

# The FDI Screening Mechanisms and the Draft EU Foreign Subsidy Regulation – Potential Conflicts of Interests and in Application

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## Abstract

Separate legal frameworks form part of the European Commission’s new strategic trade policy aiming at maintaining and contributing to the EU’s “open strategic autonomy”, while preserving an open economy within the Union. Investment screening mechanisms implemented on the grounds of security and public order will apply in parallel to the proposed EU Regulation on foreign subsidies aiming at addressing economic distortions caused by foreign subsidies to ensure a level play-

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ing field within the internal market. Even if both are implemented side-by-side, the legal frameworks will overlap. The following text illustrates scenarios where questions of regulatory interplay and overlap may arise and analyses the potential consequences thereof. It identifies specific difficulties in streamlining legal frameworks where legal areas are partly shared and separated between the Member States' and the Union's competences. It concludes that an ambition to preserve an open economy within the Union, attract investments and minimise unpredictability in transactions requires that possibly conflicting interests are addressed. It also illustrates the need for foreign and Union investors to consider and try to identify layers of risks and exchange information on ownership, ties and funding by foreign states early on in a transaction.

**Keywords:** Foreign Direct Investment Screening Mechanism, Foreign Subsidies, Competence, Deal Certainty, Regulatory Interplay, Open Strategic Autonomy

### A. Introduction – Regulatory interplay of investment screening mechanisms

The European Union (EU) has introduced several legal frameworks as part of the European Commission's new strategic trade policy, which was presented in February 2021.<sup>1</sup> The main objective of the trade policy is to maintain and contribute to the EU's "open strategic autonomy" while preserving an open economy within the Union.<sup>2</sup> Although these frameworks share a common purpose, they have been presented as separate pieces of legislation, each targeting specific key interest areas. In some instances, they will unavoidably overlap which will give rise to questions of competence and priority or even conflicts of interests.

The following text looks at the example of the EU Foreign Direct Investment (FDI) Screening Regulation (FDI Screening Regulation)<sup>3</sup> and the proposal for an EU regulation on foreign subsidies distorting the internal market<sup>4</sup>, a final compromise text of which was presented on 13 July 2022 (draft EU Regulation on foreign subsidies).<sup>5</sup>

1 *European Commission*, Commission sets course for an open, sustainable and assertive EU trade policy, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_644](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644) (2/6/2022).

2 *European Commission*, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Europe's moment: Repair and Prepare for the Next Generation, COM/2020/456 final.

3 Regulation (EU) No. 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, p. 1–14.

4 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final.

5 *Council of the European Union*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market – Letter to the Chair of the INTA Committee of the European Parliament, 2021/0114 (COD).

The FDI Screening Regulation sets out a Union framework for cooperation in the area of screening of foreign, i.e. non-EU, direct investments on the grounds of security or public order. It exists and operates in parallel with EU Member States' national FDI screening mechanisms which aim at protecting national security interests. Notably, the FDI Screening Regulation does not take away competence or decision-making powers from the Member States.<sup>6</sup>

The FDI Screening Regulation does, however, set out a framework for such screenings and explicitly states that an investor with ties to a foreign state is a factor that is of particular interest in the screening context. Such ties may be of particular concern if the foreign state has also provided funding directly or indirectly for the foreign investor to pursue the investment in the Union, e.g. through the acquisition of an EU target.

On the other hand, the draft EU Regulation on foreign subsidies aims at addressing economic distortions caused by foreign subsidies to ensure a level playing field within the internal market. Contrary to the EU FDI Screening Regulation, the draft EU Regulation of foreign subsidies confers authority and decision-making powers to the European Commission (i.e. not the Member States) including the right to block or impose conditions upon investments into the internal market.

As stated in preamble 2a of the draft EU Regulation on foreign subsidies, it will cover all sectors of the economy capturing also those covered by the FDI Screening Regulation. Thus, the two frameworks will clearly have to operate in parallel. Cases concerning investments made by subsidised foreign investors in sectors covered by the FDI regulation will therefore trigger situations where the two frameworks could render two different decisions and consequences for businesses.

