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The Foreign Subsidies Regulation Under Scrutiny

A Legal Analysis of its Consistency with the General EU Principle of Legal Certainty

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Abstract

The Foreign Subsidies Regulation (FSR) came into effect in July 2023, with the aim of addressing foreign subsidies which potentially lead to distortions in the internal market of the European Union (EU). Since the Commission published its proposal for the Regulation, the FSR has come under consistent scrutiny from both scholars and stakeholders. In particular, scholars have noted the lack of clarity in the FSR with regard to its key definitions and procedural framework, an opinion also shared by different industry professionals. In an attempt to address these concerns, this essay aims to answer the question of '*To what extent is the Foreign Subsidies Regulation consistent with the EU principle of legal certainty?'* Assessing the coherence between the Regulation and the principle of legal certainty offers also reflections on the Regulation's broader coherence within the constitutional framework of the EU. To fulfill this purpose, this essay follows the legal dogmatic method and begins with an analytical overview of the principle of legal certainty, defining both its scope and placement within the legal order of the EU. As a principle, legal certainty is broad and far-reaching, and often denoted as an "umbrella principle" with regard to its different sub-principles. This essay observes the traditional definition, anchored in jurisprudence from the Court of Justice of the EU and legal doctrine. Legal certainty thus entails that legislation is clear, precise, and foreseeable, with a particular emphasis on its derivative principles: legitimate expectations and non-retroactivity. A *de lege lata* assessment of the Foreign Subsidies Regulation is thereafter undertaken in order to define the Regulation in its current legal form, followed by an analysis of the interaction between the Regulation and the principle. This legal study therefore demonstrates that the FSR converges with the principle of legal certainty to a certain extent, recognizing that the concerns of legal uncertainty are not unfounded, and urges the Commission to produce a narrower and more definitive framework of the FSR in the upcoming 2026 Commission Guidelines.

Keywords: European Union, Legal Certainty, Foreign Subsidies, Financial Contribution, Competition Law, Legitimate Expectations, Retroactivity, General Principles.

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Abbreviations

CJEU	Court of Justice of the European Union
EC	European Commission
EU	European Union
FFC	Foreign Financial Contribution
FSR	Foreign Subsidies Regulation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

1 Introduction

1.1 Background

Amid the shifting landscape of global economic influence, the European Union (EU) has sought to recalibrate its competition and trade policies through the introduction of various regulatory devices. In particular, the Joint Declarations of 2021[1] and 2022[2] by the European Commission, the European Parliament, and the Council, identified regulating foreign subsidies as a forthcoming challenge. The European Commission (EC) suggested that there existed a regulatory gap which the FSR aims to close, stating that no other Union instruments addressed distortions in the internal market caused by foreign subsidies.[3] Thus, this legislative priority materialized in 2023 in the implementation of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market. The FSR features a unilateral approach to target state-controlled undertakings which receive financial support from third countries, and which may affect the competitive equilibrium of the EU.[4] Moreover, the FSR navigates between the fields of competition and trade law, primarily positioning itself at the intersection of the EU State aid, EU merger control, EU public procurement rules, and the anti-subsidy rules of the World Trade Organization (WTO). In the case of the latter field, the FSR shares this space with the Agreement on Subsidies and Countervailing Measures[5] (SCM Agreement) and with its intra-EU implementation as the Basic Anti-Subsidy Regulation.[6]

The imperative to safeguard fair market dynamics in light of growing global challenges has thus prompted the EU to strengthen its regulatory oversight in key areas, evident in the field of competition law. Most recently, the FSR and the Digital Markets Act[7] exemplify how policy objectives have been codified into law, reflecting the EU's increasing willingness to assert regulatory authority over the internal market to ensure fair competition. However, while advancing such objectives, the EU remains bound by a stringent constitutional order, grounded in its two founding treaties[8] and the Charter of Fundamental Rights.[9] Equally, the EU is

[1] European Parliament, 'Joint Declaration 2021' (Thematic Note, 12 January 2021) https://oeil.secure.europarl.europa.eu/oeil/en/legislative-priorities/thematic-note?id=2066000.
[2] European Parliament, 'Joint Declaration 2022' (Thematic Note, 7 July 2022) https://oeil.secure.europarl.europa.eu/oeil/en/legislative-priorities/thematic-note?id=41360.
[3] Recitals 5-6, Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December on foreign subsidies distorting the internal market (2022) OJ L 330/1 (hereinafter referred to as the 'Foreign Subsidies Regulation' and 'FSR').
[4] Recital 1, Regulation (EU) 2022/2560, OJ L 330/1.
[5] Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (hereinafter referred to as the 'SCM Agreement').
[6] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidized imports from countries not members of the European Union (2016) OJ L 176/55.
[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2022/1828 (Digital Markets Act) (2022) OJ L 265/1.
[8] Consolidated Version of the Treaty on European Union (2016) OJ C202/13 (TEU); Consolidated Version of the Treaty on the Functioning of the European Union (2016) OJ C202/47 (TFEU).
[9] Charter of Fundamental Rights of the European Union (2016) OJ C202/389.

constrained by general principles of EU law, of which enjoy treaty-level status.[10] The legal order of the EU therefore demands that legislation is consistent with these foundational instruments and principles, ensuring the universal application of legal acts within the Member States. In particular, the doctrine on the 'rule of law' acts as a cornerstone of the European legal order, ensuring the uniform application within the Union, facilitating also a predictable legal roadmap for individuals and businesses.[11] Enshrined in the preamble to the Charter of Fundamental Rights of the European Union (EUCFR) and in Article 2 of the TEU,[12] the rule of law operates as a constitutional basis from which the EU must govern. Framed as a broad, overarching principle, the EC defines the rule of law through six different principles: legality, equality, effective judicial protection, prohibition of the arbitrary exercise of executive power, separation of powers, and legal certainty.[13] Of particular interest to this essay is the principle of legal certainty, which requires that laws be precise, clear, and foreseeable.[14] The Court of Justice of the European Union (CJEU) has consistently cemented legal certainty as a fundamental principle, affirming that rules be clear and precis "so that he may be able to ascertain unequivocally what his rights and obligations are and take steps accordingly."[15]

Since the Commission published its proposal for the Foreign Subsidies Regulation, the Regulation has been subject to continuous scrutiny by both scholars and stakeholders. The prevailing concern among these actors is the Regulation's lack of clarity, particularly regarding the broad definition of 'foreign subsidy.' Scholars such as Philip Reinhold and Thomas Weck argue that this ambiguity significantly undermines the EU's core principle of legal certainty.[16] Similarly, Lidja Simunovic highlights that undertakings are currently operating in an environment of uncertainty due to the Regulation's vague provisions.[17] Further, industry professionals have claimed that the FSR is structurally problematic in relation to the principle of legal certainty, particularly in relation to the quasi-retroactive nature of its Article 53.[18] These concerns suggest that the Regulation may fail to ensure the legal certainty required under EU law, raising questions about its practical enforceability and constitutionality, especially with regard to the novelty of the Regulation and limited number of cases and legal discourse to date. The apparent uncertain application of

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[10] Publications Office of the European Union, 'Sources of European Union Law' (Eur-Lex, 21 April 2022) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14534, accessed 23 May 2025.

[11] European Commission, "What is the Rule of Law" (European Commission, 2024), https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en#:~:text=European%20Commission-,Legal%20certainty,rule%20of%20law%20in%20Europe, accessed 01 May 2025.

[12] Art. 2, Treaty on European Union (2016) OJ C202/13.

[13] European Commission, "What is the Rule of Law."

[14] Case C-17/03, *VEMV and Others* (2005) EU:C:2005:362, para. 80.

[15] Case C-143/93, *Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen* (1996), EU:C:1996:45, para. 27.

[16] P. Reinhold & T. Weck, 'Welcome to the Jungle! Identification of Foreign Subsidies Under the New EU Foreign Subsidies Regulation' (European State Aid Law Quarterly, Vol 23, Issue 1, 2024, pp. 22-24), https://doi.org/10.21552/estal/2024/1/5.

[17] Lidija, Simunovic, 'The EU Foreign Subsidies Regulation (FSR): A Game Changer or Impossible Mission?' in Comparative Law Issues and Challenges Series (ECLIC 8 - Special Issue, December 2024, pp. 342-362), DOI: 10.25234/eclic/35843, p. 347.

[18] Adrian Emch. et al., "Friction, Scrutiny and Risk: One Year of EU Foreign Subsidies Regulation Filings" (Hogan Lovells, 15 October 2024), https://www.hoganlovells.com/en/publications/friction-scrutiny-and-risk-one-year-of-eu-foreign-subsidies-regulation-filings, accessed 01 May 2025.

the FSR thus warrants further research. Therefore, a closer examination of the Regulation's scope, structure, and implementation is necessary to determine whether the FSR meets the requirements of legal certainty and provides a predictable framework for undertakings operating within the internal market. Accordingly, analyzing the FSR *de lege lata*, particularly in relation to the principle of legal certainty, sheds light on the extent to which the Regulation is compliant with the broader legal order of the EU.

1.2 Purpose and Research Questions

In addressing the concerns of legal uncertainty, the purpose of this essay is to critically assess the extent to which the Foreign Subsidies Regulation complies with the general EU principle of legal certainty, thereby reflecting on its coherence with the broader constitutional framework of the European Union. Therefore, this essay aims to answer the following research question: *To what extent is the Foreign Subsidies Regulation consistent with the EU principle of legal certainty?*

1.3 Delimitations

In addressing the overarching aim of this essay, the following legal research will be limited to the jurisdiction of the European Union. It is limited to a doctrinal analysis of the FSR within the existing EU legal order, exploring the Regulation in its current legal form. Additionally, while the FSR operates at the intersection of several legal regimes, including EU State aid and WTO subsidy rules, this legal study will not engage with a detailed comparative analysis of these regimes. Moreover, while this essay includes an overall assessment of the FSR and generally explores the key provisions of the Regulation in order to contextualize its legal framework, a comprehensive investigation of each single provision of the FSR is beyond the scope of this essay. Accordingly, special emphasis has been placed on the key provisions of the FSR which scholars and stakeholders also argue may have implications for legal certainty. This essay also does not extend to the assessment of the policy effectiveness of the FSR, it remains more precisely concerned with the legal coherence of the FSR as it currently stands within the broader constitutional legal order of the EU. Lastly, the principle of legal certainty, while broad and multifaceted, is in this essay interpreted in line with established jurisprudence of the CJEU and authoritative legal doctrine. It is therefore defined with regard to the following requirements: precision, clarity, and foreseeability. This essay also recognizes legal certainty's sub-principles of legitimate expectations and non-retroactivity, which particularly relate to the predictability of legislation.

1.4 Methodology and Materials

This essay adopts the legal dogmatic method in order to examine the legal architecture of the Foreign Subsidies Regulation. The legal dogmatic method consists of interpreting the rules and legal foundations of legislation in a systematic manner, with respect to the hierarchy of legal sources.[19] Since this essay relates only

[19] Jan Kleineman, 'Rättsdogmatisk Metod,' in Nääv, Maria & Zomboni, Mauro (Ed.), *Juridisk Metodlära* (Lund: Studentlitteratur, 2nd ed, 2018), p. 21.

to EU law, the method rests on the interpretation of the current legislative body of the EU, that is, primary and secondary law, CJEU case law, preparatory documents and communications, and doctrine. Materials used in this essay thus consist of the TEU, TFEU, EUCFR, and the general principles of EU law as the primary legal source. The secondary legal sources, the Foreign Subsidies Regulation and the Commission Implementing Regulation (EU) 2023/1441,[20] serve thereafter as the central legal foundations of this essay. These acts are accompanied by preparatory works, primarily the White Paper,[21] the Commission's Proposal[22], and guidelines, such as the Staff Working Documents. Further, this essay is heavily centered on the use of CJEU jurisprudence with relation to defining the principle of legal certainty. However, with respect to the investigations and cases falling under the FSR in Chapter 4 of this essay, CJEU case law is limited. Rather, legal literature and digital sources are utilized in the context of FSR investigations and cases. Contributions from stakeholders are also considered to a limited degree in this essay. Furthermore, the latter part of this essay includes a critical analysis of the FSR against the backdrop of legal certainty. Kleineman suggests that the legal dogmatic method can also be employed with regard to this style of analysis, noting that the method entails analyzing legislation and the operational application within the legal order.[23] Moreover, Chalmers elaborates on analyzing the compatibility of European competition law with fundamental rights, distinguishing between an analysis of a legislation's compliance with such rights, and an analysis of the institutional set-up, where an actual decision's compatibility is assessed.[24] This essay mirrors the first methodological structure used in fundamental rights assessments, focusing instead on the FSR's compliance with the principle of legal certainty.

