THE FOREIGN SUBSIDIES REGULATION. MORE THAN A COMPETITION TOOL FOR THE MEDIA SECTOR?

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ABSTRACT *Complaints regarding the distortive and unregulated competitive effects of foreign investors sponsored through foreign state subsidies investing in Europe through mergers and acquisitions, public procurement, and greenfield projects, have led to the creation of the Foreign Subsidies Regulation (FSR). Through the FSR, subsidies granted by non-EU governments can be reviewed by the European Commission. The FSR signals a more cautious, protectionist approach to foreign investments in critical sectors to which media and telecom belong to. Through a comparison of select procedural provisions, this article situates the FSR among two other ex-ante regulations, the Foreign Direct Investment Regulation, and the EU Merger Regulation, revealing its striking commonalities with the latter. Media concentration and covert foreign subsidies exceed competition-related concerns to include risks to media capture and foreign interference. While focusing on addressing competition-related market distortions, the FSR plays an unexpected role in the European Media Freedom Act, which addresses the risks of financially state-controlled 'rogue media service providers'.*

KEYWORDS

FOREIGN SUBSIDIES REGULATION, EUROPEAN MEDIA FREEDOM ACT, MERGERS AND ACQUISITIONS, PUBLIC INTEREST, MEDIA CAPTURE, REGULATORY COOPERATION

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INTRODUCTION

Europe's economy has become increasingly open and interlinked with the global economy. After the removal of foreign trade barriers, movements of capital in the EU surged, among which, foreign direct investments (FDI),[1] have been recognised as bearers of economic growth (Bisciari & Piette, 2007; European Commission, 2021c). FDIs come in two different forms: greenfield investments and mergers and acquisitions (M&As). The former is a market entry strategy chosen by companies seeking maximum control over their abroad operations and they usually lead to the establishment of a new company or a subsidiary. The latter include transactions resulting in transferring the assets ownership to an owner established abroad (European Commission, n.d.). This latter form of FDI is foreign entities' primary mode of entry into the EU markets, which accounts for almost 80% of the FDIs (Carril-Caccia & Pavlova, 2018), and is the type of investment this article focuses on. M&As are scrutinised under the EU Merger Regulation (EUMR) (Council of the European Union, 2004), a pillar of EU's competition toolbox whose aim is to assess if proposed M&As will have harmful effects on competition. Based on established thresholds, these assessments are conducted at the EU or at the Member States level.

Foreign companies, including foreign digital platforms, have been investing and taking over European media and telecommunication companies. For example, the Chinese telecommunications equipment manufacturer Huawei was able to secure major contracts for telecommunications infrastructure development with British Telecom (BT), Vodafone, T-Mobile, and Orange among others (Drahokoupil et al., 2017). In 2022, e&, the Emirati-based multinational telecommunications services provider – which is 60% owned by the United Arab Emirates (UAE) government – acquired 9.8% of the UK-based Vodafone Group's share capital, making e& its largest shareholder; its stake increasing[2] two years later to 15% (Telecompaper, 2024). Other foreign acquisitions involved the Indian conglomerate Bharti Enterprises' acquisition of Altice' 24.5% stock in the BT Group in 2024, the e& and Vodafone's strategic partnership in that same year, e& acquisition of PPF Telecom Group's assets in various European markets, and the Swiss telecom Swisscom's acquisition of Vodafone Italia.[3] Acquisitions in the digital world have also been observed with foreign tech companies like Apple, Microsoft, Meta, Google, Amazon and Tencent, acquiring European companies.[4] Although contributing to the EU's economic growth, FDIs are recognized to pose certain threats to national security or public order in sectors considered of critical importance. Article 4(1)(a) and (e) of the Foreign Direct Investments Regulation (FDI Regulation) (European Parliament and Council, 2019) enumerate communications and media among these critical sectors.

[1] Art.2(1) of the Foreign Direct Investment Regulation (European Parliament and Council, 2019) defines a foreign direct investment as an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.
[2] The increase is the result of Vodafone's stock buyback which reduced the number of outstanding shares.
[3] Switzerland being outside the EU is considered foreign.
[4] Some more known transactions being concluded in the music industry, video games industry, the cloud industry and haptic technology.

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According to the Commission (2021), there have been observations over a growing number of instances where foreign subsidies[5] granted by non-EU countries to foreign investors have facilitated the acquisitions of EU undertakings to the detriment of fair competition, have influenced investment decisions, have distorted trade in services or have influenced the behaviour of their beneficiaries in the EU market. For example, an investigation by the Commission in 2011 revealed that both Chinese Huawei and ZTE received significant support from the Chinese government including massive credit lines from state-owned banks (Drahokoupil et al., 2017). The Chinese digital technology giants, comprising of Baidu, Alibaba and Tencent, also known as BAT, are also receiving hefty support for outbound M&As (Su & Flew, 2021; Z. Sun et al., 2017). According to a US-based advocacy group which tracks subsidies allocated by the US states in a subsidy tracker database, since 2000 Google, Amazon, Facebook, Apple and Microsoft have been receiving large amounts of direct and indirect state subsidies amounting to billions of euros, in the shape of state and federal grants and loans, tax credits and rebates, discounts on property taxes and the use of designated enterprise zones where tax concessions are offered to encourage business investment (Good Jobs First, 2024).[6] Block and Keller (2011) eloquently explain the tremendous role played by the U.S. government in the development and success of the US tech companies. Alongside the forms of subsidies above-mentioned, they mention fiscal taxation policies, intellectual property and patent law reforms, public investments in physical and digital infrastructures on which the tech companies rely on, and public funds provided for R&D which encouraged private sector investments. The substantial granted subsidies have played a part in the hundreds of M&A involving these entities, in increasing their competitiveness and in their accumulation of power (Mirrlees, 2021). Using the data from the same subsidy tracker database, research by Sun and Xu (2024) finds a positive association between the U.S. government subsidies and operational efficiency highlighting that the subsidies benefit the resource management and competitive positioning of the beneficiaries.[7] The definition of a foreign subsidy (footnote 5) is extremely broad, and the types of subsidies enumerated in the U.S. context fall under it. EU law recognises that governmental interventions in the shape of State aid are needed when correcting market failures or suboptimal investment situations. Uncontrolled State aid in the Member States poses risks to free competition and the health of the internal market. Thus, such support is strictly regulated under Article 107 of the Treaty on the Functioning of the European Union (European Union, 2012). Because certain subsidies granted by foreign states would constitute State aid under EU law if

