Regulating for a sustainable and resilient single market

Challenges and reforms in the areas of state aid, competition, and public procurement law

Marta Andhov, Andrea Biondi and Luca Rubini

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Marta Andhov is Associate Professor in Public Procurement Law at the Faculty of Law, University of Copenhagen, Denmark; member of the EU-Horizon 2020 funded *Sustainability and Procurement in International, European and National Systems (SAPIENS)* Steering Committee; Principal Investigator in the Purchase Power – Sustainable Public Procurement through private Law Enforcement PurpLE; Contact: marta.andhov@jur.ku.dk.

Andrea Biondi is Professor of EU Law and Director of the Centre of European Law, King's College London. Contact: andrea.biondi@kcl.ac.uk

Luca Rubini is Senior Research Fellow in International Law, University of Turin, Law Department. Contact: l.rubini@unito.it

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Contents

Foreword

At the time of writing this foreword, the date is 31 December 2022, the day on which the EU is celebrating the 30th anniversary of the official 'completion' of the internal market – or, to be more precise, of the formal deadline set for its completion by the 1986 Single European Act (SEA), which had the aim of 'progressively establishing the internal market over a period expiring on 31 December 1992' (Article 13 SEA), thus fulfilling Jacques Delors' ambition encapsulated in the 1985 White Paper on 'Completing the Internal Market'.[1]

There is undoubtedly cause for celebration. The single market currently sits at the centre of the European economic integration project and plays a key role in the EU processes of political and social integration. Its centrality is recognised by the EU Treaties, with Article 3(3) of the Treaty on the European Union (TEU) stipulating that 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

This centrality would have been purely totemic had it not been for the inherent success and resilience of the European integration project. Over the past 30 years, the single market has survived several crises largely unscathed: economic ones (including various recessions and austerity-driven downturns), political ones (Brexit comes immediately to mind) and, more recently, a pandemic and a violent armed conflict virtually on its doorstep. While undoubtedly still a 'project', and far from being fully accomplished let alone finalised, the single market has consolidated its role as the central *Weltanschauung* of the European Union.

Yet, important anniversaries are, perhaps inevitably, both a cause for celebration and a time for prudent introspection. And a 30th birthday, to paraphrase C. S. Lewis, can be particularly significant, representing the point at which one has become accustomed to being 'a walking and talking adult'. No longer a slave to dreams, and perhaps not yet a servant of regret, the European single market at 30 could be embracing a new sense of purpose

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1. https://op.europa.eu/en/publication-detail/-/publication/4ff490f3-dbb6-4331-a2ea-a3ca59f974a8/language-en

and, in many ways, is already doing so – a sense of purpose that goes beyond the original mercantile objectives of 'free movement' (important as they are) and genuinely contributes to the bigger project depicted in broad brushstrokes in Article 3(3) TEU, that of a 'highly competitive social market economy', ensuring both social and environmental sustainability while promoting technological progress.

A report recently produced by a team of ETUI researchers for the Belgian Ministry of the Economy ('Rethinking the European single market: Moving towards new frontiers for a highly competitive, socio-ecologically sustainable and resilient Europe', co-authored by Mehtap Akgüç, Nicola Countouris, Bob Hancké and Philippe Pochet, and published in September 2022) argues specifically that 'the strengths of the single market could be enhanced and harnessed in order for the EU to succeed in delivering on what is arguably its number one challenge: a just green transition', and that this could be achieved, in particular, while pursuing the EU's emerging open strategic autonomy agenda. The report moreover acknowledges that, for the single market project to deliver successfully on this agenda, some recalibration of its regulatory institutions would be needed, while also suggesting that this recalibration (to some extent already in the making) would – and should – be fully compatible with the Treaty-based objective of a 'highly competitive social market economy'.

The papers contained in the present report were commissioned from their authors by the ETUI in parallel with the delivery of the aforementioned report for the Belgian authorities. The three authors of this report are senior academic lawyers and experts in the fields of public procurement and state aid, as well as on the rules defining the EU's 'competitiveness', including through its external trade dimension and its relationship with the World Trade Organization. Their expertise was sought specifically with a view to capturing this important regulatory facet of the debate pertaining to the 'recalibration of the single market'. In this connection, as expressly acknowledged in the report for the Belgian authorities, their insights and analyses provided an extremely useful background document on the basis of which the ETUI team could develop its own views on these topics and, in many respects, underpinned the ETUI's recommendations on the future regulatory trajectories of the single market as an instrument for sustainability and for open strategic autonomy. In publishing this report, we seek both to disseminate their expert views and acknowledge our appreciation for their work.

For the most part, the picture that the authors, law professors Marta Andhov, Andrea Biondi and Luca Rubini, have painted for us is one of progressive incrementalism in the EU's efforts to bolster the contribution that the single market rules covered by their analysis make to the ecological, social and industrial sustainability dimensions of the European project. For instance, Andhov's paper traces the evolution of the 'best value' concept in EU public procurement from what used to be a rather crude 'lowest acquisition price' to a far more balanced 'method' considering all costs being incurred during the lifetime of the product, work or service, including costs that – as now

expressly stated in Article 68 of Directive 2014/24/EU – are 'imputed to environmental externalities linked to the product, service or works during its life cycle'. Similar trends can be identified in the development of state aid legislation with, for example, the 2012 State Aid Modernisation (SAM) package targeted at making Europe 'a smart, sustainable and inclusive economy' with the objective of helping the EU and its Member States to 'deliver high levels of employment, productivity and social cohesion'. Competition law rules have also progressively acknowledged the importance of ecological and social sustainability, as perhaps best epitomised by the growing acceptance by the Court of Justice of business conduct that would otherwise be anti-competitive but that, to the extent that it also pursues important objectives which are in line with the ecological transitions (for example setting up joint ventures to develop research and development), is viewed more leniently by EU law, effectively allowing companies and national authorities to take some non-economic factors into consideration, as for instance in the 2002 *Wouters* case.

Just as importantly, our experts have also remarked that this trend towards greater facilitation for the achievement of sustainability goals has significantly intensified in recent years, particularly since the Covid-19 pandemic revealed the over-reliance of the single market on long and, in the event, fragile global supply chains, including for goods and services of 'strategic' relevance for Europe. This acceleration effectively continued apace with the development of the EU's open strategic autonomy agenda, a point further explored in the aforementioned ETUI report commissioned by the Belgian authorities. Our experts have focused their (and our) attention on important initiatives such as: the October 2020 Commission consultation on 'Competition policy supporting the Green Deal', discussed by Rubini alongside a number of other flanking initiatives in the area of competition policy; the 'Temporary Framework for State Aid', discussed by Biondi, established on 19 March 2020 and subsequently amended and extended, allowing Member States to counteract the economic losses and keep businesses afloat during the pandemic and, more recently, during the Ukrainian conflict and the energy crisis, through a series of subsidies and support tools, including specific investment and solvency support measures; and the further flexibility offered to 'Important Projects of Common European Interest', a joint venture supported by several Member States in strategically important sectors, including those linked to the twin transition. While much remains to be refined and developed, it is abundantly clear that the focus of attention of these core areas of EU legislation in regulating and shaping the functioning of the single market is indeed being directed more towards sustainability goals.

Readers of this report, and of the three papers produced by our experts, will undoubtedly feel enriched by the sophisticated and detailed analysis of the – often untapped – potential offered by these recent, ongoing reforms. Reforms that, as the authors point out, are carefully balancing both the social and the competitiveness rationales sustaining the Treaty formula for a 'highly competitive social market economy'.

As this report goes to print, it is increasingly apparent that Europe may be entering a new phase: a phase characterised by a greater appetite for central government and EU support and (public) investment for, in particular, the green transition, also in an attempt to emulate analogous forms of assistance and facilitation offered by other global players, such as the US with the recently adopted Inflation Reduction Act. In a recent speech, EU Commission President Ursula von der Leyen[2] explicitly referred to the importance, moving forward, of further 'adapting' state aid rules, in order to prevent a scenario where 'investments in strategic sectors leak away from Europe, [as] this would only undermine the single market'. She also advocated 'additional funding at the EU level', including through the creation of a dedicated 'sovereignty fund' to support the green transition and a higher level of policy coordination, for strategic goods and technologies such as hydrogen, semiconductors, quantum computing, AI and biotechnology. The geopolitical justification for such further reforms is far from being dissimulated, with explicit references to the challenges posed by an 'assertive China' and an 'aggressive Russia'.

What is less clear, however, is how these new policy orientations will shape the future of the single market, and whether its rules will continue to sustain a vision of competitiveness linked to openness and, essentially, market-based regulations balanced against sustainability goals – as explored in the present report – or an alternative vision of 'external' competitiveness partly linked to greater public funding and driven by greater regulatory facilitation for capital concentration in specific strategic sectors of the European economy. What is equally unclear is the extent to which the EU intends to accompany any such potential changes with measures aimed at addressing more specifically the social dimension of the sustainability and competitiveness conundrum, a topic that the ETUI has sought to explore at greater length in the report produced for the Belgian Ministry of the Economy and that will no doubt continue to occupy our researchers in the future.

Brussels, 31 December 2022
Nicola Contouris
Director of the ETUI
Research Department

2. Speech by President von der Leyen at the College of Europe in Bruges, 4 December 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7487.

Recalibrating the single market: public procurement law

Marta Andhov

1. Introduction

In the aftermath of the financial and economic crisis of 2008-2009, the European Commission tasked Professor Mario Monti with producing a report to assist in relaunching the single market project.[1] Despite the report containing some very insightful analyses and recommendations for reform, a full relaunch of the single market project was somewhat hampered by a worsening macroeconomic framework and half a decade of EU-steered austerity policies. Yet, over the past decade, the single market has remained a resilient and, of course, central aspect of the European project, strong enough to withstand the political tensions surrounding austerity, Brexit and the Covid-19 crisis.

However, despite this inherent resilience, it is also arguable that the single market – and, within it, some of its central institutional and regulatory arrangements – has reached a point where recalibration is both necessary and politically needed to rise to meet several newly emerging challenges. These stem from the EU's new approach to its 'strategic autonomy', developed partly in the aftermath and as a consequence of the Covid-19 pandemic, and from the European Green Deal (and, in the interim, the ambitious targets included in the 'Fit for 55' package). Meeting these challenges will require the functioning of the single market to be rebalanced in a way that both facilitates the achievement of these goals and, at the same time, ensures the political stability and viability of the European integration project. This includes maintaining its social legitimacy.

This chapter focuses on public procurement law and its potential reform as a tool to accomplish this rebalancing exercise. It is crucial to stress that, perhaps inevitably, the use of public procurement law should be explored not in isolation but alongside a broader set of reforms. In the context of rebalancing the functioning of the single market, three axes for reform emerge:

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1. M. Monti (2010), 'A New Strategy for the Single Market: at the Service of Europe's Economy and Society', Report to the President of the European Commission José Manuel Barroso, 9 May 2010, ref. Ares(2016)841541.

1.1 Twin transition axis

Europe is facing two transitions simultaneously. The first can be characterised as the fourth technological revolution, based on advanced automation, the developing Internet and the prioritisation of software over hardware. The second transition is the climate crisis, forcing the world into rethinking many economic processes from the ground up to reduce its carbon intensity: from carbon-neutral transport and energy systems to the reduction of wasteful products and 'cheap' consumption in general.

1.2 Social sustainability axis

A 'just transition' that is synonymous with sustainable development can be achieved only if it is green and social.[2] Social sustainability of the European integration process is essential if the EU's Just Transition Mechanism is to be politically, economically and ecologically sustainable. Ignoring the social aspect of sustainable development has a high cost in terms of inequality, by undermining political cohesion and generating resistance to ecological and technological transformations. Internal and external delocalisation of production and supply lines often takes place in a way that is either blind to or contributes to a reduction in the social sustainability of the system.

1.3 Strategic autonomy axis

Recent frictions in the supply chain (due to Covid-19) have – again – put the question of Europe's external trade links on the table.[3] The EU's dependence on China and on other Asian parts producers has sparked a debate on 'Open Strategic Autonomy' (OSA). Discussing OSA is impossible without examining industrial policy options.[4] But industrial policy is subject to SEM rules on procurement. Gone are the days when governments could simply subsidise a new sector or product line into existence and then give it preferential treatment in government contracts.

An industrial policy that successfully increases Europe's strategic autonomy will also be subject to a series of first- and second-order institutional and economic conditions: how can the potential benefits of building more resilient

2. See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en.
3. W. Raza, J. Grumiller, H. Grohs, J. Essletzbichler and N. Pintar (2021), Study requested by the INTA Committee: 'Post Covid-19 value chains: options for reshoring production back to Europe in a globalised economy', European Union.
4. See https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_en.

local supply be balanced against the costs of setting up such sectors where they do not exist or barely exist.[5]

This chapter seeks to elaborate on the key role and untapped potential of public procurement law in harnessing the strengths of the single market to achieve European policy goals along the three axes mentioned above. It will also expand on the constraints to this lever and how the boundaries might be pushed.

To that end, the chapter begins by introducing what public procurement is and how the concept of Sustainable Public Procurement (SPP) developed (sections 2-3). Section 4 discusses the current internal EU legal framework for SPP and reflects on the external EU dimension regarding free trade agreements (FTAs) and sustainability. Section 5 presents the key role and untapped potential of EU procurement law, focusing on mandatory minimum green procurement criteria, the forgotten dimension of social sustainability and the potential of EU industrial policy. Section 6 explores the main constraints on pursuing SPP. Finally, section 8 concludes the chapter by suggesting how to push forward with reform.

2. What is EU public procurement law?

Public procurement refers to the situation where a contracting authority uses public funds to purchase goods, works and services from the commercial market.[6] Those purchases are made to fulfill the government's needs essential to carry out its functions. The process concludes with a public contract between the contracting authority and the supplier who has won the procurement process.

A reference to the EU Public Procurement Directives or to the EU public procurement rules is normally a reference to the rules contained in the Public Contracts Directive or the Utilities Directive.[7] These directives are supplemented by the 'Concessions Directive', 'Defence and Security Directive',

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5. On scepticism towards European industrial strategy, see J. Lewander, N. Helwig, C. Håkansson, T. Iso-Markku and C. Nissen (2021), Strategic Autonomy – Views from the North, Swedish Institute for European Policy Studies (SIEPS).

6. For a general overview of EU public procurement law, see R. Caranta and A. Sanchez-Graells (2021), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing; the European Procurement Law series, Edward Elgar Publishing; S. Arrowsmith, The Law of Public and Utilities Procurement, Third Edition (Sweet and Maxwell, 2014); A. Semple, *A Practical Guide to Public Procurement* (Oxford University Press, 2015), M. Andhov and W. Janssen, Bestek – Public Procurement Central (blog and podcast).

7. The Public Contracts Directive is the short name for Directive 2014/24/EU on public procurement. The Utilities Directive is the short name for Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

and the 'Remedies Directives', which were adopted to ensure efficient and fast review when the Public Procurement Directives are infringed.[8]

Referring to the EU Public Procurement Directives as 'the EU public procurement rules' is, to some extent, misleading. It detracts from the fact that contracting authorities in the Member States must also respect the provisions and principles of the EU treaties, including, in particular, an obligation of transparency when they procure *outside* the scope of the Public Procurement Directives.[9] The Court of Justice of the European Union (CJEU) ruled in the *Telaustria* case that this obligation consists in ensuring, 'for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition, and the impartiality of procurement procedures to be reviewed'.[10]

While this statement lacks clarity, it does not lack significance. The essence is that, in many instances, there must be publication and some kind of procurement procedure, even though the contracting entity is outside the scope of the EU Public Procurement Directives.

It is fair to say that EU public procurement law has changed over the years. In the old days, the 'anti-national' narrative was more marked. Thus, for instance, recital 20 of Directive 92/50/EEC stated that public service common rules were aimed at eliminating 'practices that restrict competition in general and participation in contracts by other Member States' nationals in particular'.[11]

The CJEU held in *Ordine degli Architetti and Others* that public procurement is about removing the risk of 'public authorities [indulging] in favouritism'.[12]

While the 'anti-national' narrative still lies at the heart of EU public procurement law, nowadays, it is less present in the wording of the provisions. The emphasis is on the main purpose of the EU Public Procurement Directives being to open up the public contracts market through efficient competition by means of a set of rules that ensure equal treatment of tenderers and transparency in the award of public contracts.

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8. Directive 2014/23/EU on the award of concession contracts; Directive 2009/81/EC on the coordination of procedures for the award of contracts by contracting authorities or entities in the fields of defence and security; and the Remedies Directives (Directive 89/665/EEC and Directive 2007/66/EC).

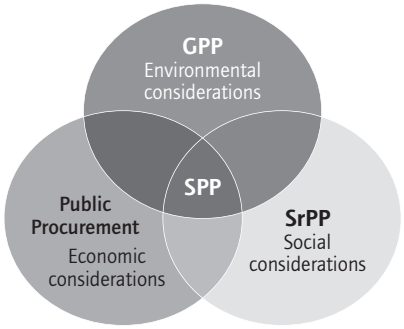
9. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU).

10. Judgment of the Court of Justice of 7 December 2000, *Telaustria and Telefonadress v Telekom Austria*, C-324/98, ECLI:EU:C:2000:669, paragraph 62.

11. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, p. 1.

12. Judgment of the Court of Justice of 12 July 2001, *Ordine degli Architetti and Others v Comune di Milano*, C-399/98, ECLI:EU:C:2001:401, paragraph 75.

3. Development of the concept of sustainable public procurement



Procurement has been seen primarily as an economic activity, meaning that laws of the market economy affect the relationship between the parties to a public contract.[13] However, public procurement has increasingly been used as a policy tool for achieving broader goals such as social inclusion (social sustainability axis),[14] environmental protection[15] or promotion of innovation (twin transition axis).[16] The Public Procurement Directives have to be seen in this context as a reaction against the favouring of national tenderers and the awarding of public contracts to economic operators who did not offer the best commercial solutions. Therefore, it can be said that the procurement rules allow the contracting authority to use public procurement as an instrument to pursue various policies as long as it follows an economic rationale where the choice of contractor is governed by the concept of best value for money (national procurement goals) and respects the EU public procurement principles (non-discrimination, equality, transparency, open competition, and proportionality).

What has changed over the past few decades is the once-narrow understanding of the economic rationale behind public procurement and the concept of value for money. In the light of the climate change emergency, the development of the Sustainable Development Goals (SDGs)[17] – to which the EU has

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13. P. Trepte (2004), Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation, Oxford University Press, pp. 18-19.

14. Christopher McCrudden, Buying Social Justice: Equality, Government Procurement and Legal Change (OUP 2007); M. Andhov and B. Bergsson (2021), 'Equal Pay and EU public procurement law – case study of mandatory Icelandic ÍST85 standard', *Nordic Journal of European Law*, Vol. 4, No. 1, pp 1-24; Marta Andhov (Andrecka) (2017), 'Corporate Social Responsibility and Sustainability in Danish Public Procurement' in M. Andhov (Andrecka), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *European Procurement & Public Private Partnership Law Review (EPPPL)*, pp. 333-345.

15. L. Mélon (2020), 'More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' *Sustainability*, Vol. 12, No. 3, pp. 1-24; P. Kunzlik, 'Green Public Procurement – European Law, Environmental Standards and "What To Buy" Decisions', *Journal of Environmental Law*, No. 25, 2013, pp. 173202.

16. See M. Andhov (Andrecka) (2015), 'Innovation Partnership in the New Public Procurement Regime – A Shift of Focus from Procedural to Contractual Issues?', Issue 2, *PPLR*, pp. 18-31; P. Cerqueira Gomes (2021), *EU Public Procurement and Innovation: The Innovation Partnership Procedure and Harmonization Challenges*, Edward Elgar Publishing.

17. Under Agenda 2030, SPP has been established as one of the targets of the United Nations' Sustainable Development Goals and SDG 12 on sustainable consumption and production (target 12.7).

contributed – and general EU commitment to sustainable development in the EU Treaties, a broader understanding of these concepts has come to the fore as the importance of sustainability in the internal market has increased.[18] This progress has led to the development of a concept of sustainable public procurement.[19]

The Commission defines Sustainable Public Procurement (SPP) as 'a process by which public authorities seek to achieve the appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of the project.'[20]

Given the scale of EU public procurement (1.8 trillion euros spent annually, equivalent to approximately 14% of the EU's GDP), the purchasing power of the EU (institutions and Member States) can be leveraged to create new market behaviours and shift the existing ones towards sustainable consumption and production. For example, a public buyer can require that supplies are produced and works and services performed in accordance with standards that call for equal pay between men and women, comply with health and safety measures and avoid social dumping. Public buyers can prefer 'green goods' that are manufactured or services that are performed using energy-efficient methods from renewable sources. The public buyer can nudge the market by providing the industry with incentives for the development of green technologies and products and for the promotion of social responsibility. Consequently, SPP can play a key role in harnessing the strengths of the single market to achieve European policy goals along the axes mentioned above.

In the public procurement context, there is currently more of a common understanding that economic rationale should not be based on the lowest acquisition price but should take into account the best price-quality ratio

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18. https://ec.europa.eu/environment/integration/internal_market_en.htm

19. Article 11 TFEU; Article 3(3) TEU; European Commission (2010), Europe 2020: A strategy for smart, sustainable and inclusive growth, Brussels, COM(2010) 2020. Sustainable development was defined in the 1983 Brundtland Report as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. See *Our Common Future: Report of the World Commission on Environment and Development* (Oxford University Press, 1987).

20. https://ec.europa.eu/environment/gpp/versus_en.htm; for a general overview of Sustainable Public Procurement law, see S. Arrowsmith and P. Kunzlik (eds.) (2009), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press; B. Sjåfjell and A. Wiesbrock (eds.) (2015), *Sustainable Public Procurement Under EU Law – New Perspectives on the State as Stakeholder*, Cambridge University Press; R. Caranta and M. Trybus (eds.) (2010), *The Law of Green and Social Procurement in Europe*, Djøf Publishing; M. Andhov (2019), 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?' in Sanja Bogojevic, Xavier Groussot and Jörgen Hettne (eds.), *Discretion in EU Procurement Law*, Hart Publishing; M. Andhov (Andrecka) (2017), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *EPPPL*; And M. Andhov (Andrecka) and K. Peterkova Mitkidis (2017), 'Sustainability requirements in EU public and private procurement – a right or an obligation?', January 2017, *Nordic Journal of Commercial Law (NJCL)*, pp. 56-87.

using a cost-effectiveness approach such as life-cycle costing.[21] The latter is understood as a method 'considering all the costs that will be incurred during the lifetime of the product, work or service',[22] including costs that are 'imputed to environmental externalities linked to the product, service or works during its life cycle'.[23]

Similarly, economic rationale does not mean that the social dimension of the internal market should be ignored; that is tenderers should not be allowed to gain a competitive advantage by engaging in social dumping or even human rights violations. European social market economy requires the creation of a fair and prosperous society which, in turn, translates into legal compliance and an understanding of the economic rationale and value for money in the context of public procurement. Value for money is a concept that will ultimately determine the contracting authority's principles.[24] It can solely have an economic dimension that is not recommended or address broader environmental and social policies.[25]

SPP can play a key role in harnessing the strengths of the single market to achieve European policy goals along the aforementioned axes; however, this is not without its challenges. The ongoing challenge is to strike a balance between the two interests of open competition and sustainability. The practical application of sustainable considerations in public procurement (for example by requiring energy-efficient production methods for the goods being purchased, imposing organic standards for food or creating apprenticeships under construction contracts) may narrow the competition and increase prices.[26] Furthermore, the question that continually resurfaces is whether the application of sustainable considerations runs a higher risk of ultimately giving preferential treatment to local suppliers, which is subject to a fundamental prohibition under EU internal market laws. Consequently, the legal framework of sustainable public procurement law introduces checks and balances to ensure the prosperity of the internal market while pursuing the goals that, in the context of this study, are reflected in the three axes.

The next section will examine the legal framework of SPP, how the law has developed through CJEU rulings and how SPP is codified today.

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21. M. Andhov, R. Caranta et al. (eds.) (2020), Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability, Routledge Publishing.

