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# A NEW REGIME ON PROTECTION OF PUBLIC PROCUREMENT AGAINST FOREIGN SUBSIDIES DISTORTING THE INTERNAL MARKET: MIGHTY PALADIN OR GIANT ON THE FEET OF CLAY?

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**Summary:** As a response to possible distortive effects of foreign subsidies, which are not covered by the current rules of the World Trade Organization and primary and secondary law of the EU, on 6th May 2021 the European Commission introduced a new regime against foreign subsidies by introducing the proposal of the Regulation on foreign subsidies distorting the internal market. This new proposal includes three so-called modules: a set of measures of general application that governs the *ex officio* review of subsidies (Module 1), specific rules on concentrations (Module 2) and specific rules in public procurement in the EU (Module 3). The paper will focus on some of the features of Module 3 and assess the context, feasibility, and possible consequences for the course of public procurement in the EU covered by the public procurement directives

**Keywords:** EU law, public procurement, State aid, subsidies, international trade, WTO.

## 1 Introduction

On the level of international trade, the European Union (hereinafter "EU") faces challenges caused by aggressive trade policy of countries that are characterised by non-market economy, massive subsidies, and engagement of state-owned enterprises.[1] As a response to possible distortive effects of for-

1 See, e.g., CROCHET, Victor, GUSTAFSSON, Marcus. Lawful remedy or illegal response? Resolving the issue of foreign subsidization under WTO law. In *World Trade Review* [online]. 2021, vol. 20, no. 3, pp. 343–366. ISSN 14753138. DOI: 10.1017/S1474745621000045; VERMULST, Edwin, GATTA, Brian. Concurrent trade defense investigations in the EU, the EU's new anti-subsidy practice against China, and the future of both. In *World Trade Review* [online]. 2012, vol. 11, no. 3, pp. 527–533. ISSN 14747456. DOI: 10.1017/S1474745611000498; CROCHET, Victor, HEGDE, Vineet. China's 'Going global' policy: Transnational production subsidies under the WTO SCM agreement. In *Journal of International Economic Law* [online]. 2020, vol. 23, no. 4, pp. 841–863. ISSN 14643758. DOI: 10.1093/jiel/jgaa029; NAGY, Csongor István. World trade, imperial fantasies and protectionism: Can you really have your cake and eat it too? In *Indiana Journal*

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eign subsidies, which are not covered by the current rules of the World Trade Organization (hereinafter "WTO") and primary and secondary law of the EU, on 6th May 2021 the European Commission (hereinafter "EC") introduced a new regime against foreign subsidies by introducing the proposal of the Regulation on foreign subsidies distorting the internal market (hereinafter "Draft RFSDIM").[2] This new proposal includes three so-called modules: a set of measures of general application that governs the *ex officio* review of subsidies (Module 1), specific rules on concentrations (Module 2) and specific rules in public procurement in the EU (Module 3). Briefly, Module 3 introduces mandatory notification of foreign subsidies received by the tenderer and other undertakings involved in the tender, evaluation of such a subsidy and its possible distortive effect on the internal market because of "unduly advantageous tender" and finally, decision making power of the EC thereon, including the possible prohibition of awarding the contract. The paper will focus on some of the features of Module 3 and assess the context, feasibility, and possible consequences for the course of public procurement in the EU covered by the public procurement directives.[3] First, it will map the Draft RFSDIM in the context of the measures of the international trade rules in force (section 2). Secondly, it will estimate the volume and number of tenders, supplies, works and services potentially covered by the new regime (section 3). Thirdly, it will compare the concept of an "unduly advantageous tender" with the concept of an "abnormally low tender" currently enshrined in PPD (section 4). Fourthly, it will outline possible results and their impact on tender procedures (section 5).

## 2 Current measures against foreign subsidies and their legal framework

Current measures of the EU against injurious subsidies are based on the WTO rules, in particular Art. VI and Art. XVI of the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT"), Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement").[4] On the EU level, these rules are enforced by the EC under secondary legislation, currently by

*of Global Legal Studies* [online]. 2019, vol. 26, no. 1, pp. 87–132. ISSN 15430367. DOI: 10.2979/indjglolegstu.26.1.0087.

2 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market. COM/2021/223 final.

3 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242) (hereinafter „PPD"), Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374), Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64). For the purposes of this paper, PPD will only be analysed, for the remaining directives conclusions will be the same *mutatis mutandis*.

4 For historical context see, e.g., PÄRN-LEE, Evelin. The Origins of Supranational State Aid Legislations : What Policymakers Must Know and Adhere to. The Case of Estonia. In *TalTech Journal of European Studies* [online]. 2020, vol. 10, no. 1, pp. 123–145. DOI: 10.1515/bjes-2020-0007

Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union[5] (hereinafter "RPASI"). This regime does not cover subsidization of services and there is no similar anti-subsidy mechanism in the General Agreement on Trade in Services (hereinafter "GATS"). Art. XV GATS does not provide a precise measure against subsidies and merely acknowledges that "Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services." [Art. XV(1) GATS]. The call for consultations is the only remedy against subsidies provided by the GATS: "Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration." [Art. XV(2) GATS].