1.5 Thesis Structure

Chapter 1 of this essay introduces the subject material, defining the legal problem and the rationale for which the following legal study originates from. Chapter 2 establishes a definitive skeleton for the principle of legal certainty, thereby clarifying the boundaries of what legal certainty entails in EU law, which are operationalized in Chapter 5. Chapter 3 explores the legal framework of the Foreign Subsidies Regulation *de lege lata*, discussing firstly why the Regulation was implemented and on which legal basis it rests. The chapter proceeds to interpret key provisions of the FSR, outlining the framework and instruments through which it operates, and finally examining the structure and key provisions of the Commission Implementing Regulation. Chapter 4 gives an overview into the current investigations under the FSR in order to provide a contextual illustration into how the FSR's provisions have been employed and interpretated by the EC and CJEU. Chapter 5 provides the

[20] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 (2023) OJ L 177/1 (hereinafter referred to as the 'Commission Implementing Regulation' and 'Implementing Regulation').

[21] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM (2020) 253 final (17 June 2020); includes the European Commission's intent to regulate foreign subsidies on the internal market.

[22] European Commission, Proposal for a Regulation on foreign subsidies distorting the internal market, COM (2021) 223 final, 2021/0114 (COD) (5 May 2021).

[23] Kleineman, Jan, 'Rättsdogmatisk Metod,' p. 21.

[24] Chalmers et al, *European Union Law: Text and Materials* (Cambridge: Cambridge University Press, 5th ed, 2024), p. 887.

analytical core of this essay, assessing the extent to which the FSR is consistent with the principle of legal certainty. This chapter opens by discussing the perspectives of the EU, scholars, and stakeholders, as regards to legal certainty in the FSR. These perspectives are analyzed within the framework of the FSR and then synthesized in order to answer the research question of this legal study. Chapter 6 offers concluding reflections and advances a *de lege ferenda* perspective by proposing considerations for the 2026 Guidelines and future avenues of research.

2 The General EU Principle of Legal Certainty

2.1 Defining the Principle of Legal Certainty

The 'rule of law' is a cornerstone of the EU legal order, codified in the primary law of the Union. The rule of law safeguards the authority of law, ensuring legal longevity and clarity in regulating persons, businesses, and institutions. It is inscribed in both the preamble of the EUCFR and Article 2 of the TEU, and, the CJEU has consistently acknowledged its foundational value. *Les Verts v European Parliament* established that the EU is a "community based on the rule of law,"[25] confirmed also in *Kadi*.[26] As mentioned, the Commission defines the rule of law along six different principles, where the compliance of such principles ensures that the rule of law continues to be a governing force in the EU. Chalmers further notes that the rule of law "can be a Treaty provision, binding EU law, fundamental rights or general principles of law."[27] The principle of legal certainty is one of those general principles stemming from the rule of law doctrine, which guarantees that provisions of EU legislation and regulation be known, clear and precise, stable, certain, and predictable.[28] The principle holds significant weight within the legal order of the EU, with CJEU jurisprudence illustrating that failure to uphold legal certainty may render legislation inapplicable under specific circumstances.[29] The Court first established the principle of legal certainty as a general principle of EU law in *Commission v Italy*, stating that:

> [The] principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.[30]

The Court reinforced the principle in *Commission v Greece*,[31] and further defined the principle in *Heinrich*, stating:

> [Union] rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[32]

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[25] Case C-294/83, *Parti écologiste "Les Verts" v European Parliament* (1986), EU:C:1986:166, para. 23.
[26] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* (2008), EU:C:2008:461, para. 316.
[27] Chalmers et al, *European Union Law*, p. 355.
[28] Jérémie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust,' (European Law Review, Vol. 41, no.41, pp. 275-288), http://hdl.handle.net/2078.3/177694, p. 275.
[29] Case C-143/93, *Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen* (1996), para. 33.
[30] Case C-257/86, *Commission v Italy* (1988), EU:C:1988:324, para. 12.
[31] Case C-159/89, *Commission v Greece* (1991), EU:C:1991:77, para. 11.
[32] Case C-345/06, *Heinrich* (2009), EU:C:2009:140, para. 44.

The Court's ruling underscores the notion that legislation must be clear and precis so that individuals and businesses can determine what their rights and responsibilities are, and respond accordingly. Scholarship agrees with this definition, with Van Meerbeeck noting that laws must "be foreseeable by those subject to them,"[33] an idea also endorsed by Takis Tridimas.[34] Thus, legal rules must hold a character of precision, clarity, and foreseeability according to the principle of legal certainty.

2.2 The Sub-Principles of Legitimate Expectations and Non-Retroactivity

The principle of legal certainty is categorized as an "umbrella principle" expressing itself not only through its main requirements of precision, clarity, and foreseeability, but also through two sub-principles. These expressions include the principle of legitimate expectations and the principle of non-retroactivity.[35] Certain scholarship also acknowledges other sub-principles extrapolating from the principle of legal certainty;[36] however, this essay chooses to highlight non-retroactivity and legitimate expectations due to their settled recognition in case law. A unique connection also binds these two principles, with Juha Raitio stating that non-retroactivity is inherently linked to the protection of legitimate expectations, as quasi-retroactive application of EU law can only be permissible in exceptional cases where it serves specific objectives without breaching legitimate expectations.[37]

The principle of legitimate expectations, also referred to as the protection of legitimate expectations, describes the idea that individuals who act in good faith based on legal expectations, "should not suffer from the disappointment of those expectations."[38] In its textual interpretation, a 'legitimate expectation' can be broken down to the lawful or justified belief that something will happen. It details a legal presumption; however, this principle faces limitations in terms of its applicability. The following quote from the *Di Lenardo* and *Dilexport* joined cases, highlights that the principle of legitimate expectations is limited to three factors, confirmed also in *SNCF v Commission*:[39]

> Any trader on the part of whom an institution has promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. (…) Furthermore, while the principle of protection of legitimate expectations is one of the fundamental principles of the Community, traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organization of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances.[40]

[33] Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice,' p. 280.
[34] Takis Tridimas, 'Legal Certainty and Protection of Legitimate Expectations', In *The General Principles of EU Law* (Oxford: Oxford Academic, online ed, 2006, pp- 242-297) https://doi.org/10.1093/oso/9780199258062.003.0006, accessed 24 April 2025.
[35] Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice,' p. 280.
[36] Juha Raitio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law' (Legisprudence, Vol 2, 2008, pp. 1-23), https://doi.org/10.1080/17521467.2008.11424671, p. 3.
[37] Ratio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law,' p. 4.
[38] Ratio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law,' p. 3.
[39] Case T-454/13, *SNCF v Commission* (2017), EU:T:2017:134, para. 282.
[40] Joined Cases C-37/02 and C-38/02, *Di Leonardo and Dilexport* (2004), EU:C:2004:443, para. 70.

As noted in the case, these three factors include first, an individual may only invoke the principle if a Union institution has given a reason to expect a certain outcome. Secondly, that an individual cannot have reasonably been able to foresee any legal changes; and thirdly, that the area of law which the expectation has been born from, cannot be an area subject to frequent changes. Areas like agriculture and the internal market, are two examples of such areas where legal changes often occur. *Duff and Others* also highlight the limited scope of legitimate expectations, similarly suggesting that it may only be employed when the EU has created a situation which would give rise to such expectations.[41] Proportionality also plays a role in defining the scope of the principle of legitimate expectations, where scholars stress that the principle is centered on achieving a fair balance between public interests and the private rights of individuals;[42] in effect, a de facto tug-of-war between EU citizens and institutions. The principle of legitimate expectations is thus relative, where the requirements of the principle must be weighed against public interests.[43]

Moreover, the principle of non-retroactivity carries significant normative weight for the concept of legal certainty. With roots dating back to ancient Roman law, the idea that punishing someone on the absence of a rule when the act was committed is unlawful, is a widely recognized notion.[44] A common definition of retroactivity is defined as an act of extending the scope "to a prior time or to conditions that existed or originated in the past."[45] With regard to its legal application, retroactivity can therefore textually be defined as a regulation being applicable to past events or to past conditions prior to the date of enforcement. Case law states that the prohibition on retroactivity entails that a legal measure cannot take effect before its publication[46] and that legal measures are unable to apply to activities which were concluded prior to the publication. Scholars such as Van Meerbeeck[47] and Popelier agree with this notion, endorsing the idea that legal subjects must be made aware of when they are to be bound by a law in order to attain or avoid possible legal consequences.[48] However, the Court states in *Azienda Municipale Ambiente* that legal measures can apply to activities which originated before the publication, only if such activities maintain on-going and future effects.[49] Taken together, a regulation that applies to concluded activities is generally considered invalid in the eyes of the court, unless those activities produce continuous effects.

The CJEU has however, acknowledged an exception to the general rule, stating in *Kirk* that retroactive measures which induce penalties are prohibited.[50] In *Queen v MAAF*, the court held:

[41] Case C-63/93, *Duff and Others* (1996), EU:C:1996:51, para. 19-20.
[42] Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker' (Legisprudence, Vol 2, No 1, 2008, pp. 47-66), http://dx.doi.org/10.1080/17521467.2008.11424673, p. 62.
[43] Case C-526/14, *Kotnik and Others* (2016), EU:C:2016:570, para. 68.
[44] Y. Kryvoi & S. Matos, 'Non-Retroactivity as a General Principle of Law' (Utrecht Law Review, Vol 17, Issue 1, 2021, pp. 46-85) https://doi.org/10.36633/ulr.604.
[45] Merriam Webster Dictionary, 'Retroactive,' https://www.merriam-webster.com/dictionary/retroactive, accessed April 20, 2025.
[46] Case C-554/14, *Ognyavoc* (2016), EU:C:2016:835.
[47] Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice,' p. 281.
[48] Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker,' p. 62.
[49] Case C-15/19, *Azienda Municipale Ambiente* (2020), EU:C:2020:371, para. 58.
[50] Case C-63/83, *Kirk* (1984), EU:C:1984:255, p. 2690.

> That provision cannot be interpreted as imposing on Member States the obligation to adopt measures which conflict with Community law, in particular with the principle that penal provisions may not have retroactive effect.[51]

The principle of non-retroactivity is thus absolute with regard to penal measures, a notion deeply rooted in CJEU jurisprudence.[52] Codifying the exclusion of retroactive penal measures is also established in the EU Member State's constitutions, recognized for example in the Swedish Constitution, *Regeringsformen*.[53] The European Convention of Human Rights also acknowledges this absolute prohibition, stating that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."[54] The CJEU has also noted that the absolute prohibition applies in administrative law, affirming that measures liable to produce significant financial consequences are barred from legislation.[55] For example, the Court ruled in *Dansk Rørindustri and Others v Commission,* that retroactive measures in competition law which indict penalties are unlawful.[56] Scholars further suggest that there is a strict prohibition against retroactive measures which disadvantage individuals.[57] Judicial reasoning in these cases therefore suggests that the anticipated consequential effect of the retroactive measures is significant in determining the prohibition of retroactivity.

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[51] Case C-331/88, *The Queen v Ministry of Agriculture, Fisheries, and Food, ex parte FEDESA and Others* (1990), EU:C:1990:391, para 44.

[52] Case C-521/15, *Spain v Council* (2017), EU:C:2017:982, paras. 145-146; Case C-3/06 P, *Groupe Danone v Commission* (2007), EU:C:2007:88, para. 86.

[53] 2 Kap. 10 § *Regeringsformen* (SFS 1972:152).

[54] Art 7(1), Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, European Treaty Series No. 5, 1950).

[55] Case C-94/05, *Emsland-Stärke* (2006), EU:C:2006:185, para. 43.

[56] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, and C-213/02 P, *Dansk Rørindustri and Others v Commission* (2005), EU:C:2005:408, para. 202.

[57] Ulf Bernitz, 'Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law' (Stockholm Institute for Scandinavian Law, 1957-2009), https://www.scandinavianlaw.se/pdf/39-3.pdf, p. 52.

3 The Foreign Subsidies Regulation

3.1 Regulation (EU) 2022/2560: Legislative Background and Core Provisions

The Foreign Subsidies Regulation emerged as a response to the growing concern of imbalance as regards to the functioning of the internal market. The fear was that undertakings receiving financial support from outside of the EU, i.e. foreign subsidies, were disproportionately disrupting the competitive equilibrium of the EU. Leading European decision-makers argued that the Union lacked the legislative instruments necessary to address such foreign subsidies and the resulting distortions, thus prompting the EU institutions to address the regulatory gap. In June of 2020, the European Commission published the 'White Paper on levelling the playing field as regards foreign subsidies,' in order to address the perceived regulatory gap in the domain of subsidy control. The White Paper underscored the EU's intention of putting forth a regulatory framework aimed specifically at targeting foreign subsidies which may distort the internal market.[58] Key to establishing the FSR was to first critically examine whether there was an actual gap that needed to be filled in the field of anti-subsidy control. The Commission highlighted in the White Paper that the existing State aid rules were (and remain) restricted to the governing of subsidies granted only by the Member States of the EU.[59] Further, the Commission acknowledged the limitations of the EU rules in respect to mergers, public procurement, and anti-subsidy regulation:

> These instruments, however, have their limitations and do not allow to address all foreign subsidies affecting the internal market. The EU anti-dumping and anti-subsidy rules apply to the import of goods into the EU. They however do not cover trade in services, investment or other financial flows in relation to the establishment and operation of undertakings in the EU.[60]

The Commission reinforced this position through the formal publication of the proposal for the Foreign Subsidies Regulation, affirming that the Regulation would target only the distortions which fell outside the scope of the existing regulatory frameworks which govern subsidy control.[61] This stance has later translated into Article 44 of the FSR, which lists the legal acts which intersect with the FSR, asserting that the FSR either is "without prejudice to the application of" or "takes precedence over" the related legal act.[62] The proposal further emphasized that the Regulation would mainly target recipients of large foreign subsidies, which in turn would be most likely to distort the internal market.[63] Lawmakers also maintained that it was imperative to target 'foreign' subsidies, arguing that subsidies originating in less transparent markets of third-countries may be at a heightened risk of distorting the internal market. Accompanying the proposal, the Commission published an

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[58] European Commission, White Paper COM(2020) 253 final, p. 5.
[59] European Commission, White Paper COM(2020) 253 final, p. 5.
[60] European Commission, White Paper COM(2020) 253 final, p. 10.
[61] European Commission, Proposal COM(2021) 223 final, p. 4.
[62] Art. 44, Regulation (EU) 2022/2560, OJ L 330/1.
[63] European Commission, Proposal COM(2021) 223 final, p. 11.

