Substantive and Procedural Parallels and Overlaps Between Art. 107, 108 TFEU and the (Draft) Regulation

Sarah Blazek* and Jochen Christoph Hegener**

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Abstract

Similarities between the European Commission's proposal for a regulation on foreign subsidies distorting the internal market and State aid law have been widely noted, not least because of their similar goals. This article analyzes overlaps and parallels between both substantive and procedural rules in the European Commission's proposal and State aid law. In particular, the article focuses on the extent to which precedents regarding the definition of State aid may also inform the application of the proposal and its definition of foreign subsidies.

* Sarah Blazek, E.M.A (European Inter-University Centre, Venice) is a lawyer (Rechtsanwältin) and Associated Partner at Noerr in Munich and Brussels. Email: sarah.blazek@noerr.com.

** Dr. Jochen Christoph Hegener, LL.M. (Columbia University) is a lawyer (Rechtsanwalt), Attorney-at-Law (New York) and Associate at Noerr in Munich. Email: jochen.hegener@noerr.com.

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A. Introduction

Much has been made of the similarities between certain aspects of the Draft Regulation[1] and existing legislation in EU law. This is particularly the case regarding State aid law, which is commonly cited as the most relevant existing template for addressing foreign subsidy control.[2] This appears to be a natural conclusion based in particular on the similarity in purpose of the two legislative areas, i.e. to establish a level playing field in the internal market by regulating the conferral of economic benefits with a State origin. However, if State aid law is in fact the relevant template for the Draft Regulation, parallels and overlaps between the text of the Draft Regulation and State aid law (as codified as well as applied) may actually run deeper.

This article aims to analyze and identify more thoroughly the extent of these parallels and overlaps between the Draft Regulation and existing State aid law both in terms of substance (i.e., the definition of foreign subsidies in comparison to the definition of State aid) (B.) and the procedures stipulated in both areas (C.). The article finishes with a short conclusion and outlook on whether and to what extent the application of the regulation will be aligned with existing State aid law (D.).

B. Substantive parallels to State aid law

I. Terminology of the Draft Regulation

It has been noted in a number of (first) assessments of the Draft Regulation that parallels with State aid law can be found in its substance, in particular the *definition of foreign subsidies* used in the Draft Regulation.[3] In that regard, Art. 2 (1) Draft Regulation reads as follows:

1 This article is based on the original proposal made by the European Commission (Commission) on 5 May 2021 (the Draft Regulation). Unless otherwise stated, references to particular articles are references to this text. References to the text of the regulation according to the provisional agreement resulting from the interinstitutional negotiations (published on 11 July 2022 and available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf (20/7/2022)) are cited as such.

2 See for instance the press release by the Council of the European Union on the provisional agreement with the European Parliament citing State aid law as the background of the Draft Regulation, available at: https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/ (20/7/2022).

3 See for instance *Luja*, EStAL 2021/20, p. 188. It should of course be noted that Annex I of the Commission's White Paper explicitly mentioned the definition of a "subsidy" in the EU Anti-subsidy Regulation and the EU Regulation on safeguarding competition in the air transport sector as additional templates for the definition of a "foreign subsidy", see *Euro-*

> For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides 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 an individual undertaking or industry or to several undertakings or industries.[4]

According to the Commission, three separate cumulative conditions necessary to find that a foreign subsidy has been granted result from this definition:[5]

(i) there should be a financial contribution provided, directly or indirectly, by the public authorities of a third country;[6]
(ii) the financial contribution should confer a benefit to an undertaking engaging in an economic activity in the market; and
(iii) the benefit should be conferred to an individual undertaking or industry or several undertakings or industries.

This definition of foreign subsidies is complemented by another clause in defining the substance of the Draft Regulation. Art. 1 (1) Draft Regulation defines its *subject matter* as follows:

> This Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.

It is thus made clear on a substantive level that the definition in the Draft Regulation also requires foreign subsidies to cause (iv) a distortion of the internal market in order for its rules to take effect, which adds a fourth condition[7] to the definition of foreign subsidies as applicable under the Draft Regulation.

When analyzing substantive parallels and overlaps with the definition of State aid, these conditions will serve as the reference point.

pean Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, p. 47.

4 The definition is slightly amended in the text of the regulation according to the provisional agreement resulting from the interinstitutional negotiations (changes are highlighted):
"For the purpose of this Regulation, a foreign 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*."