Owing to the specific character of international trade law, i.e., the EU is a Member of the WTO, the powers of the EU are restricted not only by the EU primary law but also by the legal regime of the WTO. It is crucial for feasibility of the proposed RFSDIM whether foreign subsidies as covered by the Draft RFSDIM are covered by Art. 1 SCM Agreement. If so, Art. 32.1 SCM Agreement can prevent such a regime or at least restrict its manoeuvring space: "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." The regime proposed by the Draft RFSDIM is apparently a measure "against" subsidies provided by the other Member of the WTO and can be feasible in the legal framework of the WTO only if (1) it fulfils the exemption clause under Art. XX GATT[6] or (2) it is proven that it is not covered by the SCM Agreement at all.[7] Without arguing in detail, even if the definition of "foreign subsidy" under the Draft RFSDIM does not fully correspond to the definition of "subsidy" under Art. 1 SCM Agreement, at least in the extent in which they correspond to each other, the regime under the Draft RFSDIM is caught by the prohibition under Art. 32.1 SCM Agreement. At least transnational export and local content subsidies are caught in the net of the SCM Agreement, in addition to the prohibition of Article XVI(4) GATT on export subsidies for non-primary products.[8] In the area of services, the WTO legal framework definitely lacks any effective remedy against foreign subsidies. Moreover, unilateral measures can be challenged under the National Treatment clause under Art. XVII GATS.[9] Although Art. XVII is not applicable in the area of public

5 OJ L 176, 30.6.2016, p. 55–91.

6 CROCHET, Victor, GUSTAFSSON, Marcus. Lawful remedy or illegal response? Resolving the issue of foreign subsidization under WTO law. In *World Trade Review* [online]. 2021, vol. 20, no. 3, p. 356.

7 NAGY, Csongor István. Foreign Subsidies, Distortions and Acquisitions. In *Central European Journal of Comparative Law* [online]. 2021, vol. 2, no. 1, p. 157. ISSN 2732-1460. DOI: 10.47078/2021.1.147-162

8 NAGY, Csongor István. Foreign Subsidies, Distortions and Acquisitions. In *Central European Journal of Comparative Law* [online]. 2021, vol. 2, no. 1, p. 154. ISSN 2732-1460. DOI: 10.47078/2021.1.147-162

9 For national treatment and non-discrimination see, e.g., KOVÁČIKOVÁ, H. *Harmonizácia pravidiel verejného obstarávania v práve medzinárodného obchodu*. Bratislava: Univer-

procurement, vis-à-vis parties to the Government Procurement Agreement (2012) (hereinafter "GPA"), non-discrimination clause of Art. IV GPA can be activated. Indeed, the Member of the WTO can escape from prohibition of its unilateral measures under general exemptions pursuant to Art. XX(d) GATT[10] and XIV(c) GATS.[11] However, possible application of these exemptions weakens the wording of the Draft RFSDIM since it is directly aimed to protect the internal market of the EU but no other laws applicable within the internal market of the EU.[12] In particular, it is not aimed to protect competition rules established by the EU Merger Regulation[13] or by the EU State Aid rules. Regarding the public procurement rules, the Draft RFSDIM is not aimed to maintain free circulation of goods, services and freedom of establishment, i.e., the goal of public procurement directives.

The EC tried to avoid all these controversies by Art. 40(7) Draft RFSDIM that limits the scope of application and investigation of the foreign subsidies in order to be in line with all international obligations of the EU.[14] This provision can have disastrous effects on the transparency of applying the RFDIM regime. In every single case, it shall be checked whether "…such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into…" and whether such an action "… amount to a specific action against a subsidy within the meaning of Article 32.1" SCM Agreement. Compared to the trade in goods, the trade in services under the GATS is not uniformly regulated and depends on the commitment to schedules by a particular Member of the WTO. This non-uniformity of the WTO sys-

zita Komenského v Bratislave, Právnická fakulta, 2020, p. 31–32.

10 "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (…)."

11 "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (...) (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this (...)."

12 A contrario NAGY, Csongor István. Foreign Subsidies, Distortions and Acquisitions. In *Central European Journal of Comparative Law* [online]. 2021, vol. 2, no. 1, p. 157. ISSN 2732-1460. DOI: 10.47078/2021.1.147-162

13 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1–22).

14 "An investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into. In particular, no action shall be taken under this Regulation which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures. This Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements."

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tem is underlined by the plurilateral character of the GPA. Moreover, free trade agreements concluded by the EU regularly contain provisions on subsidies and a possible review of their legality. Therefore, the enforcement regime will be totally fragmentated and the contracting authority as well as economic operators can be thrown into insecurity during the public procurement procedure.

Nevertheless, apart from the abovementioned possible objections to the regime suggested by the Draft RFSDIM, there are several instances of different evaluation standards regarding the foreign subsidies under the Draft RFSDIM and the RPASI. Firstly, the RPASI deals with subsidization of goods, while the Draft deals with all subsidized areas of economy. Secondly, the mechanism of enforcement is different. The RPASI is based on investigation and the EC shall establish the existence of the subsidy, its value, injury caused to an industry of the EU and a causal link between the subsidy and the injury. The EC cannot prohibit inflow of the subsidized goods and it can merely "countervail" effects of the subsidy. On the other hand, in the Draft RSDIM regime, the EC can prevent subsidized undertakings from participation in the public procurement procedure at stake if other possible remedies are not sufficient. The EC need not identify the existence of a subsidy and its amount owing to the self-reporting duty of the undertaking. Thirdly, under the RPASI, only countervailable subsidies can be taken into consideration, based on the three groups of subsidies under the SCM Agreement: the prohibited, the actionable and the non-actionable (i.e., countervailable). Meanwhile, the Draft RFSDIM is targeted against all subsidies, including the non-actionable. Fourthly, there is a difference in the evaluation of hurtful effects of the subsidy. Under the RPASI "[a] determination of injury shall be based on positive evidence and shall involve an objective examination of: (a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the Union market for like products; and (b) the consequent impact of those imports on the Union industry."[15] Under the Draft RFSDIM "The assessment of whether there is a distortion on the internal market pursuant (…) and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure at stake." [16] and "[a] distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market."[17] The evaluation is not evidence-based but rather "…shall be determined on the basis of indicators…"[18] Therefore, due to these differences in evaluation standards of elements of subsidy and its impact, the previous decision making practice and case law of the EC, the Court of Justice of the European Union (hereinafter "CJ EU") on anti-subsidy policy can hardly provide a guiding light explaining the concepts included in the Draft RFSDIM.