[5] Article 3(1) of the EU's Foreign Subsidies Regulation (European Parliament and Council, 2022b) defines a foreign subsidy as a financial contribution which is provided directly or indirectly by a third country – central government and public authorities, foreign public entities or private entities whose actions can be attributed to the third country – which confers a benefit to an undertaking engaging in an economic activity in the internal market, and which is limited to one or more undertakings or industries. Those conditions are cumulative. Article 3(2) of the same Regulation, enumerates various financial contributions as falling under the definition of a foreign subsidy, inter alia: (a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling; (b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or (c) the provision of goods or services or the purchase of goods or services. A more obvious and direct aid that a foreign state can provide is by the state participating in the company's capital itself (e.g., as a shareholder as in the case of e&).

[6] Amazon has received $5.9 billion, Alphabet – Google's parent company – and Meta Platforms – Facebook's parent company – has each received $2,1 billion, Apple $1.9 billion, Microsoft $1.4 billion.

[7] Buts and Jegers (2012) also found that in Belgium, State aid (i.e., government support which also comes in the form of subsidies) has had a significant positive effect on the market shares of the beneficiary firms, thus inevitably impacting their competitiveness.

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granted by a Member State, the difference in treatment risks to distort competition in the EU's internal market, as these subsidies could give a competitive advantage to the foreign entity (European Court of Auditors, 2020).

Until 2023, the EU lacked a regulatory tool to screen foreign entities' capital for subsidies. The FDI Regulation,[8] which coordinated national screening mechanisms, was the closest applicable tool. However, national FDI screening regimes only consider threats to security and public order and do not thoroughly investigate the source of the investment nor the granted subsidies. When it comes to the media sector, considering its dual economic and cultural role, some Member States limit, and sometimes prohibit the ownership of domestic media organisations by foreign natural or legal persons (Afilipoaie & Ranaivoson, 2023). Some foreign players consider such restrictions as a market entry barrier, reaffirming a growing worldwide economic protectionist trend (Grieger, 2019; Timmers, 2022) which prioritises sovereignty and security over open market principles. These restrictions are included in the national merger procedures to safeguard the media sectors. These procedures are aligned with the EUMR to ensure consistency in the enforcement of competition law across the EU, yet the Member States often adapt their merger control rules such as defining national public interest exceptions, setting lower triggering thresholds for mergers or limiting ownership of domestic media organisations. According to Gal (2003), the EUMR is the most powerful tool to level the competitive playing field. Although Evens et al. (2020) share Gal's views, they reveal that the EUMR's limitation lies in the fact that it does not address a company's capital structure nor the origin of funds, as the origin of the funds, especially in the case of foreign subsidisation, can give the beneficiary a competitive advantage in the M&A bidding process for a European entity and could pose risks beyond competition.

This regulatory gap is covered by the Foreign Subsidies Regulation (FSR) (European Parliament and Council, 2022b) which entered into force in the summer of 2023. The FSR establishes a legal basis to demand information about any granted foreign subsidies in the past few years. As is the case with other EU regulations dealing with economic analyses and weighing conflicting interests, the EU is committed to proportionality – a general principle of EU law. As part of other regulations, the FSR comes with its own balancing test[9] embodying the proportionality principle. Yet, because the balancing test is inspired by the interest test in EU trade defence mechanisms (Crochet, 2022), it is possible that the Commission would honour established trade agreements with third countries despite the adverse distortive effects of a foreign subsidy. Jan and Pierfrancesco (2023) also show scepticism as to the application of the balancing test. Legal practitioners have argued that because of the FSR's position as a political and policy tool, and the Commission's discretionary powers, the decisions could be manipulated to protect the EU industries, regardless of the economic realities justifying that intervention (Dentons, 2021).

[8] Art.6-8 FDI Regulation

[9] Under Art.6 FSR the Commission "may balance the negative effects of a foreign subsidy in terms of distortion in the internal market [...] against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union".

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The aim of this article is twofold: (i) identify where the FSR fits in the already existing ex-ante regulatory framework, and (ii) examine how the information obtained under the FSR could address issues beyond competition concerns and market distortions. That is possible because foreign investments backed by foreign subsidies can potentially create risks surrounding media capture and political interference, with extended implications to media pluralism and wider public interests (Dragomir, 2019) and could thus have some unforeseen implications in the application of the European Media Freedom Act (EMFA) (European Parliament and Council, 2024), particularly regarding its Section 5 'Requirements for well-functioning media market measures and procedures' and the identification of so-called 'rogue media service providers'.[10]

The first section of this article looks at how the FSR came into the spotlight. The second section looks at the risks to public interest concerns (i.e., the freedom and pluralism of the media) raised by media transactions and how the discussed regulatory framework tackles those concerns. This is followed by the legislative interplay analysis between the three regulations and the article ends with a short discussion on the FSR's unexpected role in the EMFA.