Impact Assessment which provides further context for the legislative framework of the FSR.[64] The Impact Assessment highlighted that the implementation of the Foreign Subsidies Regulation would promote uniformity and predictability of foreign-subsidy control in the EU, also enhancing legal certainty for undertakings.[65] Following the proposal for the Regulation, the EU began the ordinary legislative procedure in order to enact the Foreign Subsidies Regulation into law. The European Parliament and the Council were thus co-legislators, with the Committee on International Trade leading the amendment discussions.[66] The final act, Regulation (EU) 2022/2560, was signed into law on December 14th, 2022 and officially entered into force on July 12, 2023.

3.1.1 Scope and Key Definitions

The Foreign Subsidies Regulation was drafted on the legal grounds of Article 114 TFEU (internal market harmonization) and Article 207 TFEU (the Common Commercial Policy),[67] suggesting that the Regulation at its core would serve as a tool for safeguarding fair market dynamics and managing external economic influences on the internal market. These aims translated into the adopted 54 provisions, which as per the objective, aim to address foreign subsidies which may have the potential of distorting the internal market of the EU. Article 1(1) of the FSR defines this aim:

> The purpose of this Regulation is to contribute to the proper functioning of the internal market by establishing a harmonized framework to address distortions caused, directly or indirectly, by foreign subsidies, with a view to ensuring a level playing field. [68]

Article 1(2) further defines the scope of the Regulation, stating that the FSR applies to foreign subsidies granted to undertakings, including public undertakings that are directly or indirectly controlled by the State, and which engage in an economic activity within the Union's market.[69] Article 1(2) thereby outlines three cumulative conditions for which the FSR requires: foreign subsidies (i), granted to undertakings (ii) which engage in an economic activity within the EU (iii). Article 3 of the FSR further establishes cumulative conditions for when a foreign subsidy is deemed to exist: a third country (i) must directly or indirectly (ii) provide a financial benefit (iii) which confers a benefit on an undertaking (iv), of which that undertaking must engage in an economic activity in the internal market (v), and which is limited to one or more undertakings or industries (vi).[70] To simplify, these conditions which define the existence of a foreign subsidy can be normatively interpreted as four cumulative conditions: "it must be a financial contribution (i), granted by a third country to a specific recipient (ii) through which the recipient gained an economic benefit (iii),

[64] European Commission, Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation on foreign subsidies distorting the internal market, SWD(2021) 99 final (5 May 2021).

[65] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 37.

[66] European Parliament, 'Report on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal market' (A9-0135/2022, 28 April 2022), https://www.europarl.europa.eu/doceo/document/A-9-2022-0135_EN.html.

[67] Preamble to Regulation (EU) 2022/2560, OJ L 330/1.

[68] Art. 1(1), Regulation (EU) 2022/2560, OJ L 330/1.

[69] Art. 1(2), Regulation (EU) 2022/2560, OJ L 330/1.

[70] Art. 3, Regulation (EU) 2022/2560, OJ L 330/1.

and that there is an element of electivity (iv)."[71] The first criterion requires that a financial contribution is in play, where Article 3(2) of the FSR lists the forms that a financial contribution may originate as; such as, the transfer of funds or liabilities, the foregoing of revenue that is otherwise due, and the provision of, or the purchase of, goods or services.[72] These financial contributions are often referred to as 'foreign financial contributions' (FFCs), as they must be provided by a third-country party, as in, must be provided by a non-EU State. This includes central government authorities and any public or private body whose resources are influenced by that state.[73] Further, the FFC must confer an economic benefit. Recital 13 to the FSR broadly defines that a benefit should be interpreted on the basis of comparative benchmarks, such as a tax treatment.[74] It is however unclear as to whether the FSR adopts a similar approach to assessing the benefits produced by financial contributions as is done in EU State aid law.[75] In addition, the last condition implies selectivity, where doctrine notes that "the determinative factor is whether the third-country favored only certain undertakings, sectors or industries, or the selectivity resulted from the use of such foreign subsidies."[76]

Moreover, the Regulation assesses foreign subsidies which have the potential to lead to distortions in the internal market. The FSR defines the existence of these distortions in its Article 4, stating that a distortion occurs where a foreign subsidy "is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market."[77] As legal commentary highlights, the Commission is not permitted to presume a distortion merely on the basis that a recipient actively operates within a competitive sector.[78] Rather, Article 4 of the FSR requires an evidence-based analysis based off of the following indicators:

(a) the amount of the foreign subsidy;

(b) the nature of the foreign subsidy;

(c) the situation of the undertaking, including its size and the markets or sectors concerned;

(d) the level and evolution of economic activity of the undertaking on the internal market;

(e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.[79]

Article 4 of the FSR thus introduces a substantive test focused on the potential distortion of the internal market, assessed through a case-by-case evaluation that considers factors such as the amount and nature of the subsidy, the conditions under

[71] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 344-345.
[72] Art. 3(2), Regulation (EU) 2022/2560, OJ L 330/1.
[73] Art. 3(2), Regulation (EU) 2022/2560, OJ L 330/1; See also "Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 346."
[74] Recital 13, Regulation (EU) 2022/2560, OJ L 330/1.
[75] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 347.
[76] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 348.
[77] Art. 4(1), Regulation (EU) 2022/2560, OJ L 330/1.
[78] Tongle Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement' (Sriwijaya Law Review, Vol 9, Issue 1, 2025, pp. 114-136), DOI:10.28946/slrev.Vol9.Iss1.3048.pp114-136, p. 124.
[79] Art. 4(1), Regulation (EU) 2022/2560, OJ L 330/1.

which the subsidy was granted, and the market position of the undertaking in question. In an effort to enhance clarity, the Commission published preliminary guidelines in 2024, including initial clarifications on Article 4(1).[80] The Commission specified that with regard to the foreign subsidy improving the competitive position of the undertaking, it is necessary to establish a relationship between the subsidy and the activities of the undertaking in the internal market.[81] Further, the Commission notes that the "actual or potential" effects are broadly assessed, provided that competition concerning that activity within the market is, or could be, adversely affected by the foreign subsidy.[82] Regarding the role of the indicators, the Commission states that the list is neither exhaustive nor mandatory, rather that each case will be reviewed based on the specific circumstances of the specific case. The framework for identifying 'distortions in the internal market' will therefore be developed through the Commission's case practice.[83] It should also be noted that Article 5 of the FSR lists categories of foreign subsidies which are deemed to be high-risk in distorting the internal market; such subsidies do not require an assessment based off of the indicators in Article 4 of the FSR.[84]

3.1.2 Procedural Framework: *Ex-Ante* and *Ex-Post* Mechanisms

The Foreign Subsidies Regulation features a hybrid enforcement structure, combining both *ex ante*[85] and *ex post*[86] dimensions. This structure broadly extends the scope of the FSR, enabling it to act both proactively and reactively. Furthermore, the Regulation is of unilateral nature, meaning that the Regulation is confined to the discretion of one regulatory power: the European Commission.[87] In enforcing the FSR to tackle concentrations, the Directorate-General for Competition (DG COMP) is responsible, and, in enforcing the FSR as regards to public procurement procedures, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG Grow) is responsible.[88] The reasoning behind the Commission's sole enforcement, according to the Commission, is that it provides a "one-stop-shop" for undertakings, avoiding complexity with dealing with multiple authorities at the same

[80] In July of 2024, the Commission published a Staff Working Document providing initial clarifications on the application of Articles 4(1), 6, and 27(1) of the FSR. Though the clarifications are not legally binding, they reflect the European Commission's preliminary understanding of the relevant provisions of Regulation (EU) 2022/2560, aiming to guide stakeholders in the application of the Regulation. See "European Commission, Commission Staff Working Document, Initial clarifications on the application of Article 4(1), Article 6, and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, SWD (2024) 201 final (26 July 2024)."

[81] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 1.

[82] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 2.

[83] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 2.

[84] Art. 5, Regulation (EU) 2022/2560, OJ L 330/1.

[85] *Ex ante* refers to provisions which apply "before transaction;" in other words, provisions of the FSR apply pre-emptively, with decisions based off of predictions.

[86] *Ex post* refers to provisions which apply "after transactions;" in other words, provisions of the FSR apply reactively, with decisions based off of actual results.

[87] Recital 8, Regulation (EU) 2022/2560, OJ L 330/1.

[88] European Commission, 'Foreign Subsidies Regulation' (European Commission: Competition Policy), https://competition-policy.ec.europa.eu/foreign-subsidies-regulation_en, accessed 15 April 2025.

time.[89] However, the broad regulatory powers enjoyed by the Commission have been criticized by scholars and stakeholders alike.

Two central mechanisms in regulating foreign subsidies operate as part of the *ex ante* dimension of the FSR. First, Article 20 of the Regulation sets up a notification-based procedure for concentrations involving FFCs above certain thresholds. In this context, notification is mandatory for concentrations if the acquired company or one of the merging parties achieves an EU turnover of at least €500 million and the financial contribution involved in the transaction exceeds €50 million.[90] A similar mechanism is set-up in Article 28 of the Regulation for public procurement procedures, where the value of the tender exceeds specific thresholds. The threshold for mandatory public procurement notification is set at €250 million-value contract and the financial contribution involved in the tender exceeds €4 million per third-country.[91] Thus, Articles 20 and 28 of the FSR impose an obligation on undertakings to notify to the Commission when they receive financial contributions meeting the thresholds set in the FSR from beyond non-EU States. In addition, undertakings can voluntarily notify the Commission of foreign subsidies that may result in distortive behavior on the internal market that fall outside of the mandatory notification obligation. Such notifications are known as *ad hoc* notifications.[92] Legal commentary notes that these notifications can prove especially useful in certain fields, such as in the context of tax.[93] These provisions aim to pre-emptively mitigate the potential distortive effects which may occur as a result of foreign subsidies present in the internal market. The EU considers that the *ex ante* framework of the FSR will improve legal certainty for undertakings by enabling decisions on measures to be made prior to the completion of transactions.[94]

Moreover, the Regulation grants the Commission the power to investigate foreign subsidies *ex officio*. Through this *ex post* review format, the Commission can investigate foreign subsidies which are suspected to distort the internal market, but which may fall outside the notification mechanisms.[95] This means that the Commission may investigate foreign subsidies after they have been granted,[96] regardless of a notification obligation. Article 9 of the FSR defines this procedure:

> The Commission may on its own initiative examine information from any source, including Member States, a natural or legal person or an association, regarding alleged foreign subsidies distorting the internal market.[97]

Any information sent to the Commission which prompts suspicion, regardless of source, may therefore lead to an *ex officio* review. Though there is no specified timeline for which the Commission may investigate *ex officio*, the review procedure

[89] European Commission, White Paper COM(2020) 253 final, p. 29.
[90] Art. 20, Regulation (EU) 2022/2560, OJ L 330/1.
[91] Art. 28, Regulation (EU) 2022/2560, OJ L 330/1.
[92] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 354-355.
[93] Freshfields Bruckhaus Deringer, 'Supplementing state aid: tax and the EU Foreign Subsidies Regulation' (October 2023), https://www.freshfields.com/globalassets/noindex/articles/supplementing-state-aid---tax-and-the-eu-foreign-subsidies-regulation.pdf, p. 4.
[94] European Commission, Proposal COM(2021) 223 final, p. 8.
[95] Art. 9, Regulation (EU) 2022/2560, OJ L 330/1.
[96] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 76.
[97] Art. 9, Regulation (EU) 2022/2560, OJ L 330/1.