15 Art. 8(1) RPASI.
16 Art 26 Draft RFSDIM.
17 Art. 3(1) Draft RFSDIM.
18 Art. 3(1) Draft RFSDIM.

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**3 Threshold for evaluation of the foreign subsidies**

The Draft RFSDIM sets a threshold of EUR 250 million for the estimated value of public procurement, in which undertakings shall submit their notification on all financial contributions received in the three years preceding the notification or declaration or confirmation of non-existence of such a contribution. On the other hand, the Draft RFSDIM does not set a minimum amount of subsidy that is subject to scrutiny under Art. 28 et seq. Draft RFSDIM. Thus, comparing to Art. 18(3) Draft RFSDIM that requires the notification of a foreign subsidy in the concentration review only in case of an aggregate subsidy of more than EUR 50 million, in case of public procurement, every foreign subsidy is subject to a review. On this basis, Sánchez Graells challenges the measure on the grounds of proportionality.[19] However, the different treatment of recipients of foreign subsidies is not, as such, proof of a discriminatory or non-proportionate measure. From the undertaking's point of view, the situation is not so different. In the context of public procurement, the undertaking is merely required to submit "another" document disclosing its foreign subsidies. Proportionality can be challenged in the next stage, when all such notifications shall be submitted to the EC for evaluation. The Draft RFSDIM does not provide any *de minimis* rule, i.e., a rule allowing the contracting authority not to submit notifications to the EC and not to overburden the EC with insignificant cases of foreign subsidies. In the case of state aid provided by the Member States, *de minimis* state aid (aid not exceeding EUR 200 000) is deemed not fulfilling all the criteria under Art. 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU").[20] If it is accepted that state aid up to EUR 200 000 cannot distort the internal market, there is no reason to consider such a foreign subsidy distortive to the internal market if it meets *mutatis mutandis* criteria for *de minimis* state aid. The Draft RFSDIM stipulates that an aggregate foreign subsidy bellow EUR 5 million is unlikely to distort the internal market [Art. 3(2)]. However, this is not *de minimis* rule *stricto sensu*, since such a foreign subsidy shall be still notified and shall be still under scrutiny by the EC. Another *ad valorem* level of *de minimis* can be inspired also by Art. 14(5) RPASI:" The amount of the countervailable subsidies shall be considered to be *de minimis* if such amount is less than 1 % *ad valorem*. (…) concerning imports from developing countries, the *de minimis* threshold shall be 2 % *ad valorem*."

Based on data in the Tenders Electronic Daily published by the EC, Table 1 shows the number of tender notices that comply with EUR 250 million threshold. Moreover, it shows the number of notices (and their % of total number of notices) that cover services and works and thus are not apparently covered by the possibility of imposing countervailing duties.

19 SÁNCHEZ GRAELLS, Albert. Feedback from: University of Bristol Law School. In *European Commission. Trade & investment – addressing distortions caused by foreign subsidies* [online] [cit. 21.11.2021]. Available online: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-&-investment-addressing-distortions-caused-by-foreign-subsidies/F2326817_en

20 Art. 3(1), Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1–8).

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*Table 1*

| Country | Works | Supplies | Services | Total | Services and works |
|---|---|---|---|---|---|
| Austria | 2 | 14 | 7 | 23 | 39% |
| Belgium | 3 | 5 | 6 | 14 | 64% |
| Bulgaria | 1 | | | 1 | 100% |
| Cyprus | 7 | 4 | 3 | 14 | 71% |
| Denmark | 2 | 2 | 1 | 5 | 60% |
| Finland | 4 | 9 | 5 | 18 | 50% |
| France | 26 | 60 | 181 | 267 | 78% |
| Germany | 12 | 18 | 19 | 49 | 63% |
| Greece | 12 | 4 | 7 | 23 | 83% |
| Ireland | 12 | 5 | 10 | 27 | 81% |
| Italy | 59 | 105 | 129 | 293 | 64% |
| Latvia | 2 | | 1 | 3 | 100% |
| Lithuania | 5 | 12 | 1 | 18 | 33% |
| Luxembourg | | | 1 | 1 | 100% |
| Netherlands | 2 | 5 | 24 | 31 | 84% |
| Poland | | | 1 | 1 | 100% |
| Portugal | 1 | | 3 | 4 | 100% |
| Romania | 2 | 4 | | 6 | 33% |
| Slovakia | 3 | 1 | 5 | 9 | 89% |
| Spain | 11 | 33 | 83 | 127 | 74% |
| Sweden | | | 2 | 2 | 100% |
| **Total** | **166** | **281** | **489** | **936** | **70%** |

*Source: European Commission, Tenders Electronic Daily,*[21] *data from 1 January 2015 to 21 November 2021, calls for competition, buyer located in the Member State, tenders based on the public procurement directives, estimated value of contract EUR 250 million and more.*

From Table 1 it is also apparent that the intensity of impact of the proposed RFSDIM varies across Europe and in some countries, it seems to be marginal (it will cover only several public procurement procedures) and in other countries, the number substantial. However, Table 1 also shows how ineffective the threshold can be. E.g., the filter caught merely 49 procedures in Germany, compared to 267 and 293 in France and Italy respectively. The contracting authorities have discretion in the design of their contracts, including separation of contract not only to lots, but also to smaller contracts, provided they do not circumvent application of the EU public procurement rules.[22] Hence, the question is, whether the threshold on value of the contracts fulfils expectations of the Draft RFSDIM and whether it cannot be easily bypassed by the undertakings supported by foreign governments via focusing on smaller tenders. Therefore, the situation can be solved by more interactive solutions based on automatically processed registries that aggregate data on eco-

21 https://ted.europa.eu/

22 Art. 18(1) PPD.

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nomic operators, their participation in tenders and value of their subsidies. Indeed, the EC can request undertaking to disclose its foreign subsidies even in the cases outside the scope of notifiable tenders[23] but without systematic data collection and measures, it is a rather theoretical measure.