METHODS

This article makes use of a comparison analysis of select procedural provisions of three regulations – FSR, EUMR and FDI Regulation – to understand their interplay and establish where the FSR fits in the overall ex-ante regulatory framework. It further questions whether the capital enquiries under the FSR can have a wider use beyond competition concerns, and how access to such information can help Member States' National Regulatory Authorities (NRAs) with their national media merger review cases, part of the cooperation system proposed by EMFA's Section 5, Article 22 and Article 23.

According to Milosavljevic and Poler (2019) '[l]egal analysis focuses on procedures, precedents, and doctrine and on legal documents, their developments and interpretations, and their uses within different environments (comparative perspective), or over time (historical perspective)'. One of the legal areas of utmost curiosity to communication researchers is *torts*, 'especially libel, privacy, and unfair competition' (Gillmor & Dennis, 1981). By using legal document analysis of regulations as a methodological approach, this article addresses the matter of competition seen through the eyes of three EU regulations: the EUMR, the FDI Regulation, and the FSR. The three regulations were selected on the reasoning that at their core they address in ex-ante, investment behaviours in the EU internal market that can be detrimental to fair competition and the public interests. The interplay is shown by using a comparative procedural legal analysis across seven common elements, which covers questions of authority as the decision maker and its competences, and the process implemented that leads to the final decision (Cate, 2006). Thus, the indicators compared across all three regulations are (i) origin of the transaction;

[10] Recital 44 and 49 EMFA

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(ii) assessment-triggering thresholds; (iii) jurisdiction; (iv) intervention reasoning; (v) documentation required; (vi) assessment timeline; and (vii) commitments and redressive measures.

TOWARDS THE FOREIGN SUBSIDIES REGULATION

Through various regulatory instruments, the EU has created tailor-made trade policies to advance its commercial interests, encourage competition, and protect its domestic players (Woolcock, 2012). The EU is part of the World Trade Organization (WTO) agreement which has ensured reciprocal benefits to all parties involved in the international trading system. However, under certain circumstances, discriminatory provisions, also known as preferential trade agreements (PTAs), are allowed. The Commission views PTAs as "rule-enhancing and economically beneficial" but it's shift in its trade strategy point towards a determination to defend EU values and interests, focusing on fair trade, adopting new industrial and trade policies and focusing on trade defence instruments (Eliasson & Garcia-Duran, 2024, p. 47). Levy (2009) and Stallings (2001) argue that attractive FDI schemes in countries involving low taxes and various subsidies, incentivises parties to enter PTAs. Bisciari and Piette (2007) signal that a country's strict and complicated industrial policies' views vis-a-vis trade, subsidies, fiscal measures and FDI restrictiveness can act as a deterrent. Today, most PTAs extend to competition policy, government procurement and investments. Investment provisions under PTAs include the right for the state receiving it to restrict establishment in given sectors under specific circumstances and include industry-specific limitations, including reasons relating to the public interest and national security (Miroudot, 2011). Such PTAs are an outcome of national policies and political concessions, and not market-based decisions per se (Chauffour & Maur, 2011).

Although recognising the FDIs' economic benefits, national governments acknowledged the adverse effects of underregulated FDIs. The fear of losing control in favour of foreign companies was described by Moran (2009) as threefold (i) making the Member State dependent on foreign control and the foreign owner's decisions in a crucial sector, (ii) providing for a transfer of technological knowledge and expertise that could be used in a harmful manner against the Member States' national interests, and (iii) leading to situations of infiltration, surveillance, and sabotage. By 2017, around half of the Member States were screening inbound FDIs to identify potential public interest and national security related risks to their sensitive and strategic sectors (Bian, 2021). Miroudot (2011) claims that restrictions on FDI are usually found in traditionally regulated service sectors and where the existence of such restrictions on foreign investments is a justification for addressing market imperfections; media and telecom being such sectors (Picard & Pickard, 2017; Walters, 2020).

In 2017, several economy ministers wrote a letter to the EU Trade commissioner, addressing the rise in takeovers of EU firms active in high-tech, advanced manufacturing, and infrastructure by non-EU enterprises to advance their home countries' strategic objectives. The ministers were asking to be allowed to refuse FDIs not only on public

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interest and national security reasoning but also based on economic criteria (Hanemann & Huotari, 2017).[11] The outcome of the discussions was the 2019 agreement on the FDI Regulation. Yet, the regulation did not empower Member States to assess FDIs based on economic considerations. It simply broadened the scope of the mandatory review and targeted enhanced cooperation and information-sharing between the Member States and the Commission.[12]

Using the example of China, a report by the European Court of Auditors (2020) found that certain subsidies granted by the Chinese state would constitute State aid if granted by an EU Member State, thus distorting competition in the EU's internal market, if the beneficiaries of such aid engage in FDIs in the EU. This creates a disadvantage for companies operating within the EU with limited or no subsidies. Due to the opacity of subsidies granted by non-EU countries, the informational gap persisted despite the FDI Regulation. After several targeted consultations and inspired by the EU's internal market policies and its trade policy toolbox (Trapp, 2022), the FSR was adopted.

Through the FSR the Commission gained the power to review FDIs under the premise of existence of distorting subsidies, therefore obtaining the jurisdiction to assess inbound FDIs based on economic considerations, which is what the Member States were asking for themselves. Within 100 days of its application, the Commission had already received 53 notified cases[13] out of which 42 triggered parallel assessments under the EUMR. Five cases were subject to national merger procedures and 26 cases subject to FDI screenings in one or several Member States (Moscoso & Stoyanova, 2024). Although the FSR was mainly passed to address concerns brought by FDIs particularly in the high-tech, advanced manufacturing and infrastructure as core sectors, the regulation covers other critical sectors such as media and telecom as it is exemplified below.

