangement' (European Parliamentary Research Service, 2024).

⁴⁸ As set out in Regulation (EU) No 182/2011, i.e. in accordance with the examination procedure (Article 5) by qualified majority.

the EU's response to the United States' Section 223 tariffs on steel and aluminium and in the long-running WTO aircraft dispute (US - Large Civil Aircraft).

The International Procurement Instrument (IPI), established by Regulation (EU) 2022/1031, addresses persistent asymmetries in access to public procurement markets between the EU and its trading partners. Whereas the EU maintains one of the most open procurement markets in the world, many third countries, including China and the United States, maintain restrictive procurement regimes towards EU companies⁴⁹. The IPI empowers the Commission to initiate investigations into discriminatory practices affecting EU suppliers abroad and, where negotiations fail, to impose restrictive measures on non-EU bidders in EU public tenders. Such measures may include either a downward adjustment of the bid score or, in more severe cases, exclusion from procurement procedures. The IPI thus functions both as a defensive and leverage-based instrument, encouraging reciprocal openness while protecting the EU market from unfair competition⁵⁰.

The ACI, the Anti-Coercion Instrument, adopted in November 2023 has been the most recent addition to the EU's trade defence architecture and it was developed in response to the increasing use of economic coercion by third countries, defined as measures intended to pressure the EU or its Member States into altering policy decisions. A prominent example promoting its creation was China's coercive actions against Lithuania in 2021, following Lithuania's decision to strengthen relations with Taiwan⁵¹. The ACI establishes a structure procedure enabling the EU to respond proportionately to coercive acts, including through countermeasures such as increased tariffs, restrictions on trade and investment, or limits on access to the internal market. The decision to determine the existence of economic coercion rests with the Council, ensuring political legitimacy, while the Commission is responsible for investigating the measures and proposing a response. ACI introduction marks a major evolution in the EU's external trade policy, from a predominantly rules-based system to one capable of strategic retaliation when the Union's sovereignty or decision-making autonomy is threatened.

Finally, the Foreign Subsidies Regulation (FSR), adopted in 2022, filled a long-standing regulatory gap by addressing distortions in the internal market caused by subsidies granted by non-EU governments. These distortions were previously unaddressed under both the WTO subsidy rules

⁴⁹ Marcin Szczepański, *EU Legislation in Progress: EU international procurement instrument* (European Parliamentary Research Service, PE 649.403, November 2022).

⁵⁰ Ibid.

⁵¹ *China – Measures concerning trade in goods and services* (WTO Dispute DS610, Request for Consultations by the European Union, 27 January 2022) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds610_e.htm accessed 24 November 2025.

and EU competition law which applies only to aid granted by Member States. The FSR empowers the Commission to investigate and redress such distortions in three principal contexts: mergers and acquisitions, public procurement and other market situations. The structure, functioning and substantive assessment framework of the FSR will be analysed in depth in the following chapters, where its role within the Union's evolving system of market regulation will be further examined.

Taken together, these autonomous trade defence mechanisms represent a new generation of EU trade instruments. They expand the Union's defensive capacity beyond traditional trade remedies to encompass investment, technology, subsidies and geopolitical coercion. Their emergence illustrates a broader doctrinal shift in EU trade law, from the liberal institutionalism that characterised the post-1990s era towards a strategic autonomy paradigm, combining openness with resilience and assertiveness. This evolving architecture reflects the EU's attempt to adapt its legal and policy to a fragmented global order in which trade is increasingly intertwined with security, industrial policy and international power competition. In light of this evolving EU trade architecture, the following chapter will consider the Foreign Subsidies Regulation (FSR) in detail.

Chapter II - The Foreign Subsidies Regulation

2.1. The functions and objectives of the Foreign Subsidy Regulation

The adoption of the Foreign Subsidies Regulation (FSR) responds to a structural enforcement gap in the EU internal market framework arising from the asymmetric treatment of public financial support depending on its origin⁵². While State aid granted by EU Member States is subject to control under Articles 107 and 108 TFEU, subsidies granted by third countries to undertakings active in the Union traditionally fell outside the reach of EU competition law. At the multilateral level, WTO subsidy disciplines offer only limited and indirect remedies, primarily focused on trade in goods and not designed to address distortions arising from foreign subsidies affecting investment, services, public procurement, or corporate acquisitions within the EU⁵³. Against this background, the FSR was adopted to restore competitive balance within the internal market by addressing distortions caused by foreign state support that previously escaped effective scrutiny⁵⁴.

The Regulation applies to foreign financial support granted by non-EU states insofar as it distorts competition within the internal market. Its scope is deliberately broad, reflecting the EU's concern with structural distortions arising from different economic and governance models, including state-capitalist and non-market practices⁵⁵. In contrast to EU State aid law, which is anchored in the internal allocation of public resources within Member States, the FSR is designed to capture a wide range of state-driven advantages originating outside the Union that may affect market outcomes within it⁵⁶. This approach acknowledges that foreign subsidies can influence competitive dynamics not only through trade flows, but also through strategic market behaviour such as acquisitions of EU undertakings, participation in public procurement procedures, or expansion strategies supported by non-market financing⁵⁷.

The risk posed by such support lies in its capacity to enable undertakings to operate under conditions unavailable to unsubsidised competitors, thereby undermining the level playing field that constitutes a core element of the internal market. Foreign subsidies may allow beneficiaries to outbid

⁵² European Commission, 'Foreign Subsidies Regulation' (Competition Policy, European Commission) https://competition-policy.ec.europa.eu/foreign-subsidies-regulation_en accessed 12 February 2026.

⁵³ Maria Tokas, 'Playing the Game: The EU's Proposed Regulation on Foreign Subsidies' (2022) 56(5) *Journal of World Trade* 779–802

⁵⁴ Edwin De Smijter, 'There's a New Kid in Town: The Foreign Subsidies Regulation' (2022) 13(8) *Journal of European Competition Law & Practice* 529–530.

⁵⁵ Ibid.

⁵⁶ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

⁵⁷ Ibid.

rivals in public tenders, acquire EU targets at valuations disconnected from market fundamentals, or sustain loss-making operations with a view to long-term market dominance⁵⁸.

Beyond its immediate objective of filling the enforcement gap between EU State aid control and international subsidy disciplines, the FSR performs a broader systemic function within the EU legal order⁵⁹. Its purpose is not merely to identify the existence of foreign subsidies, but to neutralise their distortive effects on competition within the internal market, irrespective of the sector concerned or the form of market access⁶⁰. In this respect, the FSR does not operate as a traditional trade defence instrument focused on imports, nor as a simple extension of State aid law. Instead, it functions as a market-corrective mechanism applicable to all economic activities carried out within the Union⁶¹.

The Regulation thereby reinforces the principle of competitive neutrality, ensuring that competition in the internal market is determined by merit rather than by foreign state support⁶². At the same time, it pursues a preventive and deterrent objective. Through notification obligations and enhanced investigative powers granted to the Commission, the FSR seeks to discourage undertakings from relying on foreign subsidies when engaging in strategic market behaviour within the EU, particularly in concentrations and public procurement⁶³.

Finally, the FSR reflects a broader policy orientation towards strengthening the EU's strategic autonomy⁶⁴. While preserving openness to foreign investment and international participation in the internal market, the Regulation equips the Union with a unilateral enforcement tool capable of addressing distortions in an increasingly fragmented global economic order, where multilateral remedies often prove ineffective or unavailable. In doing so, the FSR aims to safeguard fair competition within the internal market without abandoning the EU's commitment to openness and integration⁶⁵.

⁵⁸ European Commission, 'About the Foreign Subsidies Regulation' (Competition Policy, European Commission) https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/about_en accessed 12 February 2026.

⁵⁹ Edwin De Smijter, 'There's a New Kid in Town: The Foreign Subsidies Regulation' (2022) 13(8) *Journal of European Competition Law & Practice* 529–530

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² European Commission, 'About the Foreign Subsidies Regulation' (Competition Policy, European Commission) https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/about_en accessed 12 February 2026.

⁶³ Ibid.

⁶⁴ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889–908

⁶⁵ Thomas Müller-Ibold, 'The Draft Foreign Subsidies Regulation – Relationship with Other Union Instruments – Some Thoughts on Multilevel Enforcement and Duplication of Efforts' (2022) 25(3) *Zeitschrift für Europarechtliche Studien* 431–442

2.2. What is a subsidy under the FSR?

The notion of a foreign subsidy under EU law is defined in Article 3 of FSR. A foreign subsidy exists where four cumulative conditions are satisfied.

First, there must be a financial contribution. This concept is interpreted broadly and includes any intervention that entails a charge on public resources⁶⁶. Article 3(2) FSR contains a non-exhaustive list of examples for financial contributions. It covers direct transfers of funds, such as grants, loans, guarantees, capital injections, or debt forgiveness, as well as fiscal incentives, tax exemptions, or the forgoing of revenues otherwise due. It also encompasses the provision or purchase of goods and services by a third country, even where such transactions are carried out on market terms.

Second, the financial contribution must be provided directly or indirectly by a third country⁶⁷. For the purposes of the FSR, all non-EU states qualify as third countries, including EEA states and countries with special trade agreements with the EU. Contributions may originate not only from central governments but also from regional or local authorities, public entities, and state-owned enterprises, provided their actions are imputable to the third country⁶⁸.

Third, the contribution must be limited to one or more undertakings or industries, introducing an element of selectivity⁶⁹. General measures applicable without distinction do not qualify, whereas enterprise-specific, sector-specific, or region-specific interventions do⁷⁰.

