Investment law at a crossroads

Foreign State state subsidies distorting competition

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The EU and the Indo-Pacific Region. Challenges and opportunities

Common commercial policy

- It derives largely from the rules and provisions contained in WTO agreements, which govern the multilateral trading system.
- CCP is the interface between the increasingly integrated internal market and its external trade partners
- The consolidation of the internal market strengthened the EU's position as a pole of attraction and influence for trade negotiations, conducted bilaterally with other countries and multilaterally in the GATT.
- Nexus of international political economy, regulatory governance, and foreign policy

CCP Scope
(Article 207 (1))

- the conclusion of tariff and trade agreements relating to trade in goods and services
- the commercial aspects of IPR
- and foreign direct investment (with the exception of portfolio)
- trade protection measures (dumping or subsidies)

Anti-dumping measures (Regulation (EU) 2016/1036)

A product is considered dumped when when non-EU manufacturers sell it in the EU at a price below the normal value (usually the sales price) on their domestic market.

Price-undercutting is not in itself illegal. anti-dumping measures may be imposed only:

- whether there is dumping by the producers in the country/countries concerned;
- whether the European industry concerned suffers 'material injury';
- whether there is a causal link between dumping and injury, and;
- whether putting measures in place is not against the European interest.

The European Commission must observe applicable procedural requirements, including the due process rights of interested parties.

When the 4 conditions are met, the Commission can adopt anti-dumping measures.

The Commission is entrusted with imposing anti-dumping duties. Duties are normally imposed for five years.

Prior to the FSR, subsidies granted by non-EU governments went unchecked, while subsidies granted by Member States are subject to close scrutiny under EU State aid rules.

The EU has developed a sophisticated State aid control, aiming at ensuring fair conditions for all undertakings engaging in an economic activity in the internal market.

Foreign State state subsidies distorting competition

Both private undertakings and public undertakings which are directly or indirectly controlled or owned by a state, might receive subsidies from third countries.

Foreign subsidies may **distort the EU's internal marke**t, including by providing their recipients with an unfair advantage

- to **acquire companies**, including those with strategic assets such as critical infrastructure and innovative technologies.
- or obtain **public procurement** contracts in the EU

to the detriment of fair competition.

Lack of reciprocity, excacerbated by the fact that a significant share of FDI into the EU came from State-owned companies enabling foreign investors to pay more than domestic investors when buying stakes in European companies.

EU Foreign Subsidies Regulation
(Regulation (EU) 2022/2560)

- The FSR addresses such distortions and closes a regulatory gap.

Objective: Extra territorial extension of EU State aid rules to foreign investors subsidised by their home government

Ensure a level playing field for all companies operating in the Single Market, while remaining open to trade and investment

- The FSR is based on Articles 114 (internal market) and 207 (CCP) TFEU

Scope of the FSR

Both FDI and FSR regulations share the same underlying concerns over loss of market leadership in competitiveness.

However, FSR creates an extra layer of control across or sectors of economic activity.

It applies to all economic activities in the EU:

- concentrations (mergers and acquisitions),
- public procurement procedures,
- and all other market situations.

FDI control

FDI Screening

- National **security concerns**

- **Member States** may scrutinise and block FDI in strategic or sensitive sectors

FSR

- Address resilience and competitiveness concerns **beyond national security**

- **Commission** is vested with centralised powers in relation to broad categories of FDI

Notification procedure

FSR entails a deeper and more centralised controls on inward FDI in the EU.

Notification obligation to the Commission for concentrations and public procurement above certain thresholds.

Concentrations involving a financial contribution by a non-EU government where

(i) the acquired company, one of the merging parties or the joint venture generates an EU turnover of **at least €500 million** and

(ii) the foreign financial contribution involved is **more than €50 million**

Public procurement procedures, where

(i) the estimated contract value is **at least €250 million** and

(ii) the foreign financial contribution involved is **at least €4 million per non-EU country**; the Commission may prohibit award of contracts in such procedures to companies benefiting from distortive subsidies.

Notification procedure

- **all other market situations**, the Commission can start investigations on its own initiative (*ex-officio*) if it suspects that distortive foreign subsidies may be involved.

Who's in charge?

- The **European Commission** is the sole enforcer of the FSR.

DG COMP: distortions on the internal market caused by foreign subsidies outside public procurement procedures.

DG GROW: financial contributions in public procurement procedures

Investigative powers

A notified concentration cannot be completed and an investigated bidder cannot be awarded the public procurement contract while under investigation by the Commission.

In case of breach of this obligation, the Commission can impose fines, which may reach up to 10% of the company's annual aggregated turnover.

The Commission can also prohibit the completion of a subsidised concentration or the award of a public procurement contract to a subsidised bidder.