*Table 2*

| | A | B | C | D | E | F | G | H | I | J | K | Total | Total without prior publication/call |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Austria | | 6 | | 14 | 9 | | 5 | | | | | 34 | 18% |
| Belgium | 1 | | | 9 | 3 | 2 | 3 | | 3 | | | 21 | 5% |
| Bulgaria | | | | | | | | | | 1 | | 1 | 0% |
| Cyprus | | | | 1 | | | | | | | | 1 | 0% |
| Czechia | 1 | | | 1 | | | | | 1 | | | 3 | 33% |
| Denmark | | | | 5 | 9 | 9 | 3 | | | | | 26 | 0% |
| Finland | | | | 7 | 5 | | | | 1 | | 1 | 14 | 0% |
| France | 20 | 7 | 47 | 303 | 21 | 15 | 21 | 1 | 10 | 84 | | 529 | 14% |
| Germany | 4 | 6 | 1 | 62 | 26 | 5 | 5 | 1 | | 3 | | 113 | 10% |
| Greece | | | | 9 | | 2 | | | | | | 11 | 0% |
| Hungary | | | | 2 | | | | | | | | 2 | 0% |
| Ireland | 2 | 1 | | 7 | 4 | 8 | | | 4 | | | 26 | 12% |
| Italy | 1 | 15 | | 86 | | 53 | 10 | | | 11 | | 176 | 9% |
| Latvia | | | | 2 | 1 | 1 | | | | 1 | | 5 | 0% |
| Lithuania | | | | 3 | | | 2 | | | | | 5 | 0% |
| Luxembourg | 1 | | | 2 | | | | | | | | 3 | 33% |
| Netherlands | 4 | 1 | | 90 | 1 | 7 | | | 11 | | 1 | 115 | 4% |
| Poland | | | | 10 | | 1 | | | | | | 11 | 0% |
| Portugal | 1 | | | 15 | | | | | | | | 16 | 6% |
| Romania | | | | 1 | 1 | | | | | | | 2 | 0% |
| Slovakia | 1 | | | 5 | | 1 | | | 1 | 2 | | 10 | 10% |
| Slovenia | | | | | | 1 | 2 | | | | | 3 | 0% |
| Spain | 2 | 2 | | 50 | | 2 | 5 | | | 4 | | 65 | 6% |
| Sweden | | 1 | | | 2 | 1 | | | | | | 4 | 25% |
| Total | 38 | 39 | 48 | 684 | 82 | 108 | 56 | 2 | 31 | 106 | 2 | 1196 | 10% |

*Legend:*

| | |
|---|---|
| A | Negotiated procedure without a call for competition |
| B | Contract award without prior publication |
| C | Concession award without prior concession notice |
| D | Open procedure |
| E | Competitive procedure with negotiation |

23 Art. 28(6) Draft RFSDIM.

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| | |
|---|---|
| F | Restricted procedure |
| G | Negotiated procedure |
| H | Innovation partnership |
| I | Competitive dialogue |
| J | Concession award procedure |
| K | Not specified |

*Source: European Commission, Tenders Electronic Daily,*[24] *data from 1 January 2015 to 21 November 2021, contract notices, buyer located in the Member State, tenders based on the public procurement directives, estimated value of contract EUR 250 million and more, author's calculations.*

Table 2 shows the level of competitiveness in tenders covered by the Draft RFSDIM as well as ratio on non-competitive awards. The Draft RFSDIM does not seem to deal with the situation of non-competitive awards and refers to the evaluation of tenders vis-à-vis each other. It tacitly expects that in a non-competitive procedure, such as negotiations without prior notice, the contracting authority concludes a contract with the incumbent contractor or with a local company. The possibility of excluding a subsidized company can be, in fact, included in the contracting authority's selection of the prospective contractor.

*Table 3*

| | Number of awards | | | | | Single bid | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Country** | **2015** | **2016** | **2017** | **2018** | **2019** | **2015** | **2016** | **2017** | **2018** | **2019** |
| Austria | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 1 |
| Belgium | 1 | 2 | 1 | 9 | 1 | 0 | 2 | 0 | 0 | 0 |
| Bulgaria | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Croatia | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Cyprus | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Czechia | 6 | 3 | 5 | 9 | 1 | 0 | 0 | 0 | 3 | 0 |
| Denmark | 1 | 4 | 8 | 3 | 7 | 0 | 1 | 2 | 0 | 0 |
| Estonia | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Finland | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| France | 7 | 9 | 16 | 38 | 37 | 0 | 1 | 4 | 10 | 12 |
| Germany | 0 | 1 | 1 | 9 | 2 | 0 | 1 | 0 | 2 | 2 |
| Greece | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 1 |
| Hungary | 2 | 4 | 7 | 4 | 3 | 2 | 1 | 5 | 1 | 1 |
| Ireland | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| Italy | 11 | 14 | 16 | 11 | 12 | 4 | 1 | 4 | 3 | 6 |
| Latvia | 0 | 1 | 0 | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| Lithuania | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Luxembourg | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Malta | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| Netherlands | 0 | 6 | 4 | 11 | 4 | 0 | 0 | 1 | 1 | 0 |

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| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Poland | 11 | 7 | 4 | 10 | 7 | 1 | 1 | 2 | 3 | 2 |
| Portugal | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Romania | 0 | 3 | 4 | 2 | 11 | 0 | 0 | 0 | 0 | 2 |
| Slovakia | 0 | 5 | 1 | 0 | 0 | 0 | 2 | 0 | 0 | 0 |
| Slovenia | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Spain | 5 | 158 | 2 | 5 | 161 | 0 | 1 | 0 | 0 | 1 |
| Sweden | 0 | 3 | 1 | 4 | 2 | 0 | 0 | 0 | 0 | 1 |
| **Total** | **44** | **221** | **73** | **118** | **255** | **7** | **11** | **20** | **24** | **29** |

*Source: European Commission, Tenders Electronic Daily, Tenders Electronic Daily (TED) (csv subset) – public procurement notices,*[25] *TED – Contract award notices 2015, TED – Contract award notices 2016, TED – Contract award notices 2017, TED – Contract award notices 2018, TED – Contract award notices 2019,*[26] *buyer located in the Member State, estimated value of contract EUR 250 million and more, author's calculations.*

The application of the proposed RFSDIM is relevant only if there are several bidders and thus a lower and more advantageous tender is capable to diminish the chances of a non-subsidized undertaking to win the contract. Table 3 shows the ratio of tenders awarded to a single bidder in the procurement procedures potentially covered by the Draft RFSDIM.