Fourth, the financial contribution must confer a benefit on an undertaking engaged in economic activity in the EU internal market⁷¹. A benefit exists where the recipient is placed in a more favourable position than under normal market conditions, assessed in line with the market economy operator principle⁷². For the assessment of whether a financial contribution confers such favourable position, the Commission evaluates the terms of the financial contribution by comparing them to conditions

⁶⁶ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889–908.

⁶⁷ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 3.

⁶⁸ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

⁶⁹ Regulation (EU) 2022/2560 [2022] OJ L330/1, recital 14; and Hornkohl L and Mattiolo P, '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' (2025) 24(4) *European State Aid Law Quarterly* 340.

⁷⁰ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889–908.

⁷¹ Regulation (EU) 2022/2560 [2022] OJ L330/1, recital 13.

⁷² Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

that would have prevailed under normal market circumstances⁷³. This comparison serves to establish whether the undertaking received an economic advantage that a market operator would not have granted. In practice, the benchmark analysis may rely on a variety of reference points, depending on the nature of the contribution. These include, in particular, the investment behaviour of private investors, the financing rates obtainable on the market for comparable undertakings, the fair market value of goods or services bought or sold, or the tax treatment applied to comparable operators in similar situations⁷⁴. For instance, a loan granted at an interest rate below the prevailing market rate, or an acquisition of assets at a price diverging from their market value, may indicate the presence of a benefit. Likewise, tax measures may confer a benefit where they depart from market-consistent or generally applicable taxation practices. Where no directly comparable benchmark exists, the Regulation allows for a degree of methodological flexibility⁷⁵. Existing benchmarks may be adjusted to reflect relevant differences, or alternative benchmarks may be constructed using generally accepted valuation and economic assessment methods. This is particularly relevant in cases involving state-owned enterprises, complex financial instruments, or non-market economy contexts, where market comparators may be distorted or unavailable⁷⁶. The use of such adjusted or alternative benchmarks ensures that the benefit analysis remains effective and economically grounded, even in the absence of perfect comparability⁷⁷. By anchoring the concept of benefit to objective market-based benchmarks, the FSR seeks to distinguish between foreign public interventions that merely reflect market participation and those that artificially enhance the competitive position of undertakings active in the internal market. This approach reinforces the Regulation's focus on competitive distortions rather than on the formal presence of state involvement as such⁷⁸.

2.3. The enforcement architecture and investigative tools

The Foreign Subsidies Regulation establishes a centralised enforcement architecture, conferring exclusive competence on the European Commission to investigate and remedy distortions caused by foreign subsidies in the EU internal market⁷⁹. This institutional choice ensures uniform application of

⁷³ Ibid.

⁷⁴ Regulation (EU) 2022/2560 [2022] OJ L330/1, recital 13.

⁷⁵ Regulation (EU) 2022/2560 [2022] OJ L330/1, recital 18.

⁷⁶ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089.

⁷⁷ Ibid.

⁷⁸ Lukas Hornkohl and Pietro 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' (2025) 24(4) *European State Aid Law Quarterly* 340.

⁷⁹ European Commission, 'About the Foreign Subsidies Regulation' (Competition Policy, European Commission) https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/about_en accessed 12 February 2026.

the Regulation across Member States and prevents divergent national enforcement approaches that could undermine legal certainty, competitive neutrality, or the integrity of the internal market. Given the cross-border nature of foreign subsidies and their potential impact on market structures and competitive conditions throughout the Union, a centralised administrative model is both functionally and legally justified. From a procedural standpoint, the FSR is structured around a dual enforcement system, combining mandatory notification procedures with a residual *ex officio* investigative mechanism⁸⁰. The Regulation identifies specific market situations in which foreign subsidies are considered particularly likely to distort competition and subjects them to prior regulatory scrutiny through notification obligations. At the same time, it preserves the Commission's ability to intervene in all other market situations through *ex officio* investigations, thereby ensuring comprehensive market coverage and preventing regulatory circumvention.

More specifically, the FSR operationalises this enforcement logic through three complementary procedural avenues. Two of these are notification-based procedures, applicable respectively to concentrations and to public procurement procedures exceeding defined financial thresholds⁸¹. In both contexts, the notification obligation is accompanied by a standstill requirement, which prohibits the implementation of the concentration or the award of the public contract until the Commission has completed its assessment. This mechanism allows the Commission to examine foreign financial contributions granted by non-EU governments before potentially distortive effects materialise, while offering legal certainty to market participants through clearly defined thresholds and procedural stages. The third avenue consists of broad *ex officio* investigative powers, enabling the Commission to initiate investigations on its own initiative in all other market situations where foreign subsidies may distort competition but do not trigger a notification obligation. This residual mechanism is essential to the effectiveness of the Regulation, as it addresses distortions arising below notification thresholds or in market configurations not captured by the notification procedures. Where the Commission finds that foreign financial contributions constitute distortive foreign subsidies, it is empowered to impose appropriate redressive measures in order to restore competitive neutrality in the internal market. This structure provides the foundation for the differentiated analysis of the three procedural mechanisms, which are examined in turn below.

First, the Regulation introduces a mandatory notification regime for concentrations involving non-EU governments financial contributions⁸². This procedure targets mergers, acquisitions, and the

⁸⁰ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 9, 10, 20.

⁸¹ European Commission, 'About the Foreign Subsidies Regulation' (Competition Policy, European Commission) https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/about_en accessed 12 February 2026.

⁸² Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 19 and following.

creation of joint ventures where at least one of the parties is active in the internal market above a defined economic threshold and has received substantial financial support from a non-EU government. Specifically, the procedure applies where the acquired company, one of the merging parties, or the joint venture generates an EU turnover of at least €500 million, and the parties have received foreign financial contributions exceeding €50 million in the preceding three years. The underlying rationale is that foreign subsidies may enable subsidised undertakings to pursue acquisition strategies that would not be viable under normal market conditions, thereby distorting competition at the structural level.

Second, the Regulation establishes a notification-based procedure for public procurement⁸³. This mechanism reflects the particular vulnerability of procurement markets to foreign subsidies, which may allow bidders to submit abnormally low or financially unsustainable offers, thereby crowding out unsubsidised competitors. It applies where the estimated contract value is at least €250 million, and where the bid involves a foreign financial contribution of at least €4 million per third country over the last three years. Unlike traditional public procurement remedies, which focus on procedural fairness and equal treatment, the FSR addresses the source of the competitive distortion, namely foreign state support embedded in the bid. By requiring prior notification of significant foreign financial contributions in large-scale procurement procedures, the Regulation enables the Commission to assess whether the bid benefits from distortive subsidies and, where necessary, to impose redressive measures or exclude the bidder.

Third, and complementing the notification regimes, the FSR confers on the Commission broad *ex officio* investigative powers covering all other market situations⁸⁴. This residual mechanism allows the Commission to initiate investigations on its own initiative where foreign subsidies may distort competition but fall below notification thresholds or concern activities not captured by the *ex ante* procedures. The inclusion of *ex officio* powers is essential to prevent regulatory evasion and to ensure the effectiveness of the Regulation across diverse market configurations. It also reflects the recognition that foreign subsidies may distort competition in more subtle or fragmented ways, such as through gradual market expansion, pricing strategies, or support to service providers, which cannot be adequately addressed through notification-based control alone.

Taken together, the notification procedures for concentrations and public procurement with the Commission's *ex officio* investigative powers, constitute a coherent and integrated enforcement

⁸³ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 27 and following.

⁸⁴ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 9 and following.

framework under the Foreign Subsidies Regulation. This procedural architecture enables the Commission to address distortive foreign subsidies across a wide range of market situations, combining targeted prior scrutiny in high-risk contexts with a residual mechanism capable of capturing distortions that fall outside predefined thresholds.

2.4. The distortion assessment and the balancing test

The Foreign Subsidies Regulation complements its notification-based and *ex officio* investigative procedures with a set of procedural safeguards and enforcement mechanisms designed to ensure that foreign subsidies do not distort competition in the EU internal market.

A central element of this framework is the standstill obligation, which applies in the context of notified concentrations and public procurement procedures⁸⁵. Under this obligation, concentrations may not be implemented and public contracts may not be awarded until the Commission has completed its review and adopted a decision. The standstill requirement preserves the competitive *status quo* during the investigative phase and prevents distortive effects from materialising prematurely. In doing so, it reflects the preventive logic familiar from EU merger control, while adapting it to the specific risk posed by competitive advantages arising from foreign state support. Compliance with the standstill obligation is therefore essential, as its breach may trigger formal investigations, administrative sanctions and enforcement consequences⁸⁶.

Once the standstill obligation enables the Commission to conduct an in-depth investigation, the assessment moves to a substantive evaluation of the foreign subsidy's effects on competition⁸⁷. Where the Commission establishes that a foreign financial contribution constitutes a foreign subsidy and that it distorts competition in the internal market within the meaning of Article 4 FSR, the analysis does not automatically lead to the imposition of redressive measures or to the prohibition of the transaction or tender. Instead, Article 6(1) FSR introduces a balancing test, which constitutes a distinct and additional analytical step within the enforcement framework.

Through the balancing test, the Commission weighs the negative effects of the distortive foreign subsidy against its potential positive effects⁸⁸. This mechanism reflects the Regulation's objective of safeguarding competitive neutrality while avoiding the undue restriction of beneficial foreign investment. It allows the Commission to assess whether, notwithstanding its distortive nature, a foreign subsidy may generate sufficient benefits to justify regulatory tolerance or a reduced intensity

⁸⁵ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 24, art. 28.

⁸⁶ Regulation (EU) 2022/2560 [2022] OJ L330/1, artt. 25, 26, 30.

⁸⁷ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 11.

⁸⁸ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 6.

of remedial intervention. Importantly, the balancing test is not a preliminary screening tool, but a corrective and proportionality-based assessment applied only after a finding of distortion under Article 4 FSR, which itself focuses exclusively on competitive harm.