is limited to a ten-year period.[98] It should however be noted that the ten-year period resets if the Commission takes any actions under Articles 10, 13, 14, or 15 of the FSR, i.e., if the Commission begins addressing and remedying the possible distortion. This framework has consistently been questioned in legal literature,[99] despite the Commission insisting that the added Union involvement guarantees legal certainty.[100] Nonetheless, both the *ex post* and *ex ante* mechanisms empower the Commission to perform a preliminary review if there is sufficient indication that the foreign subsidy may distort competition within the Union.[101] Thereafter, the Commission may consider that further information is required to assess the foreign subsidy, of which the Commission would carry out an in-depth investigation under Article 11 of the FSR.[102] During the in-depth investigations, the Commission can request information to be provided by the undertaking in question,[103] carry out inspections within the EU to survey records, employees, and premises which may provide information necessary to the Commission,[104] and can conduct inspections outside of the EU, provided that the targeted non-EU State obliges.[105]

Furthermore, if the Commission finds sufficient evidence of the foreign subsidy potentially distorting the internal market, the Commission may adopt interim measures which apply for a specific period of time, or which apply until the final decision of the in-depth investigation has been provided.[106] Such measures may consist of refrainment from investments, offering access to infrastructure that were acquired or supported by the foreign subsidies in question, and licensing assets acquired through the aid of the foreign subsidies.[107] Finally, if the Commission finds the foreign subsidy to distort the internal market, actually or potentially, Article 7 of the FSR allows for the Commission to impose redressive measures or accept commitments from the undertaking. Commitments and redressive measures shall be proportionate in nature, and may consist of reducing market presence, publishing results of research, divestment of assets, dissolving the concentration concerned, and/or repayment of the foreign subsidy.[108] It should be noted that this list is non-exhaustive, meaning that other commitments or redressive measures may be accepted by the Commission in order to remedy the possible distortion on the internal market. Further, the redressive measures align with established measures under the European competition law framework.[109]

[98] Recital 61 and Article 38, Regulation (EU) 2022/2560, OJ L 330/1.
[99] Wolfgang Weiß, 'The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?' (March 2024), https://www.researchgate.net/publication/379046003_The_Regulation_on_Foreign_Subsidies_Distorting_the_Internal_Market_A_path_to_a_level_playing_field, p. 117.
[100] European Commission, Proposal COM(2021) 223 final, p. 50-51.
[101] Art. 10, Regulation (EU) 2022/2560, OJ L 330/1.
[102] Art. 11, Regulation (EU) 2022/2560, OJ L 330/1.
[103] Art. 13, Regulation (EU) 2022/2560, OJ L 330/1.
[104] Art. 14, Regulation (EU) 2022/2560, OJ L 330/1.
[105] Art. 15, Regulation (EU) 2022/2560, OJ L 330/1.
[106] Art. 12, Regulation (EU) 2022/2560, OJ L 330/1.
[107] Art. 7(4), Regulation (EU) 2022/2560, OJ L 330/1.
[108] Art. 7, Regulation (EU) 2022/2560, OJ L 330/1.
[109] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 120.

3.1.3 The Balancing Test

Article 6 of the Regulation introduces the "Balancing Test," in which the Commission has the opportunity to balance the negative effects of a foreign subsidy with the positive effects that are produced as a result of foreign financial support. The Article states:

> 1. The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union.
>
> 2. The Commission shall take into account the assessment under paragraph 1 when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments.[110]

Article 6 thus introduces a broad test which the Commission may utilize in its evaluation of foreign subsidies distorting the internal market. Under this provision, even if a subsidy confers a competitive advantage which may disrupt the competitive equilibrium of the EU, the Commission may choose to approve it if the positive effects clearly outweigh the negative impact which it produces. The balancing of effects may also be used by the Commission when determining the character and scope of redressive measures or commitments.[111] Article 6 does not, however, include any indications as to how the Balancing Test will be carried out, rather indications are included in the non-binding preliminary guidelines published by the EC in 2024. With regard to the positive effects that may be considered, the policy goals of the Union will be taken into consideration. Specifically, considerations relating to research and development, and environmental protection may be regarded.[112] Further, the Commission notes that it will draw on the positive effects acknowledged under the EU State aid control regime. Identification of the negative effects will be determined with regard to the market position of the undertaking and the amount and purpose of the foreign subsidy.[113] However, the Commission notes in its preliminary guidelines that the approach to the balancing test is under development; as such, there currently exists no definitive interpretation as to how the Commission will in practice carry out its actions in relation to the balancing test.[114] Nonetheless, the balancing test aims to serve as a tool ensuring that the Regulation is applied proportionately and pragmatically, aligning with the broader policy objectives of the EU, whilst still ensuring fair competition. This article thus affirms the Council's position on the Foreign Subsidies Regulation, ensuring alignment with the long-term strategic goals of the Union.[115]

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[110] Art. 6, Regulation (EU) 2022/2560, OJ L 330/1.

[111] European Commission, White Paper COM(2020) 253 final, p. 17.

[112] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 6.

[113] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 353.

[114] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 6.

[115] European Parliament, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies,' in *A Europe Fit for the Digital Age* (Legislative Train Schedule, 20 April 2025), https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-white-paper-instrument-on-foreign-subsidies?sid=9101.

3.1.4 Transitional Provisions: Article 53 of the FSR

Article 53 of the FSR sets out transitional provisions for the Regulation, which govern how and when provisions take effect, in order to create a phased application of the new regulatory framework. Article 53 states:

> 1. This Regulation shall apply to foreign subsidies granted in the five years prior to 12 July 2023 where such foreign subsidies distort the internal market after 12 July 2023.
>
> 2. By way of derogation to paragraph 1, this Regulation shall apply to foreign financial contributions granted in the three years prior to 12 July 2023 where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.
>
> 3. This Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023.
>
> 4. This Regulation shall not apply to public procurement contracts that have been awarded or procedures initiated before 12 July 2023.[116]

The article thus determines the temporal application of the Regulation's core obligations, applying retroactively up to five years.[117] Article 53(1) establishes that the FSR applies to foreign subsidies granted in the five years prior to its implementation, only where those foreign subsidies cause distortions in the internal market after its implementation. Article 53(2) further establishes that in the context of notifiable concentrations and public procurement procedures, the Regulation applies to FFC's granted in the three years prior to its implementation. Article 53(2) of the FSR thus concurs with the general notification requirements seen in Article 20(3)(b) and Article 28(1)(b) of the FSR. For instance, pursuant to the latter article, the FSR applies to financial contributions granted within the three years preceding the notification."[118] Article 53 thereby enables the Commission to apply this review mechanism during the initial phase of the FSR's enforcement. Articles 53(3) and 53(4) further define the temporal scope of the FSR, stating that in cases of concentrations and public procurement, retrospective application of the FSR will not be allowed for which transactions have been concluded, or contracts awarded, prior to 12 July 2023. These provisions thus introduce the condition that the transactions subjected to Article 53 of the FSR may not have been finalized before the Regulation came into force. The nature of Article 53 of the FSR can therefore be defined as quasi-retroactive.[119]

3.1.5 Anticipated Commission Guidelines (2026)

During the drafting of the FSR, Christophe Hansen, Rapporteur for the Committee on International Trade, emphasized that for reasons of legal certainty, the

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[116] Art. 53, Regulation (EU) 2022/2560, OJ L 330/1.

[117] Raymond Luja, 'The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union' (European State Aid Law Quarterly, Vol 20, Issue 2, 2021, pp. 187-199), https://www.proquest.com/docview/2544010816/fulltextPDF/7E54DB445104239PQ/1?accountid=14667&sourcetype=Scholarly%20Journals, p. 197.

[118] Art. 28.1(b), Regulation (EU) 2022/2560, OJ L 330/1.

[119] Quasi-retroactivity attaches new legal consequences to past transactions which continue to produce effects in the present, such as Article 53 of the Foreign Subsidies Regulation. See Ratio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law,' p. 7.

Commission must publish guidelines following the implementation of the FSR.[120] As previously mentioned, there currently exists only non-binding guidelines which provide clarity on the interpretation of Articles 4(1), 6, and 27(1) of the FSR.[121] Pursuant to Article 46 of the FSR, the Commission must however, produce and publish official guidelines which clarify the procedural framework of the Regulation. The guidelines are required to be published at the latest, by January 12th, 2026, and should be regularly updated by the Commission. The aim of these guidelines is to contribute to the transparency and predictability of the commission's enforcement of the FSR, which together is projected to increase the degree of legal certainty of the FSR.[122] Article 46(1) of the FSR states that the guidelines should clarify the following:

(a) the application of the criteria for determining the existence of a distortion according to Article 4(1);

(b) the application of the balancing test in accordance with Article 6;

(c) the application of its power to request the prior notification of any concentration according to Article 21(5) or foreign financial contributions received by an economic operator in a public procurement procedure according to Article 29(8), and

(d) the assessment of a distortion in a public procurement procedure according to article 27.[123]

Article 46 of the FSR thus dictates that the Commission clarify the criteria for determining a distortion, the application of the balancing test, and the application of the prior notification obligations.[124] Furthermore, Article 46(2) of the FSR states that "before issuing the guidelines referred to in paragraph 1, the Commission shall conduct appropriate consultations with stakeholders and Member States. The guidelines shall be built on experience gained in the course of implementing and enforcing this Regulation."[125] The Commission accordingly sent out an international 'Call for Evidence' as regards to the Foreign Subsidies Regulation in March 2025, of which there has been mixed response. However, the general consensus is that the guidelines should elucidate key definitions and indicators that the Commission takes into consideration regarding the various mechanisms operating in the FSR.[126] These perspectives on the FSR will be further analyzed in Chapter 5 of this essay.

3.2 Commission Implementing Regulation (EU) 2023/1441

Pursuant to Article 47 of the FSR,[127] the effective application of the Foreign Subsidies Regulation is supported by the Commission Implementing Regulation

[120] European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal market' (A9-0135/2022, Explanatory Statement by Rapporteur Christophe Hansen).
[121] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final.
[122] European Commission, 'Commission Launches Consultations on Guidelines under the Foreign Subsidies Regulation' (Press Release, 05 March 2025), https://ec.europa.eu/commission/presscorner/detail/en/ip_25_685.
[123] Art. 46(1)(a-d), Regulation (EU) 2022/2560, OJ L 330/1.
[124] Art. 46, Regulation (EU) 2022/2560, OJ L 330/1.
[125] Art. 46(2), Regulation (EU) 2022/2560, OJ L 330/1.
[126] European Commission, 'Commission Launches Consultations on Guidelines under the Foreign Subsidies Regulation.'
[127] Article 47 empowers the Commission to adopt implementing acts with regard to clarifying the procedural framework of the FSR; see Art. 47, Regulation (EU) 2022/2560, OJ L 330/1.

(EU) 2023/1441, which details procedural rules of the FSR. According to Article 1 of the Implementing Regulation, its scope covers the following detailed arrangements:

(1) the form, content and procedural details of notifications of concentrations;

(2) the form, content and procedural details of notifications of foreign financial contributions and declaration of no foreign financial contribution in the context of public procurement procedures;

(3) procedural details for oral statements pursuant to Article 13(7), Article 14(2), point (c) and Article 15 of Regulation (EU) 2022/2560;

(4) detailed rules on disclosure, access to file and confidential information pursuant to Article 42 and Article 43 of Regulation (EU) 2022/2560;

(5) the form, content and procedural details of transparency requirements;

(6) detailed rules on the calculation of time limits;

(7) the procedural details and time limits for proposing commitments under Article 25 and 31 of Regulation (EU) 2022/2560.[128]

The Implementing Regulation thus introduces provisions regarding the correct format for the notification forms which are to be submitted to the EC in as part of mandatory notification obligation for concentrations and public procurement procedures.[129] The Regulation also clarifies factors relating to the in-depth investigations which the Commission may carry out pursuant to the FSR, and the mandatory notification obligations.[130] For example, the Regulation sets out time limits for various phases of the Commission's review, defining also procedural rights for the parties involved, such as the right to submit commitments.[131] Further, Articles 18-20 of the Regulation detail the use and treatment of information which the Commission may collect as part of its investigations, emphasizing transparency.[132] Finally, the Regulation attaches two annexes, Form FS-CO and Form FS-PP. Form FS-CO provides detailed information on how concentrations should act pursuant to the mandatory notification obligation established in Article 20 of the FSR.[133] Form FS-PP provides detailed information on the notification of financial contributions in the context of public procedures pursuant to Articles 28 of the FSR.[134] The Commission Implementing Regulation may therefore be viewed as a procedural safeguard in relation to the FSR, enhancing clarity and transparency in certain areas.

[128] Art. 1, Regulation (EU) 2023/1441, OJ L 177/1.
[129] Art. 4-5, Regulation (EU) 2023/1441, OJ L 177/1.
[130] Art. 16, Regulation (EU) 2023/1441, OJ L 177/1.
[131] Art. 13-15, Regulation (EU) 2023/1441, OJ L 177/1.
[132] Art. 18-20, Regulation (EU) 2023/1441, OJ L 177/1.
[133] Annex I, Regulation (EU) 2023/1441, OJ L 177/1.
[134] Annex II, Regulation (EU) 2023/1441, OJ L 177/1.