In the summer of 2024, e& notified to the Commission under the FSR its intention to acquire sole control of several of PPF Telecom Group's assets in the EU. The Commission opened an in-depth investigation, in which it concluded that e& had received unlimited guarantees[14] from a wealth fund controlled by the UAE possibly distorting the EU internal market. The review concluded that e& had its own sufficient resources to perform the acquisition and that the foreign subsidies would have not altered the outcome of the acquisition process. However, the Commission managed to extract a ten-year commitment package as it had concerns over the use of distortive subsidies in the EU internal market post-transaction (European Commission, 2024c). In the framework of our analysis,

[11] The letter referred to Art.XIV of the General Agreement on Trade in Services (GATS) (World Trade Organization, 1995) which gives WTO members grounds to impose restrictive trade measures, but only if they pose a serious threat to one of the fundamental interests of society, as reflected in public policy and law, thus subject to national decisions.

[12] Such cooperation is paramount, as according to the Fourth Annual Report on the screening of FDIs into the Union (European Commission, 2024a), more than one-third of all cases triggered multi-jurisdictional notifications across several Member States, requiring coordination. The regulation also attempted to harmonise the national screenings by publishing an indicative list of factors to help determine if an investment is likely to affect security and public order.

[13] At the end of October 2024, it was reported that the number of notified cases had reached 105. The impact assessment accompanying the FSR proposal estimated that no more than 33 cases will be notified annually (European Commission, 2021a).

[14] In the context of a concentration, an unlimited guarantee can facilitate the concentration by enabling the acquirer to obtain financing from public or private banks below market terms so as to be able to offer the seller a higher purchase price for the target, thus improving the bidder's capacity to finance the transaction (European Commission, 2024b).

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assessment of potential anticompetitive future conduct is part of the EUMR review and results in forward-looking commitments post-merger, same logic as the commitments imposed under the national FDI screening mechanisms. Investigations under the FSR are strictly linked to the 'concentration concerned'.[15] This element of speculation not directly tied to the 'concentration concerned' exceeds the scope intended for the FSR, highlighting the Commission's overreaching its discretionary power, just as highlighted by Dentons (2021).

Another case notified under the FSR in the same year was the Swiss telecom Swisscom's acquisition of Vodafone Italia. The Commission approved it unconditionally[16] however, the case also triggered a parallel investigation under the Italian merger procedures. In mergers considered capable of affecting the competitive and pluralistic structure of the media sector, the NRA – Authority for Communications (AGCOM) – assesses the merger alongside the Italian Competition Authority and binds the latter's decision (Afilipoaie & Ranaivoson, 2023). While AGCOM cleared the transaction unconditionally, alongside the Italian Presidency of the Council of Ministers and the Swiss Competition Commission, the Italian Competition Authority (AGCM) opened an in-depth investigation into the transaction (Huber, 2024a). At the end of December 2024, AGCM approved the acquisition after accepting a number of behavioural commitments proposed by Swisscom. The Italian Minister for Business and Made whose areas of action include communications and spectrum licenses allocation also approved the transaction (Huber, 2024b).

These cross-border transactions not only reflect the globalised nature of business operations and the interconnectedness of markets but also highlight the importance of legal coherence, clarity and moreover, national and cross-border collaboration. One of the most fit examples of such cross-border collaboration is the European Competition Network (ECN) established in 2004, which is composed of representatives of the European Commission and the National Competition Authorities (NCAs), whose role is to facilitate cooperation, pool together expertise and share best practices in the area of competition. In 2010, the ECN established the EU Merger Working Group to foster consistency, convergence and cooperation among EU merger jurisdictions, especially in issues arising from mergers with cross-border impact.

THE REGULATORY FRAMEWORK ADDRESSING PUBLIC INTEREST CONCERNS IN MEDIA M&A

The media sector is included in the FDI Regulation and in the FSR, among the critical sectors considered at risk from foreign control and interference. Although an economic tool, the EUMR[17] allows Member States to take appropriate measures to protect their legitimate interests, with plurality of the media being one of them, as well as other public interests that must be recognised by the Commission. Generally, media sectors are characterised by

[15] Art.19 FSR
[16] Under the FSR, the Commission is not required to publish its phase one decisions. Swisscom itself announced the clearance. This reduces the transparency of the Commission's M&A work under the FSR.
[17] Art.21(4)

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high levels of concentration (Peruško, 2010). From a media and communications point of view, market concentration can reduce choice, restrict the number of providers which can negatively impact societies by limiting flows of information, reducing diversity, variety, and pluralism, and handing over the cultural and political influence to a handful of firms (Iosifidis, 2014; Picard & Pickard, 2017).

Concentrated ownership in the media can be used to instrumentalise the sector, leading to a form of media control known as media capture, in which the media serves alternative political and business agendas, influenced by vested interests beyond just the government (Mungiu-Pippidi, 2012). Dragomir (2024) discusses four main components that constitute media capture, among which the discriminatory allocation of state financial resources (e.g., state subsidies, state advertising), and the acquisition of substantial portions of the private media industry (e.g., governments employ state-controlled entities or businesses to procure media assets).[18]

The notion of public interest does not have an operational definition, and thus the matter is approached differently depending on a country's institutional philosophies. Nevertheless, as Barnett (2010) explains, public interest provisions must be rooted in normative democratic values. In the media context, the notion of public interest typically refers to diversity, pluralism, and variety (Afilipoaie & Ranaivoson, 2022). Safeguarding the public interest can be done through various mechanisms, such as government subsidies, and a coordinated public policy, media policy and competition policy, including (foreign) ownership restrictions and limitations (Trappel & Meier, 2022). Half of the Member States require NRAs and/or the Ministries to assess media mergers based on media pluralism and other public interest goals and to advise the NCAs (Afilipoaie & Ranaivoson, 2022). This reveals that the economic tool provided by the EUMR can also help safeguard non-economic goals.