5 See recital 8 et seqq. of the Draft Regulation.

6 Recital 8 of the regulation text resulting from the interinstitutional negotiations divides this into two different criteria: (i) a financial contribution that is (ii) provided directly or indirectly by a third country.

7 In the regulation text from the interinstitutional negotiations, the aforementioned elements would amount to a total of five conditions (see footnote 6 above).

II. The definition of State aid

By contrast, the definition of State aid according to Art. 107 (1) TFEU has been developed and specified over many years primarily through application and interpretation by European courts. The consensus definition developed over time is best summarized by the Commission Notice on the notion of State aid,[8] which requires the following five conditions to be fulfilled:

(i) an undertaking engaged in economic activity;
(ii) state origin;
(iii) an advantage;
(iv) selectivity; and
(v) an effect on trade and competition.

These conditions constitute the point of comparison to the substance of the Draft Regulation and the definition of foreign subsidies.

III. The definitions in comparison

Even in advance of a more thorough analysis, the aforementioned list of conditions under both definitions suggests that individual conditions in the definition of foreign subsidies have a clear equivalent in the definition of State aid:

	Condition of the foreign subsidy definition	**Condition of the State aid definition**
i)	Financial contribution provided, directly or indirectly, by the public authorities of a third country	State origin
ii)	Benefit to an undertaking engaging in an economic activity in the market	Undertaking engaged in economic activity Advantage
iii)	Individual undertaking or industry or several undertakings or industries	Selectivity
iv)	Distortion of the internal market	Effect on trade and competition

In the following, this article will analyze more closely to what extent the individual conditions of foreign subsidies should be interpreted in line with their (apparent) equivalents in State aid law.

8 OJ C 262 of 19/7/2016, 1 et seqq.

1. Financial contribution with a third country origin

Art. 2 (2) (b) Draft Regulation specifies that financial contributions by a third country shall include financial contributions provided by

(i) the central government and government authorities at all other levels;
(ii) foreign public entities, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or
(iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

This definition of "third country origin" is noticeably broad. In case of public or private entities in particular, when deciding the question of whether their actions can be *attributed* to a third country, the reference to "elements such as" as well as "all relevant circumstances" will likely give the Commission relatively broad discretion to find elements that link a particular entity to a third country. This appears to stem from the Draft Regulation's goal to enable the Commission to address financial contributions from outside of the EU in light of possibly significantly diverging environments in the respective countries[9] (as is made clear by the phrasing "legal and economic environment prevailing in the State").

In State aid law, the condition of "state origin" is split into two separate elements, (i) the granting of an advantage directly or indirectly through State resources and (ii) the imputability of such a measure to the State.[10] Out of the two, the question of imputability most closely resembles the afore-mentioned test of "attributability" under the Draft Regulation.[11]

Similar to the Draft Regulation, measures can be imputable to a Member State even if they are granted through public or private entities.[12] Moreover, case law has clarified that the element of imputability is also to be tested with a view of a broad set of indicators arising from the circumstances of the case and the context in which the measure was taken.[13] However, the set of indicators ordinarily cited in the con-

9 See for instance the description of the particular risks associated with foreign subsidies in *European Commission*, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, p. 6 et seq.
10 See General Court, case T-351/02, *Deutsche Bahn AG v. Commission,* ECLI:EU:T:2006:104, para. 103.
11 The question of whether a financial contribution stems from *State resources* does not appear in the text of the Draft Regulation. It may however still be implicitly contained in the test of attributability, similar to the tendency in State aid law to consider this question together with the question of imputability; cf. Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., para. 38.
12 Cf. CJEU, cases C-67/85, C-68/85, C-70/85, *van der Kooy v. Commission*, ECLI:EU:C:1988:38, para. 35.
13 Cf. CJEU, case C-482/99, *France v. Commission (Stardust)*, ECLI:EU:C:2002:294, para. 55.

text of imputability appear more tailored to the more homogenous economic and legal environment prevalent in the EU.[14]

A first assessment of the condition of "third country origin" would therefore suggest that it may be applied largely congruently with the State aid condition of imputability, potentially differing however in the nature of the indicators to be applied when assessing measures by public and private entities.