The starting point of the balancing exercise is the identification of the subsidy's negative effects on competition in the internal market. These effects primarily consist in the improvement of the recipient's competitive position and the resulting actual or potential adverse impact on market dynamics. Such distortions may manifest through altered market behaviour, including aggressive pricing, expanded output, increased risk-taking, or acquisition and bidding strategies made possible by subsidised financing⁸⁹. The intensity and scope of these negative effects are decisive for the outcome of the balancing test. The more severe and far-reaching the distortion, the less likely it is that positive effects will outweigh it⁹⁰.

Against this background, Article 6(1) FSR allows the Commission to take into account positive effects of the foreign subsidy⁹¹. These may relate, first, to the development of the subsidised economic activity in the Union, assessed from the perspective of its impact within the internal market rather than the policy objectives pursued by the subsidising third country. In addition, the Commission may consider other positive effects linked to relevant EU policy objectives, including environmental protection, climate change mitigation, social standards, and the promotion of research and development. Moreover, the balancing test may also accommodate positive effects linked to non-EU policy objectives, insofar as they are relevant to the Union, such as environmental protection or human rights promotion in third countries, provided that these effects have a meaningful connection to EU interests or values⁹².

A central constraint of the balancing test is the requirement that positive effects be specific to the foreign subsidy. This implies a causal link between the subsidy and the claimed benefits⁹³. Absent the subsidy, the positive effects would not occur or would occur only to a significantly lesser extent. The burden of demonstrating such positive effects lies with the undertaking invoking them, which must

⁸⁹ This has been clarified from the European Commission, *Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market* (C/2026/42, OJ C 224, 13 January 2026).

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² European Commission, *Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market* (C/2026/42, OJ C 224, 13 January 2026).

⁹³ Ibid.

establish, with a sufficient degree of likelihood, that the subsidy leads or is likely to lead to a change in behaviour resulting in the claimed benefits.

Overall, the balancing test constitutes a crucial mechanism through which the FSR reconciles competition protection with openness to foreign investment.

2.4.1. Focus: the role of the Commission Guidelines in the application of the FSR

Recently, to further enhance the coherence, predictability and transparency of this enforcement framework, the Commission adopted the Guidelines on the application of the Foreign Subsidies Regulation in January 2026, pursuant to Article 46 FSR⁹⁴. The Guidelines do not alter the substantive structure of the Regulation, but clarify how the Commission applies its investigative, analytical and remedial powers in practice, thereby reinforcing the procedural logic described above.

In particular, they clarify the assessment of distortions of competition under Article 4 FSR by articulating a two-step analysis. Once the existence of a foreign subsidy is established, the Commission first examines whether the subsidy strengthens the beneficiary's competitive position in the internal market, including through potential cross-subsidisation where the financial contribution is not directly linked to EU economic activities. It then assesses whether the subsidy is liable to alter competitive behaviour or market dynamics to the detriment of other operators, for instance through pricing strategies, bidding behaviour, expansion decisions or increased risk-taking enabled by subsidised financing.

The Guidelines further specify how this framework applies in the context of public procurement procedures, clarifying the assessment under Article 27 FSR. Where there are indications that a foreign subsidy may have influenced the terms of a tender, the Commission examines whether the subsidy was used in the design of the bid and whether the resulting offer is unduly advantageous when compared with competing bids and the contracting authority's estimates. If such advantage is established, the Commission assesses whether it stems, to an appreciable extent, from the foreign subsidy rather than from legitimate competitive factors.

The Guidelines also provide important clarification on the application of the balancing test under Article 6 FSR as a distinct and subsequent analytical stage, applicable only after a finding of distortion. The balancing test operates as a proportionality-based mechanism through which the

⁹⁴ European Commission, *Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (C/2026/42, OJ C 224, 13 January 2026)*.

Commission weighs the negative effects of the foreign subsidy against positive effects that are specific to the subsidy and relevant to the Union. The undertaking invoking such effects bears the burden of demonstrating their existence and their causal link to the subsidy. Where the positive effects outweigh the distortive impact, the Commission may refrain from intervention; where they do not, it may accept commitments or impose appropriate redressive measures.

Finally, the Guidelines clarify the Commission's discretionary power to request prior notification of concentrations or foreign financial contributions in public procurement procedures falling below the ordinary thresholds. By identifying the factors guiding the exercise of this call-in mechanism, the Guidelines aim to reconcile administrative flexibility with legal certainty.

In this way, the Guidelines consolidate the FSR's procedural safeguards and enforcement mechanisms into a coherent and operational system.

2.5. The remedies and the redressive measures

At the conclusion of its investigation, the Commission may adopt different types of decisions depending on the outcome of its assessment and the conduct of the undertakings concerned. The Foreign Subsidies Regulation establishes a graduated decision-making framework which will be further examined.

First, where the Commission concludes that no foreign subsidy exists, or that a foreign subsidy does not distort competition within the meaning of Article 4 FSR, it may close the procedure without adopting redressive measures. This outcome may also arise where a subsidy is considered negligible in light of the *de minimis* thresholds or where, following the application of the balancing test under Article 6(1) FSR, the positive effects of the subsidy outweigh its negative impact on competition. In such cases, the Commission effectively issues a decision allowing the concentration to proceed or the public procurement procedure to continue without further intervention⁹⁵.

Second, where the Commission identifies a distortive foreign subsidy but considers that the distortion can be effectively addressed through commitments offered by the undertaking concerned, it may adopt a commitments decision⁹⁶. Commitments must be sufficient to fully remove the distortion and may be structural or behavioural in nature. Structural commitments may include divestments or the separation of business units, while behavioural commitments may involve access obligations, licensing of key technologies, repayment of the subsidy, or restrictions on market conduct enabled by the subsidy. Once accepted, commitments become legally binding and are subject to

⁹⁵ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 25, art. 31.

⁹⁶ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 7, art. 25, art. 31.

monitoring and enforcement by the Commission. This mechanism reflects a cooperative enforcement model and enhances regulatory flexibility, while ensuring effective restoration of competitive conditions.

Third, where the Commission establishes the existence of a distortive foreign subsidy and the undertaking fails to offer adequate commitments, or where proposed commitments are deemed insufficient, it may adopt a decision imposing redressive measures⁹⁷. The Regulation provides a non-exhaustive catalogue of potential remedies, reflecting a preference for flexibility and proportionality. Redressive measures may include, *inter alia*, repayment of the foreign subsidy, capacity reductions, restrictions on certain investments, access obligations, or prohibitions on specific market conduct. In the context of notified concentrations and public procurement procedures, the Commission may ultimately prohibit the transaction or the award of the public contract where no remedy is capable of fully eliminating the distortion. This prohibition power represents the most far-reaching enforcement outcome under the FSR and ensures that subsidised transactions or bids that would irreversibly distort competition do not materialise.

To ensure the effectiveness of this enforcement framework, the FSR provides for a robust system of sanctions. Failure to comply with the Commission's decisions, accepted commitments, redressive measures, standstill obligations, or information requests may result in fines of up to 10 percent of the undertaking's aggregate worldwide turnover. In addition, the Commission may impose periodic penalty payments of up to 5 percent of the average daily turnover for each day of continued non-compliance. These sanctions underscore the binding nature of the FSR's procedural and substantive obligations and reinforce its preventive and corrective character.

Taken together, the range of possible decisions and enforcement measures ensures that the FSR is not merely a screening instrument, but a fully-fledged regulatory regime capable of producing legally enforceable outcomes. By combining clearance decisions, commitment-based solutions, and prohibition or corrective interventions, the Regulation enables the Commission with a comprehensive framework to address distortions caused by foreign subsidies while preserving proportionality, legal certainty, and the integrity of the internal market.

2.6. The ADNOC/Covestro Case

An important practical application of the Foreign Subsidies Regulation is provided by the European Commission's investigation and conditional approval of the acquisition of Covestro AG by

⁹⁷ Regulation (EU) 2022/2560 [2022] OJ L330/1, art. 7.

Abu Dhabi National Oil Company PJSC (ADNOC)⁹⁸. While the FSR has been applicable since July 2023 and the Commission had already initiated several investigations prior to this case, the ADNOC/Covestro decision represents one of the earliest instances in which the Commission completed an in-depth investigation of a notified concentration and adopted a substantive decision accompanied by binding commitments. As such, it offers valuable insight into the Commission's emerging decisional practice under the Regulation.

The transaction was notified to the Commission on 15 May 2025 pursuant to Article 21 FSR, as it met the relevant turnover and foreign financial contribution thresholds⁹⁹. Following its preliminary review, the Commission opened an in-depth investigation on 28 July 2025, identifying preliminary concerns that ADNOC and Covestro had benefited from foreign subsidies granted by the United Arab Emirates that could distort competition in the internal market. The suspected subsidies included, in particular, an unlimited State guarantee benefiting ADNOC and a committed capital increase into Covestro, both of which raised concerns that the acquisition could be pursued on financial terms not available to unsubsidised investors¹⁰⁰.

In line with the analytical framework set out in Articles 4 and 6 FSR, the Commission examined whether the alleged foreign subsidies strengthened ADNOC's competitive position in the Union and whether they were liable to distort competition. The investigation focused on two main dimensions¹⁰¹. First, the Commission assessed whether the subsidies may have distorted the outcome of the acquisition process, notably by enabling ADNOC to submit an offer at an unusually high valuation or under particularly favourable conditions, potentially deterring competing bidders. Second, it examined whether the subsidies were likely to generate negative effects on competition post-transaction, by artificially improving the merged entity's financing capacity and risk tolerance, thereby enabling more aggressive investment strategies to the detriment of other market participants.