22. European Commission webpage on 'Life-cycle costing', available at: www.ec.europa.eu/environment/gpp/lcc.htm; for a similar definition, see ISO 20400:2017, *Sustainable procurement – Guidance* (April 2017).

23. Article 68(1) of Directive 2014/24/EU.

24. D. McKevitt and P. Davis (2016), 'Value for money: a broken piñata?', *Public Money & Management*, Vol. 36, Issue 4, pp. 257-264, DOI: 10.1080/09540962.2016.1162591.

25. D. Klingler (2020), 'Measuring What Matters in Public Procurement Law: Efficiency, Quality and More' *Journal of Management Policy and Practice*, Vol. 21(3), pp. 73-98.

26. K. M. Halonen (2021), 'Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement', *Maastricht Journal of European and Comparative Law* https://doi.org/10.1177/1023263X211016756.

4. EU legal framework for SPP

Legal development in the area of SPP really took off in early 2011, when the Commission published its green paper on 'the modernisation of EU public procurement policy – towards a more efficient European Procurement Market'.[27] The green paper referred to the Europe 2020 strategy for smart, sustainable and inclusive growth.[28] Public procurement was said to play a key role as a market-based instrument for realising smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. It was to do so by:

(a) improving framework conditions for businesses to innovate, making full use of demand-side policy;
(b) supporting the shift toward a resource-efficient and low-carbon economy (for example, by 'encouraging wider use of green public procurement');
(c) improving the business environment, especially for innovative SMEs.

The reform process initiated by the green paper led to the adoption of the sixth generation of EU Public Procurement Directives which emphasised the importance placed on green, social and innovative considerations in public procurement, thereby lowering, to a certain extent, the regulatory risks attached to these issues under the 2004 directives.

With regard to the regime provided for by the 2004 directives,[29] innovative, environmental and social considerations in the tender process were either not directly included in the text of the directives (in the case of innovation) or were included for the first time and with a limited scope (for environmental and social issues).[30] Environmental and social considerations were cumulatively referred to as 'secondary' and 'horizontal' policies and thereby understood as 'objectives that are not necessarily connected with the procurement's functional objective' in the sense of acquiring goods, works or services.[31]

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27. COM(2011) 15 final.
28. European Commission (2010), Europe 2020: A strategy for smart, sustainable and inclusive growth, Brussels, COM(2010) 2020.
29. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors , OJ L 134, 30.4.2004, p. 1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114 (Public Sector Directive).
30. S. Arrowsmith (2009), 'A Taxonomy of Horizontal Policies in Public Procurement' in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press, pp. 108-146.
31. S. Arrowsmith and P. Kunzlik (2009), 'Public Procurement and Horizontal Policies in EC law: General Principles' in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press, pp. 9-54.

Reforms in 2014 saw a shift from sustainable considerations being regarded as 'secondary' – in other words, 'nice to have but not necessary' – to 'strategic'.[32] The Commission emphasised that strategic public procurement is to be understood as an umbrella term encompassing public procurement used as a policy tool and therefore includes considerations other than solely economic ones: 'Strategic public procurement should play a bigger role for central and local governments to respond to societal, environmental and economic objectives, such as the circular economy.'[33]

There is an increase in provisions directly referencing environmental, social and innovative considerations under the current Public Procurement Directives. Still, there is a limited amount of mandatory provision in the area of SPP. Consequently, contracting authorities are left with discretionary power to decide whether or not to apply the facultative provisions on SPP. The Public Contracts Directive regulates SPP at the various stages of the procurement process through a wide range of provisions. These will be discussed in detail below.

4.1 Sustainability principle[34]

Article 18(2) is a new addition to procurement principles and states the following:

> The Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

32. M. Andhov (2019), 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?' in Sanja Bogojevic, Xavier Groussot and Jörgen Hettne (eds.), *Discretion in EU Procurement Law*, Hart Publishing.

33. European Commission (2017), Communication on 'Making Public Procurement work in and for Europe', COM(2017) 572 final, p. 8; European Commission (2017), 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' in M. Andhov (Andrecka), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *EPPPL*, pp. 219-223.

34. M. Andhov (2021), Commentary on Article 18(2) in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 187-207.

The inclusion of Article 18(2) in the Public Contracts Directive is viewed as a milestone in achieving a sustainable market of public contracts by emphasising that polluting and social dumping should not be rewarded.[35] In 2020, Thierry Breton said that Article 18(2) lays down an obligation for Member States to take appropriate measures to ensure that, in the performance of procurement contracts, economic operators comply with applicable obligations in the fields of social and labour law, including those established by collective agreements.[36] However, the binding nature of the provision, or rather, its legal consequences, are unclear, since Article 18(2) creates a somewhat generic duty, being addressed to the Member States rather than to contracting authorities. Therefore, the question remains: if Member States have merely transposed the wording of Article 18(2) without any further action or elaboration, what is the scope of the duty of individual contracting authorities?

In *Tim SpA*, the CJEU stated that the purpose of including sustainability considerations in Article 18 was that 'the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article' (paragraph 38). The CJEU referred to the fact that Article 18(2) is 'a cardinal value' and that Member States 'must ensure compliance' with the enumerated laws.[37]

Consequently, Article 18(2) imposes a minimum due diligence requirement on contracting authorities and tenderers to comply with adequate environmental, social and labour laws.

The Advocate General's opinion in the *Tim SpA* case argued that an insufficient level of due diligence is shown by a 'failure by the tenderer to carry out checks when it includes in its tender a subcontractor that has breached the obligations in Article 18(2) is, at the very least, a case of negligent omission.'[38]

As a counterbalance to Article 18(2), the CJEU indicated that attention must be paid to the principle of proportionality in the scope of expected diligence.[39]

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35. Article 18(2) is referred to as a 'horizontal clause', see A. Wiesbrock (2015), 'Socially responsible public procurement: European value or national choice?' in B. Sjåfjell and A. Wiesbrock (eds.), *Sustainable Public Procurement Under EU Law – New Perspectives on the State as Stakeholder*, Cambridge University Press, p. 78; as 'mandatory social considerations', see European Trade Union Confederation (ETUC) (2015), New EU framework on public procurement: ETUC key points for the transposition of Directive 2014/24/EU, p. 9, https://www.etuc.org/sites/default/files/publication/files/ces-brochure_transpo_edited_03.pdf; and as a 'mandatory social clause', see A. Semple (2018), 'Living Wages in Public Contracts: Impact of the *RegioPost* Judgment and the Proposed Revisions to the Posted Workers Directive' in A. Sánchez-Graells, *Smart Public Procurement and Labour Standards*, Hart Publishing, p. 83.

36. https://www.europarl.europa.eu/doceo/document/E-9-2020-002698-ASW_EN.html

37. Judgment of the Court of Justice of 30 January 2020, *Tim SpA v Consip SpA*, C-395/18, ECLI:EU:C:2020:58, paragraph 38.

38. Opinion of Advocate General Campos Sánchez-Bordona delivered on 11 July 2019 in Case C-395/18, *Tim SpA v Consip SpA*, paragraph 35.

39. Judgment of the Court of Justice of 30 January 2020, *Tim SpA v Consip SpA*, C-395/18, ECLI:EU:C:2020:58, paragraph 48. Listen to Bestek Public Procurement Podcast #8 – Article 18(2) and the Tim Case: A Sustainability Principle?

4.2 Reserved contracts

Member States may decide to implement Article 20 of the Public Contracts Directive on reserved contracts, which permits buying socially.[40] Under Article 20, public contracts may be reserved for sheltered employment undertakings whose main aim is the social and professional integration of disabled and/or otherwise disadvantaged persons (provided they make up more than 30% of staff). The provision includes all categories of disadvantaged workers, covering the unemployed and people from disadvantaged minorities or otherwise socially marginalised groups. Contracts for certain health, social and cultural services can be reserved for non-profit undertakings pursuing a public service mission and organised based on participation, with a maximum duration of three years.[41] It should be underlined that public contracts are reserved for a particular type of enterprise (for example, a social enterprise).

Nevertheless, they cannot be reserved for a specific enterprise.[42] Whenever possible, there must still be competition between reserved contract providers. At the end of the process, tenders will be assessed on the basis of their offer. The contract will be awarded to the enterprise offering the best price/quality ratio or the most economically advantageous tender.

4.3 Technical specifications

Under the technical specifications provision in Article 42 of the Public Contracts Directive, the contracting authority must define the subject matter of the public contract.[43] In so doing, the contracting authority may include social and environmental considerations if they are linked to the subject matter of the contract and are sufficient to constitute technical specifications. It follows from the *Dutch Coffee* case that, while the requirement for a product to be derived from organic agriculture is an acceptable technical specification, fair trade requirements for products cannot constitute technical specifications but instead are contract performance conditions.[44] When drafting technical specifications, the contracting authority may 'refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they

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40. I. Baciu (2021), Commentary on Article 20 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 218-255.
41. Directive 2014/24/EU, Title III (Articles 74-77).
42. I. Baciu (2018), 'The Possibility to Reserve a Public Contract under the New European Public Procurement Legal Framework', Vol. 13, Issue 4, *EPPPL*, pp. 307-325.
43. C. Risvig-Hamer (2021), commentary on Article 42 in R. Caranta and A. Sanchez-Graells (eds.) *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 462-473.
44. Judgment of the Court of Justice of 10 May 2012, *European Commission v Kingdom of the Netherlands (Dutch Coffee)*, C-368/10, ECLI:EU:C:2012:284.

are linked to the subject-matter of the contract and proportionate to its value and its objectives.'[45]

The provision on technical specifications also includes an express social dimension in that, for all procurement intended for use by natural persons, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.[46]

4.4 Labels[47]

Article 43 of the Public Contracts Directive allows contracting authorities to refer directly to environmental or social labels, as long as the label requirements are linked to the subject matter of the contract and concern appropriate criteria.[48] The general requirements for using labels in public procurement are that the criteria must be objectively verifiable and non-discriminatory. The criteria must be established in an open and transparent adoption procedure, and the label must be accessible to all interested parties so as to avoid discrimination or preferential treatment. Finally, a third party is to set the label requirements over which the company applying for the label cannot exercise a decisive influence. By allowing specific labels to be called for, the Public Contracts Directive overrode the rule established in the *Dutch Coffee* case according to which a public buyer could not refer to specific labels as the source of information when choosing the most economically advantageous tender.

There are two limitations on the ability to require a specific label. First, following the principles of mutual recognition, non-discrimination and open competition, other products that are not certified with a particular label but certified by different labels or considered functionally equivalent must be recognised as compliant, and the means to prove this must be allowed during the procurement procedure. This again follows the *Dutch Coffee* case, where, ultimately, an infringement was found, as the tender required the use of specific labels without allowing equivalent labels to be used, which was held by the Court to be in breach of EU law.

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45. Article 42(1) codifies what was established in the *Dutch Coffee* case (C-368/10), paragraph 91.

46. Ibid.

47. M. Andhov (2021), Commentary on Article 43 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 474-481.

48. For a general overview, see R. Caranta (2015), 'Labels as enablers of sustainable public procurement' in B. Sjåfjell and A. Wiesbrock (eds.), *Sustainable Public Procurement Under EU Law: New Perspectives as Stakeholder*, Cambridge University Press, p. 112; C. Nouira, G. Grolleau, and N. Mzoughi (2004), 'Public Purchasing and Eco-Labelling Schemes: Making the Connection and Reinforcing Policy Coherence', 15(2), *Journal of Interdisciplinary Economics*, pp. 131-151.

The second counterweight that limits the general rule on referring to a specific label is that, where a company cannot obtain the specific label indicated by the public buyer, or an equivalent label, the public buyer must accept other appropriate means of proof. The impossibility of obtaining the label must not be attributable to the bidder, who must prove it was unable to obtain the label within the relevant time limits for reasons that cannot be ascribed to it.

4.5 Exclusion grounds

Article 57 of the Public Contracts Directive sets out two categories of exclusion grounds: mandatory and discretionary. The bidder might be excluded for sustainable reasons in both of these categories.[49] With regard to mandatory grounds, Article 57(1)(f) and (2) respectively impose a duty on contracting authorities to exclude economic operators that:

– have been the subject of a conviction by final judgment for child labour and other forms of trafficking in human beings; and
– are in breach of legal obligations to pay taxes or social security contributions where this has been established by a judicial or administrative decision having final and biding effect.

Article 57(4) allows (facultative) contracting authorities – and permits Member States to require those authorities – to exclude bidders who have proven unreliable, which encompasses violations of environmental or social obligations,[50] including rules on accessibility for disabled persons or other forms of grave professional misconduct,[51] such as violations of competition rules or intellectual property rights.[52]

4.6 Environmental management systems

Article 62 of the Public Contracts Directive empowers contracting authorities to require compliance with the environmental management system (EMS) that a company has in place for any contract.[53] Equivalent certificates must be

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49. P. Friton and J. Zoll (2021), Commentary on Article 57 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 558-635.

50. For discretionary exclusion grounds for not paying taxes, see judgment of the Court of Justice of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici v Comune di Milano*, C-358/12, ECLI:EU:C:2014:2063. The case considers what a 'serious infringement' is and involves the application of the principle of proportionality to exclusion grounds.

51. See judgment of the Court of Justice of 13 December 2012, *Forposta SA and ABC Direct Contact sp. Zoo v Poczta Polska SA*, C-465/11, ECLI:EU:C:2012:801; and judgment of the Court of Justice of 14 December 2016, *Connexxion Taxi Services BV v Staat der Nederlanden*, C-171/15, ECLI:EU:C:2016:948.

52. Recital 101 of the Public Contracts Directive.

53. A. Semple (2021), Commentary on Article 62 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 670-676.

accepted. However, the ability of bidders to rely on non-certified systems has been reduced (in a similar way to the situation with labels under Article 43). Non-certified systems may still be used where bidders can demonstrate that:

(i) they had no access to certification or no possibility of attaining it within the relevant time limits for reasons not attributable to them; and
(ii) the measures they propose are equivalent to those applicable under the requested environmental management system or standard.

While equivalency is to be accepted, in *Evropaïki Dynamiki v European Environment Agency,* the General Court stated that the public buyer was allowed to award different scores based on the quality of the evidence produced regarding environmental management measures.[54]

In this instance, quality was related to third-party verification, which allowed more points to be awarded when the quality of a company's EMS was assessed.

4.7 Award criteria

Article 67 allows contracting authorities to refer to sustainable factors, which may be defined as part of the most economically advantageous tender (MEAT) award criteria, where they are weighted in addition to the price offered.

Sustainable considerations to be included in the award criteria must be linked to the subject matter of the public contract in question. However, each individual award criterion does not need to give an economic advantage to the public buyer.[55] Award criteria must not confer an unrestricted freedom of choice on contracting authorities. That means that discretion must be exercised based on objective criteria.[56] The factors included in the award criteria must ensure the possibility of effective competition and must be verifiable.[57]

It follows from the *Dutch Coffee* case that fair trade might be considered as part of the award criteria.[58] The CJEU also confirmed that award criteria might concern the specific process of production, provision or trading of the goods, services or works being purchased or a specific process for another

54. Judgment of the General Court of 8 July 2010, *Evropaïki Dynamiki v European Environment Agency*, T-331/06, ECLI:EU:T:2010:292, paragraphs 76 and 77.
55. Judgment of the Court of Justice of 17 September 2002, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99, ECLI:EU:C:2002:495, paragraph 55.
56. Judgment of the Court of Justice of 20 September 1988, *Gebroeders Beentjes BV v State of the Netherlands*, C31/87, ECLI:EU:C:1988:422, paragraph 26.
57. Judgment of the Court of Justice of 4 December 2003, *EVN AG and Wienstrom GmbH v Republik Österreich*, C-448/01, ECLI:EU:C:2003:651, paragraph 52.
58. Judgment of the Court of Justice of 10 May 2012, *European Commission v Kingdom of the Netherlands (Dutch Coffee)*, C-368/10, ECLI:EU:C:2012:284, paragraph 91.

stage of their life cycle, even where such factors do not form part of their material substance.[59]

Besides fair trade, other social aspects can also form part of the award criteria. In the *Nord-Pas-de-Calais* case, the CJEU ruled that a condition relating to unemployment could, in principle, be applied as an award criterion provided it was consistent with the fundamental principles of EU law, in particular the principle of non-discrimination.[60]

4.8 Life-cycle costing[61]

Article 68 allows contracting authorities to make use of life-cycle cost methodologies. Life-cycle costing (LCC) must, to the extent relevant, cover part or all of the costs over the life cycle of a product, service or works, including:

(a) costs borne by the contracting authority or other users (such as costs relating to acquisition; costs of use, such as consumption of energy and other resources; maintenance costs; and end of life costs, such as collection and recycling costs); and
(b) costs attributed to environmental externalities linked to the subject matter of the contract during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and other pollutant emissions and other climate change mitigation costs. These costs are not reflected in the price of what the public buyer is procuring. Usually, the costs relating to 'environmental externalities' are borne by society at large rather than a specific public buyer.

Wherever an LCC method has been made mandatory under EU law, this method must be applied. A list of those methodologies – there currently being only one, the Clean Vehicles Directive – is annexed to the Public Contracts Directive.[62] The Clean Vehicles Directive, in its 2009 version, required minimal public buyers to take energy consumption and environmental impacts (emissions) into account when procuring road transport vehicles.[63] It provided a methodology for monetising those impacts to assess operational lifetime energy and the cost of environmental impacts. However, since then,

59. Ibid.
60. Judgment of the Court of Justice of 26 September 2000, *Commission of the European Communities v French Republic (Nord-Pas-de-Calais Region)*, C-225/98, ECLI:EU:C:2000:494, paragraphs 49-54.
61. M. Andhov et al. (eds.) (2020), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability*, Routledge Publishing.
62. Annex XIII.
63. Article 5(1) to (3) of Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120, 15.5.2009, p. 5.

the Directive has been updated (2019/1161/EU), and the application of a specific methodology has been dropped in favour of establishing relevant targets that are to be met.[64]

4.9 Abnormally low tenders

According to Article 69(4), contracting authorities are obliged to reject a tender where it has been established that the tender is abnormally low because it violates the obligations under the sustainable laws listed in Article 18(2).[65] For example, this may occur if there has been a violation of employment protection provisions and working conditions in force at the place where the service is to be provided or if there has been non-payment of social security contributions.[66] However, the contracting authority must first request an explanation from the tenderer concerned before rejecting the tender as abnormally low.[67]

4.10 Contract performance conditions[68]

Article 70 allows contracting authorities to lay down special conditions relating to the performance of a contract with regard to environmental, social or employment-related considerations. They must be included in the procurement documentation or the call for tenders and be linked to the subject matter of the contract. The 'link to the subject matter' requirement prevents public buyers from applying general corporate social and environmental responsibility (CSR) policy within performance conditions.[69] Therefore, a requirement for the contractor to invest in the overall production capacity of renewable energy or establish a company diversity hiring policy, for example, is prohibited. In this context, it is worth remembering that the mandatory

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64. M. Andhov (2021), Commentary on Article 68 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 721-728.

65. On what is an abnormally low tender, see judgment of the Court of Justice of 22 June 1989, *Fratelli Costanzo SpA v Comune di Milano*, C-103/88, ECLI:EU:C:1989:256, paragraphs 18-20; judgment of the Court of Justice of 27 November 2001, *Impresa Lombardini SpA v ANAS*, C-285/99, ECLI:EU:C:2001:640, paragraphs 47 and 55; and judgment of the Court of Justice of 29 March 2012, *SAG ELV Slovensko and Others v* Úrad pre verejné obstarávanie, C-599/10, ECLI:EU:C:2012:191, paragraph 28.

66. Éric Van den Abeele (2014), 'Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?', ETUI Working Paper 2014.08, p. 19.

67. See judgment of the Court of Justice of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, ECLI:EU:C:2012:191.

68. M. Andhov (2021), Commentary on Article 70 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 747-754.

69. M. Andhov (Andrecka) (2017), 'Corporate Social Responsibility and Sustainability in Danish Public Procurement', in M. Andhov (Andrecka), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *EPPPL*, pp. 333-345.

environmental and social standards concerning the supplier are enforceable under Article 18(2) of the Public Contracts Directive. The apparent prohibition in recital 97 on CSR requirements must be read as a prohibition on imposing higher-than-mandatory standards on suppliers only in so far as they are not related to or go beyond the subject matter of the contract.

Performance conditions relating to environmental considerations might be applied to protect the environment or animal welfare, for example, in the production or provision process.[70] In the context of the supply of goods, they could require that the manufacture of the supplies purchased does not involve toxic chemicals.

The catalogue of social performance conditions is broad. It includes the ability to incorporate requirements to:

(a) employ disadvantaged persons or members of vulnerable groups (e.g. long-term unemployed, persons with disabilities) as part of the workforce used to perform the awarded contract;[71]
(b) implement training measures for the unemployed or young persons;
(c) pay a certain wage to workers under a procurement contract;[72] and
(d) obtain the products supplied from small-scale producers in developing countries, subject to trading conditions favourable to them.[73]

Finally, recital 98 suggests that performance conditions can even be used to create a level playing field in the context of gender equality in the labour market by favouring 'the implementation of measures [aimed at promoting the] equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, [...] [ensuring compliance] in substance with fundamental International Labour Organisation (ILO) Conventions, and [...] recruit[ing] more disadvantaged persons than are required under national legislation.'

In recent years, the consideration of labour law and social protection of workers, specifically the question of a minimum wage as a special condition in public procurement contracts, has been much discussed following the CJEU rulings in three cases: *Rüffert*,[74] *Bundersdruckerei*[75] and *RegioPost*.[76]

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70. Recital 98 of Directive 2014/24/EU.
71. Judgment of the Court of Justice of 20 September 1988, *Gebroeders Beentjes BV v State of the Netherlands*, C31/87, ECLI:EU:C:1988:422.
72. Judgment of the Court of Justice of 17 November 2015, *RegioPost v Stadt Landau in der Pfalz*, C-115/14, ECLI:EU:C:2015:760.
73. Judgment of the Court of Justice of 10 May 2012, *European Commission v Kingdom of the Netherlands (Dutch Coffee)*, C-368/10, ECLI:EU:C:2012:284.
74. Judgment of the Court of Justice of 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, C-346/06, ECLI:EU:C:2008:189.
75. Judgment of the Court of Justice of 18 September 2014, *Bundesdruckerei GmbH v Stadt Dortmund*, C-549/13, ECLI:EU:C:2014:2235.
76. Judgment of the Court of Justice of 17 November 2015, *RegioPost v Stadt Landau in der Pfalz*, C-115/14, ECLI:EU:C:2015:760.

These cases analyse the compliance of performance conditions through the lens of public procurement law and the Posted Workers Directive.[77] In these cases, the CJEU found that the ability of public buyers to introduce social considerations in terms of a minimum wage in procurement procedures was limited – particularly in the first two cases – by the specific conditions in the Posted Workers Directive and by the general principles of EU law. The CJEU's 2014 decision in *RegioPost* shows a more open approach to balancing social considerations and providing services in public procurement.[78]

4.11 Subcontracting

Subcontracting adds a strong social dimension to the instrumentalisation of public procurement, as it can contribute to the creation of new jobs. It is often used to supplement human, economical or technical resources or increase the bidder's capacities.[79] Subcontractors to a contract for services, supplies or works must respect social, environmental and labour law obligations under Article 18(2).[80] The nature of the obligation imposed in Article 71(1) is rather vague, not least because of the general statement that subcontractors' compliance with Article 18(2) is to be secured by 'appropriate action by the competent national authorities acting within the scope of their responsibility and remit'.

The mandatory nature of the provision is further reinforced by the stipulation that:

> Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).[81]

Contracting authorities may verify (or may be required by the Member States to verify) whether there are grounds for exclusion of subcontractors pursuant to Article 57. While subcontractors have a strict obligation to comply with Article 18(2), their failure in this context ultimately comes at the expense of the main contractor. This was emphasised in the *Tim* case, which highlighted the fact that the bidder's suitability as a contractor can be affected by breaches committed by the subcontractor.

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77. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

78. A. Sánchez-Graells (ed.) (2018), *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost*, Hart Publishing.

79. J. Stalzer (2021), Commentary on Article 71 in R. Caranta and A. Sanchez-Graells (eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, pp. 755-775.