Situations may arise in which Member States have concluded that they have no concerns under their FDI screening systems, but the European Commission may have concerns regarding the internal market. For instance, Member States may have no concerns clearing an investment from a friendly nation in a sensitive sector under its FDI screening systems, but the European Commission may apprehend issues and impose redressive measures under the draft EU Regulation on foreign subsidies if the foreign government – albeit friendly – subsidises the foreign investor. Overall, the European Commission will likely find itself having to compromise between two different interests, e.g. free movement of capital, attracting foreign investments and deal certainty, weighed against “security and public order” and “distortions to the internal market”.

The following text focuses first on the objectives and scope of the FDI Screening Regulation and Member States' FDI screening mechanisms, as compared to the draft EU Regulation on foreign subsidies. It thereafter illustrates scenarios where questions of regulatory interplay and overlap may arise and analyses the potential consequences thereof.

6 The FDI Screening Regulation was adopted on 19 March 2019 and has been fully implemented since 11 October 2020.

## B. The FDI Screening Regulation and Members States' FDI screening mechanisms

### I. Subject matter and scope

The FDI Screening Regulation entered into force in October 2020. Direct investments from outside the EU fall within the Union's Common Commercial Policy, which the Union, through Art. 207 Treaty of the Functioning of the EU, has exclusive law-making competence over.<sup>7</sup> At the same time, each Member State has sole responsibility for its national security as well as the right to protect its essential security interests.<sup>8</sup> To coordinate these partly overlapping competences, the FDI Screening Regulation establishes a Union framework for the screening of foreign direct investments within the Union and authorises Member States to maintain, amend or adopt national mechanisms to screen foreign direct investments into their territory on the grounds of security or public order.<sup>9</sup> These national laws share some mandatory basic requirements set out in the Regulation, but are in practice characterised by differences in scope and procedure.<sup>10</sup>

More importantly, the FDI Screening Regulation serves as a mechanism for cooperation and information exchange between Member States, and between Member States and the European Commission regarding foreign direct investments likely to affect security or public order.<sup>11</sup> The purpose of the mechanism is to create a forum whereby a Member State that receives a foreign investment is obliged to receive and consider comments from other Member States or the European Commission in relation to the foreign investments' impact on their respective security or public order. It does not give other Member States or the European Commission a right to block or veto an investment in such cases, but it is intended to allow for sufficient peer pressure upon the recipient Member State to address others' concerns during its screening process.

### II. Coordination and cooperation

Member States' FDI screening mechanisms must adhere to certain basic requirements to operate in accordance with the framework. For instance, they must have defined timeframes, be transparent in procedures and scope and may not discriminate between third countries.<sup>12</sup> Towards this aim, Art. 4 of the FDI Screening Regulation sets out a non-exhaustive list of factors that may be taken into consideration

7 Art. 207 (1) TFEU and Art. 3 (1)(e) TFEU, as confirmed by the European Court of Justice in, for example, Opinion 2/15 of 16 May 2017, paragraph 82.

8 Art. 4(2) TEU, Art. 346 TFEU and Art. 3 FDI Screening Regulation.

9 Art. 1 (1) and Art. 3 (1) FDI Screening Regulation.

10 *European Commission*, Report from the Commission to the European Parliament and the Council, First Annual Report on the screening of foreign direct investments into the Union, COM(2021) 714 final, p. 6.

11 Art. 1 (1) FDI Screening Regulation.

12 Art. 3 (2) FDI Screening Regulation.

when determining whether a foreign direct investment could be subject to screening.<sup>13</sup> These factors thus aim to provide some clarity for investors who have made, or are considering making, foreign direct investments in the Union. However, as stated in the preamble recitals of the FDI Screening Regulation, the framework is open-ended and allows for “all relevant factors” as well as the “context and circumstances of the foreign direct investment” to be taken into account, thus foreseeing individual case-by-case evaluations.<sup>14</sup>