In its final decision of 14 November 2025, the Commission concluded that ADNOC and Covestro had indeed received foreign subsidies liable to distort the internal market¹⁰². It emphasised that unlimited State guarantees fall within the category of foreign subsidies most likely to distort

⁹⁸ European Commission, *Commission conditionally approves ADNOC's acquisition of Covestro under the Foreign Subsidies Regulation* (IP/25/2687, 14 November 2025).

⁹⁹ European Commission, *ADNOC / Covestro* (Case FS.100156) Decision with Commitments under art 11(3) Regulation (EU) 2022/2560, 14 November 2025.

¹⁰⁰ *Ibid.*

¹⁰¹ European Commission, *Commission opens in-depth foreign subsidies investigation into ADNOC's acquisition of Covestro* (IP/25/1894, 28 July 2025).

¹⁰² European Commission, *ADNOC / Covestro* (Case FS.100156) Decision with Commitments under art 11(3) Regulation (EU) 2022/2560, 14 November 2025.

competition under the FSR, given their capacity to eliminate market discipline and reduce financing costs independently of commercial risk. Absent corrective measures, the Commission considered that the transaction would have led to distortive effects both during the acquisition process and in the subsequent competitive conduct of the merged entity within the Union¹⁰³.

Rather than prohibiting the concentration, the Commission accepted a set of binding commitments offered by ADNOC under article 7 FSR. These commitments combined measures aimed at removing the source of the distortion with measures designed to offset its effects. In particular, ADNOC undertook to amend its articles of association to eliminate the unlimited State guarantee by aligning them with ordinary UAE insolvency law¹⁰⁴. In addition, ADNOC committed to grant access to certain sustainability-related patents held by Covestro on transparent and pre-defined terms, thereby facilitating broader market access to key technologies and generating positive spillover effects for innovation within the Union¹⁰⁵. The commitments were made binding for a period of ten years and are subject to monitoring by an independent trustee under Commission supervision.

The ADNOC/Covestro decision is significant for several reasons. First, it constitutes one of the first¹⁰⁶ completed in-depth merger investigations resulting in a conditional clearance decision, thereby providing an early and concrete illustration of how the Commission applies the Regulation in the context of concentrations.

Second, the case demonstrates the Commission's approach to remedial design under the FSR, which draws on, but is not identical to, traditional competition law instruments. The acceptance of commitments that both eliminate a structural source of distortion and generate positive effects relevant to EU policy objectives illustrates how commitments under article 7 FSR may be structured to eliminate the source of distortion while taking into account broader Union interest.

Third, the decision highlights the FSR's distinctive focus on the origin of competitive advantages, rather than on market power as such. In fact, unlike EU merger control, which centres on market structure and the risk of market power arising from horizontal or vertical overlaps, the Commission's assessment in ADNOC/Covestro was directed at the origin of the competitive advantage. In other

¹⁰³ European Commission, *ADNOC / Covestro* (Case FS.100156) Decision with Commitments under art 11(3) Regulation (EU) 2022/2560, 14 November 2025.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ European Commission, *e& / PPF Telecom Group* (Case FS.100011) Decision under Regulation (EU) 2022/2560, concerning the acquisition of sole control over PPF Telecom by Emirates Telecommunications Group (e&), in which the Commission conducted one of its first in-depth investigations under the Foreign Subsidies Regulation and conditionally cleared the transaction following commitments addressing potential distortions arising from foreign financial contributions.

words the Commission's concerns were not rooted in dominance, foreclosure effects or structural concentration effect in the chemicals market. Rather they concerned the impact of foreign state support (in this case unlimited state guarantee and capital backing) enabled the acquisition to be pursued under financial conditions detached from normal market discipline thereby distorting the competitive process itself. In this respect, the case confirms the autonomous role of the FSR alongside EU merger control and State aid law.

Overall, the ADNOC/Covestro case marks an early and instructive step in the development of the Commission's enforcement practice under the FSR. It illustrates the Regulation's capacity to produce legally binding outcomes in complex cross-border transactions and provides a reference point for future cases involving subsidised acquisitions of EU undertakings. As the Commission's decisional practice evolves, this case is likely to serve as an early reference point in the emerging decisional practice for the interpretation of distortion, the application of the balancing test, and the design of redressive measures under the FSR.

2.7. Prospective development of the FSR Framework

Pursuant to Article 52, the European Commission is required to review the implementation and enforcement of the Regulation by July 2026 and every three years thereafter. On 12 August 2025, the Commission formally launched the first review, thereby initiating the evaluation mechanism¹⁰⁷. As a preliminary step, the Commission opened a public consultation and a call for evidence, inviting contributions from a broad range of stakeholders, including undertakings, legal practitioners, Member States, business associations and the research community, with a submission deadline of 18 November 2025.

The Commission has indicated that the review report will concentrate on several core aspects of the Regulation's operation. In particular, the review will examine the assessment of foreign subsidies liable to distort the internal market, the practical application of the balancing test, the exercise of the Commission's powers to investigate potentially distortive foreign subsidies on its own initiative, the adequacy of the notification thresholds applicable to concentrations and public procurement procedures, and the overall level of regulatory complexity and compliance costs faced by economic operators. These areas correspond to key elements of the enforcement architecture and reflect those aspects of the Regulation that have given rise to interpretative questions and practical challenges during its initial phase of application.

¹⁰⁷ European Commission, *Commission launches review of Foreign Subsidies Regulation* (Press Release IP/25/1954, 12 August 2025).

The feedback gathered through the consultation process will inform the review report to be presented to the European Parliament and the Council by July 2026. Where appropriate, the Commission may accompany the report with legislative proposals aimed at refining or adjusting the existing framework. From a systemic perspective, the launch of the review confirms the dynamic character of the Regulation and its capacity to evolve in light of enforcement experience. It also provides an institutional forum in which concerns relating to proportionality, legal certainty and administrative burden may be addressed, while preserving the Regulation's core objective of preventing distortions of competition in the internal market arising from foreign subsidies.

Chapter III - The International Dimension

3.1. Introduction

While the European Union has increasingly relied on autonomous instruments to address distortive foreign subsidies within the internal market, the multilateral framework governing subsidies remains anchored in the World Trade Organization (WTO), and in particular in the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Unlike the Foreign Subsidies Regulation and traditional trade defence instruments, which operate primarily within the EU legal order, the SCM Agreement constitutes the central multilateral discipline on state subsidies affecting international trade¹⁰⁸.

This chapter examines the SCM Agreement from a systemic perspective and analyses its relationship with the European Union as both a WTO Member and a regulatory actor endowed with a highly developed internal State aid regime.

3.2. Function and rationale of the SCM Agreement

The SCM Agreement rationale lies in the recognition that subsidies, while not inherently unlawful, may significantly distort competitive conditions in international trade and undermine the reciprocal balance of market access commitments¹⁰⁹.

Unlike EU State aid law, which is premised on market integration and competition neutrality within a single economic area, the SCM Agreement reflects a coordination-based regulatory model characteristic of public international law¹¹⁰. It does not aim to harmonise national subsidy policies or to eliminate subsidies as such. Rather, it seeks to manage their external effects by disciplining those forms of state intervention that adversely affect the trade interests of other WTO Members¹¹¹.

This restrained regulatory ambition is a direct consequence of the WTO's institutional structure¹¹². In the absence of a centralised enforcement authority, the SCM Agreement relies on decentralised enforcement through dispute settlement and countermeasures. As a result, Members retain a

¹⁰⁸ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889-908.

¹⁰⁹ Agreement on Subsidies and Countervailing Measures (SCM Agreement).

¹¹⁰ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889-908.

¹¹¹ For an overview on the agreement: Marín Durán Gracia, *The WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (OUP 2013); Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis and Michael Hahn, 'Subsidies and Countervailing Duties' in *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 299–374.

¹¹² On this topic: Matsushita Mitsuo, Schoenbaum Thomas J, Mavroidis Petros C and Hahn Michael, 'Subsidies and Countervailing Duties' in *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 299-374

significant degree of regulatory autonomy in designing and implementing domestic subsidy schemes, subject only to limited multilateral constraints.

3.3. What is a subsidy under the SCM?

The SCM Agreement adopts a functional and effects-oriented definition of subsidies. Article 1 SCM requires that for the existence of a subsidy the following cumulative conditions shall be met: (i) the presence of a financial contribution by a government or public body or any form of income or price support within the meaning of Article XVI GATT and (ii) secondly that contribution must confer a benefit on the recipient. In addition, only subsidies that are specific within the meaning of article 2 SCM fall within the scope of the SCM Agreement¹¹³. WTO case law has consistently emphasised that the assessment of a benefit depends on market-based benchmarks, thereby embedding economic reasoning into the legal analysis¹¹⁴. From a systemic perspective, this definition reflects the WTO's concern with trade distortion rather than competition distortion per se¹¹⁵. This stands in contrast with EU State aid law, where the distortion of competition within the internal market constitutes the primary benchmark¹¹⁶. As a result, certain forms of state intervention that would be problematic under EU law may fall outside the scope of the SCM Agreement if they lack sufficient trade effects or specificity.

3.3.1. Financial contribution

Article 1.1(a)(1) of the SCM Agreement identifies three categories of measures that may constitute a financial contribution by a government or public body. First, a financial contribution exists where a government practice involves a direct transfer of funds, such as grants, loans, or equity infusions, as well as potential direct transfers of funds or liabilities, including loan guarantees. Second, a financial contribution may arise where government revenue that is otherwise due is forgone or not collected. This category encompasses a wide range of fiscal measures, including tax credits and other forms of preferential tax treatment. Third, a financial contribution is present where a government provides goods or services other than general infrastructure, or where it purchases goods¹¹⁷.