80. See Directive 2014/24/EU, Article 71.

81. Ibid., Article 71(6)(a).

Finally, application of the proportionality principle will determine the limit of the expected due diligence. The CJEU confirmed in *Tim SpA* that attention must be given to proportionality as a general EU law principle where 'the exclusion provided for by national legislation is imposed on the economic operator who submitted the tender for a failure to fulfil obligations committed not directly by that operator but by a person outside his undertaking, in relation to the control of whom the operator may not have all the authority required or all the necessary means at his disposal'.[82]

4.12 Outside the EU procurement framework: FTAs and sustainability

Free trade agreements (FTAs) are important external action instruments of the EU, which is the most important trading partner for about 80 countries. One of the largest plurilateral agreements is the World Trade Organization's Agreement on Government Procurement (GPA).[83] This was revised in 2012 and has 21 parties comprising 48 WTO Members.[84]

Under the GPA, signatory countries voluntarily agree to abide by set regulations in government procurement practices.[85] The intention is to secure transparency and open competition for domestic and foreign firms. The GPA obligations do not apply across the board to all procurements by all parties, and there are limits on their scope and coverage. More precisely, the GPA applies only to procurements by entities listed in Annexes 1 to 3 of Appendix I to the Agreement, of goods and services listed in Annexes 4 and 5 of Appendix I, concerning contracts that exceed certain monetary thresholds.

The core principles of the GPA are open competition, non-discrimination and transparency. Under the GPA's national treatment provision, each party must accord to goods, services and suppliers of any other party to the GPA treatment that is 'no less favourable' than the treatment accorded to domestic goods, services and suppliers.[86]

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82. Judgment of the Court of Justice of 30 January 2020, *Tim SpA v Consip SpA*, C-395/18, ECLI:EU:C:2020:58, paragraph 48.

83. On the GPA, see S. Arrowmith and R. D. Anderson (eds.) (2011), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press.

84. Signatories to the GPA: Armenia, Australia, Canada, the European Union (27 Member States), Hong Kong (China), Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Republic of Moldova, Montenegro, Aruba (Netherlands), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, the United Kingdom and the United States. Another 35 WTO Members/observers and four international organisations participate in the Committee on Government Procurement as observers. Eleven of these Members with observer status are in the process of acceding to the Agreement. See https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

85. Article II:3 of the GPA.

86. Article IV:1 of the GPA.

The GPA is silent on the social dimension of sustainability. It does not include any references to social or labour considerations. Environmental considerations are promoted through Article X:6 on technical specifications and Article X:9 on evaluation criteria concerning tender documentation.

Similarly, although the EU-South Korea FTA 2010, the EU-Japan FTA 2017, the EU-Mercosur FTA and the CETA incorporate the GPA, they do not include the societal dimension of sustainability.

The new generation of EU FTAs reflects the increased importance of sustainability, thereby becoming a new instrument for EU socio-economic policy in line with SDG 12. Environmental, social and labour obligations are mainly enshrined in the trade and sustainable development chapters of these agreements.

The 2018 EU-Mexico 'Agreement in Principle' is the first FTA to contain at least one provision that includes all three pillars of sustainability. The 2018 draft FTAs with Australia and New Zealand herald a new wave of FTAs. They refer expressly to environmental and social considerations and further establish 'obligations in the field of [...] social and labour law'. They allow contracting entities to take sustainability considerations into account 'throughout the procurement procedure', thus going beyond the specifications and evaluation criteria limits seen until now.[87]

5. The key role and untapped potential of EU public procurement

The sixth generation of the EU Public Procurement Directives clarified that SPP is permissible. However, a large majority of the legislative solutions have a facultative character. Similarly, the Commission has issued various soft-law tools, such as guidance on how to procure sustainably (*Buying Green! Handbook*;[88] *Buying Social*[89]*)* and non-binding GPP criteria for 20 common priority range of products and services such as cleaning products and services and copying and graphic paper.[90]

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87. M. Trybus (2022), 'The EU acting through Free Trade Agreements: I case of sustainability and public procurement' in E. Fahey and I. Mancini (eds.), *Understanding the EU as a good global actor*, Edward Elgar Publishing, pp. 107-123.

88. European Commission (2016), Directorate-General for Environment, Buying Green! – A handbook on green public procurement – 3rd Edition, Publications Office.

89. European Commission (2021), Buying Social – A guide to taking account of social considerations in public procurement – Second edition, 2021/C 237/01, OJ C 237, 18.6.2021, p. 1.

90. Cleaning products and services (2018); Computers, monitors, tablets and smartphones (2021); Copying and graphic paper (2008); Data centres, server rooms and cloud services (2020); Electrical and Electronic Equipment used in the Health Care Sector (2014), etc. The extensive list can be found at https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

The existing initiatives and regulatory framework have not yet contributed to a substantial shift in sustainable purchasing in the EU public contract market. Therefore, there is still untapped potential of public procurement to contribute to the uptake of SPP, the Green Deal and the Just Transition. To tap into that potential, new developments suggest the introduction of EU-wide minimum mandatory green criteria, the purpose of which is to increase the uptake of GPP and avoid fragmentation of the internal market (twin transition axis).[91] These new developments launched by the introduction of the EU Green Deal will be discussed below.

5.1 Green transition

In December 2019, the Commission set out the European Green Deal, a strategy for Europe to tackle climate change and environmental impact as a whole through a green and just transition.[92] The Green Deal emerged against the background of the UN's 2030 Agenda and its SDGs and focuses on:

a. Moving towards a zero-pollution ambition;
b. Preserving and restoring ecosystems and biodiversity;
c. Supplying clean, affordable and secure energy;
d. Mobilising industry for a clean and circular economy;
e. Building and renovating in an energy- and resource-efficient way;
f. Accelerating the shift to sustainable and smart mobility;
g. Implementing the 'Farm to Fork' strategy: a fair, healthy and environmentally-friendly food system.

In its strategy, the EU Green Deal places public procurement front and centre as a tool to achieve the strategy's objectives.[93] In particular, by referring in the new Circular Economic Action Plan to its as yet untapped potential, the Commission points out that EU public procurement reform 'has not led to sufficient uptake of Green Public Procurement (GPP) yet'.

The Circular Economy Action Plan and the Sustainable Product Policy also have the potential to transform what contracting authorities buy. Alongside the requirement for greener transport in the cities, the Action Plan alludes to the potentially significant role of public procurement in the years to come, since public authorities, including the EU institutions, are to lead by example and ensure that their procurement is green.[94] To achieve this goal,

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91. M. Andhov et al. (2020), *Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, DOI: http://dx.doi.org/10.2139/ssrn.3559393, 58 pp.
92. European Commission (2019), Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions: The European Green Deal, COM(2019) 640 final.
93. Listen to M. Andhov and W. Janssen (2020), Bestek – The Public Procurement Podcast #3: The EU Green Deal in light of public procurement law, running time: 43:34 minutes.
94. European Commission (2019), Communication from the Commission: I European Green Deal, COM(2019) 640 final, p. 8.

the Commission will propose further guidance on green public purchasing. In addition:

> The Commission will propose minimum mandatory green criteria or targets for public procurements in sectorial initiatives, EU funding or product-specific legislation. Such minimum criteria will 'de facto' set a common definition of what a 'green purchase' is, allowing collection of comparable data from public buyers, and setting the basis for assessing the impact of green public procurements. Public authorities across Europe will be encouraged to integrate green criteria and use labels in their procurements. The Commission will support these efforts with guidance, training activities and the dissemination of good practices.[95]

The intended next step is the introduction of minimum mandatory green requirements in sectoral legislation following the example of the Energy Performance of Buildings Directive (2010/31/EU) and the Energy Efficiency Directive (2012/27/EU), as well as the introduction of new legislation and the strengthening of existing laws setting minimum environmental standards for the procurement of certain goods and possibly also services. It is worth noting that the introduction of the minimum mandatory green criteria in public procurement will, de facto, shift the focus of the public procurement framework from 'how' to buy to ultimately 'what' contracting authorities are buying. That approach, although applauded by some, is criticised by others who point out that the new approach will substantially limit the discretion of contracting authorities when deciding what to buy.[96]

Following the launch of the EU Green Deal, several consequential reforms, with potential relevance to SPP, are currently being considered. They are linked to the following:

a. EU Climate Law;
b. 'Fit for 55' initiative;
c. 'Renovation Wave' initiative; and
d. 'Farm to Fork' initiative.

Current legislative initiatives on sectoral mandatory GPP focus on electronics and ICT, batteries and vehicles, packaging, plastics, textiles, construction and buildings, and food, water and nutrients.

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95. European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Sustainable Europe Investment Plan – European Green Deal Investment Plan, Brussels, 14.1.2020, COM(2020) 21 final, p. 12.

96. For more on discretion in public procurement, see S. Bogojevic, X. Groussot and J. Hettne (eds.) (2019), *Discretion in EU Public Procurement Law*, Hart Publishing.

5.2 Promotion of the forgotten social dimension of sustainability

Besides the green aspects, the European Green Deal proposes a new growth strategy to transform the EU 'into a fair and prosperous society, with a modern, resource-efficient and competitive economy'.[97]

In achieving that aim, the importance of the social dimension of the EU Green Deal must be underlined. For example, the green transition could affect coal mining regions, leading to unemployment, and the negative socio-economic impact of the transition must therefore be alleviated. If the pledge 'no person and no place left behind' is to be taken seriously, the social dimension of the transition is crucial to its success.[98]

There are two distinct dimensions to the social aspect of SPP:

– An internal market where SPP can contribute to achieving a 'Just Transition' and inclusion in Europe; and
– An external element where SPP should ensure compliance with human rights beyond the EU's borders.[99]

Social sustainability objectives may include promoting human rights through the implementation of fair labour practices, the pursuit of equality or the provision of support to disadvantaged groups in society such as specific cultural or ethnic groups or communities within particular undeveloped geographical areas.[100]

The social dimension of EU public procurement is still underdeveloped compared to the environmental dimension. While provisions on matters such as labels and life-cycle costing pave the way for the inclusion of social aspects, there are largely in their infancy. See, for example, recital 96 of the Public Contracts Directive which states that 'the feasibility of establishing a common methodology on social life-cycle costing should be examined, taking into account existing methodologies such as the Guidelines for Social Life Cycle Assessment of Products adopted within the framework of the United Nations Environment Programme.'

As the EU Green Deal predominantly focuses on environmental aspects, the social dimension of public procurement developments has been somewhat

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97. European Commission (2019), Communication from the Commission: The European Green Deal, COM(2019) 640 final, p. 1.
98. C. McCrudden (2007), Buying Social Justice: Equality, Government Procurement, and Legal Change, Oxford University Press.
99. O. Martin-Ortega (2021), 'Sustainable public procurement: Strengthening the social and human rights dimensions of SPP in the framework of the European Green Deal', *BHRE Research Series*, Policy Brief 1. December 2021.
100. O. Martin-Ortega and C. Methven-O'Brien (eds.) (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer, Edward Elgar Publishing.

neglected. That may also be due to a lack of clarity over the legal standing of social considerations, which are often seen as inherently connected with localism. These challenges will be discussed further in the section on constraints.

The main aspects of social sustainability which are continuously promoted but still not realised involve making public procurement more accessible for small and medium-sized enterprises, social enterprises and farmers and more gender-responsive. [101]

Finally, the newly-adopted proposal for a Corporate Sustainability Due Diligence Directive is particularly relevant.[102] The proposal fosters sustainable and responsible corporate behaviour throughout global value chains, thus complementing due diligence requirements under product/sector-specific legislation (batteries, deforestation, etc.). The proposal is particularly relevant to SPP, as it has the potential to answer the call for the EU to make it mandatory for contracting authorities to map and monitor their supply chains for risks of breaches of environmental and social rules, including those that protect human rights.[103]

5.3 Industrial policy (strategic autonomy axis)

Industrial policies typically give preference to local suppliers through support for industrial and economic development, support for small and medium-sized enterprises (SMEs) and procurement of innovation. At times, social policy is difficult to distinguish from industrial policy when considered in terms of public procurement law. For example, support for SMEs may be viewed as a policy supporting industrial development or a social policy aimed at reducing unemployment and poverty. At the same time, it may also contribute to increasing competition between suppliers and reducing prices in the procurement market – in other words, promoting better value for money.[104]

101. EIGE's gender-responsive public procurement step-by-step toolkit

102. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final

103. M. Andhov et al. (2020), *Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, DOI: http://dx.doi.org/10.2139/ssrn.3559393, 58 pp.

104. M. Trybus and M. Andhov (Andrecka) (2017), 'Favouring Small and Medium-Sized Enterprises with Directive 2014/24/EU?' in M. Andhov (Andrecka), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *EPPPL*, pp. 224-238.

The prime example of industrial policy is to be found in the United States of America, where the Buy American Act[105] has been used to support local industries for almost a century.[106] Both President Trump and President Biden signed executive orders changing policies and practices of the federal procurement of services and goods, giving preference to those of US origin.[107] Recognition should also be given to the massive US small business programmes, which include public procurement to support local SMEs and which have been in operation since 1953.[108]

The United Kingdom applied a similar approach in 2021 for contracts below the thresholds derived from the GPA, where contracts are reserved for:

a. Supplier location – this means running a competition and specifying that only suppliers located in a specific geographical area can bid;[109]
b. SMEs/voluntary, community and social enterprises (VCSEs) – this means running a competition and specifying that only SMEs and VCSEs can bid.[110]

Industrial policies giving preference to the use of domestic production capacities and sourcing from regional suppliers are prohibited under EU internal market laws, as this would discriminate against suppliers from other Members States, thus breaching the EU public procurement principles of equal treatment and non-discrimination.

However, a question arises as to whether it would be possible to introduce a preference for sourcing from:

(a) companies in structurally disadvantaged regions across the EU (e.g. coal-mining regions);
(b) producers residing in the EU; or
(c) producers disposing of production capacities in the EU.[111]

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105. 41 USC section 10a-10d.
106. The Buy American Act was first enacted in 1933; see M. J. Golub and S. L. Fenske (1987), 'US Government Procurement: Opportunities and Obstacles for Foreign Contractors', Vol. 20, *The George Washington Journal of International Law and Economics*, p. 567.
107. See https://www.govinfo.gov/content/pkg/FR-2021-01-28/pdf/2021-02038.pdf (2021).
108. J. Linarelli (2011), 'The Limited Case for Permitting SME Procurement Preferences in the Agreement on Government Procurement' in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press, p. 444.
109. Cabinet Office, A Guide to Reserving Below Threshold Procurements, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014494/20210818-A-Guide-to-Reserving-Below-Threshold-Procurements.pdf, Crown Commercial Services, December 2020.
110. Ibid.
111. European Parliament, Directorate-General for External Policies of the Union, W. Raza et al. (2021), 'Post Covid-19 value chains: options for reshoring production back to Europe in a globalised economy', Publications Office. DOI: 10.2861/118324, p. 75.

Such options would have to be assessed against the EU's commitments under the GPA. The GPA rules apply to covered entities and goods and services above certain threshold values. The threshold for goods distinguishes between:

(a) procurement by central government contracting entities, where the threshold is 139 000 euros (the EU's Annex 1 to Appendix I to the GPA); and
(b) procurement by sub-central government contracting entities, where the threshold is 214 000 euros (the EU's Annex 2 to Appendix I to the GPA).

Sub-central government entities include all regional and local contracting authorities and bodies governed by public law in the EU context.[112] Consequently, if the political will existed to regulate EU public procurement below the threshold by creating industrial 'Buy European' policies that provided preferential treatment to European companies and goods, this might be possible.[113] Even though the choice of EU over foreign goods would be largely inconsistent with the general international trade principle of non-discrimination, it is important to note that preference could be given to EU suppliers, goods and so on over non-European ones. Nonetheless, the preference could not be for local or domestic within a particular Member State. That is prohibited even in public procurements under the EU thresholds.[114]

As regards procurement above the GPA threshold, it is highly doubtful that a 'Buy European' policy would be compliant, as preferential treatment for Europeans over companies from countries that are members of the GPA or other FTAs would not be permissible.

It would be possible to apply a 'Buy European' policy to third-country suppliers who are not part of the GPA and with whom the EU has not signed binding international or bilateral free trade agreements covering public procurement.[115] These third-country companies do not have secured access to EU procurement markets and may be excluded. The International Procurement Instrument was adopted for that purpose.[116]

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112. See definitions in Article 2 of Directive 2014/24/EU.
113. There seems to be opposition to EU Strategic Autonomy approach at least in the European Nordic countries. See J. Lewander et al. (ed.) (2021), Strategic Autonomy – Views from the North: Perspectives on the EU in the World of the 21st Century, SIEPS.
114. Judgment of the Court of Justice of 3 December 2001, *Bent Mousten Vestergaard v Spøttrup Boligselskab*, C59/00, ECLI:EU:C:2001:654.
115. M. Andhov, 'EU and public procurement: making better use of the existing toolbox' in M. Wiberg (ed.), *EU Industrial Policy in a Globalised World – Effects on the Single Market*, pp. 73-86.
116. Ibid.

6. The main constraints on pursuing SPP

6.1 Link to the subject matter of the contract[117]

Not all sustainable (environmental and social) considerations are allowed under EU public procurement law. The main limitation here lies in the concept of a 'link to the subject matter' of the contract. This means that general corporate social or environmental policies and practices are excluded.[118]

The 'link to the subject matter' concept has been developed by the CJEU in its case-law on award criteria for public contracts. In the Court's first judgment in this area, the *Concordia* case, where the contracting authority used environmental considerations, namely the emissions of nitrogen oxide and noise among the criteria for the contract award, the CJEU established that, 'where the contracting authority decides to award a contract [...], it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract'.[119]

In addition, the criteria must not confer an unrestricted freedom of choice on the contracting authority, must be explicitly mentioned in the contract notice or tender documents (transparency requirement) and must comply with the fundamental Treaty principles, particularly that of non-discrimination.[120] Further development of the case-law in this area included examining the award criteria where the contracting authority had allocated a weighting of 45% to the ability of bidders to produce renewable electricity in amounts that exceeded the volume required under the contract (*EVN and Wienstrom* case).[121] The CJEU ruled that the weighting with regard to capacities of electricity exceeding the contracting authority's requirements meant that the criterion was not linked to the subject matter of the contract.

The concept of the 'link to the subject matter' in public procurement has been criticised, as it essentially limits the effective pursuance of sustainability goals.[122] This is because the requirement makes it impossible to include

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117. Based on M. Andhov (Andrecka) and K. Peterkova Mitkidis (2017), 'Sustainability requirements in EU public and private procurement – a right or an obligation?', January 2017, *Nordic Journal of Commercial Law (NJCL)*, pp. 56-87.

118. Directive 2014/24/EU, recital 97; on issues of CSR in public procurement, see M. Andhov (Andrecka) (2017), 'Corporate Social Responsibility and Sustainability in Danish Public Procurement' in M. Andhov (Andrecka), guest editor, special issue on 'Procurement Beyond Price: Sustainability and CSR in Public Purchasing', Vol. 12, Issue 3, *EPPLR*, pp. 333-345.

119. Judgment of the Court of Justice of 17 September 2002, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99, ECLI:EU:C:2002:495, paragraph 64.

120. Ibid.

121. Judgment of the Court of Justice of 4 December 2003, *EVN AG and Wienstrom GmbH v Republik Österreich*, C-448/01, ECLI:EU:C:2003:651.

122. See A. Semple (2015), 'The link to the subject matter: a glass ceiling for sustainable public contracts?' in B. Sjåfjell and A. Wiesbrock (eds.), *Sustainable Public Procurement Under EU Law – New Perspectives on the State as Stakeholder*, Cambridge University Press, pp. 50-74.

general CSR policies to the extent that they address matters beyond the specific needs of the public entity. In terms of what this means in practice, it seems that a requirement for a contractor to invest in the local community outside the provisions of the specific contract might not be contested on this basis.[123] However, the contract performance clause may be directly linked to the activities carried out under the contract, such as:

– obtaining a recycling rate of over x% of materials disposed of during construction works;
– offsetting gas emissions caused by delivering supplies (payments or planting trees) throughout the contract.

While the Public Procurement Directives were being redrafted, the CJEU dealt with the milestone *Dutch Coffee* case.[124] In a supply contract for tea and coffee vending machines, the contracting authority wished to include award criteria relating to organic and fair trade characteristics. In its ruling, the CJEU confirmed that non-economic criteria related to a particular means of production (for example, organic) or distribution (such as fair trade labels) could be considered linked to the subject matter of a contract.[125] In the judgment, the CJEU expanded the concept of 'link to the subject matter' of a contract by underlining that there was no requirement for award criteria to relate to a product's core characteristic or something that alters its material substance. This part of the judgment was codified in Article 67 of the Public Contracts Directive, where the *Dutch Coffee* case therefore influenced the definition of the concept.

6.2 Risk of artificially narrowing competition

Procurement principles constitute another limitation on sustainable considerations under EU public procurement law. Specifically, Article 18(1) of the Public Contracts Directive requires compliance with open competition:

> The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. The competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

123. A. Semple (2015), *A Practical Guide to Public Procurement*, Oxford University Press, pp. 197-204.
124. Judgment of the Court of Justice of 10 May 2012, *European Commission v Kingdom of the Netherlands (Dutch Coffee)*, C-368/10, ECLI:EU:C:2012:284.
125. Ibid., paragraphs 89-92.

The public procurement regime is market-based and fully dependent on the system's ability to attract contract awards.[126] Therefore, an obstacle to conducting and legitimising SPP lies in the potential distortion of competition resulting from such procurements. To be precise, SPP criteria are often more complex. They may create a higher entry barrier to the procedure and possibility of contract execution which disincentives economic operators from participating in a procedure in the first place. In other words, pursuing sustainability goals via public procurement can narrow down the competition.[127]

The technical specifications, award criteria and even the contract performance clauses of such tenders tend to be more complex than traditional ones, meaning that fewer economic operators are either willing or able to bid. The complexity here refers to the incorporation of sustainability standards that usually require bidders to use innovative technologies and processes to deliver the aim of the contract. Firstly, such complex requirements can make the economic viability of operating the contract questionable. Secondly, some bidders do not have or cannot obtain the sufficient, sustainable technical capacity needed for executing the contract. Logically, this narrows the pool of bidders that can offer sustainable goods, works and services.

In contrast, such standards generate procompetitive benefits over the long run by raising environmental standards to the benefit of the public as a whole.[128] Thus, to escape the risk of artificially narrowing down the competition, the given market has to have enough market participants to offer sustainable solutions. As this is the case in only a few open market economies, it is legitimate to drive the change of the market participants through the demand side – in other words, through public procurements.

Article 18(1) predicts that competition in public procurement procedures may need to be narrowed down to achieve its objective aims. It should not be narrowed down in a way that aims to favour a specific tenderer. It must not be intentionally and unnecessarily restrictive. 'Intentionally' here addresses the creation of rigged tenders, which are corruptive and anti-competitive practices.

It is left to the executive discretion of the contracting authorities to decide the degree of restrictiveness of the requirements they are setting up. Nonetheless, this executive discretion is bound by the principles of the Procurement Directives and by the CJEU's case-law.[129] The executive discretion as well as

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126. A. Sanchez-Graells (2016), 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?', Vol. 22, Issue 2, *European Public Law* , p. 391.

127. A. Sanchez-Graells (2015), Public Procurement and the EU Competition Rules, Second Edition, Hart Publishing.

128. F. M. Beattie (2021), 'Procuring a Greener Future' in *Competition Law, Climate Change & Environmental Sustainability*, Institute of Competition Law, pp. 193-204.

129. A. Sanchez-Graells (2019), 'Some Reflections on the "Artificial Narrowing of Competition" as a Check on Executive Discretion in Public Procurement' in S. Bogojević, X. Groussot and J. Hettne (eds.), *Discretion in EU Public Procurement Law*, Hart Publishing, pp. 79-98.

an express need for the balancing of the two objectives are also present in recital 74 of the Public Contracts Directive:

> The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services.