2. Benefit to an undertaking engaging in an economic activity

While the Draft Regulation appears to define the "benefit to an undertaking engaging in an economic activity" as a single condition, a comparison to State aid law suggests that this clause is more appropriately dealt with when split into two separate elements, i.e. the undertaking engaged in an economic activity (see under a)) and the conferral of a benefit (see under b)).

a) Undertaking engaged in an economic activity

While the Draft Regulation makes ample use of the term "undertaking", it does not offer a specific definition of the term as used in the Draft Regulation. Similarly, Art. 1 (2) Draft Regulations specifies the term "economic activity" only insofar as acquiring control or merging as well as participating in a public procurement procedure are considered to be forms of economic activity. Nonetheless, this specification is not exhaustive, as the Commission has made clear that "general market situations" are encompassed by the Draft Regulation.[15] On the other hand, financial contributions to entities engaging in non-economic activities are not considered to constitute foreign subsidies.[16]

In State aid law, the Court of Justice of the European Union (CJEU) has consistently defined the term "undertaking" with reference to entities engaged in economic activity, regardless of their legal status and the way in which they are financed. "Economic activity", on the other hand, has been held to be any activity consisting of offering goods and services on a market.[17]

The lack of a specific definition of both elements in the Draft Regulation combined with the use of terminology identical to that used in State aid law suggests

14 See the indicators cited in the Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., para. 43.

15 See for instance the Executive Summary of the Impact Assessment Report, available at: https://ec.europa.eu/competition-policy/document/download/5e974ec8-f275-48da-afbe-757bbde78c2b_en?filename=foreign_subsidies_impact_assessment_executive_summary.pdf (20/7/2022), p. 2. The regulation text resulting from the interinstitutional negotiations thus clarifies: "*Among others*, an undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure in the Union is considered to be engaging in an economic activity in the internal market".

16 Recital 10 of the Draft Regulation makes this point explicitly.

17 Cf. CJEU, case C-35/96, *Commission v. Italy*, ECLI:EU:C:1998:303, para. 36.

that these definitions should be applied in a similar fashion under the Draft Regulation.[18] After all, that would enable the Commission to monitor contributions to any entity engaged in any form of market activity, which is therefore able to influence (and distort) the internal market.

b) Financial contribution that confers a benefit

Furthermore, the Draft Regulation requires there to be a financial contribution which confers a benefit. While the term "benefit" itself is again left undefined in the Draft Regulation, Art. 2 (2) (a) Draft Regulation includes a list of measures which are deemed to be financial contributions.

In the absence of an explicit definition of the element of "benefit", the recitals of the Draft Regulation provide some guidance on its application. Recital 10 of the Draft Regulation provides that the existence of a benefit should be determined on the basis of comparative benchmarks. In that regard, it names the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or adequate remuneration for a given good or service as appropriate benchmarks and declares that additional benchmarks may developed on the basis of generally accepted assessment methods.

That appears largely identical to the assessment of the State aid law condition of "advantage".[19] This condition has been held to be present when there is an economic benefit that an undertaking could not have obtained under normal market conditions, i.e., in the absence of State intervention.[20] In order to determine whether this condition is fulfilled, the market economy operator test[21] is the crucial determinant and also requires different forms of benchmarking. For instance, in the case of State investments, the test requires a benchmarking with the investment practices of a private investor operating under normal market economy conditions.[22] To identify an appropriate benchmark, State aid law requires particular attention be paid to (i) the kind of operator concerned, (ii) the type of transaction as well as (iii) the market or markets concerned. Different benchmarks may therefore be appropriate to account for a given case. In addition, whether a transaction is in line with market conditions can also be established on the basis of a generally accepted standard as-

18 See also the arguments for and against this application of State aid equivalents in *Luja*, EStAL 2021/20, p. 193.

19 See also *Luja*, EStAL 2021/20, p. 188. This assessment is strengthened by the regulation text resulting from the interinstitutional negotiations, which in recital 10 now formulates that a financial contribution that would have been obtained under normal market conditions should not be considered a benefit, thereby expressly adopting elements of the State aid law definition of an "advantage".

20 See CJEU, case C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para. 60.

21 See Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., paras. 73 et seqq.

22 See for instance CJEU, case C-142/87, *Belgium v Commission ('Tubemeuse')*, ECLI:EU:C:1990:125, para. 29.

sessment methodology.[23] All this results in flexible use of benchmarking to best recreate normal market conditions, which is likely the approach suggested by Recital 10 of the Draft Regulation as well.