The Regulation also calls upon Member States to identify and prevent circumvention of their screening mechanisms. Member States have implemented this in different ways, such as through different adaptations in scope.<sup>15</sup> For instance, in Slovenia, an intra-Union investment could be subject to review if the investing party is ultimately owned by a person in a third country. Other Member States have gone or are proposing to go further. Sweden, which does not yet have a screening system, has proposed an FDI screening mechanism requiring all investors irrespective of their nationality to notify investment over set thresholds. In other words, Swedish, EU and third country investors would all have to notify their investments in the covered sectors if the proposal enters into force.<sup>16</sup>

The Regulation also obliges Member States to notify the European Commission of existing and adopted screening mechanisms. Based upon this information, the European Commission shall regularly publish a consolidated list of existing acts.<sup>17</sup> As of 1 July 2021, screening mechanisms are in force in 18 Member States.<sup>18</sup> This number has remained consistent in May 2022.<sup>19</sup>

Cooperation between Member States is partly established through notification requirements and the possibility to provide comments and opinions within set timeframes. The 18 Member States with screening mechanisms are automatically obliged to notify both the European Commission and other Member States of any screenings of foreign direct investments in their territory.<sup>20</sup> Other Member States as well as the European Commission may provide comments and opinions if they consider it likely that the foreign direct investment in question will affect its or more than one Member State’s security or public order.<sup>21</sup> An intention to provide comments shall be declared within 15 calendar days from the day of the notice, and comments should be sent within 35 calendar days from the day of the notice.<sup>22</sup>

13 Preamble recital (12) FDI Screening Regulation.

14 Preamble recital (12) FDI Screening Regulation.

15 Art. 3 (6) FDI Screening Regulation.

16 *Swedish Parliamentary inquiry*, Swedish Government Official Reports SOU 2021:87, p. 262.

17 Art. 3 (7) and Art. 3 (8) FDI Screening Regulation.

18 *European Commission*, Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union, COM(2021) 714 final, p. 6–10.

19 *European Commission*, List of screening mechanisms notified by Member States, available at: [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157946.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf) (3/6/2022).

20 Art. 6 (1) FDI Screening Regulation.

21 Art. 6 (2) and Art. 6 (3) FDI Screening Regulation.

22 Art. 6 (6) and Art. 6 (7) FDI Screening Regulation.

The Regulation also provides for alternative regimes for cooperation. Naturally, for Member States without screening mechanisms, there is no obligation to notify that foreign direct investments within their territory are undergoing screening. Moreover, some Member States' mechanisms may be limited in scope, excluding some investments from its coverage. The Regulation also foresees that in these situations, other Member States as well as the European Commission may request information on planned or completed investments that do not undergo screening and issue comments which shall be given "due considerations".<sup>23</sup>

It may however take time before such investments are uncovered and the Regulation therefore provides for retrospective rights to comment. If the investment has been completed, comments may be provided retrospectively within 15 months after its completion.<sup>24</sup> Through this cooperation channel, interests of security and public order within the Union may be prioritized also when national laws have not yet been adopted. A recent example highlighting this possibility is the European Commission's Communication, calling for all Member States to implement greater vigilance towards Russian and Belarusian direct investments within the Union in view of the military aggression against Ukraine.<sup>25</sup>

Member States are required to share a minimum level of information to ensure that a basic level of information is distributed, in order for other Member States and the European Commission to decide whether they want to issue comments or opinions.<sup>26</sup> Some of these aspects may be particularly relevant for the regulatory interplay with the draft EU Regulation on foreign subsidies, in particular as information on, *inter alia*, ownership structures including the ultimate investor and participation in the capital, as well as funding of the investment and its source, shall be provided. With such information, the European Commission or other Member States may detect the risk that an investment is indeed made with subsidised capital, which in turn may create a spillover and trigger the application of the new rules on foreign subsidies.