The pursuit of sustainability objectives should be followed by applying the proportionality test in each case. This reasoning is expressed in the various CJEU rulings.[130]

Halonen argues that the adverse effects of Green Public Procurement on competition are especially relevant, as the EU is already experiencing a low level of competition in public procurements, which inherently makes them costlier for public buyers.[131] Considering that there are signs of economic aspects taking priority over environmental objectives in the EU's current policies, SPP efforts have a chance of seeing a prodigious drawback from an a priori normative standpoint.[132] Consequently, it is essential to balance the two objectives to achieve sustainable outcomes without constraining competition to an inefficient level. If this balance proves to be attainable, the normative approach to environmental matters is highly likely to change.

6.3 Particular problems in pursuing social sustainability

Member States and contracting authorities can exercise discretion when including social sustainability requirements in their procurement, other than the mandatory compliance requirement under Article 18(2). Thus, the inclusion of social sustainability requirements depends on the willingness of contracting authorities to act in such a manner.

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130. Judgment of the Court of Justice of 25 October 2018, *Roche Lietuva UAB*, C-413/17, ECLI:EU:C:2018:865, paragraphs 40-41.

131. For exact numbers, please see European Commission, Communication on 'Making Public Procurement Work in and for Europe', COM(2017) 572 final, p. 5. See K.-M. Halonen (2021), 'Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement' in *Maastricht Journal of European and Comparative Law*, Vol. 28, Issue 4, pp. 535-555.

132. S. Kingston (2015), 'The uneasy relationship between EU environmental and economic policies: the role of the Court of Justice' in B. Sjåfell and A. Wiesbrock (eds.), *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder*, Cambridge University Press, p. 26.

Pursuing social objectives via public procurement can be dubious and controversial for several reasons. These are usually connected with localism, for example to combat local unemployment, which has the potential to lead to preferential treatment for domestic suppliers – a practice that is prohibited under EU public procurement law.

For public buyers in the EU, social sustainability is much more of an uncharted territory than green sustainability. There is no such thing as common social procurement criteria developed at EU level, as is the case with GPP criteria, meaning that, even when prescribed, those criteria are not uniformly verifiable or transparent. Even though the Commission has attempted to promote the instrumentalisation of public procurement for social impact via an informative document on good practices, most procurement officers still lack the technical skills and knowledge to implement social sustainability in procurement processes,[133] whether in terms of the selection of the appropriate procurement phase or with regard to the scoring system used.[134]

The most prominent and unequivocally legal issue with social sustainability requirements is that social criteria are not as product-related as environmental and other concerns.[135] Therefore, the link to the subject matter may often not be as clear, which is a crucial element that has to be satisfied by contracting authorities in public procurement procedures. The difficulty of proving that social standards are intrinsic to the delivery of the goods or services procured has led contracting authorities to avoid the inclusion of social criteria in tender specifications, except for criteria linked to the performance monitoring stage.[136]

Lastly, the biggest stumbling block in the current pursuit of social sustainability is that Article 18(2) sets the sustainability principle but does not, by itself, create any additional legal ground for the enforcement of the rules to which it refers; it simply clarifies that the Member States should seek to ensure compliance.[137] Consequently, contracting authorities have the role of 'watchdog', but with considerably constrained authority to act against a party who is theoretically in breach.

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133. European Commission, Executive Agency for Small and Medium-sized Enterprises, L. Martignetti, V. Caimi and D. Daniele (2020), *Buying for social impact: good practice from around the EU*, Publications Office, https://data.europa.eu/doi/10.2826/8319.

134. E. Varga (2021), *How Public Procurement Can Spur the Social Economy*, Stanford Social Innovation Review (SSIR), https://ssir.org/articles/entry/how_public_procurement_can_spur_the_social_economy.

135. M. Burgi (2010), 'Secondary Considerations in Public Procurement in Germany' in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe*, First Edition, Djøf Publishing, pp. 105-142.

136. A. Wiesbrock (2015), 'Socially responsible public procurement: European value or national choice?' in B. Sjåfjell and A. Wiesbrock (eds.), *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder*, Cambridge University Press, pp. 75-98.

137. A. Sanchez Graells, *How to crack a nut*, Blogpost, see https://www.howtocrackanut.com/blog/2014/09/cjeu-continues-reducing-scope-of.html.

7. Conclusions: how to move forward[138]

While the sixth generation of EU Public Procurement Directives has made huge strides towards creating sustainable public purchasing markets, its potential for not fully harnessed. In order to utilise the public sector's purchasing power in a green and just transition, some regulatory changes should be introduced. These proposals have been developed in the author's previous collaborative project, *Sustainability Through Public Procurement: The Way Forward – Reform Proposals* (2020) and include the following suggestions:

- giving effect to Article 18(2): any breach must be made mandatory grounds for exclusion in line with Article 57(1) of the Public Contracts Directive; parallel changes must be introduced in the other Public Procurement and Concessions Directives;
- removing any reference to the 'link to the subject matter': objectivity is safeguarded by reference to the life cycle of the goods and services purchased; suggested action on developing LCC methodologies at EU level will also reinforce progress in limiting risks of discrimination beyond what is achievable through the 'link to the subject matter';
- making sustainability an explicit objective of the Public Procurement Directives: the achievement of sustainability targets should be included among the objectives of the Public Procurement Directives, as early as recital 1. This would potentially provide a more functional interpretation of the legal possibilities granted by procurement law, thereby providing even more leeway from a legal perspective;
- explicitly allowing contracting authorities to require suppliers to have effective sustainability policies in place as part of the selection criteria: sustainability policies, including CSR, imply a structured approach to respect for human rights and wider sustainability, which is as relevant as experience or economic standards and can steer entire commercial sectors towards sustainability;
- shifting the focus back to a three-pillar understanding of sustainability: environmental considerations in public procurement gain more traction as those that are easier to argue objectively (climate change does not recognise borders) and therefore commonly accepted. Particularly under the EU Green Deal, the greatest advances have been made in the area of environmental public procurement, where, to some extent, the interrelation between 'green' action and its social dimension has been neglected.[139] This worrying development in shifting the focus from SPP to Green Public Procurement should be perceived as a step back. There is a need to strengthen the social dimension of public procurement and recognise human rights violations and social dumping as equally burning

138. Based on M. Andhov et al. (2020), *Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, DOI: http://dx.doi.org/10.2139/ssrn.3559393.

139. O. Martin-Ortega (2021), 'Sustainable public procurement: Strengthening the social and human rights dimensions of SPP in the framework of the European Green Deal', BHRE Research Series, Policy Brief 1, December 2021.

issues currently facing the EU. A three-dimensional SPP with equally strong social, environmental and economic considerations should be reflected in EU initiatives on SPP going forward. This is particularly relevant, as social sustainability in public procurement has not been developed extensively.

These proposals for reform would be compatible with a revised tenets of EU public procurement law. Above all, the law would need to recognise that the fragmentation of procurement law, where the sole focus is on one individual procurement transition, is a flawed approach that does not serve us well as an EU society. A more holistic approach – one where we care not only that suppliers are not using forced labour in the performance of our public contracts, but more importantly that they do not use forced labour in any of their business activities – is required.

Recalibrating the single market: state aid law

Andrea Biondi

1. Introduction

The conflict between economic and societal policies brought about by the process of European integration is nothing new. Nevertheless, the Covid-19 health and economic crisis, at a time when the effects of the 2008 financial meltdown were still lingering on, has added a dramatic dimension to that conflict given the scale and the gravity of the problems, which are, in many respects, unprecedented. In particular, the Covid-19 pandemic, as well as being a major public health emergency, has caused an unprecedented shock to both the global and EU economies. Unlike any other past crises, the pandemic has had an impact on every sector of the economy, from transport to SMEs, retail and banking.

Despite this gloomy scenario, the European internal market has not only remained resilient but has become gradually more receptive to challenges and to the aspirations that often arise as a result of dramatic events. Two ostensibly opposing centripetal forces are at work: on the one hand, the need for coordinated and uniform supranational responses; on the other, the unavoidable need to rely on national resources in terms of redistributive policies. In this context, EU rules on the control of state aid are, of course, key to maintaining the right balance between the need to prevent Member States from using their discretion in determining economic policies as a way of directly influencing and affecting the market and the need to provide effective methods of directing public resources towards objectives of common interest.

State aid law has undergone considerable transformation, especially in recent years. This chapter will outline the current general regulatory framework and will concentrate on specific topics by analysing them mainly from a legal viewpoint, through the three lenses adopted in the Resilience and Tensions in the Single Market report: the twin transition axis (technological and green transitions), the social sustainability axis and the strategic autonomy axis.

2. Evolving dimension of EU state aid control

The EU state aid control model is characterised by a comprehensive transfer of market regulatory competences from the state to the European level by allocating to the supranational regulator – the European Commission – the power to determine the legality of state market interventions. Yet state aid rules affect substantive economic, social and political choices made by the Member States. Public spending can, of course, be used by national governments to direct resources towards 'public needs', it can be deployed as a mechanism for attracting private actors or stimulating private investment, R&D activities and green measures, or it can instead be used to rescue or promote the growth of local industries. However, there is a danger of these policies triggering anti-competitive behaviours and protectionism. The history and development of state aid control are therefore emblematic of the perennial struggle to reconcile the liberalisation of trade and the preservation of other societal values.

2.1 EU system of state aid control

Pursuant to Article 107(1) TFEU, a national measure that is classed as aid is one that entails an effective burden on the state or on a public authority (granted by the state or through state resources) that would not have been adopted by a rational market operator (advantage) and that favours certain undertakings (selectivity). Additionally, it must strengthen the position of the undertaking on the market (distortion of competition) and must have an actual or potential effect on the internal market (effect on trade between Member States). Such a definition was conceived in the early stages of EU integration, appearing in the preparatory works for the Treaty of Rome. Indeed, the Spaak Report stated that '[l]a règle générale est que sont incompatibles avec le marché commun les aides [...] qui faussent la concurrence et la répartition des activités en favorisant certaines entreprises ou certaines productions' ([a]s a general rule, financial assistance [...] is incompatible with the common market if it distorts competition and the distribution of economic activities by favouring certain enterprises or certain types of production).[1]

The conditions set out in Article 107(1) TFEU must be met concurrently for a measure to be regarded as state aid. Thus, state aid control as a legal process is something of a 'formal typology'.[2] As is often reiterated by the Court of Justice of the European Union (CJEU), 'aid' as defined in the Treaty is a legal concept which must be interpreted through objective factors via an analysis of its effects rather than the policy objectives.[3]

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1. Intergovernmental Committee on European Integration (1956), The Brussels Report on the General Common Market (Spaak Report), Title II, Chapter 1, Section 2, p. 57.
2. Kleiner T. (2011), 'Modernization of State Aid Policy' in Szyszcak E. (ed.), *Research Handbook on European State Aid Law*, Edward Elgar Publishing, pp. 1-27.
3. Judgments of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100; and of 2 July 1974, *Italian Republic v Commission of the European Communities*, C-173/73, ECLI:EU:C:1974:71, paragraph 13.

Nevertheless, the objectiveness of the concept of aid has to be balanced by a policy element, as aid can be regarded as compatible with the internal market in certain circumstances. Article 107(2) TFEU sets out the following situations where aid is to be considered compatible with the internal market:

(a) where the aid has a social character and is granted to individual consumers without any discrimination related to the origin of the products concerned;
(b) where it addresses any damage caused by natural disasters or exceptional occurrences.[4]

A different set of compatibility criteria result from Article 107(3) TFEU. Aid can be declared compatible if it:

(a) promotes the economic development of areas with serious underemployment rates or an abnormally low standard of living, or where the aid is to be implemented in the EU's outermost regions;
(b) promotes the execution of projects of common European interest or remedies a serious disturbance in the economy of a Member State;
(c) facilitates the development of certain economic activities or of certain economic areas;
(d) promotes culture and heritage conservation without affecting trading conditions and competition in the Union to an extent contrary to the common interest;
(e) falls within a category specified by decision of the Council on a proposal from the Commission.

The task of balancing the straight prohibitions contained in Article 107(1) with the criteria listed in Article 107(2) and (3) falls to the European Commission. Whilst under Article 107(2) the Commission has an obligation to declare aid compatible when the conditions set out in the provision are met, Article 107(2) entails no such obligation, and so the Commission has the discretion to carry out an economic, legal and policy analysis in order to make a decision on compatibility. The effectiveness of the Commission's control is ensured by Article 108 TFEU, which makes prior notification of all new aid measures (both schemes and individual aid) compulsory. This mechanism is reinforced by the 'standstill' clause under which Member States are prohibited from granting the proposed aid before the Commission has made its assessment.

As far as the relationship between the systems of state control devised by the Treaty and the national legal order is concerned, the following specific observations should be made. As the Treaty grants the European Commission exclusive competence to determine whether a certain measure is compatible with the internal market and, at the same time, confers on the Commission

4. There is an additional provision referring to aid granted to 'the Federal Republic of Germany affected by the division of Germany' which should have been repealed five years after the entry into force of the Treaty of Lisbon, but this has not yet been done.

the power to enforce its decision,[5] the prerogative of Member States is considerably reduced. The CJEU has been extremely clear in this regard. It is settled case law that the assessment of the compatibility of aid measures or of an aid scheme with the internal market falls within the exclusive competence of the Commission, subject only to review by the CJEU.[6]

More significantly, the CJEU has held that the Commission's competence takes precedence over any residual Member State competence.[7] In *Commission v Spain*, the Court held that state aid control rules are 'the expression of one of the essential tasks with which the European Union is entrusted under Article 2 EC, namely the establishment of a common market, and under Article 3(1)(g) EC, which provides that the activities of the Community are to include a system ensuring that competition in the internal market is not distorted'.[8]

Despite this strong Treaty-based constitutional structure, political pressure, recurring economic crises, Members States' tactics in outbidding each other in any form of subsidy and favouritism for national providers meant that, for decades, the EU was unable to ensure a 'level playing field', crucial to establishing a single market. State aid control started to take hold around the 1990s, with the Commission emphasising the duty of notification for aid measures and adopting historical decisions against national champions such as Credit Lyonnais, Air France and Volkswagen. This is not intended as a history lesson but simply as an observation that, in those days, the rationale of state aid rules was to eradicate national protectionist policies. A leading case in which EU law was deployed to attack a national industrial policy is that of *Du Pont de Nemours Italiana*.[9] In that case, which involved issues of free movement, state aid and public procurement, an Italian company brought an action after being excluded from an award in the health sector on the grounds that, under Italian law, local health authorities were required to procure at least 30% of their supplies from undertakings established in the south of Italy. While that system was designed to boost the economic development of the south, the company argued that it constituted an obstacle to the free movement of goods and, therefore, constituted unlawful aid. The Court agreed, holding that the national measure encouraged protectionism and should be considered incompatible with the internal market.

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5. Article 288 TFEU describes a decision as 'binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.'

6. Judgment of the Court of Justice of 11 July 1996, *SFEI and Others v La Poste and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 42.

7. Judgment of the Court of Justice of 18 July 2007, *Ministero dell'Industria del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA,* C-119/05, ECLI:EU:C:2007:434.

8. Judgment of the Court of Justice of 13 May 2014, *European Commission v Kingdom of Spain*, C184/11, ECLI:EU:C:2014:316, paragraph 70.

9. Judgment of the Court of Justice of 20 March 1990, *Du Pont de Nemours Italiana SpA v Unità sanitaria locale Nº 2 di Carrara*, C-21/88, ECLI:EU:C:1990:121.

Although state aid rules have, formally, remained almost unchanged since the Treaty of Rome, their scope has evolved dramatically. State aid control has adjusted to an enlarged market – one which expanded from six to 27 Member States – and to new technologies, innovative industrial processes and economic and political challenges from inside and outside the Union. To a greater extent than competition provisions, state aid rules have been flexible enough to serve as a tool of EU integration.[10] This is, strikingly, acknowledged in secondary legislation, with the State Aid Procedural Regulation[11] confirming that transformations in regulatory policies can occur de jure and de facto 'due to the evolution of the internal market'.[12]

The role of the European Commission has evolved too. Over time, the Commission's role has become pivotal, given that it effectively has the power to challenge national policies. The Commission can decide to investigate aid, reach informal agreements with Member States to change national legislation, order the recovery of unlawful aid and bring infringement proceedings before the CJEU. Several initiatives have attempted to move towards 'decentralisation' by giving Member States more leeway in terms of implementation. First, the General Block Exemption Regulation (GBER) [13] exempts certain types of aid, representing almost 95.5%[14] of new state aid measures, from notification. In addition, the Commission introduced higher levels of accountability and transparency.[15] For instance, Article 9 GBER enables interested parties to access information on aid. Member States have a duty to set up their own webpages containing detailed information on aid granted and its beneficiaries. The Commission has also set up a State Aid Transparency Public Search page, which gathers together all national grants of state aid. While decentralisation allows the Commission to facilitate compliance and to rely on local systems for ad hoc monitoring, it may also tempt Member States to grant aid in amounts and forms and for purposes not permitted by state aid rules.

The past decade has also witnessed a marked process of replacing individual state aid decisions by general criteria codified in a variety of soft law instruments such as guidelines, notices and so on. This has created a

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10. Biondi A. and Righini E. (2015), 'An evolutionary theory of state aid control' in Arnull A. and Chalmers D. (eds.), *The Oxford Handbook of European Union Law*, Oxford University Press, pp. 670-690.

11. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

12. See the definition of 'existing aid' as per Article 1(b)(v) of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 TFEU, OJ *L248*, 24.9.2015, p. 9.

13. Commission Regulation (EU) No 651/2014 of 17 June 2014 OJ L 187, 26.6.2014, p. 1–78.

14. European Commission, 'State Aid Scoreboard 2020', available at https://ec.europa.eu/competition-policy/state-aid/scoreboard_en.

15. European Commission, DG Competition Policy Brief, 'State Aid Transparency for taxpayers' (2014), available at http://ec.europa.eu/competition/publications/cpb/2014/004_en.pdf (accessed 23 May 2019).

general framework that fosters good business practice and competitiveness while allowing Member States the flexibility to pursue their policies.[16] The two major reforms that took place in 2005[17] and in 2012[18] testify that the Commission has embraced a more flexible approach, ensuring that state aid rules do not block 'worthy' objectives pursued by state measures. The 2012 State Aid Modernisation (SAM) package is particularly revealing, as it aims to make Europe 'a smart, sustainable and inclusive economy' with the objective of helping the EU and its Member States to 'deliver high levels of employment, productivity and social cohesion.'[19] Moreover, the SAM requires more efficient public spending, targeting growth-promoting policies that fulfil common European objectives. By placing the emphasis on the efficiency of public support, state aid rules improve both the quality and budgetary discipline of public finances, thereby reconciling the growth-enhancing role of public spending with the need to bring budgets under control. The enlarged GBER now extends block exemptions to categories of aid deemed worthy a priori, given their virtuous aims. For instance, these categories include aid for innovation, culture, making good damage caused by natural disasters, sport and broadband infrastructures, as well as social aid for transport to remote regions and aid for certain agriculture, forestry and fisheries sectors. Finally, in 2019, the Commission launched the revision of existing rules known as 'Fitness Checks'[20], in line with the Better Regulation Guidelines;[21] it has also introduced new sectoral rules via soft law instruments.

2.2 The pandemic and state aid control

The Covid-19 pandemic was a shock even to the system of EU state aid control. The Temporary Framework for State Aid[22] ('TF'), established on 19 March 2020 and extended until 30 June 2022, allowed Member States to counteract economic losses and keep businesses afloat during multiple lockdowns. The TF was welcomed by Member States as it enabled them to support their national

16. See also Stefan O. (2012), 'Hybridity before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law', Vol. 37, No. 1, *European Law Review*, pp. 49-69; Blauberger M. (2009), 'Of "Good" and "Bad" Subsidies: European State Aid Control through Soft and Hard Law', *West European Politics*, Vol. 32, Issue 4, pp. 719-737. European Commission, 'State Aid Action Plan – Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009', COM(2005) 107 final.
17. European Commission, 'State Aid Action Plan – Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009', COM(2005) 107 final.
18. Communication from the Commission of 8 May 2012 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU State Aid Modernisation (SAM), COM(2012) 209 final.
19. Ibid.
20. Available at https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines-evaluation-fitness-checks.pdf.
21. Commission Staff Working Document, Better Regulation Guidelines, SWD(2021) 305 final, Brussels, 3.11.2021.
22. Communication from the Commission: Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, 2021/C 473/01, OJ C 473, 24.11.2021, pp. 1-15.

economies efficiently and swiftly. According to the Commission, by September 2021, more than 650 decisions on aid had been implemented, amounting to around 3 trillion euros in authorised aid to undertakings in difficulty.[23] Such figures – which, if anything, could be underestimated in official calculations – can be explained by the particularly harsh consequences suffered by the EU economy, given that, unlike past crises, the pandemic had consequences for each economic sector.

The legal basis of the TF is a combination of Article 107(3)(b), 107(3)(c) and 107(2)(b) TFEU in restricted circumstances. The TF consists of 111 paragraphs and runs for 43 pages. Its aim is twofold: first, to apply state aid control in a 'targeted and proportionate manner' so as to ensure that national measures help the undertakings which suffered the most from the consequences of the Covid19 outbreak and, secondly, to 'frame' the national support measures within the state aid control system so as to guarantee that the level playing field of the EU internal market remains intact. In this way, the TF, while emphasising that this is not the time for harmful subsidy races, permits a coordinated and proportionate application of state aid rules that could prove vital in preserving at least some degree of European solidarity.

Only very limited conclusions can currently be drawn from the implementation of the TF. The Commission has yet to publish the total amount of aid granted during the pandemic together with its sectoral and geographical distribution and the exact distribution between Member States.[24]

As far as sectoral distribution is concerned, it appears that most pandemic aid disregarded the size and the sector of the beneficiaries and focused on undertakings that were objectively in difficulty.[25] Despite that, certain sectors received more aid more than others. Preliminary findings suggest that pandemic aid departed from the traditional policy objectives encouraged by the Commission, such as environmental aid, research, development and innovation aid, and regional aid.

In an unprecedented move, the Commission published a notification template[26] for state aid measures intended to compensate for damage caused by Covid-19, which contains a list of essential elements to be included by Member States, such as a detailed description of the measure, budget, form of aid and information about beneficiaries. In particular, Member States must provide

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23. See at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4948. See Biondi A. (2021), '*State Aid Control and COVID-19: a Map to the Temporary Framework*' in Utirilla D. and Shabbir A. (eds.), *EU Law in Times of Pandemic*, EU Law Live Press, pp. 363-374; Agnolucci I. (2022), 'Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures', Vol. 13, Issue 1, *Journal of European Competition Law & Practice*, p. 4.

24. Ibid.

25. Ibid.

26. Available at https://ec.europa.eu/competition-policy/system/files/2021-05/template_TF_notification_107_2_b_0.pdf.

evidence of the link between the Covid-19 outbreak, the restrictive measures affecting the beneficiaries and the damage suffered, as well as between the damage suffered and the aid. The TF ultimately seems to have facilitated the granting of aid under Article 107(2)(b) TFEU,[27] whereas the pre-pandemic interpretation and application of that provision was particularly restrictive.[28]

Article 107(3)(b) TFEU, which had previously been relied on as the legal basis for tackling the repercussions of the financial crisis, was generally preferred by Member States, given that it does not require governments to show a causal link between the Covid-19 outbreak and the restrictive measures affecting the beneficiaries and the damage suffered, or between the damage suffered and the aid, as is required by Article 107(2)(b) TFEU. [29]

2.3 A new temporary framework – the war in Ukraine

The Commission has adopted a new Temporary Crisis Framework[30] to support the economy in the light of Russia's invasion of Ukraine. This is once again based on Article 107(3)(b) in view of the fact that the EU economy is experiencing a serious disturbance. Member States are permitted to grant several types of aid, including direct grants of up to 400 000 euros per undertaking and other liquidity support in the form of state guarantees and subsidised loans. These state measures can be granted to any undertaking affected by the crisis if it is active in all economic sectors. There are then specific provisions to compensate companies facing high energy prices. These measures can be granted in any form, including direct grants, as long as the overall aid per beneficiary does not exceed 30% of the eligible costs and does not exceed the maximum cap of 2 million euros at any given point in time. These ceilings can be raised considerably if needed for undertakings active in specific sectors, such as the production of aluminium and other metals, glass fibres, pulp, fertiliser, hydrogen and many basic chemicals. The Temporary Crisis Framework lasts until 31 December 2022. As in the case of the earlier TF, the Commission has promptly approved a variety of state measures targeted at virtually any economic sector (no data are available yet).