¹¹³ Agreement on Subsidies and Countervailing Measures (SCM Agreement), article 1.

¹¹⁴ For instance: Appellate Body Report, *Canada – Aircraft*. But also: Appellate Body Report, *EC – Large Civil Aircraft*, para. 973.

¹¹⁵ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889-908.

¹¹⁶ Ibid.

¹¹⁷ See on this topic: Panel Report, *US – Export Restraints*, para. 8.73; Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.53; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 124–125.

The list of financial contributions set out in Article 1.1(a)(1) is exhaustive¹¹⁸. On this basis, the panel in *US – Export Restraints* held that export restraints do not fall within the scope of the SCM Agreement, notwithstanding the fact that they may confer economic advantages on domestic producers comparable to those resulting from a financial contribution¹¹⁹. While some commentators have criticised the closed nature of this list, particularly in light of governments’ increasing sophistication in designing novel forms of support, the panel’s interpretation is firmly grounded in the text of the Agreement¹²⁰. At the same time, WTO adjudicating bodies have consistently interpreted the three enumerated categories broadly, thereby ensuring that a wide range of governmental measures may still be captured within the definition of a financial contribution¹²¹.

The categories listed in Article 1.1(a)(1) are not mutually exclusive. A single measure may simultaneously fall within more than one category of financial contribution or alternatively be characterised as a form of income or price support. Because the classification of a measure may influence the subsequent assessment of whether a benefit is conferred, complainants are well advised to examine whether different aspects of the same governmental intervention may be subsumed under multiple heads of financial contribution¹²².

3.3.2. Conferral of benefit

The requirement that a benefit be conferred introduces an explicitly economic dimension into the legal analysis. WTO case law has consistently defined benefit by reference to market-based benchmarks, focusing on whether the recipient is placed in a more favourable position than it would have been under normal market conditions¹²³. The assessment is conducted from the perspective of the recipient and does not depend on whether the government incurs a financial cost¹²⁴.

¹¹⁸ Appellate Body Report, *US – Large Civil Aircraft*, para. 613.

¹¹⁹ Panel Report, *US – Export Restraints*, paras. 8.69, 8.75. The ‘financial contribution’ requirement was precisely included to counter the purely effect-based definition of the United States (paras. 8.63–8.72). The United States had proposed that the term ‘(actionable) subsidy’ was defined as ‘any government action or combination of actions which confers a benefit on the recipient firm(s)’ (MTN.GNG/NG10/W/29, 22 November 1989).

¹²⁰ Rubini, ‘The International Context of EC State Aid Law and Policy: The Regulation of Subsidies in the WTO’ in A Bondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (OUP 2004) 149–88.

¹²¹ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (CUP 2014) 39–114.

¹²² *Ibid.*

¹²³ This has become settled case law. See, for instance, Appellate Body Report, *EC – Large Civil Aircraft*, para. 973. And: Appellate Body Report, *Canada – Aircraft*, para. 154.

¹²⁴ Appellate Body Report, *Canada – Aircraft*, para. 154–156.

This approach embeds comparative economic reasoning into WTO subsidy law and reinforces its effects oriented character¹²⁵. At the same time, it limits the scope of the SCM Agreement by excluding measures that, despite involving governmental resources, do not alter market outcomes in a manner relevant to international trade.

3.4. Specificity

A central structural feature of the SCM Agreement is the requirement of specificity under Article 2 SCM¹²⁶. Only subsidies that are specific to certain enterprises, industries, or regions fall within the scope of the SCM Agreement. Measures of general application are excluded from WTO scrutiny.

This design choice reflects the multilateral context in which the SCM Agreement operates. Unlike the EU, the WTO lacks a centralised authority capable of supervising national economic policies. Specificity thus functions as a jurisdictional threshold that prevents the SCM Agreement from evolving into a general system of subsidy control¹²⁷.

3.5. Substantive disciplines under the SCM Agreement

Article 3 of the SCM Agreement prohibits two categories of subsidies: export subsidies¹²⁸ and local content subsidies which are subsidies contingent upon the use of domestic over imported goods¹²⁹. These measures are deemed inherently trade-distorting and are therefore subject to *per se* illegality, without the need to demonstrate adverse effects on trade.

The prohibition of such subsidies constitutes an intrusive component of the SCM Agreement, as it embodies one of the few areas in which WTO Members achieved a high degree of normative consensus regarding the harmfulness of specific subsidy practices. Nevertheless, the restricted scope of prohibited subsidies underscores the limits of this consensus, as it confines the prohibition to a narrowly circumscribed set of measures and fails to encompass many contemporary forms of industrial support that may equally distort competitive conditions in international markets¹³⁰.

¹²⁵ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (CUP 2014) 39–114.

¹²⁶ See, e.g., Appellate Body Report, *US – Softwood Lumber IV*, para. 72.

¹²⁷ Csongor István Nagy, ‘The EU’s New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?’ (2023) 57(6) *Journal of World Trade* 889-908.

¹²⁸ Namely subsidies that are contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance (art. 3.1 (a) SCM Agreement).

¹²⁹ SCM Agreement article 3.1 (b).

¹³⁰ Csongor István Nagy, ‘The EU’s New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?’ (2023) 57(6) *Journal of World Trade* 889-908.

3.6. The European Union as a subject and shaper of subsidy Law

The position of the European Union within the global subsidy landscape is defined by a profound legal duality. As a full WTO Member, the EU is a primary subject of the Agreement on Subsidies and Countervailing Measures, bound by its disciplines and a frequent participant in its dispute settlement mechanisms. The EU's engagement with the SCM Agreement must be understood in light of its role as an economic union that increasingly seeks to shape international norms to address contemporary market distortions¹³¹.

This duality creates a complex legal dynamic. While the EU participates actively in the institutional and dispute settlement mechanisms of the WTO, its compliance with international obligations is assessed through an autonomous lens¹³². Consequently, the EU must navigate a landscape where the SCM Agreement provides the essential baseline disciplines yet remains a framework that the EU has increasingly perceived as insufficient to address certain forms of foreign state intervention¹³³.

3.7. From ex post trade remedies to ex ante market protection

The relationship between the SCM Agreement and the FSR is characterized less by direct conflict than by structural divergence. The SCM Agreement operates within a pluralistic international system and relies on decentralized enforcement¹³⁴. Its mechanisms are largely remedial, allowing affected Members to seek the withdrawal of a subsidy or to impose countervailing duties only after a distortion has materialized in the form of adverse trade effects. In contrast, the FSR is embedded in a supranational legal order that prioritizes centralized and preventive control. It functions primarily through an *ex-ante*, preventive framework, allowing the European Commission to scrutinize and intervene in mergers, acquisitions, and other market activities before distortive effects materialize, based on a broad definition of foreign subsidies and a fact-specific, effects-based assessment¹³⁵.

In contrast, the SCM Agreement functions largely as an *ex-post*, remedial instrument, relying on affected Members to initiate investigations and demonstrate adverse trade effects before

¹³¹ 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' (2025) 62(4) *Common Market Law Review* 1089.

¹³² Marios Tokas, 'Playing the Game: The EU's Proposed Regulation on Foreign Subsidies' (2022) 56(5) *Journal of World Trade* 779-802.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

countervailing measures can be imposed, and limits the scope of prohibited subsidies to clearly defined categories such as export and local-content subsidies¹³⁶.

Furthermore, the two regimes diverge in their approach to state attribution. While the SCM Agreement often applies broader presumptions of governmental support through the public body test, the Foreign Subsidies Regulation requires state involvement to be substantively established on a case-by-case basis¹³⁷. These differences underscore a significant divergence in regulatory ambition. The FSR reflects a proactive ambition to shield the internal market from contemporary forms of foreign state intervention, whereas the SCM Agreement embodies a system designed to preserve a baseline of multilateral discipline without unduly constraining the general policy autonomy of sovereign states. These structural differences explain the strategic move of the European Union toward autonomous instruments¹³⁸. Consequently, the emergence of the Foreign Subsidies Regulation should not be interpreted as a rejection of WTO law, but rather as a direct response to the structural limitations of a multilateral framework struggling to address the complexities of globalized value chains and state led economic models.

3.8. Trade distortion versus Competition distortion

A fundamental distinction between WTO subsidy law and EU State aid law lies in the nature of the distortion being addressed. The SCM Agreement is concerned with distortions of international trade between Members, focusing on external effects and inter-state relations. By contrast, EU State aid law is centred on the prevention of distortions of competition within the internal market, irrespective of whether cross-border trade effects can be demonstrated¹³⁹.

This divergence explains why certain forms of state intervention may fall outside the scope of WTO subsidy disciplines while being incompatible with EU State aid rules. WTO legality is assessed according to autonomous criteria and is not determined by compliance with EU internal law.

The FSR, however, represents a qualitative departure. It is designed to address distortions of competition within the internal market caused by foreign subsidies, regardless of their impact on

¹³⁶ On this topic: Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60(4) *Common Market Law Review* 925.

¹³⁷ See FSR (n 5) Recital 12; 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' (2025) 62(4) *Common Market Law Review* 1089.

¹³⁸ Gisela Grieger, *Understanding the EU Trade Defence Toolbox* (European Parliamentary Research Service, Briefing, Sept 2025).

¹³⁹ Craig, P. & de Búrca, G., *EU Law: Text, Cases, and Materials* (OUP, 2021).

international trade flows¹⁴⁰. This shift in focus is significant: while the SCM Agreement seeks to discipline subsidies that harm the trade interests of other states, the FSR seeks to protect the competitive process itself. This divergence explains why certain forms of state intervention may fall outside the scope of WTO subsidy disciplines while still being targeted by the EU for their impact on the level playing field¹⁴¹.