### III. Scope of FDI screening mechanisms

Under the FDI Screening Regulation, the term 'foreign direct investment' is defined as an investment of any kind by a "foreign investor" aiming to establish or to maintain lasting and direct links to the entrepreneur to whom, or the undertaking to which, the capital is made available in order to carry on an economic activity in a Member State. This includes investments which enable effective participation in the management or control of a company carrying out an economic activity.<sup>27</sup> The term

23 Art. 7 FDI Screening Regulation.

24 Art. 7 (8) FDI Screening Regulation.

25 OJ C 151 I/1, 6 April 2022, p. 1–12.

26 Art. 9 FDI Screening Regulation.

27 Art. 2 (1) FDI Screening Regulation.

‘foreign investor’ is defined as a natural person or an undertaking of a third country, intending to make or having made a foreign direct investment.<sup>28</sup>

Art. 4 FDI Screening Regulation sets forth a non-exhaustive list of different factors to consider when determining whether a foreign direct investment is likely to affect security or public order and, consequently, whether it could be subject to screening. For instance, a foreign direct investment’s potential effects on critical infrastructure, including energy, water, communications and defence infrastructure, critical technologies and access to sensitive information, or the ability to control such information, should be taken into account.<sup>29</sup> In addition, factors with regard to the foreign investor may also be considered. Whether the foreign investor is directly or indirectly controlled by the government or whether there is a serious risk that the foreign investor engages in illegal or criminal activities may, in particular, be taken into account.<sup>30</sup>

As set out in the preamble, the assessment of the potential impact on security or public order could also include considerations of foreign subsidies, by means of taking into account the “context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country”.<sup>31</sup>

### **C. The draft EU Regulation on foreign subsidies**

On 5 May 2021, the European Commission adopted a proposal for an EU regulation on foreign subsidies targeting all types of economic activities in the Union that have been subsidised by a foreign government. The main objective of the proposal is to create a level playing field within the internal market.

Currently, undertakings that receive foreign subsidies are treated differently compared to undertakings that receive financial support or compatible state aid from EU Member States. The EU state aid rules, which aim at preventing such support from EU Member States, apply only to funding or subsidies from EU Member States.<sup>32</sup> Also, there is a regulatory gap in the World Trade Organisation’s (WTO) framework on subsidies which do not effectively target subsidies related to trade in services and in relation to the establishment and operation of undertakings in the Union.<sup>33</sup>

28 Art. 2 (2) FDI Screening Regulation.

29 Art. 4 (1) FDI Screening Regulation.

30 Art. 4 (2) FDI Screening Regulation.

31 Preamble recital (13) FDI Screening Regulation.

32 *European Commission*, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, SWD(2021) 99 final, p. 7.

33 The WTO regime on subsidies consists primarily of the Agreement on Subsidies and Countervailing Measures (ASCM) and, to a lesser extent, the General Agreement on Trade in Services (GATS), which focuses on trade in services.

On 30 June 2022, the European Council and the European Parliament reached a provisional political agreement concluding the likely scope of the regulation and the powers conferred to the European Commission to investigate and remedy distortion. On 13 July 2022, the draft EU Regulation on foreign subsidies was agreed. In large parts, the draft corresponds to the European Commission's proposal first announced in May 2021. Some additions have been made, e.g. by clarifying how to assess distortive foreign subsidies and by refining the thresholds for the public procurement review regime.

### I. Existence of a foreign subsidy

The definition of a subsidy set forth in the draft EU Regulation on foreign subsidies includes four main criteria. According to Art. 2 (1), a subsidy “shall be deemed to exist where a *third country* provides directly or indirectly a *financial contribution* which confers a *benefit to an undertaking* engaging in an economic activity in the internal market and which is *limited, in law or in fact*, to one or more undertakings or industries” (emphasis added).

The definition set out in the draft EU Regulation on foreign subsidies deserves to be placed within a broader context. The discussion of how subsidies distort international trade and how to effectively regulate such distortion has been ongoing in international discussions for a long time. For instance, in January 2020, the EU, the United States (US) and Japan published a joint statement on how to strengthen the existing WTO framework on industrial subsidies.<sup>34</sup> One aspect raised by the Trade Ministers was that the legal interpretation of “public body” undermines the effectiveness of the WTO rules and they communicated a need to ensure that subsidies granted through state-owned enterprises are caught more effectively.<sup>35</sup> Against this backdrop, it is not surprising that the European Commission's proposed definition of a subsidy from a “third country”, which now appears to become definitive, was given a broad scope covering different subjects: central governments, public authorities at all other levels and foreign public and private entities whose actions can be attributed to the third country.<sup>36</sup>

Taking a non-discriminatory approach in relation to Union state aid rules restricting subsidies provided by Member States also implies that a wide approach may be taken to interpret a “third country” which covers subsidies provided *through state resources*.<sup>37</sup>

According to the definition, the third country must provide a “financial contribution” which seems to essentially include any direct or indirect aid in any form what-

34 *Trade Ministers of Japan, the United States and the European Union*, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan the United States and the European Union, available at: [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf) (13/6/2022).