This similarity between the Draft Regulation and State aid law also extends to the element of financial contributions. According to the aforementioned Art. 2 (2) (a) Draft Regulation, financial contributions shall include:

(i) the 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;
(ii) the foregoing of revenue that is otherwise due; or
(iii) the provision of goods or services or the purchase of goods and services.

The use of the word "include" suggests that this list may – even though broad in itself – not be considered exhaustive.

In State aid law, the precise form of a measure is irrelevant, if the measure has the effect of providing an advantage. Therefore, not only positive economic advantages are deemed relevant, but also relief from economic burdens.[24] This more concise definition would nonetheless cover most, if not all, of the contributions listed in the Draft Regulation. If differences between the two definitions do develop over time, that will most likely concern contributions in the form of "provisions of goods and services" and "purchase of goods and services", which State aid law is concerned with only with respect to the provision or purchase under conditions that diverge from market terms.

Thus, a closer assessment shows that the Draft Regulation and State aid law are also largely aligned with respect to the conditions of "financial contribution that confers a benefit" and "advantage" respectively.

3. Limitation to one or more undertakings or industries

The Draft Regulation further requires that the benefit be limited in law or fact to an individual undertaking or industry or several undertakings or industries.[25] Similar to some of the afore-mentioned conditions and elements of these conditions, the Draft Regulation does not offer much guidance on these conditions other than repeating in recital 11 that the benefit conferred to one or more undertakings or industries could be established by law or in fact.

However, State aid law principles may again offer indications of how to apply the condition. The condition of "selectivity" in State aid law relates to the requirement

23 Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., paras. 99 et seqq.
24 Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., para. 68.
25 The regulation text resulting from the interinstitutional negotiations shortens this condition to "limited, in law or in fact, to one or more undertakings or industries".

of Art. 107 (1) TFEU that State aid must distort competition by "favouring certain undertakings". To specify this condition, State aid case law has set out a wide range of tests and distinctions, the summary of which would go beyond the limits of this article. Given, however, that the Draft Regulation also targets conferrals of (unfair) advantages to individual undertakings or at least groups of undertakings and even implicitly refers to the definition of the State aid law concept of "material selectivity" by clarifying that a benefit limited to one or more undertakings can be established in "law or in fact",[26] it must again be assumed that the application of the condition under the Draft Regulation will likely be aligned with its presumed equivalent in State aid law.

4. Distortion on the internal market

Finally, the Draft Regulation applies only to foreign subsidies that result in a distortion of the internal market. In other words, once the existence of a foreign subsidy under Art. 2 (1) Draft Regulation has been established, the Commission will also have to assess whether this foreign subsidy distorts the internal market.

In that regard, Art. 3 (1) Draft Regulation establishes that "a distortion of the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market".[27] In order to determine whether this requirement is fulfilled, Art. 3 (1) Draft Regulation specifies a number of indicators that are to be taken into account:

(a) the amount of the subsidy;
(b) the nature of the subsidy;
(c) the situation of the undertaking and the markets concerned;
(d) the level of economic activity of the undertaking concerned in the internal market; and
(e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

Art. 3 (2) Draft Regulation further provides for a form of *de minimis* threshold that, if not exceeded, indicates a lack of distortion.[28] In addition, Art. 4 Draft Regulation enumerates categories of foreign subsidies that are most likely to distort the internal

26 See for *de jure* and *de facto* selectivity, Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., paras. 120 et seqq.

27 The determination that there is in principle a distortion of the internal market is of course complemented by the balancing test between positive and negative effects of the foreign subsidy in Art. 5 of the Draft Regulation, the contours of which will have to be defined more clearly in the future (in particular in the form of guidelines published by the Commission according to Art. 40b (1) (b) of the regulation text resulting from the interinstitutional negotiations).

28 Where the Draft Regulation quantified this threshold at EUR 5 million over any consecutive period of three fiscal years, the White Paper had included a threshold of

market, in particular (i) foreign subsidies granted to an ailing undertaking, (ii) foreign subsidies in the form of unlimited guarantees and (iii) foreign subsidies directly facilitating a concentration. Finally, Art. 1 (1) Draft Regulation again references mergers and public procurement procedures and clarifies that they are particularly likely to cause a distortion.