3.9. The SCM Agreement and the Foreign Subsidies Regulation: a structural comparison

Building upon these broader philosophical and structural differences, the FSR operates as a hybrid legal concept that draws upon the technical vocabulary of the SCM Agreement while refining its application for a more assertive regulatory environment.

3.9.1. Defining the financial contribution

A core element of any subsidy analysis is the existence of a financial contribution. Here, the FSR and the SCM Agreement show significant structural similarities but differ in their degree of flexibility¹⁴². Under WTO law, the definition of a financial contribution is exhaustive, limited to the specific categories listed in Article 1.1 of the SCM Agreement¹⁴³. In contrast, the FSR employs an open-ended approach by using the term *inter alia* when listing these same categories¹⁴⁴. This suggests a catch all capacity, allowing the European Commission to identify residual forms of financial contributions that may not fall strictly within the formalistic WTO categories¹⁴⁵. In practice, this allows the Commission to act against unforeseen types of state support that emerge from complex and non transparent economic models.

3.9.2. Imputability and the absence of the state resources requirements

Determining whether a measure can be attributed to a state is a pivotal point of divergence. While the SCM Agreement focuses on the functional authority of a public body to establish attribution, the FSR requires an assessment on a case-by-case basis¹⁴⁶. In recent practice, the Commission has

¹⁴⁰ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (CUP 2014) 39–114.

¹⁴⁴ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

¹⁴⁵ *Ibid.*

¹⁴⁶ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089–1120.

scrutinized ownership structures and the capacity of the State to exert influence through board members or strategic sectors to determine if a specific measure can be imputed to a third country¹⁴⁷.

Furthermore, both the SCM Agreement and the FSR depart from a strict requirement that a measure must result in a direct cost to the state treasury¹⁴⁸. The FSR likely omits this requirement to maintain maximum flexibility, in fact this would allow the Commission to respond to potentially unforeseen forms of involvement from third countries in distortive subsidization. Because the Commission often faces opacity issues when gathering information from third countries, requiring a direct financial tie to state coffers would significantly undermine the effectiveness of the regulation¹⁴⁹.

3.9.3. Benefit analysis and specificity thresholds

While both regimes use a counterfactual analysis to determine if a recipient is better off, they utilize different benchmarks¹⁵⁰. The WTO better-off determines if a recipient received support on terms more favorable than those available in the market¹⁵¹. The FSR utilizes a market operator test (MEO) to assess whether a private actor of comparable size would have entered into the same transaction under normal market conditions¹⁵².

Regarding specificity, both regimes converge on *de jure* specificity, looking at whether legal criteria explicitly limit access to support. However, *de facto* specificity remains a point of potential conflict¹⁵³. While the WTO framework adopts a relatively lenient approach, focusing primarily on the number of beneficiaries or the amount of financial support granted, scholars argue that transposing this standard to the FSR would unduly expand its scope of application¹⁵⁴. Given the already lower

¹⁴⁷ See Case FS.100011 – e&/PPF Telecom Group. The case concerned the acquisition of PPF Telecom’s operations in Hungary, Bulgaria, Serbia and Slovakia by Emirates Telecommunications Group Company PJSC (e&), a UAE-based undertaking controlled by the Emirates Investment Authority, the sovereign wealth fund wholly owned by the UAE government. In its decision, the Commission clarified its analytical framework for identifying and assessing foreign subsidies under the FSR, including the attribution of state resources through sovereign wealth funds and the evaluation of potential distortions in the internal market, thereby providing the first concrete benchmark for future enforcement practice.

¹⁴⁸ Rens GJ 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’ (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ WTO, Appellate Body Report, WT/DS70/AB/R, Canada – Civilian Aircraft, para 157.

¹⁵² Philipp Reinhold and Thomas Weck, ‘Welcome to the Jungle! Identification of Foreign Subsidies Under the New EU Foreign Subsidies Regulation’ (2024) 1 *EStAL* 31.

¹⁵³ 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’ (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁵⁴ WTO, Appellate Body Report, WT/DS436/AB/R, US – Carbon Steel (India); 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’ (2025) 62(4) *Common Market Law Review* 1089.

threshold embedded in the FSR's definition of a foreign subsidy, such an approach could confer excessively broad investigative and remedial powers on the Commission, thereby raising concerns under the principle of proportionality. For this reason, it is argued that the FSR should rely on a stricter *de facto* specificity threshold, closer to that developed under EU State aid law, in order to preserve a balanced and proportionate framework for the review of foreign investments¹⁵⁵.

3.9.4. The risk of conflict between the FSR and WTO subsidy law

Building upon this structural comparison, it has been argued that the Foreign Subsidies Regulation may give rise to systemic tensions with WTO subsidy law¹⁵⁶. According to this view, the FSR risks extending into areas already governed by the SCM Agreement, thereby creating potential overlap between unilateral EU enforcement and the multilateral subsidy discipline¹⁵⁷. Applying the interpretative principles of the Vienna Convention on the Law of Treaties, it is contended that certain categories of foreign subsidies, in particular prohibited subsidies such as export or local content subsidies, may fall within the scope of the SCM Agreement even where the beneficiary is established outside the territory of the subsidising state. In such circumstances, the parallel application of the FSR would enable the Commission to adopt autonomous investigative and redressive measures in an area traditionally reserved to WTO procedures, potentially undermining the supremacy of WTO law and the exclusive remedial framework of the dispute settlement system. It is further argued that the conflict rule contained in the FSR, while formally recognising the primacy of WTO law, does not provide sufficiently robust procedural safeguards to prevent unilateral action in situations of overlap¹⁵⁸. On this basis, concerns have been raised that, unless the Commission refrains from applying the FSR to practices falling within the material scope of the SCM Agreement, the Regulation may expose the Union to legal uncertainty and allegations of WTO inconsistency¹⁵⁹.

¹⁵⁵ Philipp Reinhold and Thomas Weck, 'Welcome to the Jungle! Identification of Foreign Subsidies Under the New EU Foreign Subsidies Regulation' (2024) 1 *EStAL* 31.

¹⁵⁶ Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60 *Common Market Law Review* 925.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60 *Common Market Law Review* 925.

3.10. The EU and the reform of the subsidy disciplines

In recent years, the EU has positioned itself as a key advocate for reforming WTO subsidy rules¹⁶⁰. Together with like-minded partners, it has argued that the SCM Agreement fails adequately to address industrial subsidies, state-owned enterprises, and the lack of transparency in subsidy notification¹⁶¹.

This reform agenda reflects a broader shift in EU trade policy, which increasingly links competition policy concerns with international trade governance. Rather than abandoning multilateralism, the EU seeks to recalibrate it by strengthening substantive disciplines and enhancing enforcement mechanisms¹⁶².

Despite these efforts, progress on SCM reform has been limited. The paralysis of the WTO Appellate Body and the lack of consensus among Members have constrained the evolution of subsidy disciplines. This institutional impasse provides an important contextual backdrop for the EU's turn towards autonomous instruments, while also underscoring the continued relevance of the SCM Agreement as the baseline multilateral framework¹⁶³.

3.11. Conclusion

In concluding this analysis, it becomes evident that the SCM Agreement remains the indispensable cornerstone of multilateral subsidy regulation, providing the essential baseline framework for disciplining the most distortive forms of state intervention. However, its design inevitably reflects the political and institutional constraints of a decentralized international system. Its reliance on a coordination based design, *ex post* enforcement, and a narrow focus on trade distortions limits its capacity to address the complexities of contemporary subsidy practices in a rapidly evolving global economy.

For the European Union, the SCM Agreement represents both a fundamental legal constraint and a critical point of departure. The evolving approach of the Union, which combines autonomous instruments such as the FSR with a continued formal commitment to the multilateral trading system, reflects a strategic attempt to respond to the systemic gaps in global governance. Ultimately, the interaction between WTO subsidy law and the FSR illustrates the growing tension between

¹⁶⁰ Tokas Marios, 'Playing the Game: The EU's Proposed Regulation on Foreign Subsidies' (2022) 56(5) *Journal of World Trade* 779-802.

¹⁶¹ Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60 *Common Market Law Review* 925.

¹⁶² *Ibid.*

¹⁶³ European Commission, 'World Trade Organisation (WTO)' https://competition-policy.ec.europa.eu/international-relations/multilateral-cooperation/wto_en accessed 6 February 2026.

multilateral coordination and regulatory autonomy, revealing the increasingly fragmented and layered nature of modern subsidy governance in global economic affairs.

Chapter IV - A comparative analysis: State Aid

4.1. The Relationship between EU State Aid Law and the Foreign Subsidies Regulation

The control of public subsidies constitutes a core component of the European Union's competition architecture and serves the overarching objective of preserving undistorted competition and a level playing field within the internal market¹⁶⁴. Traditionally, this function has been performed by EU State aid law, which subjects financial advantages granted by Member States to a comprehensive system of *ex ante* scrutiny under Articles 107 and 108 TFEU. Through this internal discipline, the Union seeks to prevent Member States from conferring selective economic advantages capable of distorting competition and affecting intra-EU trade¹⁶⁵.

By contrast, subsidies granted by third countries to undertakings active in the Union long remained outside the scope of effective EU control, notwithstanding their capacity to produce distortive effects comparable to those arising from State aid. This regulatory asymmetry created a structural enforcement gap, allowing foreign subsidies to undermine the competitive neutrality that EU State aid rules are designed to ensure. The adoption of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market represents the Union's response to this gap.

The FSR extends the logic of subsidy control beyond the confines of EU law by introducing a framework for the assessment and redress of distortive financial contributions granted by third countries.

The relationship between the two regimes is best understood in terms of functional complementarity: State aid law functions as an internal constraint imposed on Member States, whereas the FSR applies analogous principles to subsidies originating outside the Union, adapted to the constitutional limits of EU external action and the practical challenges of regulating foreign State support.