In must be noted, that quantitative data analysed above have shortcomings stemming from the level of the reliability of data provided by the contracting authorities in their notices,[27] in particular, when estimated value of the contract or concession and number of tenders were not submitted. Furthermore, division into lots can, in some cases, multiply results, although it has no influence on the final identification of the ratio of non-competitive tenders, i.e., cases with a single bidder.

The most frequent anti-subsidy investigation (as well as countervailing measures adopted) involves imports from China (see Chart 1) and the most frequent category of products in issue is iron and steel. The trade defence has focused majorly on the import of raw materials and basic products, although agricultural products (trout) and more sophisticated products (electric bicycles) were under investigation as well. The structure of the most frequently procured works, supplies and services in tenders fulfilling the threshold pursuant to the Draft RFSDIM (Table 4) is completely different compared to incumbent anti-subsidy actions of the EU and therefore it is not possible to make relevant estimations. However, it must be noted, that the structurally important works, supplies and services require raw materials or other products that have been already identified as subsidized (e.g., iron and steel). Art. 28(2) Draft RFSDIM also requires the notification of foreign subsidies which main subcontractors and suppli-

25 https://data.europa.eu/data/datasets/ted-csv?locale=en.

26 Subset regarding year 2020 is not available in the time of preparation of the paper.

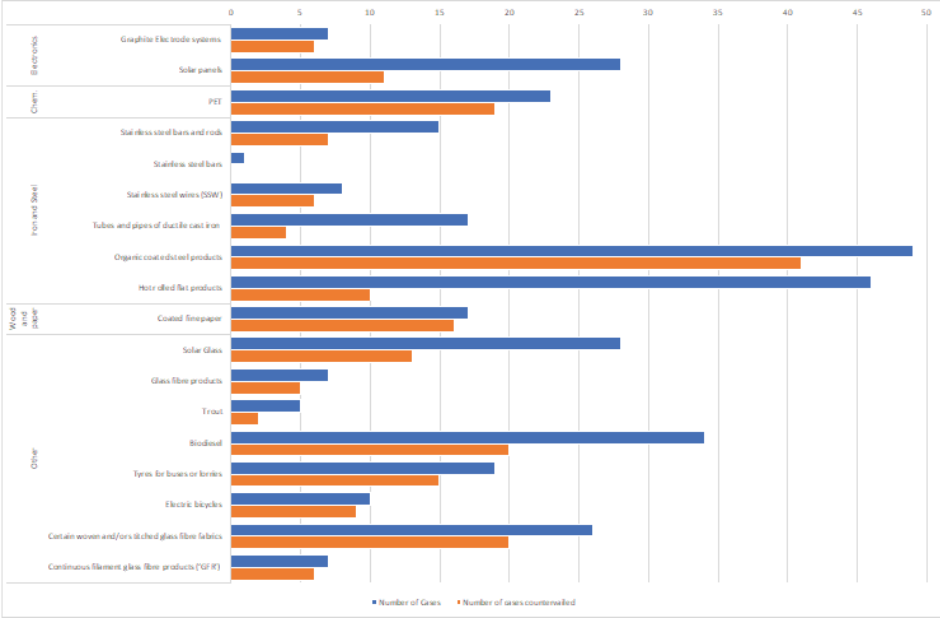
27 All reservations are explained here: https://data.europa.eu/euodp/repository/ec/dg-grow/mapps/TED_advanced_notes.pdf.

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ers[28] received, but using subsidized materials, such as iron and steel, can be too remote in the supply chain, to be caught by Art. 28(2) Draft RFSDIM. Subsidized products used by the tenderer can be caught in the procedure of the review of an "abnormally low tender" under Art. 69 PPD, although using subsidized products is not a reason for rejecting such a tender either.

*Chart 1*

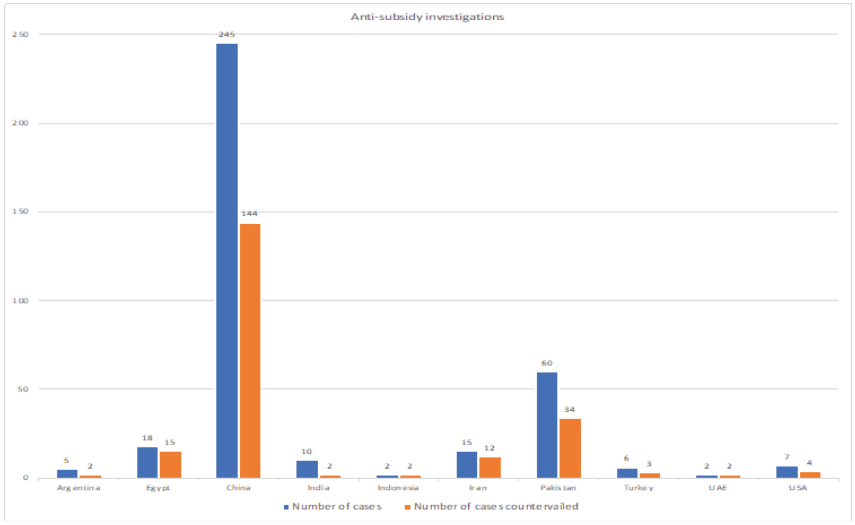
*Source: European Commission, Anti-Subsidy. Database of all subsidies investigated by the EU in its anti-subsidy investigations,* [29] *author's calculation*