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27. See, for instance, Commission Decisions SA.57061 (Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines), OJ C 220, 3.7.2020, p. 9; SA.56867 (Germany – Compensation for the damage caused by the COVID-19 outbreak to Condor Flugdienst GmbH), OJ C 310, 18.9.2020, p. 5; and SA.58125 (France – Corsair – Compensation for the damage caused by the COVID-19 outbreak), OJ C 242, 24.6.2022, p. 1.

28. Orzan M.F. (2016), '*De Jure* Compatible Aid under Article 107(2) TFEU' in Hofmann H. C. H. and Micheau C. (eds.), *State Aid Law of the European Union*, Oxford University Press, pp. 236-239.

29. Pantazi T. (2022), 'State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment', *Journal of European Competition Law & Practice*, Vol. 13, Issue 4, pp. 268277.

30. Communication from the Commission: Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C 131 I, 24.3.2022, pp. 117.

2.4 State aid control and emergency measures: some further considerations

2.4.1 Recognising that not every state measure amounts to aid

Both emergency frameworks reiterate to Member States that any kind of horizontal measure aimed at all undertakings in relation to wage subsidies or direct financial support to consumers falls outside the scope of Article 107 TFEU. Other measures, such as incentives directed at SMEs, are likely to be covered by a block exemption and subject only to general transparency requirements. However, since most Covid-19 state measures are based on a series of predetermined criteria and involve a certain degree of discretion in the assessment of access to relief conditions, the question arises of whether the Commission would have considered those measures as selective state aid in normal times.[31] Although this question relates primarily to one of the many criteria included in Article 107(1), some lessons can be learned on the extent of the application of state aid law to national regulatory policies.

2.4.2 More block exemptions? The case of R&D

The [Covid-19] TF confirmed that certain areas of national policy are deemed to be outside the realm of state aid control. [32] Although Member States are required to notify such measures, in practice the TF exempts any grant linked to R&D projects carrying out Covid-19 research into 'vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and into relevant process innovations for an efficient production of the required products'.[33] The TF thus confirms the approach that R&D aid is to be considered block-exempted. It follows that the low spending on R&D in most Member States cannot be attributed to the rigidity of state aid law but is more due to an unwillingness by Member States to grant aid in this area. Too often, the rationale for governments to support R&D is simply to prevent knowledge spillovers in this area, so tax incentives or direct grants can at least mitigate any possible loss. Interestingly, the TF incorporates a further dimension by requiring aid beneficiaries to commit to granting non-exclusive licences under non-discriminatory market conditions to third parties within the EU. In future, one might consider whether more block exemptions should

31. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1-50, paragraph 118.

32. For the very few health-related measures, see Commission Decisions SA.56786 (Italy – Production of medical equipment and masks), OJ C 187, 5.6.2020, p. 9; SA.56915 (The Netherlands – COVID-19: Direct grant scheme for e-Health services at home), OJ C 260, 7.8.2020, p. 12; and SA.58018 (Czechia – Support for Health Spas), OJ C 302, 11.9.2020, p. 9.

33. TF, paragraph 3.6. Eligible aid is up to 100% for fundamental research, 80% for industrial research and industrial development, plus there is a system of bonuses if more than one Member State supports the projects, or if there is cross-border collaboration.

be created in order to stimulate R&D spending or whether it is preferable to promote initiatives such as NextGenerationEU ('NextGen') and large-scale projects such as IPCEIs (Important Projects of Common European Interest). In this regard, it should be noted that the most recent amendments to the GBER relate specifically to the need to facilitate NextGen recovery-related aid measures.[34] The first extension applies to aid granted within EU-funded projects, thus aligning state aid control with the new rules introduced in the most recent MFF (Multiannual Financial Framework) and by the most relevant NextGen measures such as the Recovery and Resilience Facility (RRF).[35] The second main extension concerns new categories of aid linked to the twin transition to a green and digital EU, such as aid to support electric car charging and, probably most significantly, all aid for fixed broadband networks and connectivity infrastructure projects. Aid for which notification is no longer required includes any state support measures to facilitate teleworking, online education or online training services.

2.4.3 State aid conditionality

The TF also requires Covid-19 aid to be linked to EU policies such as digitalisation and environmental protection. The Air France decision is often quoted in the latter context. In that case,[36] France committed to a reduction in internal flights as a 'condition' of being allowed to support Air France. There are also 'conditionality' criteria in the Temporary Crisis Framework which invite Member States 'to consider, in a non-discriminatory way, setting up requirements related to environmental protection or security of supply'. For instance, Member States could require beneficiaries to ensure that a certain proportion of their energy consumption derives from renewable sources, or to invest in energy efficiency measures. Such provisions, however, are worded more as invitations rather than binding rules, so it could be worth exploring how they could be made more effective.[37]

2.4.4 Disequilibrium between Member States

The disparity in resources among Member States has exacerbated the risk of distortions of competition and of an asymmetric recovery. In the aviation sector, for instance, preliminary data suggest that some Member States have

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34. Commission Regulation (EU) 2021/1237 *OJ L 270, 29.7.2021, p. 39–75.*

35. Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ L 57, 18.2.2021, pp. 17-75.*

36. https://www.france24.com/en/20200524-air-france-must-slash-domestic-traffic-in-exchange-for-state-aid-minister-says; another example is the measures adopted by Denmark and Poland refusing to grant aid to those undertakings registered in tax havens; while commendable, this does not, of course, address any possible distortive effect within the internal market. See, for example, Commission Decision SA.56996 (Poland – COVID-19: Repayable advance scheme for micro, small and medium-sized enterprises), OJ C 168, 15.5.2020, p. 6.

37. In this regard, see https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658214/IPOL_STU(2020)658214_EN.pdf.

far outreached others.[38] It is worth noting that, in proceedings concerning the Commission's application of Article 107(2)(b) TFEU to this sector, it was argued that, by authorising aid for national airlines only, the Commission had infringed the principle of equal treatment, as state support measures were not extended to other EU undertakings.[39] These arguments were rejected in most cases. The Court, although acknowledging a possible difference between airlines, recalled that the general clause of non-discrimantion enshrined in Article 18 TEU applies '*without prejudice to any special provisions contained*" in the Treaty. Thus a difference in treatment – according to the Court - was actually permitted under Article 107(2)(b) TFEU, which was the legal basis for the COVID 19 related Commission decision. Member States were thus under no obligation to extend the reliefs granted to alleviate the damages caused by the pandemic to all undertakings of a certain economy sector.

2.4.5 Use or abuse of soft law instruments

Given the growing importance of soft law instruments, further reflection is needed on their specific legal value. Although the Commission's use of soft law instruments, such as guidelines, frameworks, notices and communications, may have improved legal certainty and ensured administrative simplification, it has also raised concerns about the extent to which such instruments are binding and about their transparency.[40] The EU institutions may adopt soft law instruments to explain current legislation in specific sectors, such as state aid and competition law, and to guide national administrators in their activity. However, this process of 'regulation by publication'[41] and 'regulation by information'[42] may not always be legitimate or transparent and can lead to 'backdoor legislation'. In *Dansk Rørindustri*,[43] the CJEU acknowledged

38. See Agnolucci I., cited above; Truxal T. (2020), 'State Aid and Air Transport in the Shadow of COVID-19', Vol. 45, Special Issue, *Air and Space Law*, pp. 61-82; Munari F. (2020), 'Lifting the Veil: COVID19 and the Need to Re-consider Airline Regulation', Vol. 5, *European Papers*, pp. 533-559; Costa-Cabral F., Hancher L., Monti G. and Ruiz Feases A. (2020), 'EU Competition Law and COVID19', TILEC Discussion Paper No. DP 2020-007, 23 pp., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561438.

39. See judgments of the General Court of 17 February 2021, *Ryanair DAC v European Commission (France)*, T-259/20, ECLI:EU:T:2021:92; of 14 April 2021, *Ryanair DAC v European Commission (France, Denmark, SAS AB)*, T-378/20, ECLI:EU:T:2021:194; of 14 April 2021, *Ryanair DAC v European Commission (France, Sweden, SAS AB)*, T-379/20, ECLI:EU:T:2021:195; of 9 June 2021, *Ryanair DAC v European Commission (Germany, France, Condor Flugdienst GmbH)*, T-665/20, ECLI:EU:T:2021:344; and of 14 July 2021, *Ryanair DAC and Laudamotion GmbH v European Commission (Germany, Austria, Austrian Airlines AG)*, T-677/20, ECLI:EU:T:2021:465.

40. Snyder F. (1993), 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', Vol. 56, No. 1, *The Modern Law Review*, p. 64.

41. Snyder F. (1994), 'Soft Law and Institutional Practice in the European Community' in Martin S. (ed.), *The Construction of Europe: Essays in Honour of Émile Noël*, Kluwer Academic Publishers.

42. Hofmann H. C. H (2006), 'Negotiated and non-negotiated administrative rule-making: The example of EC competition policy', *Common Market Law Review*, Vol. 43, Issue 1, p. 169 and ss.

43. Judgment of the Court of Justice of 28 June 2005, *Dansk Rørindustri and Others v Commission of the European Communities*, C-189/02 P, ECLI:EU:C:2005:408.

that soft law amounts to 'rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment'.[44] In addition, in *CIRFS*,[45] the Court held that the Commission was bound by a subsequent version of its guidelines and was, therefore, obliged to change the way in which aid was assessed in its decision. The appropriateness and legitimacy of EU soft law instruments might also be questioned, since their legal basis is uncertain.[46] Although EU state aid soft law is not formally binding on Member States, the Commission has expanded its 'soft-power' among governments by organising multilateral meetings and circulating draft guidelines in advance, but without giving governments the power of veto and by developing alternative, albeit somewhat opaque, enforcement mechanisms.[47] One might question whether the Commission's use of soft law instruments has exceeded the underlying aim of communications, notices, guidelines and frameworks, which is to clarify rather than to legislate or enforce rules.

3. First axis: green and digital – promoting 'good' spending – environmental protection

The creation of an integrated, interconnected and resilient internal energy market where consumers pay affordable prices is one of the main challenges for the EU. The energy market is particularly complex to regulate, as environmental sustainability, competitiveness and security of supplies need to be simultaneously guaranteed and reconciled. With regard to environmental sustainability, it is crucial to provide financial support in a way that encourages the use of renewable energy sources and, at the same time, prevents distortions. In terms of resources, it is still mainly down to Member States to foot the bill.

It should be borne in mind that the Court's interpretation of the 'state resources' test is particularly complex in relation to national measures promoting green electricity. The Court considers that aid does not fulfil the criterion of being 'granted by a Member State or through State resources' only where there is no specific financial burden on the state[48] and the resources do not fall under public control at any given point in time.[49] Therefore, the case law and the

44. Ibid, paragraphs 209-210.

45. Judgment of the Court of Justice of 24 March 1993, *CIRFS v Commission of the European Communities*, C-313/90, ECLI:EU:C:1993:111.

46. Among others, see Cini M. (2001), 'The soft law approach: Commission rule-making in the EU's state aid regime', Vol. 8, Issue 2, *Journal of European Public Policy*, pp. 192 and 200.

47. Stefan O. (2021), 'Soft Law and the Promise of Transparency in the Member States' in Eliantonio M., Korkea-aho E. and Stefan O. (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, Hart Publishing.

48. Judgments of the Court of Justice of 13 September 2017, *ENEA SA v Prezes Urzędu Regulacji Energetyki*, C-329/15, ECLI:EU:C:2017:671; and of 13 March 2001, *PreussenElektra AG v Schleswag AG*, C-379/98, ECLI:EU:C:2001:160.

49. Judgments of the Court of Justice of 6 March 2018, *Slowakische Republik v Achmea BV*, C-284/16, ECLI: EU:C:2018:158; and of 19 December 2013, *Vent de Colère and Others*, C-262/12, ECLI:EU:C: 2013:851.

Commission's resulting practice introduce an element of legal uncertainty as to the engagement of state aid rules depending on the degree of intervention by the public authority within the definition of the measure and also on the means of finance.

As regards the question of state aid control over national spending decisions, in 2014 the Energy and Environmental State Aid Guidelines (EEAG)[50] began subjecting aid measures to some form of market control, for instance by permitting aid only in the presence of market failures. In addition, the guidelines promoted a gradual move to market-based support for renewable energy and provided criteria to relieve energy-intensive companies exposed to international competition from charges levied to support the green transition.[51] The data show that an increasing number of compatible aid measures were granted in the period 2014-2018 in the environmental and energy field (more than 180 decisions being adopted under the EEAG).[52] As a result, the state aid framework has proved pivotal in providing a EU-wide legal framework to support Member States' efforts in reaching their 2020 climate targets.

The 2014 rules have recently been replaced by the European Commission's Climate, Energy and Environmental State Aid Guidelines[53] (CEEAG). The new guidelines exempt environmental measures under Article 107(3)(c) TFEU. Such exemptions are permitted, as environmental protection is regarded as a matter of public benefit and as a market failure that Member States may choose to address. Environmental aid is particularly relevant for the EU economy given that, according to Eurostat, more than half (55%) of all aid spending in 2018 – that is to say, 66.5 billion euros, which corresponds to 0.42% of EU-28 GDP – was allocated to environmental protection and energy savings.[54]

The new CEEAG are aligned with the objectives of the EU Green Deal.[55] The additional Communication on the European Green Deal Investment Plan,[56] adopted by the Commission in January 2020, sets out a sustainable investment plan to finance achievement of the Green Deal objectives. One of the key elements is 'enabling sustainable investments through a supportive

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50. Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, OJ C 200, 28.6.2014, pp. 1-55.
51. Fitness Check (19), Section 5.1.
52. Fitness Check (19), Section 5.1.1.
53. Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, 2022/C 80/01, OJ C 80, 18.2.2022, pp. 1-89.
54. Fitness Check (19), Section 3.2.1.
55. 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: The European Green Deal, COM(2019) 640 final, Brussels, 11.12.2019.
56. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Sustainable Europe Investment Plan – European Green Deal Investment Plan, COM(2020) 21 final, Brussels, 14.1.2020.

State aid framework'.[57] Moreover, the new guidelines are in line with the 'Clean Energy for all Europeans'[58] and 'Fit for 55'[59] packages.

As indicated by the addition of the word 'climate' to their name, and in recognition of the aims of the EU Green Deal, the scope of the revised guidelines extends to new kinds of measures, such as those relating to hydrogen, biodiversity, clean mobility, circular economy and energy efficiency. The guidelines are therefore intended to act as instructions to Member States, national authorities and undertakings on how they can better support the Union's goals in a way that is compliant with EU state aid rules. The spectrum of measures that can be exempted is now very broad, from those that aim to reduce and remove greenhouse gas to those intended to improve environmental performance of buildings or to support clean mobility.

A new feature of the revised guidelines is the inclusion of the bidding procedure as the default mechanism for the grant of aid. Special rules and extra requirements apply in the event that aid is granted under a different procedure.[60] This reflects the view that competitive procedures have a disciplining effect, ensuring that the aid does not exceed what is required (in other words, the aid must be 'proportionate'). Moreover, the Commission undertakes to assess whether the aid complies with the Taxonomy Regulation.[61] When carrying out the balancing test between positive and negative effects on the market of a given aid measure, the Commission will look at the criteria for environmentally sustainable economic activities provided for in the Taxonomy Regulation, including the 'do no significant harm' principle.

Another area affected by the revised guidelines is the development of renewable energy. Section 4.1.3.4 requires Member States to hold a public consultation on the impact on competition and proportionality of measures prior to the notification of every single measure on renewables covered by the CEEAG, in line with the Renewable Energy Directive.[62] For projects of at least 150 million euros per year, the consultation must last a minimum of six weeks and cover a set of parameters[63] demonstrating the necessity, proportionality

57. Ibid, Section 4.3.
58. See https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en.
59. See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541.
60. For instance, the guidelines allow up to 100% of the eligible costs to be covered by the aid if it is granted pursuant to a competitive bidding process. Aid granted outside competitive bidding may be considered proportionate only if it does not exceed 40% of the eligible costs.
61. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13, 22.6.2020, pp. 13-43.
62. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, pp. 82-209.
63. Eligibility; method and estimate of subsidy per tonne of CO_2 equivalent emissions avoided; proposed use and scope of competitive bidding processes and any proposed exceptions; main parameters for the aid allocation process, including for enabling competition between different types of beneficiary, etc.

and incentive effect of the proposed measure and the proposed safeguards to ensure compatibility of the aid with the EU's climate targets. To enhance transparency, the results of the consultation must be published online and comments must be evaluated with particular reference to the undue distortions that the measures could produce in the market.

Another new feature is the inclusion of possible exemptions under Article 107(3)(c) TFEU for aid in the form of reductions from electricity levies for energy-intensive users. Levies applied by Member States do contribute to funding the EU Green Deal but are not classified as environmental levies. As can be seen from the Fitness Check, there is no evidence of any correlation between the existence of reductions for energy-intensive users and the introduction of ambitious renewables policies across all Member States.[64] However, in the guidelines, aid awarded to energy-intensive users is linked with EU trade and industrial policy objectives, since it may support large undertakings competing in international markets against international rivals who are subject to less stringent environmental regulations.

A notable provision of the new CEEAG is that funding may be directed to renewable energy communities (RECs) and citizen energy communities (CECs). These communities are recognised, for instance, in Directive 2018/2001 which describes the extra value that they can add in terms of increasing local acceptance of new renewables projects, addressing socio-economic issues such as energy poverty, encouraging active participation in the energy transition by groups of vulnerable consumers and tenants, and so on. Directive 2019/944 (the Electricity Directive) states that 'Citizen energy communities constitute a new type of entity due to their membership structure, governance requirements and purpose. [65]The new CEEAG allow Member States to exempt renewable energy community projects and SME-owned projects below 6 megawatts (MW) of installed capacity from the competitive bidding requirement. RECs and small and micro enterprises may also develop wind projects of up to 18 MW without competitive bidding.

Despite the ambitious environmental policy objectives laid down in the CEEAG, several concerns remain. First, although the CEEAG prohibit aid for projects involving coal, diesel, lignite, oil and so on, which do not contribute to the EU's climate targets, aid for gas projects is permitted under certain circumstances. This is the case despite the fact that gas is not a 'light fossil fuel', which could undermine the aim to end subsidies for fossil fuels. If one takes the view that the rationale behind the guidelines is that natural gas is for now 'a bridge' on the path to more renewables', [66] the CEEAG will permit aid for investments in natural gas only if they do not create 'lock-in' effects that delay the transition to renewable or lower-carbon technologies. This may

64. Fitness Check (19), Section 5.1.1.
65. Directive (EU) 2019/944 OJ L 158, 14.6.2019, p. 125–199.
66. Vice-President Vestager's speech: at https://ec.europa.eu/commission/presscorner/detail/en/speech_21_7068.

be demonstrated, for example, by requiring the aid recipient to commit to switching to renewable energy and closing the natural gas plant within an agreed timeframe. Secondly, aid for the development and operation of nuclear energy is excluded from the scope of the guidelines.[67] Thirdly, Section 2.1 of the new guidelines permits the grant of aid for large airports[68] in express derogation of point 17(b) of the 2014 Aviation Guidelines,[69] which considers aid for such airports to be compatible under Article 107(3)(c) TFEU only in very exceptional circumstances.[70]

One aspect not fully addressed in the CEEAG is how to deal with aid that is not environmental in nature but which, due to its characteristics, may nevertheless play a role in the pursuit of the Green Deal's objectives. For instance, this may be the case with taxes that facilitate transport, certain agriculture policies or the production, storage and distribution of electricity. Although such levies should be assessed autonomously, in the light of the objective they pursue, the assessment must also factor in environmental considerations. In this context, it is worth reiterating that state aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market.[71] The CJEU has repeatedly reaffirmed the relevance of the integration of environmental protection into the definition and implementation of EU policies and activities pursuant to Articles 11 and 194 TFEU.[72] As such, a significant turning point will be the identification of a set of environmental protection standards and requirements to be implemented during the compliance assessment procedure for non-environmental aid, in particular in sensitive areas such as rescue and restructuring aid.[73]

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67. CEEAG (61), points 14-15. The exclusion of nuclear energy from the scope of the CEEAG follows the *Hinkley Point* judgment of the Court of Justice of 22 September 2020, *Republic of Austria v European Commission*, C-594/18 P, ECLI:EU:C:2020:742.

68. Airports with a passenger volume of over 5 million per year.

69. Communication from the Commission – Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, pp. 3-34.

70. Ibid., point 17(b): 'such as relocation of an existing airport, where the need for State intervention is characterised by a clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited competition distortions'.

71. See judgment of the Court of Justice of 15 April 2008, *Nuova Agricast Srl v Ministero delle Attività Produttive*, C-390/06, ECLI:EU:C:2008:224, paragraphs 50 and 51; see also Commission Decision (EU) 2015/1585 of 25 November 2014, OJ L 250, 25.9.2015, pp. 122-164.

72. *Hinkley Point* cited above.

73. For more detail, see Musardo V. (2021), 'Green Deal and Incentive Effect: What is a truly Environmental Aid?' in *European State Aid Law Quarterly*, Vol. 20, Issue 2, pp. 217-228.

4. Second axis: social accountability

This is perhaps an area where legal developments have been of less significance'[74] It should be recalled that state aid rules are limited in dealing with public services obligations. The CJEU has held that compensation for the discharge of public service obligations cannot be considered as aid. In the *Altmark* case,[75] the Court set out specific criteria for subsidies funding public services to qualify as state aid, leaving national governments a wide margin of discretion in their assessment. The *Altmark* judgment was later transposed into a series of Commission instruments intended to protect support for public service obligations (known as the 'Almunia package'). As a result, measures intended to fund social services (schools, hospitals, sports centres and so on) can be exempted from any control by the Commission.[76] Even if it does not meet all the *Altmark* criteria, an aid measure can still be cleared if it provides a service of general economic interest (SGEI) and if prohibiting the aid would obstruct the performance of the service. SGEIs are not defined by the EU institutions. Member States must decide which services are of general economic interest and the extent to which their deployment is in the public interest. In *Eric Libert and Others and All Projects & Developments*,[77] for instance, when asked to rule on whether a tax incentive for developers using part of their building projects for social housing was a public service, the Court held that this was the case, stating that, 'on account in particular of the wide discretion enjoyed by the Member States, it is not inconceivable that the social obligation may be regarded as a "public service".' In addition, any non-economic activity that has a social objective, that implements the principle of solidarity and that is supervised by the state does not fall within the scope of EU state aid control.[78]

In terms of compatibility, aid that has a 'social character' is compatible with the internal market under Article 107(2)(a) TFEU. Thus, for example, the Commission authorised a series of measures that were aimed to help

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74. See, in general, Ferri D. (2020), 'Social Services and State Aid: new steps towards a more Social Europe' in Hancher L. (ed.), *Research Handbook on European State Aid Law*, second edition, Edward Elgar Publishing, p. 206.

75. Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg v Nahrvekehrsgesellschaft Altmark GmbH*, C-280/00, ECLI:EU:C:2003:415.

76. Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, pp. 3-10. European Commission (2012), Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, OJ C 8, 11.1.2012, pp. 4-14.

77. Judgment of the Court of Justice of 8 May 2013, *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288.

78. Opinion of Advocate General Pikamäe in Joined Cases C-262/18 P and C271/18 P, *European Commission* and *Slovak Republic v Dôvera zdravotná poisťovňa, a.s.*, ECLI:EU:C:2019:1144, paragraphs 41-47.

consumers switch to digital television and that targeted certain specific disadvantaged groups (such as people with disabilities). Likewise, all the other compatibility grounds under Article 107(3) TFEU can be used as to authorise measures with a social dimension. For instance, although rescue and restructuring aid is potentially one of the most distortive forms of aid, the Commission acknowledged in the 'R&R Guidelines',[79] based on Article 107(3)(c), that the social costs of restructuring (such as social security payments and other benefits payable to redundant employees) is a factor that should be taken into account in assessing whether the measures adopted by a Member State should be considered compatible with state aid law. The guidelines specifically allow the adoption of a 'restructuring scheme for training, counselling and practical help with finding alternative employment, assistance with relocation, and professional training and assistance for employees wishing to start new businesses'. The guidelines also state that, 'given that such measures, which increase the employability of redundant workers, further the objective of reducing social hardship, the Commission consistently takes a favourable view of such aid when it is granted to undertakings in difficulty.'