Having examined this background, this chapter examines the relationship between EU State aid law and the FSR more in detail.

¹⁶⁴Michelle Cini, 'State Aid Control from a Political Science Perspective' in Herwig Hofmann and Claire Micheau (eds), *Research Handbook on European State Aid Law* (Edward Elgar 2021).

¹⁶⁵Lukas Hornkohl and Pietro 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' (2025) 24(4) *European State Aid Law Quarterly* 340.

4.2. The EU State Aid Framework

EU State aid law is primarily governed by Article 107(1) TFEU, which establishes a general prohibition on aid granted by Member States or through State resources that distorts or threatens to distort competition and affects trade between Member States¹⁶⁶. The interpretation of this provision is ultimately governed by the case law of the Court of Justice and the General Court of the European Union. To promote a coherent and consistent application of Article 107(1), the Commission adopted the 2016 Commission Notice on the notion of State aid, which consolidates and clarifies the key concepts developed in the jurisprudence of the Union Courts. According to settled case law, a measure constitutes State aid where the following cumulative criteria are satisfied. If any one of these conditions is not met, the measure falls outside the scope of EU State aid rules.

First, the measure must be granted to an undertaking, understood as any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed. What is decisive is not the entity's formal classification under national law, but whether it offers goods or services on a market¹⁶⁷. The Commission Notice reiterates that the concept is activity-based and that an entity may qualify as an undertaking for some activities but not for others, depending on whether those activities are economic in nature¹⁶⁸.

Second, the measure must be imputable to the State and financed through State resources¹⁶⁹. These are distinct yet cumulative requirements. A measure is imputable where public authorities are involved in its adoption, either directly or indirectly, including through public undertakings. State resources include all resources of the public sector, whether at central, regional, or local level, as well as resources of public undertakings over which the State exercises control. The concept covers not only direct grants from the State budget but also loans, guarantees, tax exemptions, foregone revenue, capital injections, and advantages granted through public bodies or State-controlled entities. The Commission Notice clarifies that even resources managed by private entities may qualify as State resources where they remain under public control or are channelled according to public rules¹⁷⁰. It is therefore not necessary that the aid be financed directly from the State budget, provided that the

¹⁶⁶ Damian Chalmers, Gareth Davies, Giorgio Monti and Veerle Heyvaert, *European Union Law: Text and Materials* (Cambridge University Press 2024).

¹⁶⁷ Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979.

¹⁶⁸ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

¹⁶⁹ Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

¹⁷⁰ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

measure entails a sufficiently direct link to public resources and imposes a financial burden on the State, even if only indirectly.

Third, the measure must confer an economic advantage on the recipient¹⁷¹. An advantage exists where the undertaking is placed in a more favourable position than it would have been under normal market conditions. The assessment focuses on the effect of the measure on the undertaking rather than its form or objective. In practice, this evaluation is often conducted through the Market Economy Operator (MEO) principle, under which it is examined whether a hypothetical private operator, acting under market conditions and guided by profitability considerations, would have adopted the same conduct. If the State acts in a manner that a rational market operator would not have accepted, the difference constitutes an advantage within the meaning of Article 107(1). The Commission Notice further clarifies that the existence of an advantage is assessed by comparing the beneficiary's financial situation with and without the measure¹⁷².

Fourth, the advantage must be selective. Selectivity requires that the measure favours certain undertakings, sectors, or the production of certain goods over others which are in a comparable legal and factual situation in light of the objective pursued by the measure¹⁷³. The Commission Notice distinguishes between material and regional selectivity and provides detailed guidance particularly in relation to tax measures¹⁷⁴. Measures of general application, which apply without distinction to all economic operators within the Member State, do not normally qualify as selective. However, even formally general measures may be selective in practice (de facto selectivity) where their design or application disproportionately benefits certain undertakings.

Fifth, the measure must be liable to distort competition and affect trade between Member States. This requirement is interpreted broadly and does not necessitate proof of an actual or quantifiable effect on trade¹⁷⁵. It is sufficient that the aid is capable of strengthening the position of the beneficiary relative to other undertakings competing in intra-Union trade. The Commission Notice confirms that it is not necessary for the beneficiary itself to engage directly in cross-border trade; it is enough that the sector concerned is open to competition between Member States.

¹⁷¹ Case C-73/11 P *Frucona Košice a.s. v Commission* EU:C:2013:32.

¹⁷² Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

¹⁷³ Case C-487/06 P *British Aggregates Association v Commission* [2008] ECR I-10515.

¹⁷⁴ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

¹⁷⁵ Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671.

While State aid is in principle incompatible with the internal market, Articles 107(2) and 107(3) TFEU establish a system of derogations allowing certain categories of aid to be declared compatible. These provisions introduce a structured balancing exercise, under which the Commission assesses whether the positive effects of the aid in pursuing legitimate public policy objectives outweigh its potential distortive impact on competition and trade.

4.3. Comparative Analysis: State Aid and the FSR

The Foreign Subsidies Regulation is conceptually modelled on EU State aid law, yet it deliberately departs from it in several structural respects. As Recital 9 FSR indicates, the Regulation should be interpreted in light of relevant EU legislation, including State aid law. However, the definition of a foreign subsidy in Article 3 FSR also mirrors the terminology of WTO subsidy law, creating a hybrid construct that combines internal market logic with trade law vocabulary¹⁷⁶.

4.3.1. Financial contribution versus State resources

A first and fundamental distinction concerns the requirement of a financial link to the State.

Under Article 107(1) TFEU, the measure must be granted by the State or through State resources. As clarified in the Commission Notice on the notion of State aid, the State resources condition constitutes an indispensable element of the concept of aid and ensures that only measures involving a charge on public resources fall within the scope of EU control. The notion is interpreted broadly and encompasses not only direct budgetary transfers, but also guarantees, tax exemptions, foregone revenue and resources of public undertakings that remain under State control. However, despite this broad interpretation, the requirement remains a limiting criterion. Where no public resources are involved, Article 107(1) TFEU is not triggered, irrespective of the economic effects of the measure. The judgment in *PreussenElektra* illustrates this constitutional boundary: a purely regulatory obligation imposed on private operators and financed exclusively through private funds fell outside the scope of State aid law¹⁷⁷.

The FSR adopts a different technique. Article 3 FSR does not require proof of a charge on the public budget of the third country as an autonomous condition. Instead, it relies on the concept of a financial contribution provided directly or indirectly by a third country. This formulation, inspired by

¹⁷⁶ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁷⁷ Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

Article 1 SCM, shifts the analytical focus from the existence of State resources in the EU constitutional sense to the existence of a transfer of economic value attributable to a third country.

This divergence is not accidental. In the internal EU context, Member States are bound by transparency obligations and constitutional constraints, making it feasible to verify whether public resources are involved. In the external context addressed by the FSR, however, tracing a direct fiscal burden in opaque third-country systems may be practically impossible. The omission of a strict State resources requirement therefore enhances the effectiveness of the instrument by avoiding certain evidentiary barriers¹⁷⁸.

The difference reflects a broader systemic distinction: EU State aid law disciplines Member States within a constitutional order based on mutual trust and legal integration, whereas the FSR operates as a corrective mechanism aimed at neutralising distortions originating outside that order¹⁷⁹.

4.3.2. Specificity versus selectivity

A second point of comparison concerns the delimitation of targeted advantages.

Under EU State aid law, the existence of an advantage is not sufficient in itself; the advantage must also be selective in nature. As clarified in the Commission Notice on the notion of State aid, the assessment of selectivity follows a structured three stage analysis¹⁸⁰. First, the relevant reference framework must be identified, typically consisting of the general tax or regulatory system of the Member State concerned. Second, it must be determined whether the measure constitutes a derogation from that reference framework by favouring certain undertakings which are in a comparable legal and factual situation. Third, even where such differentiation is established, it must be examined whether the measure is justified by the nature or general scheme of the system.

The selectivity requirement is therefore assessed within the internal logic of the Member State's own legal order. It performs a constitutional function within the framework of the internal market by ensuring that Member States do not confer advantages through regulatory or fiscal arrangements that undermine competitive neutrality. The selectivity test thus safeguards equality between undertakings by preventing unjustified differentiation embedded within national legal systems.

¹⁷⁸ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁷⁹ *Ibid.*

¹⁸⁰ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

By contrast, the Foreign Subsidies Regulation employs the concept of specificity, a notion drawn from WTO subsidy law¹⁸¹. Pursuant to Article 3 FSR, a financial contribution qualifies as a foreign subsidy only where it is limited, in law or in fact, to certain undertakings or industries. Although specificity serves a function comparable to selectivity in distinguishing targeted measures from those of general application, the methodology differs in important respects. The FSR does not require the identification of a domestic reference framework within the legal order of the third country, nor does it involve an assessment of whether the measure constitutes a derogation from such a framework. Rather, the inquiry focuses directly on whether the financial contribution is effectively confined to particular economic operators¹⁸².

This distinction, while not immediately apparent, is structurally significant. In EU State aid law, selectivity forms part of the constitutional discipline imposed upon Member States within the internal market¹⁸³. It requires an examination of the coherence of the national legal system and ensures that advantages are not granted through deviations from generally applicable rules. Specificity under the FSR, by contrast, is not concerned with the internal coherence of the third country's legal order. Its function is to operate as a threshold criterion designed to exclude measures of genuinely general application and to capture only those financial contributions that confer a targeted competitive advantage capable of affecting competition within the internal market. Accordingly, selectivity performs a constitutional role within the EU legal order, whereas specificity fulfils a market corrective function in the external regulatory context of the FSR.