Because cultural and media policies are under the jurisdiction of the Member States, the Commission can only carry out actions to support, coordinate or supplement the actions of the Member States. Attempts since the 1980s by the European Parliament to coordinate certain media provisions including media pluralism at the EU level have been recorded, but to no avail. However, after the repeated calls for action, the long-awaited EMFA was adopted. The EMFA lays down the first-ever EU harmonised rules on media freedom and independence. Among others, the Commission proposes a formal obligation for all Member States to designate an NRA to take part in the merger assessment and assess its impact on media pluralism based on a list of criteria.[19] Thus, the Commission recognises the risks to the media sectors and the importance of also analysing such concentrations based on non-economic considerations.

[18] Although media capture is usually discussed in the context of the state controlling the public and private media outlets inside its country's borders, foreign entities can also carry out such tactics through strategic purchases with the aim to influence the narratives in strategic markets. A case in point for controlling the narrative is the Russian state-controlled RT and Sputnik, which in 2022 were suspended in the EU because of systemic information manipulation, disinformation and propaganda by the Russian government following the war against Ukraine (Council of the European Union, 2022).
[19] Art.22(2) EMFA. We discuss in detail the criteria covering the matters of ownership, opinion-power, editorial independence and economic sustainability in our forthcoming publication (Afilipoaie & Ranaivoson, forthcoming 2025).

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Member States also use the public interest as a reasoning for their decisions on inbound FDIs. The FDI Regulation, enumerates a list of factors that Member States can consider in their screening, among which the FDIs' potential effects on the freedom and pluralism of the media.[20] Bian (2021, p. 565) claims that loose terms and ambiguous definitions "can be excessively used or abused in national law to reject any unwanted foreign investment" creating regulatory hurdles for investors due to the unpredictability, uncertainty, and lack of transparency in the reviewing system. Although the FSR in itself does not safeguard public interest concerns, the information requested could indirectly lead to its protection.

THE LEGISLATIVE INTERPLAY

This section looks at the interplay between the EUMR, the FDI Regulation and the FSR. Using a comparative procedural legal analysis across seven common elements, their commonalities and sometimes overlaps become obvious, indicating the attempts to fill in the identified regulatory gaps.

Origin of Transaction

Except for the EUMR, which covers both EU and non-EU originating transactions, the FSR[21] and the FDI Regulation[22] cover particularly non-EU originating investments. The FDI Regulation was established as a mechanism to coordinate national FDI screening regimes, and for the Commission to supervise such foreign investments into the Union for risks to security or public order.[23] Because national security is the sole responsibility of each Member State, screenings fall within Member States' jurisdiction and thus follow their established set of rules.

Assessment-Triggering Thresholds

The EUMR showcases complex thresholds, consisting of a primary turnover threshold[24] and an alternative turnover threshold.[25] However, below-turnover threshold concentrations may be referred to the Commission by the Member States and still be scrutinised.[26] In 2021 the Commission (2021b) encouraged the Member States to refer concentrations upwards, regardless of meeting the national merger control notification thresholds. This change to Article 22 EUMR also enables the review of concentrations in the digital sector, sometimes labelled by the literature as 'killer acquisitions' where the target generates little or no turnover, but it might develop into a potential competitor and innovator and thus the acquirer has a motivation 'to kill' it (Cunningham et al., 2020; European Commission: Directorate-General for Competition et al., 2019). Innovation theories of harm and the future possible competitor rhetoric are increasingly considered as parameters in merger review (Jung & Sinclair, 2019).

[20] Art.4(1)(e) FDI Regulation
[21] Art.3 FSR
[22] Art.2 FDI Regulation
[23] Art.1 FDI Regulation
[24] Art.1(2) EUMR
[25] Art.1(3) EUMR
[26] Art.22 EUMR

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The FSR proposes a three-tiered investigative tool and works with turnover thresholds just like the EUMR. However, the former requires that the turnover generated by at least one of the undertakings established in the Union to be at least EUR 500 million generated in the Union and the aggregated state financial contribution for all the undertakings to be more than EUR 50 million in the three years prior.[27] Through the *ex officio* provision,[28] at its own initiative, the Commission may request information from the notifying parties regarding alleged foreign subsidies distorting the internal market regardless of the thresholds; similar to the EUMR bellow-thresholds referrals.

Contrary, the FDI Regulation does not contain any thresholds or *de minimis* considerations. This is because the screenings take place at the Member States level if certain national thresholds are met, such as minimum percentages on voting rights, turnover thresholds, capital shares or relevant assets.

Jurisdiction

Although the internal market is an area of shared competencies, the Commission was granted exclusive power to ensure the FSR's uniform application[29] with DG COMP responsible for concentration cases.

When it comes to the EUMR, the Commission, in particular DG COMP has exclusive jurisdiction over concentrations of a Community dimension[30] and Member States cannot apply their merger regimes to these transactions[31] unless the Commission refers them downwards[32] or the Member States raise legitimate interests concerns, including risks to plurality of the media.[33] The EUMR also stipulates that the Member States may refer concentrations without a Community dimension to the Commission if the concentration affects trade between Member States and threatens to significantly affect competition within the referring Member States.[34]

The FDI Regulation includes a cooperation mechanism between Member States and the Commission's DG TRADE, which consists of a series of comments and opinions,[35] yet the Commission has no competencies in its application. The FDI Regulation requires Member States – usually though Ministries and other specialised agencies that oversee the screenings – to annually report to the Commission all inbound FDIs, including their decisions.[36] Given the intertwinement of the three regulations, their different primacies and the multiple filings, a high degree of coordination must be ensured (Burnside & Kidane, 2022; Merola & Cogoni, 2023).