Most notably, the GBER includes several provisions exempting 'social' measures. These include, for example, training aid, aid for disadvantaged workers and aid for workers with disabilities. The GBER also exempts from the need for notification regional aid, social aid for transport for residents of remote regions, aid for culture and heritage conservation, and aid for sport and multifunctional recreational infrastructures.

A few further observations should, however, be made. Covid-19 clearly demonstrated that traditional measures usually employed by governments for redistributive purposes do not fall within the scope of state aid control.[80] For instance, measures to provide support to all workers affected by the Covid-19 crisis in the form of temporary wage subsidies are not 'state aid'.[81]

Secondly, the state aid control regime explicitly acknowledges the role that state support can play in addressing market failures and equity imbalances and encourages responsible and proportionate use of resources to meet specific public policy objectives. An extra effort could be made – which would mean putting pressure on the Commission – to take into account the existence of any unintended 'discriminatory harm' while also assessing the

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79. Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, pp. 1-28.

80. Although it mostly concerns the CJEU's interpretation of Article 107(1) and thus goes beyond the scope of this report, a pressing question is how state aid law applies, and to what extent, to 'tax schemes' aimed at rebalancing either existing societal inequalities or at promoting certain public objectives with a view to ultimately delivering a more equitable and inclusive market economy. See, for example, the judgments of the Court of Justice of 8 September 2011, *Italian Cooperatives*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550; and of 16 March 2021, *European Commission v Republic of Poland*, C562/19 P, ECLI:EU:C:2021:201.

81. Ireland's Temporary Wage Subsidy Scheme: https://www.revenue.ie/en/employing-people/twss/index.aspx.

direct and indirect market effects that aid may have, either individually or at an aggregated level. In this regard, it would be useful to assess the unintended indirect effects that certain aid – especially that which is most significant in terms of value and volume – could have on protected classes. For instance, it is possible that certain aid schemes granted to support a specific sector might ultimately and unintentionally disadvantage a given protected class (women, the elderly, racial minorities, etc.) to a disproportionate degree, for example, aid measures that target traditionally male-dominated industries. Although those considerations cannot be taken into account in determining whether a certain measure can be classified as aid, that assessment could be made by national authorities when evaluating whether such a measure is compatible with EU state aid law. The existence of any unintended 'discriminatory harm' that could arise from an aid measure and the proportionality of that harm in relation to the policy objective could be verified. The Commission should then take on the task of verifying the substantial effect of those aid measures on protected classes in its regular annual reports and also make those effects part of its compatibility assessment.

5. Third axis: EU strategic autonomy

5.1 Important Projects of Common European Interest

State aid rules are still essential to ensure that a level playing field exists in the EU internal market. It is, however, widely acknowledged that it may be necessary to consider a more cohesive and, perhaps, unitary EU industrial policy since, otherwise, the EU market and EU firms risk being left behind their international rivals. The question, then, is how to preserve a set of rules which are unique within international trade law alongside the development of an 'EU' industrial policy.

Important Projects of Common European Interest (IPCEIs) have been the subject of renewed attention. Largely ignored until now, these instruments have the potential to be used to foster environmental sustainability, technological developments and, at the same time, a renewed European industrial resilience. Given their flexible nature and design, which facilitates pan-European collaboration by Member States in specific industries or sectors, IPCEIs could contribute to the mobilisation of bigger public and private funds to help achieve complete EU strategic autonomy.

IPCEIs are large projects jointly managed by a minimum of four Member States. Not every project can constitute an IPCEI, as, in order to qualify, it must tackle EU industrial objectives and strengthen EU strategic autonomy. Aid regarded as compatible under the guidelines is linked to particularly relevant EU objectives, such as the development of strategic value chains. As stated, 'The project must represent a concrete, clear and identifiable important contribution to the Union's objectives or strategies and must have a significant impact on sustainable growth, for example by being of major importance for the European Green Deal, the Digital Strategy, the Digital

Decade and European Strategy for Data, the New Industrial Strategy for Europe and its update, Next Generation EU, the European Health Union, the new European Research Area for research and innovation, the new Circular Economy Action Plan, or the Union's objective to become climate neutral by 2050, among others.'[82]

A project that is compatible with the internal market is one that is needed to overcome a market failure or to bring about positive effects, where this would not be otherwise achievable. Although the minimum number of participating Member States is only four, the benefits of the project must not be confined to the financing Member States.[83] To date, only a handful of projects have been set up under Article 107(3)(b) TFEU. The first two projects concerned the railway infrastructure[84] between Sweden and Denmark and between Denmark and Germany. The third project related to a strategic supply chain in the field of microelectronics.[85] Finally, the Battery Alliance, involving several Member States, was awarded 3.2 billion euros in 2019[86] and 2.9 billion euros in 2021.[87] A forthcoming IPCEI concerning hydrogen already has 22 Member States signed up.[88]

The figures show that only a few Member States participated in the projects mentioned above. As regards the minimum number of participants, consultations held by the Commission revealed that a requirement for only two Member States was insufficient to allow for a geographically-balanced participation.[89] The minimum number was therefore increased under the new guidelines from two to four Member States. The revised guidelines also attempt to improve the rate of Member State participation by requiring acting Member States to inform all other Member States and relevant national stakeholders about the project.[90] In addition, the guidelines place more emphasis on collaboration between large enterprises and SMEs, although it is still unclear how that collaboration can be fostered in practice. Furthermore, despite the benefits of IPCEIs to the internal market, their overall significance is evidently diminished given that they are joint efforts rather than fully-fledged, pan-European projects. What is more, their impact

82. Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, 2021/C 528/02, OJ C 528, 30.12.2021, pp. 10-18, paragraph 14.
83. Ibid, paragraphs 15-16.
84. Commission Decisions SA.52162 and SA.52617 (State aid in favour of Øresund Bridge Consortium), OJ C 109, 22.3.2019; SA.39078 (Financing of the Fehmarn Belt Fixed Link project), OJ L 399, 15.10.2020.
85. Commission Decisions SA.46705, SA.46578, SA.46595 and SA.46590 (IPCEI on Microelectronics), OJ C 7, 10.1.2020.
86. Commission Decisions SA.54793, SA.54801, SA.54794, SA.54806, SA.54808, SA.54796 and SA.54809 (Summer IPCEI on Batteries), press release of 9 December 2019, IP/19/6705.
87. Commission Decisions SA.55855, SA.55840, SA.55844, SA.55846, SA.55858, SA.55831, SA.56665, SA.55813, SA.55859, SA.55819, SA.55896 and SA.55854 (Autumn IPCEI on Batteries), press release of 26 January 2021, IP/21/226.
88. https://ec.europa.eu/growth/industry/strategy/hydrogen/ipceis-hydrogen_en.
89. Fitness Check (19), Section 5.1.
90. IPCEIs Guidelines (85), point 17.

is still sector-oriented, with any spillover effects between Member States and among EU companies yet to be demonstrated.

Prior to the 2014 guidelines, there was no specific guidance to assist Member States in conceiving, developing and delivering such projects. The 2022 IPCEI Guidelines constitute the first revision. Whilst the CEEAG are largely used by EU governments and have facilitated compliance and oriented Member States' environmental policies, the main drawback of the IPCEI Guidelines is their low success rate. As acknowledged in the Fitness Check, the limited take-up may lead to limitations in the evaluation of those rules. The evaluation was therefore based mainly on feedback from stakeholders.[91]

Furthermore, as suggested in the conclusions to the Fitness Check, collaboration between Member States and the Commission needs to be enhanced through coordinated action.[92] In 2018, the Commission set up the Strategic Forum on IPCEIs, bringing together experts and representatives from Member States to identify key value chains. It is interesting to note that the lead DGs were Growth, Industry, Internal Market, Entrepreneurship and SMEs. IPCEIs form the most straightforward link between state aid control and the development of economic and industrial policies at the EU level. The forum pointed out six key areas on which investment should focus: connected, automated and electric vehicles; smart health; low-carbon industries; hydrogen technologies and systems; Industrial Internet of Things; and cybersecurity. Strengthening the role of the Commission as a facilitator would contribute to ensuring that projects are open to all Member States. A new IPCEI on microelectronics and communication technologies is currently being prepared by a significant number of Member States.

In this context, it should be noted that the EU has recently proposed a draft regulation, widely reported in the press and known as the 'EU Chips Act', which aims to support the semiconductor sector (defined in very broad and vague terms). The proposed measure will attempt to mobilise more than 43 billion euros of public and private investments in that sector. The draft regulation identifies three main components:

(i) the Chips for Europe Initiative that will pool resources from the EU, Member States and third countries associated with existing EU programmes, as well as the private sector, to promote research, development and innovation;
(ii) specific rules on security of supply;
(iii) a Chips Fund to facilitate access to finance for start-ups and SMEs.

In short, it creates a massive subsidy for a specific industry. Aside from the specific provisions, the draft regulation purports to have two aims, the first being to create innovation capacities in the semiconductor sector and the

91. Fitness Check (19), Section 5.1.
92. Ibid.

second to increase the EU's resilience and security of supply in that sector. The draft regulation therefore has several legal bases. In the case of the first objective, Articles 173(3) and 182(1) TFEU are referred to, as both provisions deal with actions that the EU can take towards Member States to support the competitiveness and innovation capacity of the Union and ensure that the industry can adjust to structural changes caused by rapid innovation cycles. As for the second objective, the draft regulation identifies Article 114 TFEU as the correct legal basis. The Commission identifies, on the one hand, the risk that some Member States may fail to initiate regulatory measures to address the structural vulnerabilities of the sector, thereby creating barriers to trade, and, on the other hand, the need to increase the Union's resilience and security of supply. It will be interesting to see what happens in practice in terms of attribution of competence. In addition, the 'elephant in the room' is, of course, the possible impact on state aid control. The Commission states that it will consider approving aid to such facilities directly under Article 107(3)(c) TFEU. Given that the support measures will effectively be 'pre-authorised' and, by their nature, deemed to be in the public interest, one might wonder how intense the Commission's scrutiny will be. Arguably, the EU Chips Act is not well thought-out and may not prove a viable way forward. To put it bluntly, 'all in all, the European Chips Act combines the worst features of industrial policy – insufficient resources, mostly obtained by cutting valuable research elsewhere, and a vague security of supply mechanism, all managed by new permanent bodies where Member States will fight each other over the distribution of funds.'[93]

5.2 Rescue and restructuring (R&R) aid: guidelines and Temporary Framework

A key element that needs to be taken into account in building an efficient EU industrial policy concerns the rules applicable to firms in difficulty. The R&R Guidelines[94] were published in 2014 and were supposed to continue in force until 2020 but were extended until 2023. Aid for the rescue and restructuring of national undertakings is one of the most distortive types of aid, as it may be detrimental to a healthy industrial policy. It should normally, therefore, be allowed only under very strict conditions. However, R&R measures were expanded during the Covid-19 pandemic, as testified by their inclusion in the TF.[95] From this perspective, it would be interesting to consider whether certain aspects of the TF might shape future reforms of the R&R Guidelines and whether useful lessons might be learned, given that the Commission's experience of applying R&R is still limited due to the relatively low number of cases.

93. https://www.ceps.eu/the-european-chips-initiative-industrial-policy-at-its-absolute-worst.
94. R&R Guidelines (84).
95. See TF (31), Section 3.11.

Similarly, the Commission could further clarify the definition of 'undertaking in difficulty' under the guidelines. Given the concurrent application of nearly identical provisions in the GBER, an attempt should be made to give certainty to national authorities. In addition, it could be argued that the definition of 'undertaking in difficulty' is not appropriate for all types of undertaking, for instance those undertakings without any legal requirements relating to capital. Although the undertakings mainly affected by R&R are large ones and, in practice, most of them may be block-exempted, it would still be helpful to clarify the definition in both the R&R Guidelines and in the GBER itself. Simplifying the rules could be more conducive to fostering innovation. In this respect, the TF excludes micro and small companies[96] from undertakings potentially in difficulty unless they are: (a) subject to collective insolvency procedure under national law; or (b) in receipt of rescue aid (which has not been repaid) or restructuring aid (and still subject to a restructuring plan).[97]

Further lessons could be learned from the rules enshrined in the TF. In particular, drawing on merger control, the TF contains specific requirements for undertakings in receipt of measures above 250 million euros.[98] Therefore, the new R&R Guidelines could usefully include more specific requirements, such as credible exit strategies or bans on activities conducted during the restructuring period, which would need to be communicated and monitored on a regular basis. In this regard, it is worth nothing that, while the R&R Guidelines impose a rather general duty on the Commission to take into account 'possible commitments' from the Member States, the TF specifies a number of behavioural and structural commitments that the Commission is to look at when clearing the restructuring aid. For instance, whereas the R&R Guidelines provide that aid should be 'as short as possible' to restore long-term viability, under the TF, Member States are required to lay out a 'credible and detailed exit strategy', including a plan for the continuation of the beneficiary's activity, the use of funds invested by the state and further measures that both the state and the beneficiary will take in order to comply with the repayment schedule. In addition, if, six years after the recapitalisation, the state's intervention has not been reduced below 15% of the beneficiary's equity, a restructuring plan in accordance with the R&R Guidelines must be notified to the Commission for approval. Similarly, while, under the existing R&R Guidelines, beneficiaries must refrain from aggressive commercial behaviour and from acquiring shares in any company during the restructuring period, the TF prevents beneficiaries from acquiring more than a 10% stake in their

96. Undertakings with fewer than 50 employees and less than 10 million euros of annual turnover and/or annual balance sheet total.

97. For instance, see Communication from the Commission: Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak (Informal Consolidated Version), section 3, paragraphs 22 (c.bis) and 25 (h.bis).

98. Temporary Framework for State aid (5) at paragraph 72. These will need to be laid down in line with the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, pp. 1-39).

competitors and imposes limits on management remuneration[99] until at least 75% of the Covid-19 recapitalisation measures have been redeemed. Furthermore, undertakings in receipt of restructuring aid cannot make dividend payments or non-mandatory coupon payments or buy back shares, other than in relation to the state, until the Covid19 recapitalisation measures have been fully redeemed.

By contrast with the R&R Guidelines, the TF introduces a clause which prohibits the grant of aid if it is made conditional on relocation.[100] This marks a shift in Commission practice given that, in the Regional Aid Guidelines, relocation was referred to only in the context of a negative effect on the market, unlikely to be counterbalanced by any positive effect.[101] One might reasonably wonder whether a similar provision should be included in the next R&R Guidelines. Since R&R aid is already one of the most distortive forms of aid for the internal market, relocation may worsen the negative effects and provoke further imbalances.

6. Some tentative normative suggestions – pushing the boundaries

State aid control has undergone some major transformations and, when considering the outlook for the internal market, one might query where state aid control is heading. In particular, the two 'emergency' measures seem to have sparked a debate on how to improve state aid control: on the one hand, a return to a traditional and fairly strict ban on state aid will ensure – at least on paper – that Member States do not favour their own undertakings in order to avoid 'deep-pockets distortions'.[102] In other words, were the Commission to return to an orthodox approach, with no substantial changes to the Treaty or secondary legislation, the rationale for state aid control would continue to be the maintenance of the internal market. On the other hand, first the financial crisis and, more recently, the Covid-19 pandemic have brought to light several pressing issues around EU economic governance and international

99. This must not exceed the fixed part of the remuneration obtained on 31 December 2019.

100. 'Aid granted under this Communication on the basis of Article 107(3)(b) or (c) TFEU shall not be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid' (16ter TF).

101. See Regional Aid Guidelines, point 118: 'When evaluating the notifiable measures, the Commission will request all necessary information to consider whether the State aid is likely to result in a substantial loss of jobs in existing locations within the EEA. In this situation, and if the investment enables the aid beneficiary to relocate an activity to the target area, if there is a causal link between the aid and the relocation, this constitutes a negative effect that is unlikely to be compensated by any positive effects.'

102. Cited in a speech delivered by the Vice-President of the European Commission, Joaquín Almunia, 'Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints' at King's College London on 11 January 2013, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_14.

competitiveness, which may raise doubts about the suitability of state aid rules to the EU's needs.

Against this backdrop, three scenarios may be contemplated when considering the future of the internal market. First, the EU could ease the strict ban on state aid. This would effectively make the TF the 'new normal'. Such an approach would, in my view, be very dangerous, as it would risk the reintroduction of elements of protectionism and the creation of lasting distortions in the European internal market. Motta and Peitz (2020) have warned that a relaxation of state aid rules could set off a domino effect and decrease productivity in the long run by creating 'artificially more competitive' firms in some countries, which could force 'equally or more efficient rival companies' out of the market in other states, triggering further cycles of a 'subsidy race'.[103] Arguably, an efficient and effective system of state aid control can, and must, be pursued simultaneously with a more resilient and sustainable internal market. For instance, all investments and reforms involving state aid included in national recovery plans and presented in the context of the RRF are subject to state aid control, as they need to be notified to the Commission for prior approval, unless covered by one of the state aid block exemption provisions. The Commission must assess those measures as a matter of priority and can issue guidance and support to Member States in the preparatory phases of their national plans, in order to facilitate the rapid deployment of the RRF.

It should be noted that, consistent with the 'state aid governance' framework discussed in this chapter, 'control' soon turned into 'policy', as the Commission was quick to publish guidance for the rapid handling of RRF national projects under State aid rules, together with a number of sector-specific templates to help Member States design and prepare the state aid elements of their recovery plans. The 13 sector-specific state aid 'templates' are essentially compatibility guidelines. For example, the most extensive of the templates is the one devoted to energy from renewable sources, which gives maximum flexibility to Member States, for instance by recognising that measures to support infrastructure for electric cars are automatically necessary to remedy a market failure. It must be noted that all the measures notified to the Commission so far have been approved. For instance, the Commission has approved a 20 million-euro Spanish scheme, made possible through the RRF, to support the deployment of intelligent systems for motorways and tunnels within the Spanish state road network. The Commission found that the measure constituted aid but was compatible under Article 107(3)(c) TFEU, stating that: 'The aid will facilitate the development of an economic activity, and more specifically the digitalisation of certain economic services linked to road infrastructure through the deployment and enhancement of intelligent systems. This digitalisation will also help bridging the digital gap

103. Motta M. and Peitz M. (2020), 'State Aid Policies in Response to the COVID-19 Shock: Observations and Guiding Principles' in *Reconstructing the EU After COVID-19*, Vol. 55, No. 4, *Intereconomics*, Leibniz Information Centre for Economics, pp. 219-222.

with road infrastructures, where the State has already carried out similar investment projects or is currently developing them.'[104] The measures will be funded entirely by the RRF.

Another strategy would be to maintain a robust centralised control on state aid while reinforcing checks on foreign subsidies. Such a solution would give Member States a wider margin of discretion in pursuing industrial objectives, while keeping the market free from undue distortions caused by subsidies granted by foreign authorities. In that regard, the Commission has adopted a proposal[105] for a regulation to remedy distortions to the internal market created by foreign subsidies. [106]

A final scenario could be that the EU maintains the ban on state aid but, at the same time, acquires the competence to set out its own industrial agenda, thus providing guidance to Member States for the grant of aid to specific projects of EU interest. This would be a 'dual purpose' scenario. First, the EU would continue to screen aid to maintain the level playing field and prevent distortions. State aid would continue to be a cornerstone of the internal market project. Second, the EU would be able to decide on its strategic agenda and lift the ban on state aid only when the aid pursued EU strategic interests. This scenario could entail a Treaty amendment in order to reallocate competences between Member States and the Union. Finally, in this third scenario, the Union would continue to uphold the ban on state aid while establishing a 'solidarity fund'[107] based on mandatory contributions by Member States in order to allow undertakings – irrespective of nationality – to claim compensation in the event of major disturbances in national economies.

104. Press release of 19 January 2022, IP/22/421; Commission Decision of 19 January 2022 (SA.62986 – RRF – Spain – Intelligent Transportation Services (ITS) for the road sector and other services related to road safety and maintenance), C(2022) 394 final, OJ C 146, 1.4.2022.

105. 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, available at https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf.

106. See further Rubini L. – 'Ensuring the competitiveness of the EU internal market: is a recalibration necessary?'

107. Lamadrid de Pablo A. and Buendía J. L. (2020), 'A Moment of Truth for the EU: A proposal for a State Aid Solidarity Fund', Vol. 11, Issue 1-2, *Journal of European Competition Law & Practice* 1, pp. 1-2; Motta and Peitz, cited above.

Ensuring the competitiveness of the EU internal market: is a recalibration necessary?

Luca Rubini

1. Introduction

This section explores the competitiveness of the EU internal market at the global level and its interplay with the three axes of the twin transition, social sustainability and strategic autonomy.

The internal market project is inherently tied to the concept of competitiveness. Article 3.3 TEU refers to a 'highly competitive social market economy'. Not only does this evoke the idea that, within the internal market, the free forces of competition should prevail (while, importantly, allowing for social objectives), but it also hints that the internal market itself – its sectors, industries and companies – should be 'competitive' at the international level (an objective which largely constitutes the core of the strategic autonomy axis).

The idea of competitiveness therefore has a double regulatory – as well as economic – element: one internal to the EU, the other external to it. The internal dimension is chiefly shaped by the rules and legal institutions presiding over 'competition' (broadly understood and recognizing its plurality of rationales). The main concern in this respect is to ensure that private behaviour does not distort competition while allowing conduct that is efficient and beneficial for the internal market and EU society at large, including in relation to the twin transition and social sustainability objectives. The external dimension, which focuses on the international competitiveness of the internal market, is chiefly shaped by the rules governing 'free trade'. The main concern here is whether the achievement of multiple significant EU policy objectives – including those concerning the twin transition and social sustainability – puts EU operators at something of a disadvantage in relation to their global competitors. If so, the question is what interface or adjustment mechanisms are appropriate to ensure that there is a level playing field with other countries. As noted, the relevance of the strategic autonomy concept is clear at this juncture.

It is already evident that there are both tensions and synergies between these two dimensions of competitiveness and the three axes of the project, as will be highlighted in the specific analysis of the various legal instruments.

The relevant questions discussed in the chapter are as follows:

– Are the legal tools at the disposal of the EU suitable for pursuing the three axes (including, in particular, concerns around competitiveness)?
– If not, is a recalibration possible through interpretation?
– Alternatively, is law reform warranted?

While the main focus is on EU law and its ability to pursue the three axes, the chapter will also consider whether relevant international law and, in particular, that of the World Trade Organization (WTO), can accommodate the pursuit of the three axes or whether it may, in fact, constrain EU action.

The chapter is structured as follows. After an introduction to the main theme of the chapter – EU competitiveness in the light of the three axes (twin transition, social sustainability and strategic autonomy) – which will lay down the conceptual framework for the analysis, the chapter will examine three main instruments of EU law. The first is EU competition law. The question is whether the latter is capable of promoting the twin transition and social sustainability axes, and whether its rules can take account of competitiveness concerns. The chapter will then move on to examine two instruments: the Foreign Subsidies Regulation (adopted on 28th November 2022) and the Carbon Border Adjustment Mechanism (currently in the legislative process). These two instruments raise issues linked to strategic autonomy and external competitiveness, as well as to the twin transition axis. The chapter will also briefly address trade defence instruments and the FDI screening mechanism, both primarily through the lens of strategic autonomy.

With the exception of the section on competition law, this chapter therefore largely examines the external aspect of the internal market and questions whether the current and proposed legal framework can contribute to the three axes while ensuring that the playing field is kept level globally.

Each section begins by setting out the main principles and applicable provisions before analysing them through the lens of the conceptual framework. The final section of the chapter offers some general tentative conclusions and suggestions for reform.