4 Enforcement of the Foreign Subsidies Regulation

4.1 Overview of the Early Cases under the FSR

Given the novelty of the Regulation, the number of investigations and cases falling under the scope of the FSR remain limited. In the first year of its application, the Commission reviewed over 150 notifications, including two *ex officio* investigations and four in-depth investigations following notifications from public tenders and acquisitions.[135] In the 2024 *Competition Policy Brief*, the EC reported that the most common types of FFCs assessed in these investigations involved sources of financing of the notified transactions, such as capital injections and equity contributions, followed by state guarantees, direct grants, and tax benefits.[136] Additionally, approximately a quarter of transactions reviewed by the Commission involved an investment fund as a notifying party, offering clarity on the thresholds set by the FSR.[137] With regard to transactions involving mergers and acquisitions, the EC appears to consider subsidies which directly facilitate such transactions a priority area.[138] In the area of public procurement, the Commission's initiation of preliminary investigations has led to a substantial number of tenders being withdrawn.[139] Further, the initial enforcement of the FSR indicates that the Commission particularly focuses on sectors connected to the strategic objectives of the EU, such as the clean energy, security technology, infrastructure, and telecommunication sectors.[140] This highlights the strong connection between EU policy goals and the FSR, implying that actors operating in these strategic sectors may be more likely to come under scrutiny by the Regulation.

Several investigations under the FSR are currently on-going. For instance, on May 15th, 2025, ADNOC, a United Arab Emirates' (UAE) state-owned oil firm, sought approval from the EU under the FSR for its €14.7 billion acquisition of Covestro, a German chemical company.[141] This follows after the acquisition was approved under

[135] Cleary Gottlieb, 'The EU Foreign Subsidies Regulation in Practice: First Cases and Enforcement Trends' (Cleary Gottlieb, 11 June 2024), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-eu-foreign-subsidies-regulation-in-practice-first-cases-and-enforcement-trends, accessed 01 May 2025.

[136] L. Moscoso & I. Stoyanova, 'The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations' (European Commission, Competition FSR Brief, Issue 1, February 2024), https://competition-policy.ec.europa.eu/document/download/22197012-2036-4b1e-8b02-0eb8b2d6e666_en?filename=kdar24001enn_competition_FSR_brief_1_2024_100-days-of-FSR-notification-obligation.pdf, p. 2.

[137] J. Modrall and S. Gerber, 'The Foreign Subsidies Regulation – Lessons from the First Year of Enforcement' (Wolters Kluwer, 7 November 2024), https://competitionlawblog.kluwercompetitionlaw.com/2024/11/07/the-foreign-subsidies-regulation-lessons-from-the-first-year-of-enforcement/, accessed 19 May 2025.

[138] Cleary Gottlieb, 'The EU Foreign Subsidies Regulation in Practice.'

[139] N. Baeten & G. Motta, 'The EU Foreign Subsidies Regulation Beds Down: 10 Enforcement Trends' (Skadden Publication, 21 October 2024), https://www.skadden.com/insights/publications/2024/10/the-eu-foreign-subsidies-regulation-beds-down, accessed 19 May 2025.

[140] Baeten & Motta, 'The EU Foreign Subsidies Regulation Beds Down: 10 Enforcement Trends.'

[141] Foo Yun Chee, 'ADNOC seeks EU okay under foreign subsidies rules for Covestro deal' (Reuters, 15 May 2025), https://www.reuters.com/markets/deals/adnoc-seeks-eu-okay-under-foreign-subsidies-rules-covestro-deal-2025-05-

the Council Regulation (EC) No 139/2004 (EC Merger Regulation). The acquisition is currently under review, with a decision expected from the European Commission before the June 24, 2025 deadline.[142] Further, Article 9 of the FSR allows interested parties to submit information to the Commission, which may then trigger *ex officio* investigations.[143] In 2023 for example, LaLiga lodged a complaint with the Commission regarding Paris Saint Germain's (PSG) funding mechanism, alleging that PSG had received foreign subsidies from the state of Qatar, disproportionately benefiting PSG.[144] More precisely, the complaint claimed that "PSG obtains resources on non-market terms which distort several closely related markets, allowing PSG to use those foreign subsidies to sign top players and coaches well above its potential in a normal market situation."[145] That same year, LaLiga President Javier Tebas accused Manchester City of receiving competitive advantages stemming from foreign subsidies linked to the UAE. Though the Commission has not released an official statement regarding these complaints, it has been reported that following a preliminary review, the EC did not find sufficient evidence of foreign subsidies potentially causing distortions in the internal market.[146]

4.1.1 *Nuctech Warsaw*, Case T-284/24

As of May 2025, only one FSR-related case has gone to Court: *Nuctech Warsaw*, Case T-284/24. In this case, applicants Nuctech Warsaw and Nuctech Netherlands (hereinafter Nuctech) appealed a decision by the European Commission of 16 April 2024, which required an undertaking active in the threat detection systems sector to submit to inspections pursuant to Article 14(3) of the FSR.[147] Article 14(3) FSR states that undertakings shall submit to inspections ordered by the Commission.[148] Important to note is that Nuctech is a subsidiary of Nuctech Hong Kong and controlled by Tsinghua Tongfang Co., a Chinese state-backed company. Due to the nature of the companies, that being that Nuctech is a Chinese subsidiary, the Commission ordered the contested decision which resulted in inspections carried out at the applicants' premises in April of 2024. During these investigations, the Commission further requested for Nuctech to provide access to employee's digital mailboxes which were stored on Chinese servers. This action prompted the applicants to seek an appeal, arguing that the Commission infringed EU law "by compelling them to produce documents stored on servers located in China."[149] Additionally, the applicants claimed that the Commission unnecessary extended its

15/#:~:text=BRUSSELS%2C%20May%2015%20(Reuters),on%20the%20European%20Commission%20site, accessed 23 May 2025.

[142] Chee, 'ADNOC seeks EU okay under foreign subsidies rules for Covestro deal.'

[143] Art. 9, Regulation (EU) 2022/2560, OJ L 330/1.

[144] LaLiga, 'LALIGA files complaint against PSG with European Commission' (LaLiga, 12 August 2023), https://www.laliga.com/en-GB/news/laliga-files-complaint-against-psg-with-european-commission, accessed 23 May 2025.

[145] LaLiga, 'LALIGA files complaint against PSG with European Commission.'

[146] Matt Hughes, 'Manchester City and PSG to face no action over alleged breaches of EU competition law' (The Guardian, 15 May 2025), https://www.theguardian.com/football/2025/may/15/manchester-city-and-psg-to-face-no-action-over-la-liga-competition-breach-allegations, accessed 23 May 2025.

[147] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), EU:T:2024:564, para. 1.

[148] Art. 14(3), Regulation (EU) 2022/2560, OJ L 330/1.

[149] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 20.

ex officio investigatory powers to a non-EU territory;[150] alleging also that the FSR does not empower the Commission to request documents which are not directly accessible for the targeted undertaking, i.e. the digital mailboxes located on the Chinese servers.[151] The latter plea was found inadmissible by the General Court. With regard to the plea that the Commission unnecessarily extended its power to investigate beyond the EU, the Court noted that such actions are not unfound or novel, rather that such actions have repeatedly been endorsed in the field of competition law.[152] The Court states:

> It follows from the foregoing that the Commission must also be entitled to request information from undertakings located outside the European Union in order to assess whether their conduct infringes EU law and is likely to produce a substantial effect on the internal market. That applies particularly in respect of distortions of competition in that market caused by foreign subsidies referred to in Article 1 of Regulation 2022/2560.[153]

This line of reasoning thus indicates that the Court interprets the Commissions investigative powers broadly, allowing for requests of information to extend beyond the borders of the EU in order to assess possible distortions.[154] The Court reasoned that the Commissions extensive powers were necessary for the Commission to fulfill its duty in upholding the aim of the FSR, and that without such powers, the EC would be unable to "hold non-EU entities liable for conduct substantially affecting the internal market."[155] This also follows the qualified effects doctrine, which enables EU law to apply extraterritorially if conduct by non-EU actors has "immediate, substantial and foreseeable effects within the EU."[156] Furthermore, the Court's interpretation indicates that the FSR may be interpreted in light of other EU law, such as competition law as evidenced in this case. Consequently, the General Court dismissed the applicants appeal, resulting in a landmark decision endorsing the EC's extensive powers endowed by the FSR.

4.1.2 Public Procurement: *CRRC and Bulgaria's Ministry of Transport and Communications*

In February of 2024, the Commission published a press release stating that it had opened its first in-depth investigation under the FSR in January of 2024. The investigation follows a notification submitted under the public procurement procedure found in Article 28 of the FSR, where CRRC Qingdao Sifang Locomotive CO., Ltd., (CRRC), a subsidiary of CRRC Corporation (Chinese state-owned train manufacturer), notified the Commission as regards to a tender launched by

[150] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 22.
[151] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 23.
[152] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 35. For example, the Court noted that the provisions found in Article 14 of the FSR are equal to the provisions in Article 20 of Council Regulation (EC) No. 1/2003 of 16 December 2022 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (OJ 2002 L 1, p.1).
[153] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 40.
[154] Batchelor et al., 'EU Court Upholds Commission's Powers to Demand Data Held By Foreign Companies' (Skadden Publication/White Collar Defense and Investigations, 26 August 2024), https://www.skadden.com/insights/publications/2024/08/eu-court-upholds-commissions-power, accessed 23 May 2025.
[155] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 41.
[156] Batchelor et al., 'EU Court Upholds Commission's Powers to Demand Data Held By Foreign Companies.'

Bulgaria's Ministry of Transport and Communication.[157] The tender launched regarded the supply of 20 electric "push-pull" trains and related services, valued approximately at €610 million. The notification by CRRC was thus mandated by the FSR, as its Article 28 requires that any contracts which are estimated to exceed €250 million shall be notified to the Commission.[158] In the press release, the Commission noted that there were sufficient indications that the company had been "granted a foreign subsidy that distorts the internal market," thus prompting an in-depth investigation.[159] However, CRRC withdrew from the public tender, halting the in-depth investigation from progressing as of March 2024.[160]

4.1.3 Public Procurement: *Romanian Solar Photovoltaic*

On April 3rd, 2024, the Commission launched its second and third in-depth investigations under the FSR, targeting two consortia participating in a Romanian public procurement procedure for a 454.97 megawatt photovoltaic park, partially financed by the EU.[161] The first consortium consisted of the ENEVO Group, a Romanian engineering firm, and LONGi Solar Technologie GmbH, a German subsidiary of a Chinese solar giant Longi Green Energy Technology Co., Ltd.[162] The second consortium consisted of Shanghai Electric UK Co. Ltd. and Shanghai Electric Hong Kong International Engineering Co. Ltd., both owned by Shanghai Electric Group Co. Ltd. (a Chinese state-owned enterprise.).[163] The estimated value of the contract was €375 million, again exceeding the €250 million threshold set in the FSR. Following preliminary reviews, the Commission determined that there was sufficient indicators of distortion-causing behavior, thus warranting the EC to begin the in-depth investigations.[164] However, both parties withdrew from the procurement procedure.[165]

4.1.4 Acquisitions: *PPF Telecom and e&*

On September 24th, 2024, the European Commission finalized the in-depth investigation of *PPF Telecom and e&*, conditionally approving the acquisition. The

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[157] European Commission, 'Commission opens first in-depth investigation under the Foreign Subsidies Regulation' (Press Release, 16 February 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887.
[158] Art. 28, Regulation (EU) 2022/2560, OJ L 330/1.
[159] European Commission, 'Commission opens first in-depth investigation under the Foreign Subsidies Regulation.'
[160] European Commission, 'Statement by Commissioner Breton on withdrawal by CRRC Qindao Sifang Locomotive Co., Ltd. from public procurement following the Commission's opening of an investigation under the Foreign Subsidies Regulation' (Statement, 26 March 2024), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_1729.
[161] European Commission, 'Statement by Commissioner Breton on withdrawal of LONGi Solar Technologie GmbH and Shanghai Electric from public procurement following the Commission's opening of an investigation under the Foreign Subsidies Regulation' (Statement, 13 May 2024), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_2570.
[162] European Commission, 'Statement by Commissioner Breton on withdrawal of LONGi Solar Technologie GmbH and Shanghai Electric.'
[163] European Commission, 'Statement by Commissioner Breton on withdrawal of LONGi Solar Technologie GmbH and Shanghai Electric.'
[164] European Commission, 'Commission closes two in-depth investigations in the solar photovoltaic sector following the withdrawal of the companies from public procurement' (Public Buyers Community: News Article, 7 June 2024), https://public-buyers-community.ec.europa.eu/news/commission-closes-two-depth-investigations-solar-photovoltaic-sector-following-withdrawal.
[165] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 118.

review involved the acquisition of a Czech telecommunications company (PPF Telecom) and the question of whether the buyer, e& (a Middle Eastern telecommunications company indirectly controlled by the UAE), benefited from foreign subsidies in the buyout process.[166] During the investigation, the Commission found that e& had received foreign subsidies from the UAE, in the form of unlimited guarantees and loans from state-controlled banks, a category falling within the scope of the examples specified in the FSR.[167] In its review, the Commission found that that the foreign subsidies did not alter the outcome of the transaction, finding rather that the transaction may potentially lead to distortions post-acquisition.[168] Article 5 of the FSR lists State guarantees as a category most likely to distort the internal market,[169] meaning that the UAE-backed subsidies are of heightened risk in disrupting the fair market dynamics of the Union. Consequently, e& proposed commitments, agreeing to remove the unlimited guarantee and to notify the Commission of future acquisitions.[170] The Commission accepted these commitments, finding that they would both remove the existence of the unlimited guarantee and provide the Commission with the necessary tools to monitor the risks associated with the acquisition.[171] These commitments remain valid for ten years, and reflect the EC's dual focus on the role of foreign subsidies not only in the acquisition process, but also in their subsequent effect on market competition afterward.[172] This investigation also illustrates how and under what conditions the EC may accept remedial commitments in response to foreign subsidies; underscoring the FSR's role in scrutinizing foreign financial support in strategic sectors, such as the telecommunications field, in order to ensure fair competition within the EU.