[27] Art. 19 FSR, Art.20 FSR & Art.28 FSR; In comparison, the EUMR's threshold is an aggregate of at least two of the undertakings of more than EUR 250 million.
[28] Art.9 FSR
[29] Recital 74 FSR
[30] Art.21(1) to (3) EUMR
[31] Art.21(3) EUMR
[32] Art.4(4) EUMR & Art. 9 EUMR
[33] Art.21(4) EUMR
[34] Art.4(5) EUMR & Art. 22 EUMR
[35] Art.1 FDI Regulation and Art. 6 to 8 FDI Regulation
[36] Art.5 FDI Regulation

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Intervention Reasoning

Under the EUMR, the Commission assesses if concentrations impede effective competition in the internal market because of the creation or strengthening of a dominant position.[37] Generally, the EUMR is an economic tool which does not regard non-competition factors. Nevertheless, Member States may take appropriate measures to protect their legitimate interests (i.e., public security, plurality of the media and prudential rules).[38]

Concerning the FDI Regulation, the Commission oversees Member States' application of national screening mechanisms and can issue non-binding opinions.[39] Member States are only allowed to screen FDIs on security or public order grounds[40] and not on economic considerations. The aim of these screening mechanisms is to limit the threats to critical infrastructure and technologies (Chan & Meunier, 2022). Each Member State has the freedom to decide which strategic sectors and industries are sensitive to foreign investments and which factors to consider.[41] Similar to the EUMR, Member States can also consider the potential effects of such investments to the freedom and pluralism of the media.[42]

Whereas the FDI screening mechanisms address the potential threats posed by foreign takeovers and investments to national security and public order, they do not address market distortions (Stas & Geisel, 2023). The FSR on the contrary, addresses the subsidies granted by non-EU governments that could cause distortions in the internal market, with the primary purpose of preventing competitive distortions and ensuring a level playing field,[43] which is also the intervention reasoning behind the EUMR.

Documentation Required: Information over Capital Origins

As part of the notification procedures, all undertakings must file and submit various financial documentation, yet the strictness of reporting on the source of capital widely differs. Understanding the composition of one's capital is essential as it can create a competitive benefit to the undertaking and it can also reveal any possible foreign state control, which for the media can have extensive non-economic implications.

Aside from the turnover, the EUMR does not enquire any other financial information. The FDI Regulation asks for the Member States to submit the information received from its investigation concerning, among others, the ultimate investor and participation in the capital, and the funding of the investment and its source, to the best information available to them,[44] thus not being a strict requirement. Additionally, the FDI Regulation stipulates that Member States, or the Commission could obtain contextual and circumstantial information to determine if a foreign investor is controlled through significant funding,

37 Art.2(2)&(3) EUMR
38 Art.21(4) provided they are compatible with the general principles and other provisions of Community law.
39 Art.6 to 8 FDI Regulation
40 Art.2(4) FDI Regulation
41 Art.4 FDI Regulation
42 Art.4(1)(e) FDI Regulation
43 Art.1(1) FSR
44 Art.9(2)(e) FDI Regulation

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including subsidies, by their government.[45] However, this also seems to be a lax request. Contrary, the FSR stipulates precise notification requirements and disclosure obligations, including the reporting on the foreign subsidies received in the past three years.

Assessment Timeline

Although all three regulations assess cases in two phases: the preliminary review and the in-depth investigation, the EUMR and the FSR follow a similar timeline. The preliminary review and the in-depth investigation are similar in terms of allocated working days in both regulations.[46] In the in-depth transaction review, the Commission can 'stop the clock' if the parties have not replied to the Commission's information request. Relating to the national FDI screenings, the assessment timelines differ per Member State.[47]

The FDI Regulation sets up a 15-month period in which the Member States and the Commission can make comments and issue opinions for a completed FDI which did not undergo screening.[48] Under the FSR and only related to closed public procurement cases, it is stipulated that the Commission can reopen a preliminary review based on new information or notification that the initial declaration was incomplete.[49] Yet, there is no capped deadline, meaning that the Commission can always go back to its decision. Under the EUMR, the Commission is not able to reopen a closed case, but it can revoke its decision in certain circumstances.[50] Moreover, provided that the General Court or the Court of Justice annuls a merger decision by the Commission, the latter will have to re-assess it.

Commitments and Redressive Measures

Submitting any commitments and redressive measures as part of the preliminary review, fast-forwards the reviewing process and reduces the administrative burden for all parties. As it stands, only under the EUMR the notifying parties are allowed to offer commitments in the first part of the investigation.[51]

The EUMR does not list possible structural or behavioural commitments or redressive measures to offset competition concerns. Given that FDI screening regimes focus on national security or public order issues, Harper et al. (2021) argue that details of specific remedies required are usually not made public, but typically, regulators tend to ask for behavioural remedies to still encourage FDIs.[52] The FSR provides a non-exhaustive list of commitments, offering some predictability to the investors as to what might be expected of them in case the Commission finds that the foreign subsidy might be distortive.[53] The

[45] Recital 13 FDI Regulation
[46] Art.24(1) FSR & Art. 10 EUMR
[47] For example, in Denmark authorities can reopen formal investigations years after the completion of an FDI.
[48] Art.7 FDI Regulation
[49] Art.30(4) FSR
[50] Art.6(3) EUMR
[51] Art.10(1) EUMR
[52] These can be requirements to continue supply, majority ownership to be maintained in the targeted state, home nationals to be appointed to the entities' boards and in sensitive positions, restrictions on sensitive data transfers and setting up monitoring entities.
[53] Art.7(4) FSR

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list includes similar provisions to those asked for in the EUMR assessments.[54] Similar to the EUMR, the FSR gives the Commission the power to revoke a decision or adopt a new one if the undertaking concerned acts contrary to its commitments or when the decision was grounded on incomplete, incorrect, or misleading submitted information.