2. The issue of EU competitiveness: the legal perspective

2.1 Caveat: a non-legal concept for legal use

It bears noting from the outset that the concept of competitiveness, which is not a legal concept, is characterised by a considerable degree of uncertainty and pliability. It often finds expression with similar notions of 'fairness' or a 'level playing field'. Related concepts, which focus on the impact of divergent regulations, may refer to the 'distortions on competition' or 'distortions on

trade' caused by the latter. At their core, all these terminologies evoke a 'lack of equality', or even of 'equity', in international economic relations. This uncertainty and pliability – it must be said – make legal analysis difficult. At the same time, however, a rule-of-law-based community like the EU must base any action to address these concerns only on substantiated evidence. Otherwise, rather than being corrective, the EU action will inevitably constitute protectionism.

The second preliminary remark is that claims, and concerns, about competitiveness are almost inevitable in the context of a globalised economy where, at the same time, regulations on commerce, environmental protection and several other socio-economic fields are still largely national or regional. While, in certain areas, some international approximation has indeed taken place (some sectors, such as food health and safety and environmental protection, even seeing an alignment to EU standards),[1] it is also true that the increase in international trade and investment has made the diversity of domestic regulations and practices more noticeable. While, through the decades, this diversity has been partly addressed by various tools within the EU internal market (mutual recognition, harmonisation, control of state aid and competition laws), global rules fail to address it in a systematic and comprehensive fashion. Multilateral rules, represented by the WTO, as well as the regulation emerging from the large majority of preferential trade agreements (PTAs) in force, largely follow a 'negative integration' approach.[2] They aim to reduce or eliminate the major obstacles to trade, such as tariffs or quotas, but, on the whole, do not affect internal regulation or, in particular, the governmental prerogative to regulate (subject to respect for key principles of transparency, non-discrimination and, where applicable, observance of international standards and scientific principles).[3]

Crucially, whether to regulate and, if so, at what level of protection is a question which is largely untouched at the international level where, at best, minimum or basic standards may be found in very specific areas. Where international regulation does exist, enforcement is often wanting.[4] This, in practice, may mean that not all jurisdictions in the world have the same or similar standards of protection for, say, the environment, social and labour relations or competition in the market as those that the EU has created over the decades. Far from being a claim of European superiority, which would

1. See, for example, Bradford A. (2020) *The Brussels Effect: How the European Union Rules the World*, Oxford University Press.
2. See, for example, Mavroidis P.C. (2016 and 2020) *The Regulation of International Trade – Volumes 1, 2 and 3*, MIT Press.
3. For a comprehensive overview of various chapters of PTAs (e.g. labour, environment, State aid, competition) and the 'degree of integration' they pursue see Mattoo A., Rocha N., and Ruta M. (eds) (2020) *Handbook of Deep Trade Agreements*, Washington, DC: World Bank.
4. For the example of trade law, see Mavroidis P.C. (2015) *Mind over matter: Dispute Settlement in the WTO*, European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2015/34.

clearly be misplaced, this reflects the current state of affairs. In short, this statement simply seeks to highlight the inevitable diversity in regulations worldwide and, in some cases, may even lead to the conclusion that European standards are not necessarily higher or better.

These brief observations, which form the necessary background for the legal analysis proper, pave the way for a consideration of the inherent risks in claiming a 'lack of competitiveness' due to the diversity of regulations:

> Complaints about divergent domestic policies usually come to rest on an assertion that the economic or social policy results of that divergence are 'wrong' in some sense – wrong enough to justify the application of diplomatic pressure and perhaps coercive economic force as well. The degree and character of these normative starting points are an absolutely critical element in the effort to reconcile the contending policy objectives. [...] All nations have a tendency to distort the norms of fairness they apply to other countries. They assume that what they do at home is normal, and natural, and pleasing to God, while at the same time feeling perfectly free to criticize superficially different practices of others that are in no rational way distinguishable from their own.[5]

These words call for caution. In other words, the political and legal risk is that, rather than redressing the 'level playing field', any action to tackle an alleged competitiveness concern ends up being a protectionist measure which, as such, is likely to attract international reactions and claims of violations of international law.

2.2 What does WTO law say?

From a legal viewpoint, it must be stressed from the outset that, in order to pass muster under international law, and in particular world trade law, any regulation or legal instrument should be properly formulated around a duly substantiated 'competitiveness' concern, or other public policy objective, on which it is based and which justifies it. If, for example, the measure aims to extend the application of EU internal norms to foreign actors or activities, every effort should be made to ensure that these are similarly treated and that no discrimination, direct or indirect, *de jure* or *de facto*, takes place.[6] Any deviation from what would otherwise be followed, had the scenario been purely internal, should be properly justified.

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5. Bhagwati J. and Hudec R. (eds) (1996) *Fair Trade and Harmonization – Prerequisites for Free Trade?*, MIT Press, Vol. II, pp. 16 and 17. It is interesting to note that Hudec was making these comments while referring to the adoption of unilateral trade remedies of varied nature.

6. These are the key principles enshrined in GATT Article III and GATS Article XVI on national treatment.

The fundamental canons of proportionality, transparency and due process should apply to the implementation of the measure and to all procedures.[7] The system should also be characterised by openness and flexibility in assessing foreign measures and scenarios against the stated objective of the measure.[8] This means acknowledging that the same objective may be achieved through different regulatory approaches and that the EU's solution is not necessarily the only one capable of achieving the stated policy objective.[9] Openness also means that, when dealing with an international issue, the EU should be able to demonstrate that, before taking any unilateral measure, it has made genuine efforts to negotiate an international solution with all interested parties and stakeholders, and – moreover – that it continues to keep the channels of international dialogue open in order to find an agreed regulatory solution that is genuinely international. In this context, acting unilaterally becomes a necessity only where an international solution (which is always the first choice) to an urgent problem cannot be found.[10] Finally, any restriction on trade caused by the measure should be kept to a minimum.

2.3 Conclusions on WTO law and the three axes

Therefore, as a basic rule of thumb, any regulation or action that pursues a public policy goal (from research and development and innovation to climate change, from social policy and investment to ensuring a level playing field) will comply with international trade law only if the measure is based on substantiated evidence and it is necessary, proportionate, non-discriminatory, transparent, flexible and likely to cause the least possible restriction on trade.

Meanwhile, competitiveness concerns and claims are closely linked to the three axes of the project. The twin transition in technology and climate change action is dramatically changing the socio-economic and regulatory landscape in many countries and, as such, is inevitably affecting government action and the competitive conditions in which companies operate. Likewise, in an increasingly globalised world, with global value chains being structured around the competitive advantages of various jurisdictions, economic development often has a mixed social impact, with the result that calls for recalibration of

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7. The Appellate Body Report, *US – Shrimps*, WT/DS58/AB/R, adopted on 6 November 1998, which interpreted GATT Article XX, is still the leading authority in this respect.

8. Ibid.

9. In essence, this is no different from the ethos of the famous decision of the Court of Justice in the *Cassis de Dijon* case of 1979 which laid down the principles of mutual recognition and mandatory requirements. While, obviously, an automatic principle of mutual recognition makes sense in the highly integrated context of the EU internal market, the underlying idea that different policy measures may achieve the same policy objectives should also inform the assessment of foreign regulations and situations. This is, in essence, the key message given by the WTO Appellate Body in its jurisprudence on GATT Article XX, and, in particular, in its famous *US – Shrimps* decision.

10. See Rubini R. (2022) 'Transcending Territoriality: Expanding EU State Aid Control through Consensus and Coercion', *Robert Schuman Centre for Advanced Studies*, Global Governance Programme-469, Research Paper No. 33.

policies to achieve a higher level of social sustainability are raised increasingly often. It is a fact that, whilst there is overwhelming evidence that international trade increases the size of the pie, how that pie is ultimately distributed is a different issue which, to this day, is largely linked to domestic political choices.[11] Finally, competitiveness concerns lie at the core of the very notion of 'strategic autonomy', which is increasingly shaping EU policies.

Generally speaking, WTO law offers significant 'policy space' to WTO Members. Compliance with the guidelines and principles outlined above goes a long way to ensuring that the relevant measure is likely to be found WTO-law compliant.[12]

I will now proceed to analyse various areas of EU law and some of the tools being currently debated or recently adopted to tackle issues linked to the three axes of the project and broadly based on 'competitiveness' concerns. In some cases, admittedly, the intended objective is not explicitly phrased in terms of competitiveness (for example, the stated goal of the measure may be to tackle 'carbon leakage'), but, nonetheless, competitiveness issues are inevitably involved.

In my assessment, which, at this stage, is to some extent tentative, I will attempt to elicit the links to the three axes, examine whether current or proposed regulations can be interpreted in the light of those axes or whether law reform is necessary, and, finally, discuss the compatibility of EU laws with the constraints resulting from multilateral trade rules.

3. EU competition law

3.1 Rules

EU competition laws regulate the conduct of undertakings.[13] Ever since the Treaty of Rome in 1957, there have been provisions prohibiting anti-competitive agreements between undertakings (at the time Article 85 EEC, currently Article 101 TFEU) and abuses of dominant position (formerly

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11. In this respect, it is interesting to refer to the dialogue between Gregory Shaffer and Tomer Broude on this very issue. See Shaffer G. (2019) 'Retooling Trade Agreements for Social Inclusions', *University of Illinois Law Review*, pp. 1-44; Broude T. (2019) 'Social In/Equality and International Trade Reformisms of Fear', *University of Illinois Law Review*, pp. 77-90.

12. That said, there is currently significant debate about reforming the WTO rulebook, for example with respect to the rules applicable to subsidies which currently only recognise policy space, for example, for many government measures to fight climate change, implicitly and indirectly. In other words, unlike EU state aid law, there is no explicit set of exceptions for legitimate public policy objectives. For a recent contribution on this, see Siqi L. and Rubini L. (2021) 'About Knowledge and Rulemaking: Reforming WTO Rules on Subsidies' in Hoekman B., TU X. and Dong W. (eds.), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*, London: CEPR, pp. 127-148.

13. For a consistently thoughtful treatise, see Whish R. and Bailey D. (2021) *Competition law,* Oxford University Press (10th edition).

Article 86 EEC, now Article 102 TFEU). Both provisions address the distortions of competition that collusive conduct or conduct by dominant players may have on the internal market. A rich body of Commission practice and case-law have clarified the scope and content of these provisions. Over time, soft law instruments and secondary legislation have been introduced to regulate various topics such as the definition of the relevant market and to incorporate exemptions for cooperation agreements to foster, for example, research and development.[14]

The need to control concentrations between different undertakings soon became evident. While this was initially regulated through Articles 101 and 102 TFEU, in 1989 a dedicated Merger Regulation was introduced, replaced by a new regulation in 2004.[15] In principle, the Merger Regulation provides a 'one stop shop' for concentrations with an EU dimension,[16] as well as for those proposed mergers that, although falling below the relevant thresholds, are nonetheless subject to the exclusive scrutiny of the Commission at the request of one or more of the Member States.[17] The substantive appraisal is guided by the key test of whether, as a result of the concentration, there will be a significant impediment of competition in the internal market.

Normally, the appraisal of competition is based on the analysis, and balancing, of anti- and pro-competitive effects of the transaction or action.[18]

3.2 Analysis

Two perspectives need to be considered. The first is whether EU competition law (Articles 101 and 102 TFEU and the Merger Regulation) is generally in line with the twin transition axis and the social sustainability axis within the context of the strengthening and possible recalibration of the EU internal market. The second is whether competitiveness concerns, and in particular factors that take place outside the EU internal market but that may have an impact on the latter, may be taken into account in the analysis. As noted, strictly speaking, this relates more to the strategic autonomy axis.

As regards the first 'internal' perspective, there are significant decisions and regulatory frameworks that facilitate conduct that would otherwise be anti-competitive but that also pursues important objectives in line with the twin

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14. See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 of 14.1.2011 (Horizontal Cooperation Guidelines).

15. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1-22 ('Merger Regulation').

16. A concentration takes place when one undertaking takes control of another. See Article 3 of the Merger Regulation.

17. See Article 22 of the Merger Regulation.

18. See Article 2 of the Merger Regulation. However, see Article 21(4) of the Merger Regulation that allows Member States to take 'appropriate measures to protect legitimate interests' other than competition concerns.

transition, for example setting up joint ventures to develop research and development or agreeing on standards. Resorting to the 'ancillary restraints' doctrine, especially in the version of 'regulatory ancillarity' upheld by the Court of Justice of the European Union (CJEU) in the *Wouters* case,[19] may increase the ability to take non-economic factors into consideration. The principle of integration of environmental considerations into all EU policies (Article 11 TFEU) may further reinforce the positive assessment of agreements and unilateral conduct contributing to a greener economy.[20]

That said, there are concerns that current competition laws may not be enough in the fight against climate change.[21] On 13 October 2020, the Commission therefore launched a consultation on 'Competition policy supporting the Green Deal',[22] seeking feedback on what changes to antitrust and merger laws and practices were desirable to further the Green Deal's objectives. In relation to merger control, the Commission noted:

> Consumer preferences are a key aspect in the assessment of the effects of a merger, in terms both of identifying the relevant product markets and analysing the extent to which the merging companies compete against each other and against other firms. Today, environmental and sustainability considerations play an ever-increasing role in this respect.

The Commission went on to highlight the link between those consumer preferences and market definition, noting that, increasingly, 'environmentally friendly characteristics or sustainability product features' may play a key role in the analysis. On 4 February 2021, a conference was held on Competition Policy Contributing to the European Green Deal.[23]

The Commission then published a *Competition policy brief* on the topic in September 2021.[24] Among the main results of the consultation and conference was a demand for more clarity on how the pursuit of sustainability

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19. Judgment of the Court of Justice of 19 February 2002, *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98.

20. See Nowag J. (2014) 'The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligations and its Intended Reach' in Siafjiell B. and Wiesbroeck A. (eds.), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously*, Routledge.

21. For a comprehensive analysis of this question, see Holmes S. (2020), 'Climate change, sustainability, and competition law', *Journal of Antitrust Enforcement*, Oxford University Press, pp. 344-405. As regards competition and sustainability, the current initiatives of the Hellenic Competition Commission, including the creation of a 'sandbox', are worthy of special mention. See https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

22. The European Commission's consultation document, 'Competition Policy supporting the Green Deal – Call for contributions', 13 October 2021, available at: https://ec.europa.eu/competition-policy/system/files/2021-08/2021_green_deal_conf_call_for_contributions_en.pdf. For a summary, see the European Commission's *Competition policy brief* on 'Competition Policy in Support of Europe's Green Ambition' published on 14 September 2021, available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-pdf.

23. 'Call for contributions', page 4.

24. See https://ec.europa.eu/competition-policy/policy/green-gazette/conference-2021_en.

objectives affects antitrust assessment, highlighting the risk that lack of legal certainty may freeze investment. Uncertainty focuses mainly on the status of cooperation agreements, for example industry-wide agreements to phase out unsustainable products and unsustainable and/or unethical modes of production; joint procurement of sustainable input products; joint R&D&I and production agreements, in the context of which information may need to be exchanged; and the setting of industry standards for the use of sustainable products and green technologies.

Among the suggestions was that Article 101(3) TFEU should be amended to explicitly incorporate non-economic considerations. With respect to merger controls, matters that respondents highlighted, while noting that the Merger Regulation may well support a green transition, included the need:

– for consumer preferences for sustainable products, services and/or technologies to be taken into account;
– for the Commission to enforce and pursue innovation theories of harm as much as possible in merger cases, as a means of preventing the loss of 'green' innovation;
– for smaller companies investing in green technologies to be protected from 'killer acquisitions' by incumbents not pursuing environmentally friendly business strategies.

In summary, it seems that, for the sake of legal certainty, a recalibration of EU competition law to align with the goals of the Green Deal should mainly entail legislative action at various levels – from Treaty changes to soft law clarifications in the form of guidelines or communications. In other words, legal interpretation alone may not offer sufficient protection.

Equally uncertain is the relevance that social sustainability impact may have in the assessment of otherwise incompatible anti-competitive agreements, conduct or mergers.[25] Admittedly, Article 9 TFEU posits that social values have to be respected in all policy fields of the EU. The issue is how this principle can be implemented within the current framework of competition rules. The main ways in which social considerations are taken into account in competition law involve the definitions of 'undertaking' and 'economic activity' and the potential use of Article 106(2) TFEU to justify restraints on competition by the need to perform a service of general economic interest. However, one thing that is certain is that the 'social' purpose of activities is not, in itself, enough to shelter conduct from the application of competition laws. While in the *Becu* decision,[26] for example, the CJEU made it clear that employees and trade unions are not undertakings within the meaning of competition rules,

25. For a comprehensive analysis, see Heinemann A. (2018) 'Social considerations in EU competition law' in Ferri D. and Cortese F. (eds.) *The EU Social Market Economy and the Law*, Routledge.

26. Judgment of the Court of Justice of 16 September 1999, *Becu and Others*, C-22/98, ECLI:EU:C:1999:419, paragraphs 26 and 27.

in the *Albany* case,[27] it did not fully exempt collective agreements from the application of competition rules. It noted that social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 101(1) TFEU when seeking to adopt measures to improve conditions of work and employment. If a functional approach is taken, however, this does not mean that matters not necessarily pertaining to the core negotiations on conditions of work and employment, such as, in the *Albany* case, the introduction of a supplementary pension fund, cannot be considered as economic activity and hence fully subject to competition law.

One important distinction is that a contractual obligation is not necessarily a restriction of competition. Thus, if firms agree to behave legally or not to behave illegally, for example by agreeing to abide by international codes of conduct or standards of best practice in the social or environmental field, such as corporate social responsibility (CSR) rules, they cannot be in breach of competition law, for the simple reason that those commitments do not restrict competition.[28]

While there have been decisions in the past where, for example, the impact of the transaction on regional employment was a relevant consideration, such decisions seem to be more the exception than the rule.[29] The pro-competitive efficiency properties of otherwise illegal practices have not normally included consideration of the socio-economic impact of the transaction. While block exemptions do not refer to social or environmental factors (though agreements pursuing sustainability objectives may, in principle, enjoy the benefit of block exemptions, especially if they do not include hard-core restrictions and concern market shares lower than the relevant thresholds), individual exemptions might prove the best way of including those assessments.

Though the language of Treaty provisions, such as Article 101(3) TFEU and Article 102 TFEU, and of the assessment standard in the Merger Regulation, is broad, a potential major recalibration of competition assessment to include the positive socio-economic impact of the transactions under examination as a key positive indicator seems ambitious.[30] Nothing, however, precludes

27. Judgment of the Court of Justice of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430.

28. See Heinemann, ftn. 25 above.

29. See judgment of the Court of Justice of 15 June 1993, *Matra v Commission*, C-225/91, ECLI:EU:C:1993:239, paragraph 139, where the Commission underlines the 'exceptional circumstances' that led it to consider the regional development objective and the Court of Justice noted that this was taken into consideration 'only supererogatorily'. See also judgment of the Court of Justice of 11 July 1985, *Remia v Commission*, C-42/84, ECLI:EU:C:1985:327, paragraph 42.

30. The Merger Regulation opens some space to extra-competitive aspects. According to recital 23 of the Regulation, 'the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to' in the articles which correspond today to Article 3 TEU and which include social goals. This was partly taken up by the General Court in the *Vittel* case where it held that the competitive assessment of mergers can be reconciled with the taking 'into consideration of the social effect of that operation': judgment of the Court of First Instance [General Court] of 27 April 1995, *Vittel v Commission*, T-12/93, ECLI:EU:T:1995:78, paragraph 38.

the taking into account of social sustainability considerations in addition to efficiency properties proper, as happened in the *Matra* decision. This is quite different from the scenario where social sustainability represents the core, or one of the core, arguments in support of an otherwise anti-competitive practice. As the law currently stands, this practice would not pass muster. For this to happen, law reform would, once again, be needed.[31] In any event, given the increasing importance of social sustainability in the EU as a key element of its 'social market economy', a Treaty change accompanied by soft law interpretations would – I would argue – be warranted.

Equally dubious is the role of industrial policy or 'strategic' considerations in competition law and, in particular, in merger control. These considerations are the ones most likely to clash with a competition assessment. They will certainly be excluded if the focus of the merger assessment is merely European. In other words, merger control cannot authorise the strengthening, or creation, of national champions, which would have a significant impact on competition in the EU internal market – and essentially goes against the ethos of that market.

More open to debate is whether 'global strategic' considerations may be relevant in the assessment. This leads us to consider the recent *Alstom-Siemens* aborted merger which caused a high level of acrimony in the EU. The Commission objected to the said merger because of the distortions it would have caused in the EU internal market. The parties complained that the Commission had not considered that the market was not limited to the EU but instead was truly global, and that a major competitor of both Siemens and Alstom was China Railway Rolling Stock Corporation (CRRC), a heavily subsidised Chinese state-owned enterprise (SOE)[32] which was not subject to any form of control comparable to EU state aid rules.

While it remains an open question whether the market position, and the financial strength, of a major global competitor could be considered in the Commission's assessment under the Merger Regulation,[33] an animated debate on the need for a new European industrial policy ensued.[34] Within this context,

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31. See, for example, the proposal of Monti G. (2002) 'Article 81 EC and Public Policy', Vol. 39, Issue 5, *Common Market Law Review*, pp. 1057-1099, at p. 1097, to introduce a new Article 101(4) TFEU providing for exemptions in favour of public policy goals subject to an authorisation by the European Commission.

32. According to *Global Trade Alert*, CRRC would have received annual subsidies equal to 2,485 million US dollars in 2016, 1,653 million US dollars in 2017 and 2,063 million US dollars in 2018: www.globaltradealert.org ('Intervention 77444', 'Intervention 77445').

33. The Commission itself seems tentative in its white paper on foreign subsidies.

34. On 19 February 2019, the French and German Governments published a joint Manifesto for a European industrial policy (see https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2) which, among other things, suggested a possible amendment to competition rules by introducing a right of appeal by the Council in respect of the Commission's decision. It is interesting to note that both French and German law already provide for such a higher level of scrutiny where exceptional authorisations of mergers could be granted for a variety of public policy reasons, including international competitiveness.

the need to introduce instruments to address the anti-competitive practices of third countries and, in particular, China was raised.[35] This led to the European Council's mandate to the Commission to conduct a comprehensive review of EU law in order to identify any regulatory gaps which eventually generated the proposal of a regulation to tackle foreign subsidies. This will be analysed in greater detail in Section 4 below.

4. Foreign Subsidies Regulation

4.1 The Regulation

In March 2019, the European Council tasked the European Commission 'to identify before the end of the year how to fill gaps in EU law in order to address fully the distortive effects of foreign state ownership and state-aid financing in the Single Market.'[36] In June 2020, the Commission published a White Paper on levelling the playing field as regards foreign subsidies which was followed by a public consultation. In May 2021, the Commission proposed a regulation to address the distortions caused by foreign subsidies in the internal market.[37]

Under the regulation, the Commission will have the power to investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic activity in the EU and redress their distortive effects.

In particular, the regulation includes three tools: two notification-based tools and one general market investigation tool. More specifically, these consist of the following:

1. a notification-based tool to investigate concentrations involving a financial contribution by a non-EU government, where the EU turnover of the company to be acquired (or of at least one of the merging parties) is 500 million euros or more and the foreign financial contribution is at least 50 million euros (Tool 1);[38]
2. a notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government, where the

35. See Efstathiou K. (2019) *The Alstom-Siemens Merger and the need for European Champions*, Bruegel Institute, 11.03.2019, www.bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions.

36. European Council, Conclusions of the European Council meeting of 21 and 22 March 2019, EUCO 1/19, p. 2.

37. In recognition of the close connection of 'foreign subsidies' with the internal market, the identified legal basis can be found in both Articles 207 (common commercial policy) and 114 TFEU (internal market).