35 *Ibid.* p. 2.

36 Art. 2 (2) (b) draft EU Regulation on foreign subsidies.

37 Art. 107 (1) TFEU.

soever. Art. 2 (2) (a) of the draft EU Regulation on foreign subsidies includes a non-exhaustive list of contributions, which includes transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling, the foregoing of revenue that is otherwise due or the provision of goods or services or the purchase of goods or services.<sup>38</sup>

Further, the financial contribution must confer a “benefit to an undertaking” that engages in an economic activity in the internal market.<sup>39</sup> To determine if a benefit was received, “comparative benchmarks” shall be evaluated, which could include investment practices of private investors, comparable tax treatments, adequate remuneration for a given good or service, etc.<sup>40</sup>

The fourth criterion requires that the benefit is “limited, in law or in fact” to an individual undertaking or industry or to several undertakings or industries.<sup>41</sup> This is similar to the concept of “specificity” in the WTO context.<sup>42</sup> Thus, the subsidy definition will not cover financial contributions that are purely general and which do not favour specific undertakings.

A financial contribution that fulfils the four criteria will only be targeted if the European Commission finds it “distortive” by improving the competitive position of the undertaking concerned and where, in doing so, it actually or potentially negatively affects competition in the internal market.<sup>43</sup> It should be considered *unlikely* that a foreign subsidy would distort the internal market if its total amount does not exceed EUR 4 million over any consecutive period of three financial years.<sup>44</sup> Also, a foreign subsidy *shall not be considered* to cause distortive effects if its total amount does not exceed EUR 200 000 over any consecutive period of three fiscal years, and a foreign subsidy aiming at making good the damage caused by natural disasters or exceptional occurrences *may be considered* to not be distortive regardless of its amount.<sup>45</sup>

38 The European Council and the European Parliament proposed an even wider scope emphasizing that it is a non-exhaustive lists of measures and that e.g. granting of special or exclusive rights without adequate remuneration should be included. General Secretariat of the Council, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 2021/0114(COD), p. 59 ff.

39 Art. 2 (1) and preamble recital (10) draft EU Regulation on foreign subsidies.

40 Preamble recital (10) draft EU Regulation on foreign subsidies.

41 Art. 2 (1) draft EU Regulation on foreign subsidies.

42 Art. 1 (2) and Art. 2 ASCM require subsidies to be specific in order to be caught by the framework.

43 Art. 3 (1) draft EU Regulation on foreign subsidies.

44 Art. 3 (2) draft EU Regulation on foreign subsidies.

45 Art. 3 (2a) and Art. 3 (2aa) draft EU Regulation on foreign subsidies.

## II. Three investigative tools addressing distortions

According to the draft EU Regulation on foreign subsidies, the European Commission will be given three investigative tools to address foreign subsidies, two *ex-ante* tools in the case of (i) acquisitions of EU undertakings and (ii) EU public procurement, and (iii) one *ex officio* tool in other market situations.<sup>46</sup>

Some large *concentrations*, i.e. when a company acquires a Union-based company, or when a merger involving a Union-based company occurs, will be subject to mandatory notification to the European Commission.<sup>47</sup> Notification is required when two criteria are met: at least one of the merging undertakings has a generated turnover in the Union above EUR 500 million and has received financial contributions exceeding EUR 50 million in the three calendar years prior to notification.<sup>48</sup> The notification must be made and the parties must await the approval from the European Commission before the concentration may proceed.<sup>49</sup>