As this legislative comparative exercise revealed, the FSR shares the most features with the EUMR, only complementary regarding the intervention reasoning and documentation required. Such significant overlap between policy instruments is concluded by Müller-Ibold (2022, p. 440) to have been deliberate, as "it is the consequence of concurrent application with other existing rules". Moreover, when a concentration is notified to the Commission both under the FSR and the EUMR, the undertakings could give the Commission the right to use specific information submitted under the FSR in the EUMR review,[55] showcasing once again the regulations' complementarity.

THE UNFORESEEN APPLICATION OF THE FOREIGN SUBSIDIES REGULATION IN THE EMFA

In the explanatory memorandum accompanying the EMFA proposal (European Parliament and Council, 2022a, p. 2), the issue of "rogue media service providers including those that are state controlled, be it financially or editorially by certain third countries" is addressed in the context of covert funding and foreign interference posing risks of prejudice to public security and defence. Although public security lacks definitions across the regulations, Dairo (2017) makes a clear case that media and communication are powerful forces implicated in promoting or endangering it. Yet, the EMFA does not specify the tools that could lead to their identification. Recital 49 gives the Board – the entity replacing the European Regulators Group for Audiovisual Media Services (ERGA) – the responsibility to aid NRAs in identifying the 'rogue media service providers' by drawing up a list of criteria.[56] However, what could lead to their identification is the information on state subsidies, revealed as part of the FSR required documentation, which will be in the hands of the Commission.

The EMFA recognises that covert subsidies could lead to undue political influence and media capture and underline that without monitoring and assessments, even foreign information manipulation and interference from third countries can infiltrate the internal media market.[57] Foreign interference can also arise from FDIs conducted by entities in which the investor is the state as research by Chen and Young (2010) revealed that these investments are more likely conducted with political motives. To this aim, EMFA places the annual monitoring exercise on independent researchers – selected based on objective criteria under key performance indicators – whose assessment will include among others,

[54] Remedies can include providing access on FRAND conditions to an infrastructure acquired or supported by the distortive foreign subsidies, refraining from certain investments, divestment of certain assets.
[55] Recital 39 FSR
[56] Elements to be covered in such a list could concern, inter alia, ownership, management, financing structures, editorial independence from third countries or adherence to co-regulatory or self-regulatory mechanisms governing editorial standards in one or more Member States.
[57] Recital 30 and 72 EMFA

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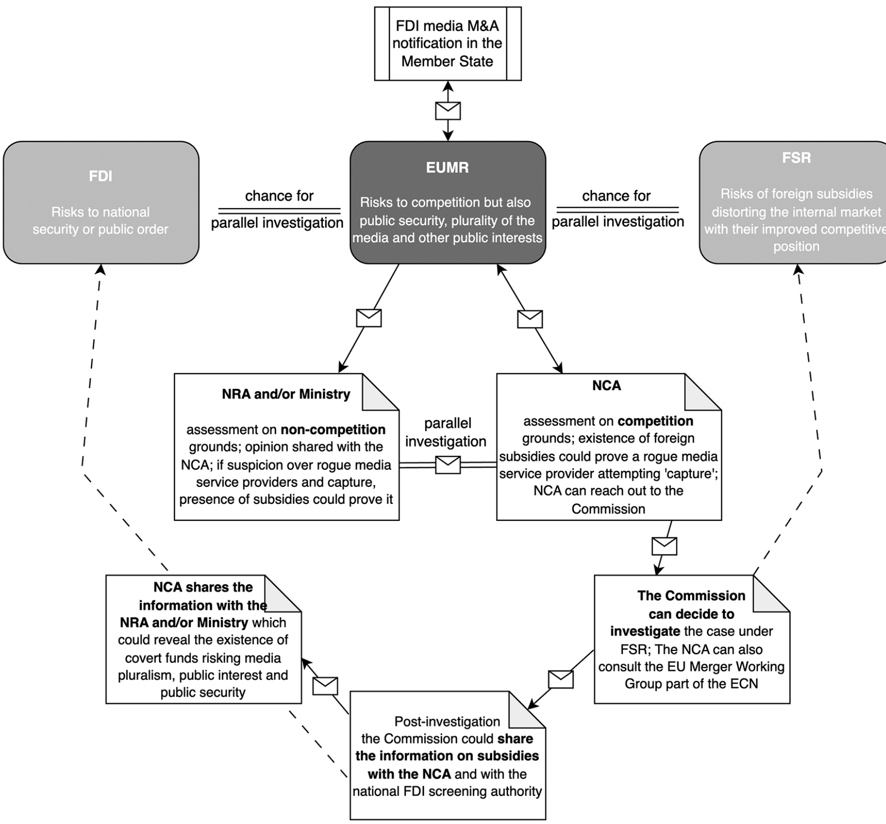
an overview of the functioning of the internal market for media services in light of the impact of online platforms, the levels of media concentration and the risks of foreign information manipulation and interference.[58]



▲*Figure 1.*
FDI media M&A procedure in a Member State

To exemplify how the cooperation system could work in practice, Figure 1 imagines a case where the foreign acquirer notifies the media merger to the NCA and NRA of a Member State, in which the NRA, under Article 22 of the EMFA, is required to assess it based on media pluralism concerns and share its opinion with the NCA. Additionally, if the national thresholds are met, the merger must also be notified in parallel under the FDI national screening regime. Moreover, there is no guarantee that the merger will avoid parallel scrutiny under the FSR. Under Article 35(1) FSR, if the Member State has an alleged