28 I.e., their economic contribution exceeds 30 % of the estimated value of the contract.
29 https://trade.ec.europa.eu/doclib/html/157607.htm

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*Chart 2*




*Source: European Commission, Anti-Subsidy. Database of all subsidies investigated by the EU in its anti-subsidy investigations,* [30] *author's calculation*

*Table 4*

| | |
|---|---|
| **Works** | Construction work, Railway construction works, Road-maintenance works, Building construction work, Construction work for electricity power lines |
| **Supplies** | Electricity, Pharmaceutical products, Rolling stock, Software package and information systems, Various medicinal products |
| **Services** | Public road transport services, IT services: consulting, software development, Internet and support, Telecommunications services, Telecommunications network, Cleaning services |

*Source: European Commission, Tenders Electronic Daily,*[31] *data from 1 January 2015 to 21 November 2021, calls for competition, buyer located in the Member State, tenders based on public procurement directives, estimated value of contract EUR 250 mil and more, most frequent items under the Common Procurement Vocabulary (CVP), author's calculations.*

### 4 Unduly advantageous tender vs abnormally low tender

The purpose of the Draft RFSDIM in the sphere of public procurement is to avoid distortion of the internal market by "unduly advantageous"[32] tenders submitted by the tenderers benefitting from foreign subsidies. This concept of "unduly advantageous" tender resembles the concept already enshrined in Art.

30 https://trade.ec.europa.eu/doclib/html/157607.htm
31 https://ted.europa.eu/
32 Art. 26, Draft RFSDIM.

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69 PPD – abnormally low tender. Therefore, in the following part, the substantial features of the concept of abnormally low tender will be analysed in order to provide comparison with the proposed mechanism in the Draft RFSDIM.

### 4.1 The concept of abnormally low tender in the EU law

The aim of introducing the concept and possible (mandatory) exclusion of abnormally low tenders is threefold. Firstly, according to Rec. 40 and 103 PPD, it is included in the complex of provisions aimed to maintain the control over the observance of the environmental, social and labour law and protection of EU and international law thereon. Secondly, possibility of exclusion of an abnormally low tender is aimed to protect the contracting authority, since tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices (Rec. 103 DPP) and thus can impair the proper performance of the contract.[33] Hence, the employment of "abnormally low tender" scrutiny can be used as one of the measures of enforcement of environmental and social responsibility policies of the EU and its Member States.[34] And thirdly, the introduction of provisions on abnormally low tenders and the harmonization of national laws in this area are aimed to protect tenderers by giving them the right to explain their tender and thus protect them from automatic exclusion on the basis of alleged abnormally low tenders.[35] Trepte also suggests a forth motive that enables the contracting authority to protect competition against subsidized or dumped products even in the cases when anti-dumping or countervailing measures had not been adopted; although he admits that the tender may be rejected if there is a risk of non-performance of the contract.[36] In this ambiguity of Trepte's approach, Ølykke sees some sort of call for a more flexible approach to the concept of the abnormally low tender, rather than strict alignment to the "non-performance approach" to this issue.[37]

33 Judgment of 10 September 2020, Tax-Fin-Lex, C-367/19, EU:C:2020:685, par. 32.

34 SEMPLE, Abby. Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements. In *European Procurement & Public Private Partnership Law Review* [online]. 2017, vol. 12, no. 3, pp. 293–309. ISSN 21947376. DOI: 10.21552/eppl/2017/3/11; CORVAGLIA, Maria Anna. *Public Procurement and Labour Rights. Towards Coherence in International Instruments of Procurement Regulation*. Oxford and Portland: Hart Publishing, 2017; CORVAGLIA, Maria Anna, LI, Kevin. Extraterritoriality and public procurement regulation in the context of global supply chains' governance. In *Europe and the World: A law review* [online]. 2018. DOI: 10.14324/111.444.ewlj.2018.06.

35 Judgment of 10 February 1982, Transporoute v Ministère des travaux publics, C-76/81, EU:C:1982:49, par. 17.

36 TREPTE, Peter. *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* [online]. Oxford University Press, 2004. ISBN 9780198267751. DOI: 10.1093/acprof:oso/9780198267751.001.0001, pp. 244, 326–327.

37 ØLYKKE, Grith Skovgaard. *Abnormally Low Tenders: With an Emphasis on Public Tenderers*. København: Djøf Forlag, 2010. ISBN 9788757423594, p. 219.

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The application of the concept of the abnormally low tender under Art. 69 PPD can be split into three phases of evaluation: (1) identification of an abnormally low tender, (2) explanation of the abnormally low tender, (3) exclusion of the tender from the public procurement procedure.[38]

The identification of a "potentially" abnormally low tender and the criteria thereon cannot be interchanged for the criteria for an "actually" abnormally low tender. The CJ EU evaluated several cases in which mathematical formulas for the definition of an abnormally low tender were under scrutiny.[39] According to the CJ EU, the term of "abnormally low tender" were left unexplained by the PPD and it is left to the Member States to define "abnormality" of tenders in their national legislation.[40] On the other hand, the "abnormality" cannot lead to an automatic exclusion from the tender.[41] Even such a definition of suspicious tenders stipulated in national law does not exclude the power of the contracting authority to challenge other possibly abnormally low tenders, since under Art. 69(1) PPD the contracting authorities shall make such a request, not to be merely allowed to do so.[42] The definition of abnormally low tender does not have to be precise and based on the mathematical calculations, even though they are *prima facie* non-discriminatory.[43] The Member States can require tenders to be examined "when those tenders appear to be abnormally low, and not only

38 E.g., Judgment of 22 June 1989, Fratelli Costanzo v Comune di Milano, C-103/88, EU:C:1989:256; judgment of 18 June 1991, Donà Alfonso v Consorzio per lo sviluppo industriale del Comune di Monfalcone, C-295/89, EU:C:1991:177.