The condition of a distortion of the internal market is necessary because the Draft Regulation does not aim at prohibiting all foreign subsidies, which distinguishes it from State aid law, as made explicit by recital 12 of the Draft Regulation. Judging by the Draft Regulation's relatively comprehensive definition of a distortion in the internal market, the Commission will carefully assess whether there is a risk of a distortion. Nonetheless, this should not be expected to be a major issue in most cases, as the definition of a distortion remains broad.

Art. 107 (1) TFEU establishes that State aid is also designed to address only those measures that distort or threaten to distort competition and affect trade between Member States. A distortion of competition, in turn, is assumed if "it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes".[29] Similarities between the tests to be applied under the Draft Regulation and State aid law again become apparent. Here, it is important to note that the definition of distortion under State aid law is not strict, as a distortion is assumed whenever a financial advantage is granted to an undertaking in a liberalized sector where there is or could be competition.[30] A similar interpretation may take hold under the Draft Regulation, as there does not appear to be a difference in wording or concept between the notions of a distortion of competition in the two areas.

C. Procedural parallels to State aid law

Considering that State aid law does in fact appear to have served as a template for many substantive aspects of the Draft Regulation, it is also worth assessing parallels and overlaps with regard to procedural aspects. In the following sections, this article therefore aims to succinctly and more closely analyze procedural aspects of the Draft Regulation that run parallel to those stipulated in State aid law. Such parallels to State aid law procedure (I.) are assessed with regard to the notification tool for concentrations (II.).[31]

EUR 200,000 and the provisional agreement resulting from interinstitutional negotiations now stipulates a threshold of EUR 4 million. The threshold in the White Paper of course matched the *de minimis* threshold in State aid law according to Art. 3 (2) of Commission Regulation (EU) No 1407/2013 (De Minimis Regulation).

29 See Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., para. 187.

30 See Commission Notice on the notion of State aid, OJ C 262 of 19/7/2016, 1 et seqq., para. 187.

31 Further similarities between State aid law and the *ex officio* tool are analyzed in detail by *Prof. Wolfgang Weiß* in this issue. Due to the unique nature of procurement law, the authors have refrained from analyzing the notification tool for public procurement proce-

I. State aid law procedure

As will be familiar to readers, according to Art. 108 (3) TFEU, State aid law requires notification by Member States of any planned aid. Such notification must be made by the Member State responsible for the measure in "sufficient time" to enable the Commission to assess whether the measure indeed constitutes State aid and its effect on the internal market. Art. 108 (3) TFEU includes a standstill obligation for the Member State concerned while the Commission performs its assessment.

While this notification requirement does not directly depend on the aid exceeding a certain threshold, the Commission has of course implemented many rules in secondary law concerning exceptions to the notification requirement, including the aforementioned *de minimis* threshold of EUR 200,000 over three fiscal years according to Art. 3 (2) De Minimis Regulation.

If and to the extent notification is required and made by the Member State concerned, it triggers a preliminary examination in which the Commission has two months to make a decision according to Art. 4 (5) of Council Regulation (EU) 2015/1589 (the "Procedural Regulation"). This preliminary examination can ultimately have three different outcomes:

- A decision that the measure does not constitute State aid within the meaning of Art. 107 TFEU and may be implemented;
- A decision that the State aid is compatible with EU rules and may be implemented; or
- A decision that there are serious doubts as to the compatibility of the notified measure with EU rules, and an in-depth investigation is required.

If an in-depth investigation of a measure is necessary, the Procedural Regulation does not include a strict time limit for the Commission to conclude its investigation.[32] At the conclusion of this in-depth investigation, three different outcomes are again possible:

- An unconditional positive decision that the measure does not constitute State aid or aid incompatible with the internal market;
- A conditional decision that the measure is found to be compatible, but conditions are placed on its implementation; or
- A negative decision that the measure is incompatible with EU rules and cannot be implemented.

dures in more detail. Therefore, this article focuses only on similarities in the notification procedure with respect to the notification tool for concentrations and in State aid law. Unfortunately, space does not permit treatment in this article of additional parallels in the two areas, such as concerning the consequences of violations of notification obligations.

32 Art. 9 (6) Procedural Regulation only states that the Commission *endeavours* to adopt a decision within 18 months from the opening of the procedure.

II. The notification tool for concentrations

A comparison of the main rules of procedure provided in the Draft Regulation with this (rough summary of) State aid law procedure again illustrates the extent to which State aid law served as a template for the Draft Regulation, but also shows some areas in which the Commission included an approach more friendly to the undertakings concerned.