4.3.3. The distortion test

Both EU State aid law and the Foreign Subsidies Regulation pursue the objective of safeguarding undistorted competition within the internal market¹⁸⁴. However, the manner in which this objective is operationalised differs significantly between the two regimes.

Under Article 107(1) TFEU, the requirements of distortion of competition and effect on trade between Member States are interpreted broadly¹⁸⁵. As clarified in the Commission Notice on the notion of State aid, it is sufficient that the measure strengthens the competitive position of the

¹⁸¹ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Erika Szyszczak, 'Distortion of Competition and Effect on Trade Between EU Member States' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (1st edn, OUP 2016) 151-176.

¹⁸⁵ *Ibid.*

beneficiary in relation to other undertakings operating in a market open to intra Union trade¹⁸⁶. The Commission is not required to demonstrate actual or quantifiable distortion of competition. Rather, the existence of a selective advantage granted through State resources is generally considered sufficient to establish a potential distortion. In practice, once the elements of State resources, advantage, and selectivity are satisfied, distortion of competition is readily inferred.

The FSR, by contrast, structures distortion assessment more explicitly. Article 4 FSR requires an evaluation of whether the foreign subsidy distorts the internal market, supported by indicative criteria, relating to the amount and nature of the subsidy, the characteristics of the undertaking, and the conditions prevailing in the relevant market¹⁸⁷. Moreover, even after a finding of distortion, Article 6 FSR introduces a balancing test weighing negative effects against possible positive effects on economic development or other Union interests. This structured balancing exercise has no equivalent at the level of Article 107(1) TFEU, where compatibility analysis is reserved to Articles 107(2) and (3) TFEU and is institutionally distinct from the determination of the existence of aid.

Thus, while both regimes aim to neutralise distortive advantages, the FSR integrates distortion assessment and balancing within a single procedural framework, reflecting its hybrid character between competition law and trade defence logic.

4.3.4. Addressees: Member State versus undertaking

Finally, the enforcement architecture reveals a structural divergence. Under EU State aid law, proceedings are formally directed against the Member State. The beneficiary undertaking is not the primary addressee of the Commission's decision and enjoys limited procedural standing. This reflects the constitutional allocation of competences within the EU legal order¹⁸⁸.

Under the FSR, enforcement action is directed against the undertaking benefiting from the foreign subsidy. The Commission cannot exercise jurisdiction over third countries due to principles of sovereignty and international law¹⁸⁹. Consequently, the undertaking becomes the procedural

¹⁸⁶ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.

¹⁸⁷ Lukas Hornkohl and Pietro 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' (2025) 24(4) *European State Aid Law Quarterly* 340.

¹⁸⁸ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

¹⁸⁹ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889-908.

addressee and enjoys full rights of defence, including access to the file and the possibility to offer commitments.

This shift from a State-centred to an undertaking-centred enforcement model marks one of the most significant institutional differences between the two regimes¹⁹⁰.

4.4. Remedies and redressive measures

The remedial logic of the two regimes further illustrates their divergent nature.

In State aid law, the primary consequence of unlawful and incompatible aid is recovery, which aims to restore the *status quo ante* by eliminating the undue advantage conferred on the beneficiary¹⁹¹. Recovery is generally regarded as automatic and non-negotiable once incompatibility has been established¹⁹². The remedial logic is not punitive but restitutive and constitutional: it seeks to restore competitive neutrality within the internal market by reversing a breach of the Treaty framework governing Member States.

By contrast, the FSR provides for a more flexible remedial framework. Although repayment of the foreign subsidy may be required, the Regulation provides the Commission with a broader range of redressive measures. Where a foreign subsidy is found to distort the internal market, the Commission may impose structural or behavioural remedies, or accept commitments offered by the undertaking, designed to neutralise the identified distortion. Such measures may include divestitures, access obligations, limitations on commercial conduct, or other adjustments aimed at mitigating competitive harm¹⁹³.

This flexibility reflects the different regulatory context in which the FSR operates. Unlike State aid law, the FSR does not seek to restore a constitutional equilibrium between Member States, nor can it require action from third country governments. Its objective is instead to correct distortive market effects within the internal market¹⁹⁴. The remedial framework therefore resembles that of competition law, where remedies are tailored to the competitive harm identified and may be structural or behavioural in nature.

¹⁹⁰ Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57(6) *Journal of World Trade* 889–908.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

4.5. Concluding remarks

This chapter has examined the relationship between EU State aid law and the Foreign Subsidies Regulation, demonstrating that the two regimes are best understood as functionally complementary yet structurally distinct instruments within the Union's competition framework. While EU State aid law constitutes a core element of the internal constitutional discipline imposed on Member States, the FSR responds to a different regulatory challenge, namely the absence of effective control over distortive subsidies granted by third countries to undertakings operating within the internal market.

The comparative analysis has shown that the FSR is conceptually anchored in State aid doctrine, particularly in its focus on economic advantage, targeted support, and distortion of competition. At the same time, it deliberately departs from the constitutional architecture of Articles 107 and 108 TFEU in order to accommodate the legal and practical constraints inherent in regulating foreign State support. These divergences are reflected in the replacement of the State resources requirement with the broader notion of a financial contribution, the use of specificity rather than selectivity, the adoption of a more explicit and effects-based distortion analysis combined with an integrated balancing test, and the shift from a State-centred to an undertaking-centred enforcement model.

Taken together, these differences confirm that the FSR cannot be regarded as a mere external transposition of EU State aid law. Whereas State aid control operates through a constitutional prohibition model, followed by narrowly circumscribed derogations assessed under Articles 107(2) and 107 (3) TFEU, the FSR embodies a market-corrective logic that integrates distortion assessment, balancing, and remedies within a single procedural framework. Its remedial architecture, which allows for flexible structural and behavioural measures, further aligns it with competition law and trade defence instruments rather than with the restitutive logic of State aid recovery.

Nevertheless, the FSR does not represent a conceptual rupture with EU State aid law. Instead, it constitutes an adaptation of State aid principles to the external dimension of the internal market, designed to restore competitive neutrality where the Union's traditional constitutional tools cannot operate. In this sense, the FSR complements EU State aid law by extending the Union's commitment to a level playing field beyond its internal borders, while respecting the limits of EU jurisdiction and the realities of globalised economic governance.

Conclusion

This thesis has explored the evolving architecture of subsidy control within the European Union and its interaction with multilateral trade law, focusing on the Foreign Subsidies Regulation as a pivotal development in contemporary EU economic governance¹⁹⁵. The analysis has demonstrated that the FSR emerges from a structural enforcement gap situated between the constitutional discipline of EU State aid law and the decentralised framework of the WTO SCM Agreement.

At the multilateral level, the SCM Agreement remains the cornerstone of international subsidy regulation¹⁹⁶. It establishes essential baseline disciplines, including the definition of financial contribution, the conferral of benefit, and the requirement of specificity, and provides remedies through dispute settlement and countervailing measures. However, its *ex post* enforcement logic and focus on trade distortion between sovereign states limit its capacity to address distortions affecting competition within integrated markets. Its design reflects the institutional constraints of the WTO system and preserves significant regulatory autonomy for its Members¹⁹⁷.

Within the European Union, State aid law operates within a fundamentally different constitutional framework. It imposes preventive and centralised control over subsidies granted by Member States, based on a general prohibition model and a structured compatibility assessment. Its objective is not merely to prevent trade distortion but to safeguard undistorted competition and equality of opportunity within the internal market. Yet this sophisticated internal discipline does not extend to subsidies granted by third countries¹⁹⁸.

The Foreign Subsidies Regulation occupies a distinct position between these two regimes. It draws on the definitional foundations of the SCM Agreement while embedding them within a supranational enforcement structure inspired by EU competition and State aid law¹⁹⁹. Its architecture departs from both models in significant respects. Unlike WTO law, it operates through centralised and preventive scrutiny rather than inter-state dispute settlement²⁰⁰. Unlike State aid law, it does not rely on a constitutional prohibition model directed at public authorities but instead addresses

¹⁹⁵ Frank Malte, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60(4) *Common Market Law Review* 925.

¹⁹⁶ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089.

¹⁹⁷ *Ibid.*

¹⁹⁸ Frank Malte, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60(4) *Common Market Law Review* 925.

¹⁹⁹ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

²⁰⁰ Eddy De Smijter, 'There's a New Kid in Town: The Foreign Subsidies Regulation' (2022) 13(8) *Journal of European Competition Law & Practice* 529.

undertakings as procedural addressees and integrates distortion assessment and balancing within a single framework²⁰¹.

The comparative analysis undertaken in this thesis has shown that the FSR embodies a hybrid regulatory logic²⁰². The replacement of the State resources requirement with the broader notion of financial contribution, the shift from selectivity to specificity, the adoption of an explicit and effects-based distortion test combined with an integrated balancing mechanism, and the flexible remedial framework collectively demonstrate that the FSR is not a mere transposition of existing doctrines. Rather, it reflects an innovative attempt to reconcile internal market protection with the realities of globalised economic governance.

Ultimately, the interaction between WTO subsidy law, EU State aid law, and the Foreign Subsidies Regulation reveals a layered and increasingly complex system of subsidy governance. The FSR represents an effort to bridge internal constitutional discipline and external regulatory gaps, thereby extending the Union's commitment to a level playing field beyond its borders. Whether this hybrid model will achieve long-term coherence within the global legal order remains uncertain. Nevertheless, its adoption marks a decisive step in the evolution of subsidy regulation and reflects the European Union's determination to preserve the integrity of its internal market in an era defined by state-driven economic competition and geopolitical fragmentation.

²⁰¹ Rens GJ 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' (2025) 62(4) *Common Market Law Review* 1089-1120.

²⁰² Frank Malte, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60(4) *Common Market Law Review* 925.

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