Mandatory notification prior to certain *public procurements* will also apply, and the European Commission's approval must be received before the contract can be awarded.<sup>50</sup> Unlike the European Commission's first proposal, the draft EU Regulation on foreign subsidies provides two thresholds for the public procurement review regime. Firstly, the public tender must have a contract value of EUR 250 million or more and, secondly, the tenderer (including its subsidiary companies without commercial autonomy and potential holding companies) and its main subcontractors and suppliers involved in the same tender must have received financial contributions of at least EUR 4 million or more in the last three years per third country.<sup>51</sup>

The third tool is a general conferral of powers to the European Commission to introduce an *ex officio* investigation of foreign subsidies in all other market situations when the afore-mentioned notifications requirements for concentrations and public procurements do not apply, e.g. for concentrations or public procurements below the set thresholds.<sup>52</sup>

In order to remedy identified distortive effects caused by foreign subsidies, the European Commission will be able to impose different redressive measures in combination with fines and periodic penalty payments in situations of non-compliance.<sup>53</sup> For the *ex ante* investigations, the European Commission will also be able to prohibit a concentration or public procurement before they take place but this measure will generally not be available in the post *ex officio* review.<sup>54</sup> However, in rare *ex officio* investigations, the European Commission may be able to dissolve a com-

46 Art. 5 (1) draft EU Regulation on foreign subsidies.

47 Art. 17–Art. 25 draft EU Regulation on foreign subsidies.

48 Art. 18 (3) draft EU Regulation on foreign subsidies.

49 Art. 19 draft EU Regulation on foreign subsidies.

50 Art. 26–Art. 32 draft EU Regulation on foreign subsidies.

51 Art. 27 (2) draft EU Regulation on foreign subsidies.

52 Art. 7–Art. 16 draft EU Regulation on foreign subsidies.

53 Art. 15–Art. 16, Art. 25 and Art. 30–Art. 32 draft EU Regulation on foreign subsidies.

54 Art. 24 and Art. 30 draft EU Regulation on foreign subsidies.

pleted concentration when no prior notification was required if there exists a substantial distortion which cannot be remedied by behavioural or structural measures or by the repayment of the subsidy.<sup>55</sup>

In its proposal for an EU regulation on foreign subsidies, the European Commission argued that the proposed regulation would complement the FDI Screening Regulation by introducing an additional review of investments in *inter alia* strategic industries, critical assets and technologies.<sup>56</sup> In the context of FDI screening and as mentioned above, subsidies can be reviewed to assess a third country's state's influence and its potential impact on a Member State's security or public order. Under the draft EU Regulation on foreign subsidies, foreign subsidised investments may be targeted to protect the level playing field and address economic distortions.

It is possible to already now anticipate potential implications of the frameworks' future regulatory interplay, which are illustrated by the two examples below which illustrate potential gaps, overlaps, and possible limitations in legal certainty.

#### D. Regulatory interplay

The following two examples, although hypothetical in nature and based on the draft EU Regulation on foreign subsidies, aim at envisioning how the two frameworks will overlap and the possible uncertainties and effects upon transactions such overlap could cause.

##### I. Example of an *ex ante* notification for an acquisition of a research facility developing batteries for the automobile sector – overlapping decision-making powers

A Union-based company develops and produces batteries for the automobile sector (the target). A foreign, non-EU company, aims to acquire a majority of the Union company's shares. The foreign investor notifies the FDI screening authority in the Member States where the target is established. The acquisition is also notified to the European Commission as the target has an aggregated turnover exceeding the threshold (i.e. 500 million EUR) and the foreign investor has received a preferential tax treatment during the last year waiving taxes otherwise due to its central government.

During its in-depth investigation, the European Commission concludes that even if there is a risk of distortion, the positive effects of the acquisition outweigh the negative distortion as the foreign investor will contribute significantly to developing the industry since the investor is a major actor in battery development. To remedy the risk of distortion, the European Commission would want to introduce redres-

55 Preamble recital (17)–(20) draft EU Regulation on foreign subsidies.

56 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final, p. 5.

sive measures by requiring publication of the results of certain research and development activities.