39 Judgment of the Court of 10 February 1982, C-76/81 – Transporoute v Ministère des travaux publics, EU:C:1982:49; Judgment of 22 June 1989, Fratelli Costanzo v Comune di Milano, C-103/88, EU:C:1989:256; judgment of 18 June 1991, Donà Alfonso v Consorzio per lo sviluppo industriale del Comune di Monfalcone, C-295/89, EU:C:1991:177; Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640.

40 Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640, par. 67.

41 Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640: Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts must be interpreted as follows: it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions…".

42 "Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services."

43 Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640.
Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640:
"68 As for the anomaly threshold applied in the cases in the main proceedings, this results from a calculation carried out for each contract notice and is based essentially on the average of the tenders submitted for that contract.
69 Such a method of calculation appears at first sight to be objective and non-discriminatory."

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when they are obviously abnormally low."[44] It must be noted that the concept of "abnormally low tender" does not cover price elements only.[45]

In the second phase, the economic operator must be allowed to provide explanations regarding the abnormally low tender within reasonable time provided by the contracting authority.[46] The list of the types of explanations under Art. 69(2) PPD[47] is not "an exhaustive catalogue of explanations that are capable of being submitted, but merely gives examples of explanations which the tenderer may provide in order to demonstrate the genuineness of the various price elements proposed. *A fortiori*, the provision in question does not authorise the exclusion of certain types of explanation."[48] The contracting authority, during its examination of the abnormally low character of a tender, takes into consideration, for the purpose of ensuring healthy competition, not only the situations set out in Art. 69(2) PPD but also all the factors that are relevant in the light of the works, supplies or services at issue.[49]

In the third phase, after the evaluation of explanation and based on this explanation, the PPD allows three possible outcomes:

(1) contracting shall exclude the tender if the level of price is benefiting from non-compliance 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 of the PPD [Art. Art. 69(3) and 18(2)];
(2) contracting authority may exclude the tender if the price is stemming from State aid and the tenderer is not able to prove that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU [Art. Art. 69(3)];
(3) contracting authority can excluded the tender if it is not satisfied by the explanation provided.

44 Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640, operative part, par. 2.
45 Judgment of 21 May 2008, Belfass v Council, T-495/04, EU:T:2008:160, par. 80.
46 Judgment of 10 February 1982, Transporoute v Ministère des travaux publics, C-76/81, EU:C:1982:49, par. 18.
47 "The explanations referred to in paragraph 1 may in particular relate to:
(a) the economics of the manufacturing process, of the services provided or of the construction method;
(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
(c) the originality of the work, supplies or services proposed by the tenderer;
(d) compliance with obligations referred to in Article 18(2);
(e) compliance with obligations referred to in Article 71;
(f) the possibility of the tenderer obtaining State aid."
48 Judgment of 27 November 2001, Impresa Lombardini, C-285/99, EU:C:2001:640, par. 83.
49 Judgment of 18 December 2014, Data Medical Service, C-568/13, EU:C:2014:2466, par. 50.

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The first scenario requires the contracting authority to exclude the tender *per se* and the link between non-compliance with obligations stipulated in Art. 18(2) PPD and the abnormally low tender is coincidental and merely enabled the contracting authority to unveil the existence of such a non-compliance and exclude it on a basis of transposition of Art. 57(4) PPD. In the cases when the economic operator received State aid, the contracting authority does not have to prove that the performance of the contract is unrealistic because State aid received by the economic operator provides enough finance to fulfil the contract. The very wording of Art. 69(4) PDD enshrines the mere fact of receiving state aid as a reason for exclusion of the bid, provided it was received contrary to Art. 107 TFEU: "Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone …".

The CJ EU explained in *ARGE* case that participation of a beneficiary of State aid does not *per se* infringe the principle of equal treatment as a general principle of public procurement under Art. 18(1) PPD.[50] On the other hand, the contracting authorities may be allowed or required to scrutiny the influence of State aid on the submitted tender.[51] However, the CJ EU also explained the substance of the text of abnormally low tender vis-à-vis receiving of State aid: "…a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty and that the obligation to repay illegal aid would threaten its financial well-being, so that that tenderer may be regarded as unable to offer the necessary financial or economic security."[52] Therefore the CJ EU limited the application of Art. 69(4) PPD only to the cases in which the State aid in issue is connected to the performance of the contract and influences the bid itself. Thus, the tenderer can be excluded only if received illegal State aid linked to the abnormally low level of the tender.[53] Under the case law, the PPD does not allow "…a priori and without further consideration, a tenderer to be excluded from participation in a procedure for the award of a public contract on the sole ground that, as a result of public subsidies which

50 Judgment of 7 December 2000, ARGE, C-94/99, EU:C:2000:677, par. 29 and 32.

51 Judgment of 7 December 2000, ARGE, C-94/99, EU:C:2000:677, par. 29: "While it is not, therefore, contrary in itself to the principle of equal treatment of tenderers for public bodies to take part in a procedure for the award of public procurement contracts, even in circumstances such as those described in the first question, it is not excluded that, in certain specific circumstances, Directive 92/50 requires, or at the very least allows, the contracting authorities to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid."

52 Judgment of 7 December 2000, ARGE, C-94/99, EU:C:2000:677, par. 30.

53 INDÉN, Tobias. Article 69. Abnormally low tenders. In STEINICKE, Michael, VESTERDORF, Peter L. eds. *EU Public Procurement Law*. Baden-Baden: C.H.BECK; Hart Publishing; Nomos Verlagsgesellschaft, 2017, p. 751.

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it receives, it is able to submit tenders at prices which are significantly lower than those of unsubsidised tenderers."[54]

Compared to the EU law, the WTO regime enshrined in the GPA is more simplified. However, the aim of abnormally low tender is under Art. XV(6) GPA much more apparent from the very wording of the provision: "Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract." There is no explicit provision on rejection of abnormally low tenders[55] and an abnormally low tender may only flag possible non-compliance with other requirements established under the GPA. This strict scope can be under pressure in case of the accession of China to the GPA. Although the wording of the provision on abnormally low tenders can be similar in the international trade agreements concluded by the EU, the context of application is different. E.g., the CETA[56] mirrors Art. XV(6) in Art. 19.14(6), however, Canada and the EU acknowledge inclusion environmental and labour rights policies in the enforcement of the CETA (Chapter Twenty-Three and Chapter Twenty-Four thereof).