4.1.5 *Czechia and Korea Hydro & Nuclear Power*, Case FSP.101847

In July of 2024, Czechia's state-owned energy company, CEZ Group – Elektrárna Dukovany II, launched a public tender for nuclear reactors.[173] Subsequently, CEZ selected South Korea's Hydro and Nuclear Power (KHNP) as the preferred bidder to construct the nuclear reactors at the Dukovany and Temelin power plants. The contract, valued at approximately €16 billion was awarded to KHNP after the Korean

[166] European Commission, 'Commission opens in-depth foreign subsidies investigation into e&'s acquisition of parts of PPF Telecom' (Press Release, 10 June 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3166.
[167] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation' (Press Release, 24 September 2024), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_24_4842/IP_24_4842_EN.pdf.
[168] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation.'
[169] Art. 5, Regulation (EU) 2022/2560, OJ L 330/1.
[170] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation.'
[171] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation.'
[172] Modrall and Gerber, 'The Foreign Subsidies Regulation – Lessons from the First Year of Enforcement.'
[173] Stéphane Séjourné, 'Request for Immediate Action to Suspend Contract Signature for the New Nuclear Reactors of Dukovany and Temelin, Czechia' (European Commission, 02 May 2025), Letter Addressed to Minister of Industry and Trade Lukás Vivcek, recital 1. Letter accessed via: "A. Zachová & S. Porciello, 'Commission letter raised questions over Czech nuclear contract timing' (Euractiv, 12 May 2025), https://www.euractiv.com/section/eet/news/commission-misled-press-over-french-pressure-on-czech-nuclear-deal/, accessed 23 May 2025.

company outbid France's Électricité de France (EDF).[174] EDF consequently filed a complaint to the Czech competition agency, alleging that KHNP benefited from unfair state support in the bidding process, halting the transaction from being finalized. The European Commission requested in a letter on May 2nd, 2025, that the transaction be put on pause due to concerns over possible distortions in the internal market due to the potential foreign subsidies. In the letter, the EC emphasized that the EU has a duty to ensure energy security across the internal market, including in Czechia.[175] The EC pointed out that the economic sectors of strategic interest to the EU fall under Article 4(1)(a) of the FSR, thus prompting the Commission to pursue a preliminary review of the public procurement process.[176] The Commission indicated that there were substantial indications that KHNP had in fact received unproportionate foreign State support, warranting an in-depth investigation pursuant to Article 10(3) of the FSR. The Commission therefore requested the full cooperation of Czechia and the company CEZ, as part of the duty of sincere cooperation, enshrined in Article 4(3) of the TEU and Recital (58) of the FSR.[177]

Furthermore, Stéphane Séjourné, on behalf of the Commission, emphasized that the request of cooperation is part of "our intention to ensure legal certainty and to make sure that our internal market rules are respected."[178] The Czech company, however, disagreed with the requests listed in the letter, defending the awarded KHNP contract and calling on EDF to publish their tender offer as an effort to showcase that KHNP's bid was the overall better offer, showing also the transparency and competitiveness of the bidding process.[179] Further, the Czech Ministry of Industry and Trade rejected the contents of the letter, saying that it "is not legally binding," and that the tender procedure was not subject to the provisions of the FSR.[180] Czechia claimed that since the tender procedure had been initiated before the effective date of the FSR, that the tender procedure should not fall within the scope of the FSR. However, Article 53(2) of the FSR applies to on-going public procurement tenders; in this case, the contract had not been awarded before the effective date of the FSR, thus falling under the Regulations' provisions.[181] This case is currently on-going, though it does further illustrate the commitment of the European Commission in scrutinizing potentially distortive-causing foreign subsidies in strategic sectors, such as in the field of nuclear energy.

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[174] A. Zachová & S. Porciello, 'Commission letter raised questions over Czech nuclear contract timing' (Euractiv, 12 May 2025), https://www.euractiv.com/section/eet/news/commission-misled-press-over-french-pressure-on-czech-nuclear-deal/, accessed 23 May 2025.
[175] Séjourné, 'Request for Immediate Action to Suspend Contract Signature for the New Nuclear Reactors of Dukovany and Temelin, Czechia,' recital 3.
[176] Séjourné, 'Request for Immediate Action to Suspend Contract Signature for the New Nuclear Reactors of Dukovany and Temelin, Czechia,' recital 6.
[177] Séjourné, 'Request for Immediate Action to Suspend Contract Signature for the New Nuclear Reactors of Dukovany and Temelin, Czechia,' recital 8-9.
[178] Séjourné, 'Request for Immediate Action to Suspend Contract Signature for the New Nuclear Reactors of Dukovany and Temelin, Czechia,' recital 12.
[179] Zachová & Porciello, 'Commission letter raised questions over Czech nuclear contract timing.'
[180] World Nuclear News, 'Czech ministry says EC letter on new nuclear 'not legally binding',' (WNN, 14 May 2025), https://www.world-nuclear-news.org/articles/czech-ministry-says-ec-letter-on-new-nuclear-not-legally-binding, accessed 23 May 2025.
[181] Art. 53, Regulation (EU) 2022/2560, OJ L 330/1.

4.2 Summary

As has been outlined, the Foreign Subsidies Regulation is currently evolving in relation to how the European Commission interprets its provisions and how the in-depth investigations will progress. In 2024, the Commission opened its first in-depth investigations stemming from the notification obligations of public procurement procedures. Though the concerned undertakings withdrew their bids, these early cases offer important insight into the functioning of the FSR. First, the withdrawal of tenders in the two public procurement cases indicates that the FSR has a preventive deterrence effect as intended under the *ex-ante* mechanisms. With the cases also being triggered under the public procurement notification regime, the €250 million threshold for notification appears to function as intended, filtering projects where foreign subsidies might provide undue advantages distorting the internal market.[182] However, given the lack of precedent and guidance as regards to in-depth investigations, concerned undertakings may view withdrawal as the safer route to avoid potential legal risk, suggesting also a degree of uncertainty of the FSR. Furthermore, the investigations indicate that the Commission has a particular focus on strategic sectors, such as transportation, clean energy, and telecommunications, as demonstrated in the case of *PPF Telecom and e&*.[183] This case also illustrates that the Commission is open to accepting commitments pursuant to Article 7 of the FSR.[184] This signals a negotiated enforcement approach within the framework of the FSR, offering clearer procedural expectations for market participants within the EU.

Moreover, the *Czechia and Korea Hydro and Nuclear Power* case provides clarity to the interpretation of Article 53 of the FSR, articulating the temporal scope of the FSR. This case demonstrates that foreign subsidies granted before the effective date of the Regulation may still come under scrutiny of the Regulation, granted that the subsidies continue to produce effects on the internal market post-FSR implementation. In the context of the Czechia case, the public procurement contract was not finalized before the effective date, thus falling under the scope of the FSR. Finally, *Nuctech Warsaw* illustrates the CJEU's interpretation of the Commissions powers under the FSR. The Court upheld the necessity of the EC's extraterritorial reach for effectively addressing foreign subsidies that may distort the internal market, thus aligning with the core objectives of the FSR.[185] This judgment confirms that the Commission's powers should be interpreted broadly, reinforcing the legal foundation for cross-border information requests and providing greater legal certainty for undertakings regarding their obligations under the FSR.

[182] Art. 28, Regulation (EU) 2022/2560, OJ L 330/1.

[183] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation.'

[184] Art. 7, Regulation (EU) 2022/2560, OJ L 330/1.

[185] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 40.

5 Analysis: Legal Certainty in the Foreign Subsidies Regulation

5.1 Perspectives on Legal Certainty in the FSR

Throughout the entire legislative process leading to the adoption of the Foreign Subsidies Regulation, the institutions of the European Union have consistently emphasized legal certainty. This emphasis has also translated into an explicit articulation of the principle of legal certainty in the Regulation.[186] Nevertheless, scholars and stakeholders have steadily maintained criticism towards the FSR, arguing that the Regulation is at times unclear and consequently legally uncertain. In particular, the following four areas of the Regulation have been subject to criticism: the key definitions and the balancing test, the procedural framework, the Commission's enforcement powers, and the transitional provisions. Moreover, scholars such as Jan Blockx, Pierfranscesco Mattiolo, and Malte Frank have challenged the narrative that the FSR fills a regulatory gap, arguing that the FSR may in fact conflict with existing legal frameworks.[187] A similar concern is that the extensive list of legislation under Article 44 of the FSR may create challenges for undertakings in understanding their respective obligations with regard to those legal acts.[188] Although the latter two concerns are not uncorroborated, sufficiently examining these perspectives on the FSR fall outside of the scope of this analysis. However, additional research in this field is recommended to further explore these considerations related to the framework of the FSR. The following sections of Chapter 5.1 will therefore consider the four main concern areas of the FSR, offering insights into the perspectives of scholars, policy stakeholders, and the EU.

5.1.1 Concern 1: Definitions and the Balancing Test

One of the principal issues identified under the current legal framework of the FSR concerns the vagueness of several key definitions, in particular the terms 'foreign subsidy,' 'financial contribution,' and 'distortion in the internal market.' For instance, the definition of financial contributions as set out in Article 3 of the Regulation has prompted criticism from stakeholders, who argue that the concept is "extremely broad."[189] Specifically, a suggestion has been made that the Commission clarify its distinction from the concept of foreign subsidy "to ensure legal certainty for companies and avoid unjustified notification obligations."[190] Legal commentary has similarly observed that the current legal text provides insufficient clarity on the

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[186] Recitals 57, 61, 63, and 70, Regulation (EU) 2022/2560, OJ L 330/1.

[187] Malte Frank, 'The EU's new Foreign Subsidy Regulation on Collision Course with the WTO' (Common Market Law Review 600, 2023, pp. 925-958), https://dx.doi.org/10.2139/ssrn.4943498, p. 16.

[188] S. Centeno & I. Vigón, 'Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market' (Pérez-Llorca, January 2023), https://www.perezllorca.com/wp-content/uploads/2023/01/Legal-Briefing-Regulation-on-foreign-subsidies.pdf, p. 2.

[189] Baeten & Motta, 'The EU Foreign Subsidies Regulation Beds Down: 10 Enforcement Trends.'

[190] European Commission, 'Have your say – Public Consultations and Feedback,' Reply from Orange SA (F3532846, 02 April 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines/F3532846_en, p. 2.

scope of what constitutes a financial contribution. For instance, that "there is uncertainty as to whether a measure constitutes a 'financial contribution' that should be included in the notification" under the non-exhaustive list of Article 3(2), or "whether a financial contribution falls into one of the most likely distortive categories"[191] pursuant to Article 5 of the FSR. Moreover, scholars note that the ambiguity of the definition of FFCs is partly attributable to the Regulation's decision not to explicitly adopt the definition used in EU State aid law.[192] However, in its Impact Assessment, the Commission clarified that the indicators and assessment criteria for identifying foreign subsidies, including financial contributions, are modelled on the existing EU State aid framework.[193] This is further embedded in Recital 9 of the FSR.[194] As a result, undertakings may rely on analogous interpretations developed in the context of State aid law when assessing their obligations under the FSR. This alignment may offer a degree of interpretative guidance, although the Faculty of Law at Sriwijaya University has pointed out that absent a clear unified structure, the resemblance between the two frameworks may instead exacerbate uncertainty for non-EU undertakings.[195] Scholarship thus indicates that the similarity of the legal frameworks may promote uncertainty, complicating compliance efforts for third-country undertakings.