Notification of foreign subsidies in the context of concentrations is required pursuant to Art. 18 (3) and (4) Draft Regulation if the following thresholds are exceeded:[33]

1. an aggregate turnover in the Union of one of the merging undertakings amounting to at least EUR 500 million; and
2. aggregate financial contributions from third countries received by all undertakings concerned in the three preceding calendar years of more than EUR 50 million.[34]

This notification is to be made by the parties involved according to Art. 19 (3) Draft Regulation. While the use of a threshold concerning the amount of foreign subsidies may be seen as either comparable or diverging from the (much lower) *de minimis* threshold in State aid law, the identity of the notifying party (the undertaking(s) concerned) constitutes a significant difference from State aid law.[35]

Similar to State aid law, the notification is to be made *ex ante*, i.e. before the concentration is implemented (Art. 19 (1) Draft Regulation), with a standstill obligation applying (Art. 23 (1) Draft Regulation). When a notification is made, the Commission is given the opportunity to perform a preliminary review of the concentration, for which it has a (comparatively shorter) timeframe of 25 working days (Art. 24 (2) Draft Regulation). Similar to State aid law, the outcome of the preliminary review can be threefold (Art. 24 (1) in conjunction with Art. 8 Draft Regulation):

- A decision to close the preliminary review because there is no foreign subsidy;
- A decision to close the preliminary review because there are no indications of an actual or potential distortion on the internal market; or
- A decision to open an in-depth investigation of the concentration.

In another divergence from State aid law, the Commission is given a time limit of (generally) 90 working days to conduct the in-depth investigation. The potential

33 However, pursuant to Art. 19 (5) Draft Regulation, the Commission may request the prior notification of any concentration that does not exceed the notification thresholds of Art. 18 (3) and (4) Draft Regulation.

34 Despite some discussions on the precise thresholds to be implemented, the regulation text resulting from the interinstitutional negotiations contains the two identical thresholds. However, the new text does appear to combine Art. 18 (3) and (4) Draft Regulation into a single clause (eliminating the clause concerning only joint ventures), similar to the combination of both clauses above.

35 This is true particularly from a practical perspective, as it will likely give the undertakings involved more agency during the notification procedure.

outcomes of the in-depth investigation (Art. 24 (3) Draft Regulation), on the other hand, are again largely aligned with State aid law:

- A decision not to object to the concentration because either the preliminary assessment has not been confirmed or a distortion of the internal market is outweighed by its positive effects (Art. 24 (3) (b) in conjunction with Art. 9 (4) Draft Regulation);
- A decision to accept commitments by the undertakings concerned to remedy potential distortions ((Art. 24 (3) (a) in conjunction with Art. 9 (3) Draft Regulation); or
- A decision to prohibit the concentration (Art. 24 (3) (c) Draft Regulation).

D. Conclusion and outlook

It is clear that the forthcoming regulation of foreign subsidies marks a milestone in European law. If ultimately passed in its current or a similar form, the Draft Regulation will introduce a comprehensive set of rules for all companies active in the EU. It is also clear from the Draft Regulation and the accompanying announcements that the Commission will go to considerable lengths to enforce the new rules. All stakeholders will have to familiarize themselves with the rules and their application in practice. Guidance within the Draft Regulation on some of the questions likely to come up is sparse. However, as shown above, State aid law in particular appears to have served as a template and will therefore be an obvious source of inspiration and guidance for those applying the new rules.

The authors conclude that State aid precedents on substantive questions (i.e. the definition of State aid and foreign subsidies) will likely be useful in providing guidance on applying the new rules. A caveat to this is the possibility that differences in the legal and economic environment in which the regulation is likely to be applied will also have an effect on these substantive questions (see in particular the condition of third country origin).

With regard to the procedural system of the Draft Regulation, more fundamental differences arise in comparison to the procedure set forth in State aid law (for example, the stricter time limits imposed on the Commission for its review and the direct participation of individual undertakings in the notification procedure). Nonetheless, the similarity in structure of these procedures (a notification procedure in which the effects of the State aid/foreign subsidies on the internal market are assessed by the Commission and possibly remedied through conditions/commitments by the parties) may result in many parallels and overlaps in practice.

Bibliography

LUJA, RAYMOND, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, European State Aid Law Quarterly, 2021, Issue 20, Vol. 2, pp. 187–199