38. The lack of regulation of 'M&A subsidies' and the consequent need for a 'multilateral compact' to regulate had already been addressed in the literature many years before the issue emerged in the EU. See Hufbauer G.C., Moll T. and Rubini L. (2008) Investment Subsidies for Cross-Border M&A: Trends and Policy Implications, *United States Council Foundation*, Occasional Paper No. 2, April 2008.

estimated value of the procurement is 250 million euros or more and the bid involves a foreign financial contribution of at least 4 million euros per third country (Tool 2);

3. a general tool to investigate all other market situations (including smaller concentrations and public procurement procedures), which the Commission can start on its own initiative and where it may request ad-hoc notifications (Tool 3).

With respect to the two notification-based tools, the acquirer or bidder will have to notify *ex-ante* any financial contribution received from a non-EU government in relation to concentrations or public procurements meeting the thresholds. Pending the Commission's review, the concentration cannot be completed and the contract cannot be awarded to the bidder under investigation.

Under the regulation, where a company does not comply with the said obligations to notify a regulated transaction, the Commission may impose fines and review the transaction as if it had been notified.

The general market investigation tool will enable the Commission to investigate other types of market situations, such as greenfield investments or concentrations and procurements below the thresholds, when it suspects that a foreign subsidy may be involved. In these instances, the Commission will be able to start investigations on its own initiative and to request ad-hoc notifications.

If the Commission establishes that a foreign subsidy exists and that it is distortive, it will, where warranted, consider the possible positive effects of the foreign subsidy and balance these effects with the negative effects brought about by the distortion. However, when the negative effects outweigh the positive effects, the Commission will have the power to impose redressive measures or accept commitments from the companies concerned to remedy the distortion.

With respect to these redressive measures and commitments, the regulation includes a range of structural remedies, such as capacity reductions or divestment of certain assets, or behavioural remedies (e.g. repayment of subsidies, market access commitments for infrastructure, publication of R&D results). In the case of notified transactions, the Commission will also have the power to prohibit the subsidised acquisition or the award of the public procurement contract to the subsidised bidder. In case of non-cooperation, the Commission can also impose fines up to 10% of global turnover. To ensure its uniform application across the EU, enforcement of the regulation will lie exclusively with the Commission.

The regulation was adopted on 28 November 2022. In the legislative debate there were significant points of discussion, including the substantive requirements triggering the notification obligations. On 30 June 2022, the Council and the European Parliament reached political agreement.

The interinstitutional agreement substantially followed the text of the Commission's proposal, the main changes being limited to the thresholds for the public procurement review regime and the assessment of the distortions of foreign subsidies and remedies (these now also include governance structure changes and an obligation to inform the Commission of future M&A or public tender bids).

4.2 Analysis

It is important to underline that the regulation, which will effectively introduce a set of unilateral tools, is not the EU's only attempt to address foreign subsidies. The need for stronger and more effective rules on industrial subsidies is also at the heart of the Commission's proposal for WTO reform,[39] as well as being one of the main motivations behind the 'trilateral' initiative with the US and Japan.[40]

The regulation, however, focuses on a specific form of subsidy, in other words, that granted by a third country to a company active or established within the internal market. The White Paper argues emphatically that the current legal framework does not, or does not easily, regulate this form of state intervention in the economy. The distortions – so the Commission argues – are real, and, since there is a lack of resolve at the international level, unilateral action is needed to fill the regulatory gap.[41]

It should be noted that the fact that EU action is unilateral is not in itself an issue under WTO law. That was clearly expressed by the Appellate Body in the *US – Shrimps* case.[42] What matters is that, essentially, the proposed instruments, both in terms of substantive and procedural requirements, do not discriminate between a 'foreign subsidy' scenario and a domestic 'state aid' scenario. Any differential treatment between the two scenarios which could not be properly justified would lead to an allegation of breach of WTO law.

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39. See, for example, the European Commission's concept paper on WTO modernisation, 20 September 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786.

40. The ethos of the proposal on foreign subsidies seems to have produced echoes also at the level of the trilateral cooperation. See the 'Joint statement of the ministers of US, Japan and EU on trilateral cooperation', dated 30 November 2021 (available at https://policy.trade.ec.europa.eu/news/joint-statement-ministers-us-japan-and-eu-trilateral-cooperation-2021-11-30_en), in which the parties commit to focus on the identification of 'problems due to non-market practices' and 'gaps in existing enforcement tools'.

41. The regulation would also cover 'transnational subsidies', i.e. those subsidies granted by one country to undertakings outside its territory or jurisdiction, thus addressing the concerns raised in recent countervailing duty investigations where the EU applied trade remedies to Egyptian imports subsidised through Chinese resources. See Commission implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of glass fibre fabrics originating in China and Egypt.

42. Appellate Body Report, *US – Shrimps*, ftn. 7 above, paragraph 121.

In this respect, there are a number of difficulties in the design and implementation of the regulation's tools that should be duly considered. Some examples follow.

– *Definition of subsidy:* whereas the language of Article 2 is clearly and intentionally based on the model of the WTO definition of subsidy, there are interesting variations and innovations (see, for example, the application to both goods and services, the reference to financial contributions by 'foreign public entities' and the insertion of the new form of financial contribution of the 'granting of special or exclusive rights without adequate remuneration').[43] It remains to be seen how this notion will be interpreted.

– *Notification requirements:* one point to consider is what will, in practice, trigger the notification obligations under both Tool 1 and Tool 2. A close review of the various provisions, with relevance given to the 'financial contribution' (which is only one element of the definition of foreign subsidy) seems to lead to a practical but equally troublesome conclusion: that third countries should notify the Commission whenever the financial contributions received from their governments reach certain thresholds. This outcome would clearly be more burdensome than the prevailing one in the EU state aid system and in the WTO system, where the obligation to notify is triggered only if there is a 'state aid' or a 'subsidy'.

– *Proof of distortion and 'balancing':* Article 3 merely outlines a few indicators of distortion but does not offer any methodology or standard of assessment that is to be used to determine the existence of a distortion of competition in the internal market. In this respect, I do not believe that simply transplanting the current EU practice, which essentially presumes the existence of a distortion on competition or an effect on trade when the other elements of state aid are present, is enough. In other words, the 'presumption-of-distortion' system works in the EU system because of its specific institutional, procedural and substantive features which encompass a wide array of justifications for legitimate subsidies (partly administered on an ad-hoc basis by the Commission, partly operating *ex lege* through block exemptions). Nothing comparable can be found in the regulation; on the contrary, the 'balancing' provision of Article 5 (which in the White Paper was called the 'EU interest test') is laconic and does not specify what objectives of foreign subsidies and, in particular, what 'positive effects' would qualify for the balancing exercise.[44] Admittedly,

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43. The latter inclusion is particularly troublesome given the significant uncertainty one notices when reading the text of the amendment proposed by the European Parliament, the Explanatory Statement, the summary explanations on the website of the European Parliament as well as the recitals (see recitals 12, 13 and 16). In particular, the rationale for this insertion is not fully clear. What does the regulation seek to target?

44. It did not come as a surprise, then, to see the European Parliament suggesting that the Commission should develop guidelines for assessing the distortive nature of subsidies and on the application of the balancing test. See draft report by Christophe Hansen, MEP, 18.12.2021 ('Hansen report').

the text agreed between the Council and the European Parliament is more specific in detailing the content of the balancing exercise, noting that the Commission should consider 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 broader positive effects in relation to the relevant policy objectives, in particular those of the Union'. The notable feature of this language is the opening-up of the exercise to a broad array of policy objectives, mostly – but not exclusively – by reference to the EU internal market.[45]

– *Tool 1 (M&A subsidies):* one essential requirement would be to ensure the maximum coherence with merger control proceedings; what in fact would have been more reasonable is the assessment of the receipt of 'foreign subsidies' within in the normal regulatory framework for merger control, perhaps by way of appropriate amendments to the Merger Regulation for the sake of legal certainty. This would have avoided, at its root, any duplication of activity and the potential for conflicting decisions.

– *Tool 2 (public procurement subsidies):* reasonable doubts might be raised over the need for this tool. Distortions caused by foreign subsidies (displacing higher-cost local producers, for example) are regularly resolved through sustainability measures allowed by the European Procurement Directives, for example, Articles 18(2), 42 and 67 of Directive 2014/24/EU.[46] The framework under the regulation may risk displacing the legislative regime contemplated by the existing Procurement Directives, and thus upend the careful policy decisions that are reflected in those directives.

– *Equivalence of control:* during the legislative process, it has been suggested that, where a third country has in place a subsidy control mechanism that is equivalent to that of the EU, both in law and in practice, foreign subsidies provided by such countries may be considered unlikely to be distortive and, as such, exempted from the regime. Clearly, this assessment of equivalence raises many issues and is strictly linked to the legal guidelines of openness and flexibility under WTO law described above.[47]

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45. An interesting expression of this is the recognition under the new Article 4(4) that "[a] foreign subsidy may be considered not to distort the internal market to the extent that it is aimed at making good the damage caused by natural disasters or exceptional occurrences."

46. See Andhov M. (2020) 'EU and public procurement: making better use of the existing toolbox' in Wiberg M. (ed.) *EU Industrial Policy in a Globalised World – Effects on the Single Market*, Swedish Institute for European Policy Studies (SIEPS), pp. 73-86.

47. Given the proverbial uniqueness of domestic systems of subsidy control, it is highly likely that equivalence scenarios arise only with countries that have signed PTAs with the EU which, despite significant variations, do provide for significant subsidy disciplines. See Rubini L. (2021) 'State aid and international trade law' in Hancher L. and Piernaz López J.J., *Research Handbook on European State Aid Law*, Edward Elgar Publishing, pp. 103-133.

– *International dialogue:* as noted in the Hansen report, given the unilateral nature of this mechanism, it is of the essence that the EU 'double down' its efforts to negotiate similar rules at the international level, and, should multilateral rules as effective as the proposed framework be agreed on, the EU regulation should be repealed. The Hansen report also suggests the possibility of the Commission engaging in a dialogue with the non-EU country without prejudice to the outcome of a specific case. I would add that dialogue would be all the more important in the case of persistent breaches by a single third country.

– *WTO law 'pre-emption':* Yet another issue is whether any action against subsidies would be 'pre-empted' by WTO subsidy rules. Article 32.1 of the Agreement on Subsidies and Countervailing Measures expressly states that 'no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.' It remains to be seen whether, now that it is about to enter into force, challenges will be made to the regulation, irrespective of the specific shape it takes, on the grounds that it arguably constitutes a 'specific action against a subsidy of another Member' and, as such, would be illegal under WTO law. The EU contends that this prohibition is not implicated because WTO rules deal with subsidies to traded goods, whereas the 'Foreign Subsidies Regulation' would not concern trade products but rather, in broad terms, investment.

5. Carbon Border Adjustment Mechanism

5.1 The proposed Regulation

The proposed Carbon Border Adjustment Mechanism (CBAM), which would operate in conjunction with, and to strengthen, the EU Emissions Trading System (ETS), would provide for EU importers to buy carbon certificates corresponding to the carbon price that would have been paid had the goods been produced under the EU's carbon pricing rules. Conversely, if a non-EU producer can show that it has already paid a price for the carbon used in the production of the imported goods in a third country, the corresponding cost can be fully deducted for the EU importer. The main stated objective of the CBAM is to deal with the risk of 'carbon leakage', that is, the risk of companies based in the EU moving carbon-intensive production abroad in order to take advantage of standards laxer than EU ones or of EU products being replaced by more carbon-intensive imports. This is quintessentially an environmental goal linked to the fight against climate change. Ultimately, this adjustment system should achieve an equalisation between the carbon price of imported products and that of domestic products, thus ensuring that the EU's climate objectives are not undermined by the relocation of production to countries with less ambitious policies.

At the time of writing, the regulation establishing the CBAM is in the legislative process. There are significant points of contention, including the scope of

the system, the potential introduction of a rebate on the EU's carbon price for exports and the possibility of the free allocation of emissions allowances currently in place in the ETS being swiftly phased out.[48]

5.2 Analysis

The CBAM is certainly an extremely ambitious measure, closely resembling the ETS in this respect. It is clear that the ultimate political motivation underlying this unilateral action is the same as that justifying the Foreign Subsidies Regulation. In times of crisis and inaction at a multilateral or plurilateral level, the EU is taking action and, in so doing, is showing leadership. While the proposed tools to tackle foreign subsidies directly target competitiveness scenarios, the CBAM is mainly justified in environmental terms.

Whether such a complex mechanism can be designed and applied in such a way that it is compatible with WTO law is another question altogether. As a matter of principle, I agree with MEP Mohammed Chahim when he notes that 'A CBAM designed as a purely climate and environmental measure is compatible with the principles of the World Trade Organization (WTO).'[49] This is certainly true, but whether the CBAM complies with WTO law requirements depends entirely on how it is ultimately designed and applied.

In this respect, there are a number of difficulties in the design and implementation of CBAM that require due consideration. Some of these are listed below.

– *Evidence of carbon leakage risk*: if the main rationale of the border adjustment mechanism is to tackle carbon leakage, it goes without saying that evidence of risk of carbon leakage in general and with specific respect to the impact of the measure should be produced.

– *Other objectives:* the presence of other objectives – and in particular competitiveness-related goals – should be fully transparent and as limited as possible, since any environmental justification cannot easily be extended to non-environmental objectives.

– *Scope of the measure*: if carbon leakage is the intended target, the scope of the measure (especially in terms of product coverage) should be properly designed and aligned to the risk. If distinctions are made between products and sectors, those choices should be properly substantiated, in particular with respect to the environmental rationale or its practical application.

48. See draft report by Mohammed Chahim, MEP, 21.12.2021 ('Chahim report').
49. Chahim report, p. 80.

– *Calculation of carbon price*: as already noted, the proposal allows for any 'carbon price' paid abroad to be deducted in respect of imported products. What is crucial here is 'to compare apples with apples'. How is the carbon price calculated abroad? Is it reasonable to compare this methodology to that applicable in the EU (where an ETS exists)? What if the export jurisdiction does not actually have a bona fide carbon price but instead relies on environmental or climate regulation? Can this be factored in and, if so, how? These are extremely important questions which must be correctly addressed to ensure that there is no discrimination between imported and 'like' domestic products.

– *Export rebates*: one key issue is whether the system should provide for export rebates. Legally speaking, a rebate on exports would not be required under WTO law; the issue is whether, under certain conditions, the EU would be permitted to grant a rebate on the carbon price paid in the EU for exports without falling foul of the prohibition on export subsidies under WTO subsidy rules. Another important issue relates to the impact of export rebates (or of their absence) on the environmental effectiveness of the measure: would they contribute to tackling carbon leakage or, instead, increase its risk? The final observation concerning export rebates is linked to the objectives of the system and to what extent the CBAM is genuinely an environmental-based measure or is, in fact, an important means of addressing the competitiveness concerns of specific (energy-intensive) industries. The issue of export rebates is, in this respect, closely linked to the debate on the phasing-out of free allowances in the EU ETS and on the state aid exemptions for energy-intensive industries. It must also be set against the backdrop of the serious disruption caused to the energy markets by the Russia-Ukraine war. The EU should pay particular attention to ensuring that a measure that is allegedly being introduced to tackle an environmental goal is not heavily tainted by economic and competitiveness concerns (doubling or even tripling the protection of certain sectors). It should also strive to ensure coherence between different policy instruments (CBAM, ETS and state aid control).

– *Use of revenue:* another important issue is the actual use of the revenue collected through the system. Earmarking that revenue for climate change-related programmes or for aid to other countries or jurisdictions for the implementation of similar programmes would significantly help in ensuring the genuineness of the policy and its compatibility with WTO law.

– *International efforts*: the EU should continue to actively cooperate and negotiate in the relevant international fora in order to contribute to the adoption of genuine multilateral or plurilateral solutions to carbon leakage and climate change. This is part of the 'openness' requirement under WTO law that any system must meet, an openness which is even

more pressing in the context of the serious international disruption caused by the Russia-Ukraine war.[50]

On 8 June 2022, the European Parliament voted against the first draft of the regulation submitted to it, mainly on grounds of an alleged lack of ambition in tackling the climate emergency.

On 22 June 2022, an amended draft regulation was approved by the European Parliament. Among the key changes to the package of carbon legislation (which includes a revision of the ETS, the establishment of the CBAM and the introduction of the Social Climate Fund), the ETS will be amended as follows:

- free allowances will be phased out from 2027 and will end by the beginning of 2032;
- maritime transport, municipal waste incineration, building and road transport will be progressively included in the system;
- revenues from the EU ETS will be exclusively used for climate action both at EU and Member State level.

The European Parliament intends to amend the draft CBAM regulation as follows:

- the scope of the regulation will be extended to cover organic chemicals, plastic polymers, hydrogen and ammonia;
- CBAM calculations will also include indirect emissions from electricity used in production processes;
- export adjustment, via free allocation of allowances, will be provided for EU manufacturers of products exported to non-EU countries without carbon pricing mechanisms similar to the EU ETS (by the end of 2025, the European Commission will have to present a report on the impact of the export adjustment mechanism and on its legality under WTO law);
- an EU-centralised authority will be set up;
- revenues generated by CBAM certificates will, in essence, be provided to support efforts of the least-developed countries to decarbonise their manufacturing.

6. Trade remedies

6.1 Regulation

EU trade remedy law encompasses various instruments that tackle a range of import scenarios which could hinder competition within the internal market. For example, the EU is entitled to impose anti-dumping duties to tackle

50. See Goldthau A. and Neuhoff K., *Why the war in Ukraine warrants a rethink of the EU carbon border tax*, in *Euractive*, 29.07.2022, at https://www.euractiv.com/section/energy-environment/opinion/why-the-war-in-ukraine-warrants-a-rethink-of-the-eu-carbon-border-tax.

dumped imports and countervailing duties to counteract subsidies, both of which situations could cause material damage to an EU domestic industry. In addition, it may introduce safeguards when an unexpected surge in imports is likely to cause serious prejudice to EU industries. It is important to underline that these trade remedies can only be applied to a specific international trade scenario, in other words, when the EU is faced with imports. They are therefore measures that are defensive of the internal market. In other words, they cannot help EU companies trying to access third markets, but they can address certain competitiveness issues domestically.

Although it largely reflects WTO law in this respect, EU regulation has its own distinctive characteristics, which on the whole involve a degree of leeway for *not* imposing trade remedies in certain situations.[51]

6.2 Analysis

EU regulation incorporates some notable variations on WTO rules, involving the introduction of further elements that must be considered when deciding whether anti-dumping or countervailing duties should be imposed. First – at least, in certain anti-dumping cases but not in countervailing duty cases – the EU continues to follow a 'lesser duty rule', meaning that, if a duty lower than the subsidy is sufficient to counteract the negative impact of dumped imports, that should be preferred over a higher duty equal to the dumping margin. It bears noting, however, that, before 2018, the 'lesser duty' rule was broadly applicable to both anti-dumping and countervailing duties. In 2018, a policy decision was made to restrict its use in countervailing duty cases. This is something which, I would argue, should be reversed in order to give the Commission more discretion on a case-by-case basis.

Secondly, and of even greater interest, the final decision on whether or not to impose anti-dumping or countervailing duties is subject to a 'public interest' test which may lead to waiving the imposition of trade defence instruments if it is considered that such a measure would not be in the EU's interest. Both of these provisions can be used to pursue the objectives of the three axes, for example by allowing the import of cheaper inputs or products necessary for the technology or green energy sector.[52] Giving the green light to imports may also prove crucial for employment and socio-economic development linked to the sectors in question.

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51. For further details, see Van Bael I. and Bellis J.F. (eds.) (2019) *EU Anti-Dumping and Other Trade Defence Instruments*, Kluwer Law International.

52. As regards green products, see the latest review of the EU's anti-dumping/countervailing duty cases against solar panels and cells in which it was decided to terminate the measures. See Beetz B. (2018) EU officially ends MIP for Chinese solar imports, PV Magazine. https://www.pv-magazine.com/2018/08/31/eu-ends-mip-against-chinese/ By contrast, in the recent wind towers anti-dumping investigation, 'green' arguments were rejected. See Commission Implementing Regulation (EU) 2021/2230 of 15 December 2021, Imposing a definitive anti-dumping duty on imports of certain utility scale steel wind towers originating in the People's Republic of China. *OJ L 450, 16.12.2021, p. 59–136*

7. Foreign direct investment screening

7.1 Regulation

The Foreign Direct Investment (FDI) Screening Regulation allows Member States to screen foreign investments which are likely to have an impact on their security and public order by considering their effect on critical assets and infrastructure. Its purpose is similar to that of mechanisms in force in other countries, such as the Committee on Foreign Investment in the United States (CFIUS).[53]

7.2 Analysis

This mechanism does not, therefore, specifically tackle the issue of distortions caused, for example, by foreign subsidies on the internal market. Given its specific remit with respect to the sensitive areas of 'security and public order', it is therefore not prudent either to use or to recalibrate it in order to address competitiveness concerns. Mixing up security and competitiveness risks creating a 'Pandora's box' scenario which, while ultimately not resolving any competitiveness issues, is liable to create international friction and to breach international laws.[54]

For similar reasons, the screening mechanism does not seem, by its nature, suited to addressing the twin transition and social sustainability axes.

8. Tentative conclusions and suggestions

Almost all measures, whether already in force or merely proposed at this stage, can contribute to tackling the competitiveness concerns of the internal market and, at the same time, to achieving the objectives of the three axes.

Legal interpretation and law reform: first, this chapter has shown that legal interpretation can be the means of ensuring protection in some cases, for example by giving new meaning to certain competition rules. In other cases, however, simply relying on the possibility that new interpretations of the current laws may produce the desired results is not the most desirable option. For the sake of both legal certainty and political recognition of certain values, serious consideration should be given to law reform at various levels (from

53. See Hufbauer G.C., Moll T. and Rubini L. (2008) Investment Subsidies for Cross-Border M&A: Trends and Policy Implications, *United States Council Foundation*, Occasional Paper No. 2, April 2008.

54. Ibid. See, in this respect, the further interpretations of GATT Article XXI on 'national security' in the Panel Report, *Russia – Measures concerning traffic in transit (Ukraine)*, WT/DS512/R, adopted on 26 April 2019; see also Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (Qatar),* WT/DS567/R, adopted on 16 June 2020.

Treaty amendment to soft law). The EU has to 'walk the walk' until the very end and fully inform and shape its policies in the light of the objectives it claims it wishes to achieve. In this respect, the basic elements of the 'Better Regulation' agenda demand that the legislative process is preceded and accompanied by a fully open and transparent consultation with the public and key stakeholders and also by methodologically sound and comprehensive impact assessments. Recalibration of the internal market and of all the instruments that ensure its internal and external functioning while meeting the key challenges of the three axes of the project requires solid knowledge and open and meaningful deliberation.[55]

WTO law compliance: equally, all measures, whether existing or proposed, can be designed and applied in line with WTO law. As a general proposition, it has been seen that – being mostly a 'negative integration contract' – WTO law offers significant leeway to governments provided that certain fundamental principles and guidelines are followed. Of course, it is the details that matter. Though politically appealing, the introduction of specific provisions or exceptions to appease certain interests or sectors that are extraneous to the main proposed goals may negatively impact their WTO-legal-compatibility assessment. By contrast, observance of the main norms of trade law (non-discrimination, transparency, proportionality and flexibility) can be useful, not only because this ensures that the policies will be legal at the international level, but also because it will help the EU to shape rational and coherent policies suitable for achieving the stated objectives.

Unilateralism as a building block: importantly, unilateralism (which characterises all the instruments analysed in this chapter) is not, legally, a fundamental obstacle, but it clearly demands that several legal standards are followed. Where unilateralism raises concerns, this is at the political level. It is, therefore, of the essence that the EU keeps international dialogue and efforts completely open. The most effective processes for governance and regulation of cross-border or even global challenges are developed not at a local level but at a plurilateral and multilateral level. As has been alluded to, while offering significant deference to governments, the WTO rulebook is far from perfect. This is inevitable given that it resulted from negotiations that took place in the 1980s and early 1990s – in what was then a completely different world. Therefore, current unilateral actions on the part of the EU should be perceived not as the solution to the problem but simply as building blocks for future global dialogue.

55. The processes concerning the initiatives on 'foreign subsidies' and 'CBAM' are good examples.

European
Trade Union Institute
Bd du Roi Albert II, 5
1210 Brussels
Belgium
etui@etui.org
www.etui.org

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