In addition, the concept of 'distortions in the internal market' has been subject to scrutiny, with claims that its vague definition leaves "businesses uncertain about what constitutes a distortion of competition and what specific indicators the Commission will rely on in its investigations."[196] As highlighted in Chapter 3 of this essay, Article 4(1) provides a non-exhaustive list of indicators which include factors such as the amount and nature of the foreign subsidy, the market situation, and the purpose and conditions of the foreign subsidy.[197] The Commission has the discretion to individually assess these indicators based on the facts of each case, which is argued to create an uncertain environment for market participants.[198] However, the EC published preliminary guidelines in 2024 which developed the definition of 'distortions in the internal market,' providing examples of what may constitute a distortion in the internal market. Though the guidelines are not legally binding, the Commission is committed to publishing official guidelines by 2026 which will further define the concept of distortion in the internal market.[199] Feedback from interested parties ahead of these guidelines recommends that the Commission provide an exhaustive list of indicators in order to promote legal certainty.[200]

[191] Freshfields Bruckhaus Deringer, 'Supplementing state aid: tax and the EU Foreign Subsidies Regulation,' p. 4.
[192] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 347.
[193] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 66.
[194] Recital 9, Regulation (EU) 2022/2560, OJ L 330/1.
[195] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 126.
[196] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 128.
[197] Art. 4(1), Regulation (EU) 2022/2560, OJ L 330/1.
[198] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 128.
[199] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 128.
[200] European Commission, 'Have your say – Public Consultations and Feedback,' Reply from European Federation of Pharmaceutical Industries and Associations (F3532834, 02 April 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines/F3532834_en, p. 2.

Furthermore, during the European Parliament's first reading of the draft proposal, Rapporteur Christophe Hansen emphasized that the European Commission should provide clarification on the balancing test in the 2026 Guidelines.[201] This view is echoed in both academic and business settings, with many sharing the perspective that Article 6 of the FSR lacks clear criteria as to what may be considered as 'positive effects.'[202] Article 6(1) of the FSR states that the balancing test consists of the EC weighing the negative effects potentially produced by a foreign subsidy against the prospective positive effects of that subsidy.[203] Further, the "relevant policy objectives" of the Union may be considered in the EC's assessment;[204] specifically, policy aims relating to research and development, and environmental protection may be taken into consideration while weighing the possible effects.[205] The legal framework of Article 6 is thus objectively broad, in that neither the Regulation itself, nor the preliminary clarifications, substantially define how the balancing test will be applied in practice. The Commission has however indicated that the EU State aid toolbox will influence the balancing test which may increase clarity to the provision, although not to the extent of detail yielded under the General Block Exemption Regulation, Regulation (EU) No 651/2014.[206] Moreover, with Article 46 of the FSR naming the balancing test as a targeted subject for the 2026 Guidelines,[207] the interpretation of Article 6 is anticipated to become increasingly clear moving forward. Ahead of these guidelines, stakeholders are recommending that the Commission provide distinct examples of potential positive effects in order to better refine the exposition of the balancing test.[208]

5.1.2 Concern 2: The Procedural Framework

As Chapter 3 of this essay explained, the procedural framework of the FSR consists of *ex ante* and *ex post* mechanisms which allow the Commission to extensively address potential distortions on the internal market arising from foreign subsidies. With regard to the *ex ante* notification obligation, the Commission has consistently underscored that the mechanism is intended to increase legal certainty by streamlining supervisory processes.[209] The EC further asserted that the *ex ante* approach allows for decisions to be rendered prior to the completion of transactions, thereby affording greater legal certainty to the concerned undertakings.[210] Overall, scholars agree with this position, citing for instance that in the case of public procurement, the mandatory notification obligation promotes greater transparency

[201] European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal market' (A9-0135/2022, Explanatory Statement by Rapporteur Christophe Hansen).
[202] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 354.
[203] Art. 6(1), Regulation (EU) 2022/2560, OJ L 330/1.
[204] Art. 6, Regulation (EU) 2022/2560, OJ L 330/1.
[205] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 6.
[206] Luja, 'The Foreign Subsidies Regulation,' p. 191.
[207] Art. 46, Regulation (EU) 2022/2560, OJ L 330/1.
[208] European Commission, 'Have your say – Public Consultations and Feedback,' Reply from CMS (F3532849, 02 April 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines/F3532849_en, p. 2.
[209] European Commission, White Paper COM(2020) 253 final, p. 29.
[210] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 76; European Commission, Proposal COM(2021) 223 final, p. 7.

and provides a more predictable market environment.[211] However, there is concern among scholars with regard to the uncertain timeframe of reviews conducted under the FSR, arguing that prolonged investigations may lead to uncertainty "regarding the outcome of contract awards."[212] Article 38 of the FSR limits the Commission to a ten-year period for initiating preliminary reviews and in-depth investigations, beginning from the date of which the foreign subsidy is granted, with the period restarting upon any actions taken in accordance with Articles 10, 13, 14, or 15.[213] According to Recital 61 of the FSR, this timeframe is intended to ensure legal certainty.[214] However, if the Commission proceeds with any formal actions pursuant to Article 38, the ten-year period resets, effectively extending the window during which the EC can examine foreign subsidies under the Regulation, hence the criticism with regard to possible prolonged investigations. Legal experts also question the ability for the EC to re-open preliminary reviews at any time,[215] and heed concern with regard to the procedure for which a preliminary review becomes an in-depth investigation:

> Moreover, no established criteria exist to determine what constitutes "sufficient" grounds for escalating an investigation from a preliminary review to an in-depth investigation. Without a clear checklist to guide companies on the required information, it becomes easier for the Commission to conclude that the submitted data is insufficient to justify the subsidies. The lack of specific guidance disadvantages companies, as the Commission can base its decision solely on the quantity or scope of the information provided rather than its relevance or quality.[216]

This criticism finds legal support in Article 10 of the FSR, which states that the Commission shall adopt a decision to initiate an in-depth investigation if the EC finds sufficient indication during the preliminary review that an undertaking has been granted a foreign subsidy that potentially distorts the internal market.[217] This case-by-case evaluation practice suggests a lack of procedural safeguards, thus rendering critique.[218] Moreover, the Commission can initiate an examination of information from any source concerning potentially distortive foreign subsidies, the so-called *ex officio* review.[219] The FSR does not however, provide any clear guidance regarding these executive investigations,[220] which has been heavily criticized in legal literature:

> The Commission hence has considerable leeway in setting priorities in foreign subsidies review, which in turn means that companies face considerable uncertainties and lack of predictability, as the Commission can in principle subject all major economic transactions to an investigations under this Regulation.[221]

[211] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 121.
[212] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 121.
[213] Art. 38, Regulation (EU) 2022/2560, OJ L 330/1.
[214] Recital 61, Regulation (EU) 2022/2560, OJ L 330/1.
[215] Luja, 'The Foreign Subsidies Regulation,' p. 198.
[216] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 129.
[217] Art. 10(3), Regulation (EU) 2022/2560, OJ L 330/1.
[218] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 352.
[219] Art. 9(1), Regulation (EU) 2022/2560, OJ L 330/1.
[220] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 123.
[221] WeiB, 'The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?' p. 117.

The above citation indicates that the lack of guidance with regard to *ex officio* reviews potentially creates an unpredictable internal market setting, thus generating an environment of legal uncertainty for undertakings. In their feedback ahead of the 2026 Guidelines, Clifford Chance LLP suggests, for instance, that specific criteria should therefore be established to guide the Commission's self-exercise of powers, particularly with regard to the sectors that are likely to be subject to *ex officio* review.[222]

5.1.3 Concern 3: Powers of the European Commission

Similar concerns of uncertainty are reflected in the overall dialogue with regard to the powers endowed to the European Commission under the FSR. The concern is that "the Commission has previously shown a tendency to exceed its authorities," with its discretion "minimally restricted with the proportionality principle and the general principles of EU law."[223] The notion that the Commission enjoys "large and unclear discretion to assess notifications and to launch investigations in its discretion at any time"[224] under the procedural framework of the FSR is reiterated by many scholars. For example, Tongle Si comments that the "broad discretion granted to the European Commission (…) and the lack of clear criteria" pose challenges, especially for non-EU companies.[225] Likewise, the Confederation of Finnish Enterprises argues that the Commission's powers "should be used restrictively and with clear safeguards, to avoid regulatory overreach and legal uncertainty," and suggest that the 2026 Guidelines clarify the scope of the regulatory powers afforded to the EC.[226]

Additionally, the lack of a structured complaint mechanism under the FSR has received criticism within the realm of academia. Legal literature notes that there are "no deadlines for the Commission's opinion on the complaint, nor does the complaining party have a right to a status review and final decision."[227] To this point, the FSR diverges from comparable EU instruments which offer greater procedural predictability, such as the framework of EU State aid.[228] The lesser degree of transparency with regard to complaints has been illustrated in this essay with regard to the case of the *LaLiga complaints*. In this case, the Commission has yet to publish any official statements regarding why the investigations into PSG and Manchester City did not progress from a preliminary review to an in-depth investigation, thus lowering the degree of transparency into the Commission's powers under the FSR. The case of LaLiga thereby reaffirms the concerns regarding the interpretation and practical application of Article 10(3) of the FSR.

[222] European Commission, 'Have your say – Public Consultations and Feedback,' Reply from Clifford Chance LLP (F3532848, 02 April 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines/F3532848_en, p. 3.
[223] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 355.
[224] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 359.
[225] Si, 'Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement,' p. 132.
[226] European Commission, 'Have your say – Public Consultations and Feedback,' Reply from Confederation of Finnish Enterprises EK (F3532828, 02 April 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines/F3532828_en, p. 3.
[227] Simunovic, 'The EU Foreign Subsidies Regulation (FSR),' p. 365.
[228] Luja, 'The Foreign Subsidies Regulation,' p. 194.

Despite concerns, the validity of the Commission's extensive authority is legally confirmed by the CJEU. In *Nuctech Warsaw*, the Court affirmed that the Commission's investigatory powers extend extraterritorially. The Court cited that the extraterritorial reach is a necessity for the Commission to be able to hold non-EU entities accountable for conduct that affects the internal market.[229] This decision suggests that the Commission's powers should be interpreted broadly under the Foreign Subsidies Regulation. Moreover, the EU has justified the extensive powers awarded to the Commission in the preparatory documents drafting the FSR, stating that the centralized system at EU-level would lead to increased legal certainty.[230] The Commission has also noted that the sole-enforcement system for the FSR developed as a result of requests for consistent application of the FSR by the Member States of the EU. The EC therefore argued that the enforcement framework of the FSR promotes predictability since the single enforcing authority would ensure a consistent application of the Regulation.[231]

5.1.4 Concern 4: Retroactive Transitional Provisions

As Chapter 3 of this essay detailed, Article 53 of the FSR imposes transitional provisions of quasi-retroactive nature, meaning that the FSR applies to foreign subsidies granted up to five years prior to its effective date, assuming the foreign subsidies in question are continuously producing effects on the internal market, and that the transaction in question was not concluded prior to the effective date of the Regulation.[232] This article has undergone significant changes with it originally being proposed to apply ten years prior to the effective date,[233] and later suggested to apply seven years prior,[234] before its current three-to-five year framework. The current provisions presented in Article 53 of the FSR concur with the broader timeline of the general notification requirements seen in Article 20(3)(b) and Article 28(1)(b) of the FSR; yet, it has still received criticism, from both scholars[235] and stakeholders[236] with regard to legal certainty. The claim is that Article 53 does not comply with the sub-principle of non-retroactivity.

Revisiting the prohibition on retroactivity, the principle clearly states that the prohibition applies only to concluded activities, not to the activities which maintain continuous effects, as worded in Article 53 of the FSR.[237] This is further demonstrated in the *Czechia and Korea Hydro and Nuclear Power* case,[238] where the EC pursued an in-depth investigation into foreign subsidies granted prior to the implementation of the FSR. However, the prohibition on retroactivity is absolute with regard to penal measures, meaning that regardless of whether the transaction in

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[229] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 41.
[230] European Commission, White Paper COM(2020) 253 final, p. 26.
[231] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 81.
[232] Art. 53, Regulation (EU) 2022/2560, OJ L 330/1.
[233] European Commission, Proposal COM(2021) 223 final, Article 47.
[234] European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal market' (A9-0135/2022, Committee on International Trade, Amendment 94, Article 47).
[235] WeiB, 'The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?' p. 117.
[236] Adrian Emch, et al., 'Friction, Scrutiny and Risk.'
[237] Case C-15/19, *Azienda Municipale Ambiente* (2020), para. 58.
[238] World Nuclear News, 'Czech ministry says EC letter on new nuclear 'not legally binding'.'

question was concluded, if the legislation induces penalties, then that legislation should be considered to fall foul to the principle of legal certainty.[239] In the case of the FSR, undertakings which fall subject to the Regulation may face redressive measures in the form of reducing market presence, refraining from certain investments, and offering access to infrastructure.[240] Penalties and fines are only given to undertakings in cases of non-cooperation, as per Articles 16 and 17 of the FSR.[241] These articles indicate that the absolute prohibition on retroactivity is inapplicable to Article 53 of the FSR. Though there are concerns over the fact that these penalties can be directly imposed on undertakings,[242] the claims of legal uncertainty as per the quasi-retroactive application of the FSR are not supported by CJEU jurisprudence.