[58] Art.26(3) EMFA

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suspicion that a foreign subsidy may exist and that it may distort the internal market, it is allowed to notify its suspicion to the Commission. Regardless of the thresholds, the Commission can decide to review the case. Even if the existence of foreign subsidies is not sufficient to indicate market distortions, the Commission could pass down the information on the subsidies to the NCA. Such insights could reveal the presence of covert subsidies which could threaten the media pluralism and public interest of the Member State under both FDI and national merger control. Article 35(3) FSR allows the Commission to share the non-confidential version of its decisions with the Member States. Recital 65 of the FSR allows undertakings to mark information as confidential or a business secret, but the Commission can decide the extent to which such information can be disclosed. As under national merger control mechanisms specific Ministries and NRAs can reject mergers if they threaten pluralism, public interests, or strategic fundamental interests of the national economy (Afilipoaie & Ranaivoson, 2022), NRAs can use the information passed down from the Commission to identify the 'rogue media service providers' and take the right measures. This information could alter the NRA's decision, having utmost weight when its decision is binding. Yet, there is a foreseeable tension between insuring transparency and protecting confidentiality, which could complicate information sharing. Considering the critical role played by media and telecom and the risks therein, subsidy disclosures should become default documentation under the EUMR and national merger control; but may face resistance from businesses wary of administrative burdens.

CONCLUSION

Although contributing to the EU's economic growth, FDIs are recognized to pose certain threats in sectors considered of critical importance, such as media and telecom. More recently, concerns over distortive foreign subsidies allocated to foreign investors gained ground and led to the adoption of the FSR, over which the Commission was granted exclusive competences. As the analysis revealed, the interplay between the FSR, the EUMR, and the FDI Regulation, alongside national merger control and FDI screening mechanisms, strive to ensure effective, fair, and open competition, whereas also providing some legal tools to ensure that public objectives can be upheld. Although these frameworks aim to fill regulatory gaps in overlapping sectors like the media, their convergence introduces jurisdictional and procedural challenges. Thus, aligning procedural requirements such as (pre)notification strategies and clearance timelines (e.g., between FSR and EUMR) can prevent case delays and misalignments (e.g., a case is cleared under the EUMR but delayed under the FSR).

As some transactions will have to concomitantly be notified under the EUMR, the FSR and the national FDI screenings, and as they will sometimes also trigger the national merger notification thresholds, the authorities in charge of the assessments will have to cooperate, coordinate their decisions, and if needed, to agree on a set of remedies. For this to happen, there is a need for improved regulatory procedural coordination and overall synergies. As Burnside and Kidane (2022) argue, FDI screenings are becoming very

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important in the application of the EUMR and the FSR are no different. Through the FSR, the Commission could also aid Member States by providing them information of possible state involvement in transactions conducted by foreign investors, aiding with their national FDI screenings. Moreover, this information exchange could unexpectedly land a helping hand to NRAs which, alongside NCAs, will have to be involved in assessing media mergers on media pluralism grounds. Thus, the information obtained by the Commission under the FSR could be used by the NRAs to identify the 'rogue media service providers'.

These legislative tools point towards legislative harmonisation attempts under the supervisory and executive powers of the Commission. In 2021, the Commission turned to Article 22 of the EUMR to encourage Member States to refer concentrations without a Community dimension to the Commission. Through the FDI Regulation, the Commission receives annual reports from the Member States, keeping tabs on inbound FDIs and issues opinions when it considers necessary. The Commission has exclusive competence over the application of the FSR and through the *ex officio* investigative tool, it enjoys unlimited screening power. Under Section 5 of the EMFA, the Commission has advisory powers in the application of national merger control rules. The regulatory frameworks' increased juxtaposition and the multi-jurisdictional notifications under a multitude of regulations, underscores the need for clearer guidelines on how far the Commission's powers extend (e.g., see the controversy in the e& and PPF Telecom Group case).

The interconnected governance addressing overlapping issues surrounding competition, media pluralism, national security and public interest, underlines the need for a balanced and transparent regulatory environment, to avoid discouraging foreign investors from investing in the European market. Additionally, refining cross-border and cross-jurisdictional cooperation and information exchange is critical for ensuring effective implementation.

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UREDBA O STRANIM SUBVENCIJAMA: VIŠE OD ALATA ZA TRŽIŠNO NATJECANJE U MEDIJSKOM SEKTORU?

Adelaida Afilipoaie

SAŽETAK *Pritužbe o narušavajućim i nereguliranim učincima stranih ulaganja koja su potaknuta stranim državnim subvencijama u Europi kroz spajanja i akvizicije, javne nabave i* greenfield *projekte dovele su do stvaranja Uredbe o stranim subvencijama (USS). Prema USS-u subvencije koje dodjeljuju vlade izvan EU-a može ocijeniti Europska komisija. USS signalizira oprezniji, protekcionistički pristup stranim ulaganjima u ključnim sektorima, uključujući medije i telekomunikacije. Usporedbom odabranih proceduralnih odredbi, ovaj članak promatra USS u kontekstu druge dvije* ex ante *regulative, Uredbe o stranim direktnim ulaganjima i Uredbe EU-a o spajanju poduzeća, pri čemu se otkrivaju upečatljive sličnosti s potonjom uredbom. Koncentracija medija i prikrivene strane subvencije prelaze zabrinutosti vezane uz tržišno natjecanje te uključuju rizike od preuzimanja medija i stranog uplitanja. Iako se fokusira na rješavanje tržišnih distorzija povezanih s natjecanjem, USS ima neočekivanu ulogu u Europskom aktu o slobodi medija, koji se bavi rizicima financijski kontroliranih „medijskih usluga iz zemalja prekršitelja".*

KLJUČNE RIJEČI

UREDBA O STRANIM SUBVENCIJAMA, EUROPSKI AKT O SLOBODI MEDIJA, SPAJANJA I AKVIZICIJE, JAVNI INTERES, PREUZIMANJE MEDIJA, REGULATORNA SURADNJA

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