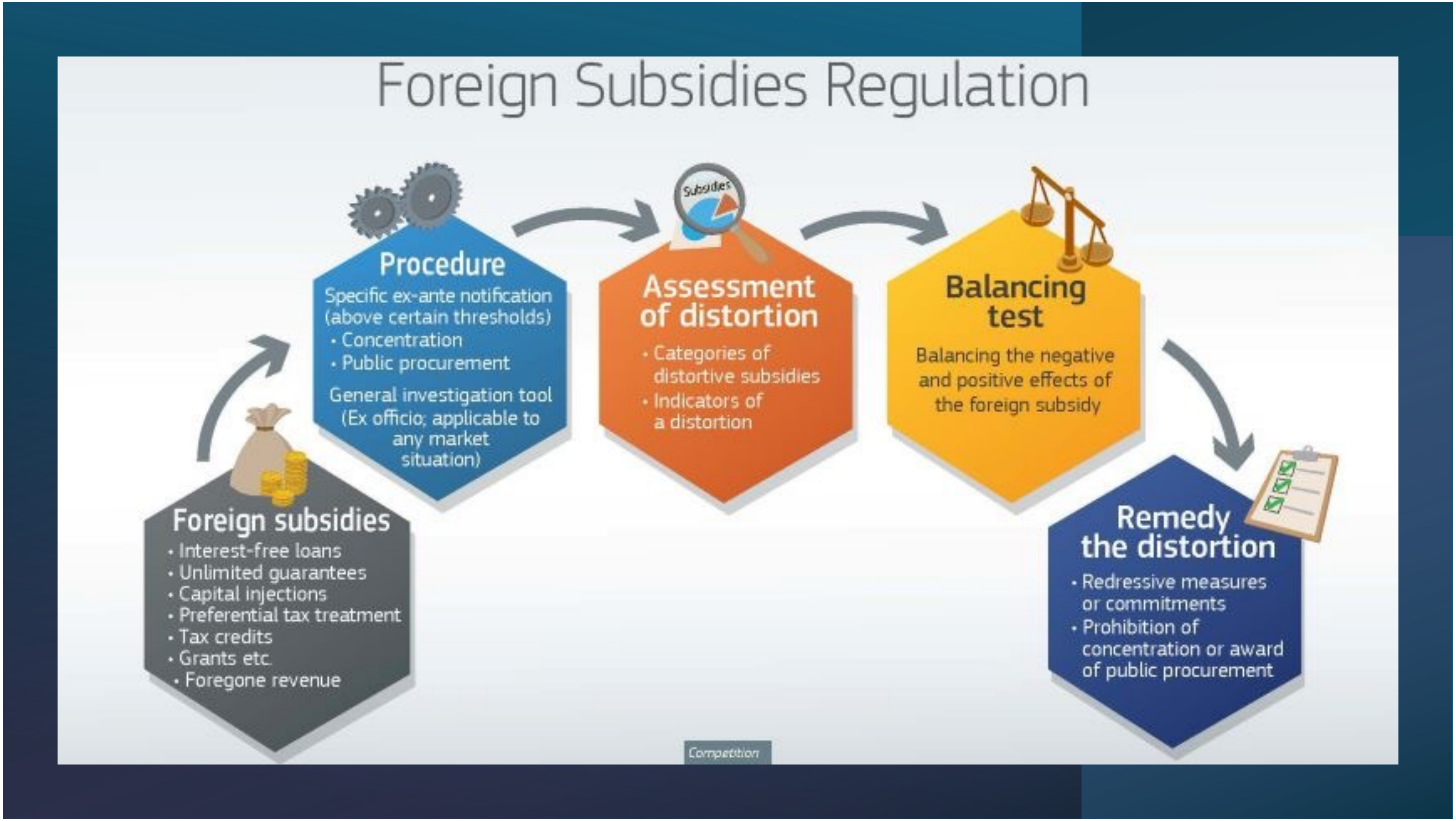
Investigative powers

Wide range of **investigative powers**:

(i) sending information requests to companies;

(ii) conducting fact-finding missions within and outside the Union; and

(iii) launching market investigations into specific sectors or types of subsidies.


Foreign Subsidies Regulation
Procedure
Specific ex-ante notification (above certain thresholds)
• Concentration
• Public procurement
General investigation tool (Ex officio; applicable to any market situation)
Subsidies
Assessment of distortion
• Categories of distortive subsidies
• Indicators of a distortion
Balancing test
Balancing the negative and positive effects of the foreign subsidy
Foreign subsidies
• Interest-free loans
• Unlimited guarantees
• Capital injections
• Preferential tax treatment
• Tax credits
• Grants etc.
• Foregone revenue
Remedy the distortion
• Redressive measures or commitments
• Prohibition of concentration or award of public procurement
Competition

Conclusion

- Both FSR and FDI screening regulations share the same underlying concerns over loss of market leadership in competitiveness
- Move toward strategic economy autonomy