5.2 Does the FSR Meet the Requirements of Legal Certainty?

The following section aims to answer the research question of '*To what extent is the Foreign Subsidies Regulation consistent with the EU principle of legal certainty?*' by synthesizing the results of the legal dogmatic study conducted in this essay. As Chapter 2 outlined, the principle of legal certainty requires that legislation is clear, precise, and foreseeable, so that individuals and businesses are "able to ascertain unequivocally what their rights and obligations are."[243] With regard to the FSR, this section begins with a discussion on the sub-principles of legitimate expectations and non-retroactivity, followed by an analysis on the conditions of clarity, precision, and foreseeability. The final section discusses also the paradoxes of the principle of legal certainty.

To begin with, the protection of legitimate expectations and the principle of non-retroactivity can be jointly examined in the context of the FSR's temporal scope. As this essay has explored, Article 53 of the FSR sets out transitional provisions which extend the application of the Regulation to foreign subsidies granted up to five years prior to the effective date, albeit assuming that such subsidies retain continuous effects.[244] The application of Article 53 was illustrated in the *Czechia and Korea Hydro and Nuclear Power* case, in which the Commission initiated a review of foreign subsidies granted prior to the Regulation's implementation, on the grounds that the contract in question had not yet been awarded.[245] The progression of the preliminary review to the in-depth investigation indicates compatibility between the quasi-retroactive application of the FSR and the principle of non-retroactivity, insofar as the Commission targets subsidies which continue to generate effects beyond the Regulation's entry into force. Furthermore, the principle of legitimate expectations requires that legislation respect the legal expectations that were reasonably held by individuals prior to a new legal act. Chapter 2 highlighted that this principle may only be invoked in cases where an institution of the European

[239] Case C-331/88, *The Queen v Ministry of Agriculture, Fisheries, and Food, ex parte FEDESA and Others* (1990), para 44.
[240] Art. 7, Regulation (EU) 2022/2560, OJ L 330/1.
[241] Art. 16 and 17, Regulation (EU) 2022/2560, OJ L 330/1.
[242] Luja, 'The Foreign Subsidies Regulation,' p. 194.
[243] Case C-345/06, *Heinrich* (2009), para. 44.
[244] Art. 53, Regulation (EU) 2022/2560, OJ L 330/1.
[245] World Nuclear News, 'Czech ministry says EC letter on new nuclear 'not legally binding'.'

Union gave an individual a legitimate reason to expect a certain outcome. Further, that expectation cannot have been born within an area of law that is subject to frequent changes or where such changes are foreseeable.[246] Legislation on the internal market represents an example of a legal area subject to frequent regulatory amendments, indicating that the principle of legitimate expectations cannot be invoked with regard to the Foreign Subsidies Regulation. In light of these sub-principles, the temporal scope of the FSR supports the objective that legal certainty is maintained in the Regulation.

In regard to the clarity, precision, and foreseeability of the Foreign Subsidies Regulation, both the de lege lata analysis of the FSR and the perspectives of interested parties highlighted persistent ambiguities concerning the key definitions of the Regulation. For example, 'foreign subsidy,' 'financial contribution,' and 'distortions in the internal market' are broad terms defined by non-exhaustive lists of indicators. Scholarly commentary has consistently argued that these loosely-defined terms contribute to an environment of legal uncertainty for market participants, with particular concern directed at the broad discretion afforded to the Commission as the sole enforcing authority under the FSR.[247] It is argued that this extensive authority in combination with the broad definitions of the Regulation creates an unpredictable environment for undertakings. However, early investigations under the FSR demonstrate that the indicators listed in the relevant provisions align with the actions pursued by the EC. For example, the Commission reported in the 2024 *Competition Policy Brief* that the most common types of financial contributions assessed included capital injections, equity contributions, state guarantees, direct grants, and tax benefits.[248] These FFCs are reflected in the list of indicators under Article 3 of the FSR,[249] highlighting that the current legal framework of the FSR agrees with the actions pursued by the European Commission.

Moreover, Article 6 of the FSR has fallen subject to discourse on its objectively broad definition which allows the EC to weigh the negative effects of foreign subsidies against positive effects which align with the broader policy objectives of the EU.[250] This article is further defined in the 2024 preliminary guidelines; although non-binding, these early clarifications provide examples of the practical application of the balancing test. For instance, the guidelines clarify that the relevant policy objectives stated in Article 6(1) of the FSR may include objectives related to research and development, and to the environmental protection of the Union.[251] Though no cases under the FSR as of May 2025 directly illustrate the balancing test in practice, *PPF Telecom and e&* indirectly demonstrates how policy objectives of the Union are considered by the EC. In *PPF Telecom and e&,* the concerned undertakings proposed commitments to the EC as a condition for finalizing the acquisition, which

[246] Joined Cases C-37/02 and C-38/02, *Di Leonardo and Dilexport* (2004), para. 70.
[247] WeiB, 'The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?' p. 6.
[248] Moscoso Stoyanova, 'The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations,' p. 2.
[249] Art. 3(2), Regulation (EU) 2022/2560, OJ L 330/1.
[250] Art. 6, Regulation (EU) 2022/2560, OJ L 330/1.
[251] European Commission, Commission Staff Working Document, Initial clarifications, SWD (2024) 201 final, p. 6.

the Commission ultimately accepted.[252] These undertakings were both active operators in the telecommunications sector,[253] a strategic sector of the Union. It may therefore be inferred that the Commission's acceptance of the commitments suggest that the EC is committed to safeguarding strategic sectors, such as in telecommunications. In this context, it is presumed that the EC engaged in an implicit balancing test, weighing the potential benefits of the telecommunications-related acquisition against the possible adverse effects on fair competition, as evidenced by the adoption of the commitments. While not a direct illustration of the balancing test, *PPF Telecom and e&* sheds light on the practical enforcement of Article 6 of the FSR, underlining the agreement between the Commission's actions and the current legal framework of the FSR. Further, *Nuctech Warsaw* established that the CJEU interprets the Commissions investigative powers broadly under the FSR, with the Court reasoning that the considerable authority is a necessity for the EC to properly operate in accordance with the aims of the FSR.[254] It is therefore reasonable to assume that the provisions of the Foreign Subsidies Regulation will continue to be interpreted liberally, i.e. extensively, indicating also the enforcement approach which the Regulation leans toward.

Furthermore, it is important to note that both the balancing test and 'distortions in the internal market' are expected to be clarified in the forthcoming publishment of the 2026 Commission Guidelines, pursuant to Article 46 of the FSR.[255] The promise of these guidelines in collaboration with the indications of the enforcement path of the FSR thus suggest a more predictable environment for market participants moving forward. The foreseeability of the Regulation is further reflected in the *ex ante* procedural framework, where the mandatory notification obligations for concentrations and public procurement procedures enable decisions by the EC to be issued in advance of finalizing transactions.[256] This mechanism enables undertakings to assess potential regulatory concerns before closing contracts, thereby reducing legal risk and increasing predictability. The Commission Implementing Regulation also provides procedural details related to the notification obligations in order to enhance transparency and facilitate the notification procedure for undertakings.[257]

5.2.1 Summary of Findings

In summation, these results indicate that despite a degree of obscurity with regard to key definitions of the FSR, the *ex ante* notification systems, the current enforcement of the Regulation, and the promise to publish clarifications on key provisions demonstrate a commitment by the Union to enhance the legal certainty of the Foreign Subsidies Regulation. The sub-principles of legitimate expectations and of non-retroactivity are also upheld with regard to the temporal scope of the Regulation. That said, the self-contradiction of the principle of legal certainty should also be taken into consideration in this analysis. Legal systems, by their very nature, involve

[252] European Commission, 'Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation.'
[253] European Commission, 'Commission opens in-depth foreign subsidies investigation into e&'s acquisition of parts of PPF Telecom.'
[254] Case T-284/24, *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission* (2024), para. 41.
[255] Art. 46, Regulation (EU) 2022/2560, OJ L 330/1.
[256] European Commission, Commission Staff Working Document, Impact Assessment, SWD(2021) 99 final, p. 76.
[257] Regulation 2023/1441, OJ L 177/1.

a degree of inherent uncertainty,[258] and attempting to establish a principle that demands certainty within a domain marked by unavoidable ambiguity, creates tension. Van Meerbeeck comments on the paradox of this normative enforcement, stating:

> When the Court defines legal certainty in absolute terms, it assumes perfectly rational public authorities and legal subjects, rules having the precision of scientific laws and a neutral mathematical language. However, these assumptions turn out to be untenable, especially in the application of EU law.[259]

Van Meerbeeck underscores the complex reality that the principle of legal certainty seeks to uphold, arguing that it is irrational to apply such a principle framed in absolute terms within a context where such absolutes do not exist. In this context, the principle of legal certainty should be viewed through a lens of proportionality, allowing for a more workable application.[260] For instance, the legal context and public interests at stake should be considered when evaluating for legal certainty.[261] In the case of the FSR, Article 1 establishes that the Regulation should address "distortions caused, directly or indirectly, by foreign subsidies, with a view to ensure a level playing field."[262] The purpose of the FSR is therefore to mitigate distortions in the internal market, an expansive aim that thus requires adaptability to a multitude of situations. In order to ensure such adaptability, broad legal concepts are often implemented in order to produce flexible legislative instruments. In this light, some degree of uncertainty may be justified in the pursuit of a dynamic legislation capable of addressing a wider objective.

Such is the case for the Foreign Subsidies Regulation. As this legal study has highlighted, the FSR operates with broad and loosely defined definitions and a far-reaching procedural framework. The provisions which define the scope of the FSR, the balancing test, and the *ex officio* review, subject the Regulation to an increased risk of legal uncertainty. On the contrary, however, the *ex ante* framework and the current enforcement trends of the Regulation suggest that there is substantial foreseeability and clarity afforded under the FSR. Further, the 2026 Commission Guidelines expect to address the central ambiguities of the FSR, suggesting that the clarifications will enhance legal certainty in the FSR. In consideration to the upcoming guidelines, and to the notion of proportionate application of the principle of legal certainty, the current legal framework of the FSR thereby does not indicate that the FSR fails the requirements of the principle of legal certainty. Rather, the FSR in its current legal state ensures a certain degree of legal certainty to undertakings which fall subject to its provisions. Therefore, the legal research put forth in this essay asserts that the Foreign Subsidies Regulation is consistent with the general EU principle of legal certainty to a certain extent.

[258] Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker,' p. 49.
[259] Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice,' p. 283.
[260] Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker,' p. 53.
[261] Popelier, 'Five Paradoxes on Legal Certainty and the Law Maker,' p. 53.
[262] Art. 1, Regulation (EU) 2022/2560, OJ L 330/1.

6 Final Reflections

The legal dogmatic study conducted in this essay resulted in the research question of '*To what extent is the Foreign Subsidies Regulation consistent with the EU principle of legal certainty?'* being answered 'to a certain extent.' This essay finds that although the FSR affords a high degree of foreseeability, clarity, and precision with regard to certain provisions, such as the *ex ante* mandatory notification obligation, the FSR is at times unclear and produces increased risk for market participants who have received potential subsidies from non-EU states. However, Article 46 of the FSR guarantees that the Commission will produce guidelines at the latest by January 2026, of which many of the central concerns from both scholars and stakeholders, are expected to be clarified in these guidelines. The development of these guidelines presents a critical opportunity to refine the Regulation's practical enforcement and enhance the clarity, precision, and foreseeability of the provisions. This essay suggests that it would be advisable for the Commission to consider more narrowly tailored definitions and transparent procedural safeguards, especially with respect to the balancing test, the definition of 'foreign subsidies,' and the *ex officio* review. These suggestions aim to increase the overall clarity and predictability for undertakings falling under the scope of the FSR. The degree of legal certainty would thereby be enhanced, which also ensures coherence between the FSR and the broader legal order of the EU. As this essay has touched upon, it is imperative that EU regulations correctly adhere to the general principles of EU law, in order for the European Union to continue functioning as a Union grounded on the rule of law. Affording a greater degree of legal certainty therefore ensures that the doctrine on the rule of law remains a governing order of the European Union.

The results of this legal study also suggest alternative avenues of research which may be conducted respective of the Regulation. Firstly, it is suggested that a similar analysis as this essay has conducted, be undertaken following the application of the guidelines post-2026. At that stage, not only is the legislative framework of the Foreign Subsidies Regulation expected to be more complete, further in-depth investigations and cases before the CJEU are expected to be under review which may provide further clarifications to the framework of the FSR. Moreover, comparative legal research into how other jurisdictions manage similar concerns about foreign subsidies may also provide insight into the effectiveness and coherence of the approach presented under the FSR. This aligns also with the recommendation to compare and draw insights from the Regulation with regard to other anti-subsidy instruments which operate within the EU and internationally, such as the SCM Agreement and its EU equivalent, the Basic Anti-Subsidy Regulation. Ultimately, Regulation (EU) 2022/2560 offers an exciting ground for legal research, due to both its hybrid enforcement approach and its interdisciplinary nature.

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