However, the Member State undertaking the FDI screening finds that the foreign direct investment affects its security and public order since the development and production of batteries are a critical technology, and allowing the foreign investor to control the development and supply of necessary equipment poses a threat to its national strategic activity. As a result, in the course of the FDI screening mechanism, the Member State wishes to limit the foreign investor's stake and ability to control the company, and that it commits to maintaining research and development operations in that Member State. These proposed measures would go in the opposite direction of what the European Commission proposes in the context of its foreign subsidies investigation.

The foreign investor thus faces two different authorities with different strategic interests and conflicting proposals for redressive measures. The foreign investor now has a narrow room for maneuvering the situation, effectively lowering the actual value of the intended acquisition.

## II. Example of an *ex officio* investigation – manufacturer of computer processing units – *ex officio* reviews and risks of deal (un)certainly

A smaller Union-based group, which produces different computer processing units for electronic communication networks, is up for sale. It has five subsidiaries established in five different Member States.

There are several parties interested in acquiring the shares of the parent company of the group, which would result in an indirect change of control of the subsidiaries. Of the two remaining bidders, a foreign investor outbids the remaining Union-based potential buyer and is accepted as the buyer.

As the group's aggregated turnover within the last financial year does not exceed the threshold in the Regulation on foreign subsidies, no mandatory *ex ante* notification is made to the European Commission.

The acquisition procedure instead focuses on identifying and filing FDI notifications in the relevant jurisdictions where this is required. FDI filings are made in all Member States in which the group has subsidiaries established, as indirect control also triggers FDI screening notification obligations. These notifications in turn trigger the FDI consultation procedure under the FDI screening regulation, whereby the European Commission and all other Member States are notified of the acquisition. Information about the foreign investor and the target is shared amongst all Member States and the European Commission, but there is no information at the time on whether the foreign investor has received subsidies to be used in the acquisition. No Member State objects to the investment, primarily because the foreign investor is from a nation that is considered low risk from a security perspective.

However, several years later, the European Commission receives information of an alleged distortion caused by foreign subsidisation through the new foreign owner of the group, which in turn was enabled by the relevant acquisition. The Euro-

pean Commission therefore decides to *ex officio* initiate a preliminary review followed by an in-depth investigation. The information at hand indicates that the foreign owner had received subsidies in the form of preferential long term loans from the government in its home jurisdiction enabling it to outbid the other Union-based bidder. The European Commission requests additional information on the relevant acquisition, but receives partially incorrect, outdated and incomplete information and could therefore decide to take a decision, based on the facts available, that foreign subsidies caused distortion on the internal market by enabling the foreign investor to outbid the Union-based potential buyer. This would thus allow the European Commission retrospectively, long after the FDI screening procedure has concluded, to introduce redressive measures against the foreign investor or the group of companies.

The example illustrates the risk of a false sense of deal certainty in transactions involving foreign investors. A full FDI screening procedure with notifications to both Member States and the European Commission is thus not a guarantee that an *ex officio* foreign subsidies investigation is not opened at a later stage. The example also highlights the risks posed by the different purposes. Whereas investments from low risk countries will likely pass through the FDI screening regimes, such jurisdictions could actually grant hidden or undisclosed subsidies.

### E. Concluding remarks

There are specific difficulties in streamlining legal frameworks where legal areas are partly shared and separated between the Member States' and the Union's competences. The total effect of requirements in different laws may create burdensome and uncertain authorisation procedures for Union-based and foreign companies aiming to invest in the Union market, even if redressive measures or investigative tools are considered proportionate in a single act.

To maintain an attractive market for investments, the regulatory interplay of laws should strive to ensure that conflicting competences do not lead to unpredictability in transactions. Deal certainty is essential for the movement of capital and business development within the internal market.

Until the draft EU Regulation on foreign subsidies is adopted and starts being applied in practice, the actual effects cannot be fully foreseen. However, it is already clear that although these frameworks are part of the Unions "open strategic autonomy", many different and possibly conflicting interests will need to be addressed. Foreign and Union investors with foreign funding will need to consider and try to identify these new layers of risks early on in a transaction. Sellers of assets or shares will need to require more from the buyers regarding transparency on ownership, ties and funding by foreign states, and that such information is exchanged and assessed early on in a transaction, in order for parties to assess deal certainty, and ultimately to be able to agree on a price.