### 4.2 Applicability of Art. 69 PPD on foreign subsidies

Art. 69(4) PPD is silent on the impact of foreign subsidies on abnormally low tender evaluation and the EC suggests that foreign subsidy can be evaluated merely in the context of viability of the contract and "any rejection of an offer as abnormally low needs to be justified by demonstrating that the foreign subsidy impedes the viability of the offer and the bidder's capacity to execute the contract at the (abnormally low) price offered."[57] Furthermore, the EC explicitly rejected that the problem of foreign subsidies can be tackled and will be tackled by PPD or its amendment and the evaluation of foreign subsidies cannot be left to the discretion of contracting authorities and national legislation of the Member States.[58]

54 Judgment of 18 December 2014, Data Medical Service, C-568/13, EU:C:2014:2466, par. 43.

55 SEMPLE, Abby. Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements. In *European Procurement & Public Private Partnership Law Review* [online]. 2017, vol. 12, no. 3. ISSN 21947376. DOI: 10.21552/epppl/2017/3/11, p. 303.

56 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23–1079).

57 Communication of the European Commission, "Guidance on the participation of third-country bidders and goods in the EU procurement market", C(2019)5494 final, chapter, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Brussels, 7 May 2021, SWD(2021) 99 final, p. 33.

58 COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Brussels, 7 May 2021, SWD(2021) 99 final, p. 44.

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This approach is not without critique. The Danish Government objected this approach claiming that "… that foreign subsidies only cause distortions of the procurement procedure through abnormally low tenders."[59] In its opinion, focusing merely on abnormally low tenders will "limit the number of tenders being investigated and the number of procurement procedures being delayed. This will be in line with the procurement directive, which stipulates that the contracting authority only can make requirements linked to the subject-matter of the contract."[60] Sánchez Graells suggest that the regime of investigation of non-abnormally low tenders subsidized by a foreign government can be discriminatory[61] because "EU-generated" tenders, that are not *prima facie* abnormally low, are not screened for receipt of (even illegal) State aid and thus they can win the contract. Both objections, in fact, call for a better "synchronization" of the concepts of "abnormally low tender" and "unduly advantageous tender". Without alignment of those concepts, disparities can occur and there will be a space for challenges due to discrimination or violation of principles of National Treatment under the WTO trade rules (including the GPA) or international bilateral or multilateral trade agreements (free trade agreements) concluded by the EU.

### 4.3 Comparison of concepts

Firstly, there is terminological and linguistic difference between the concept of "abnormally low" tender and "unduly advantageous" tender. The former suggests "abnormality" in the economic meaning and its possible economic consequences (impossibility to fulfil the contract), the latter suggest illicit or at least not fully justified behaviour. However, there is a common feature of both situations linked to a certain deviation from a tender that would be submitted under normal circumstances presupposed by the contracting authority. Similarly to the evaluation of an "abnormally low tender", the evaluation of an "unduly advantageous tender" expects link between distortion of market due to foreign subsidy and the tender in issue, since Art. 26 Draft RFSDIM covers "…foreign subsidies that enable an undertaking to submit a tender that is unduly advantageous …" and "[t]he assessment of whether there is a distortion on the internal market (…)

59 MINISTRY OF INDUSTRY BUSINESS AND FINANCIAL AFFAIRS. *The Danish Government's response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies* [online], p. 5. Available online: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-&-investment-addressing-distortions-caused-by-foreign-subsidies_en

60 MINISTRY OF INDUSTRY BUSINESS AND FINANCIAL AFFAIRS, The Danish Government's response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies, p. 5.

61 SÁNCHEZ GRAELLS, Albert. Feedback from: University of Bristol Law School. In *European Commission. Trade & investment – addressing distortions caused by foreign subsidies* [online] [cit. 21.11.2021]. Available online: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-&-investment-addressing-distortions-caused-by-foreign-subsidies/F2326817_en

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and whether a tender is unduly advantageous (…) shall be limited to the public procurement procedure at stake."

Thus, the similarity of assessment can be misleading. In the context of the abnormally low tender, the contracting authority shall in the first stage identify the abnormally low tender. If the economic operator claims that the suggested conditions explain the tender by reference to State aid, the contracting authority evaluates the legality of the State aid provided. Therefore, the State aid received by the economic operator is evaluated in the whole context of the internal market under all rules on State aid applicable. The evaluation of the State aid is not linked solely to benefits acquired by the economic operator in relation to the tender in issue, but rather *in abstracto.* And only in the case of inability of the economic operator to provide evidence on the legality of the received State aid (still *in abstracto*, i.e., not in the context of the tender itself), the contracting authority may start to consider the impact of received State aid to the tender at stake.

The evaluation of an "unduly advantageous tender" has different a starting point. Firstly, the contracting authority must identify whether a prior notification on foreign financial contributions was submitted under Art. 28 Draft RFSDIM. The evaluation of impact of foreign subsidy is split between the EC and the contracting authority. The EC evaluates whether the foreign subsidy causes distortion on the internal market not as a whole but vis-à-vis the tender at stake, only.[62] On the other hand, the contracting authority evaluates within the conditions of the tender at stake whether "the undertaking in question has in any case submitted the most advantageous tender."[63]

Nevertheless, the Draft RFSDIM does not clarify the relationship between evaluation of abnormally low tender under PPD and the investigation and evaluation under the proposed regulation. Art. 40 Draft RFSDIM deals with relations of the proposed regulation to the EU competition law, including the EU merger regulation, the regulation on protection against subsidized imports, including specific sector measures in transport, and international instruments binding to the EU. However, regarding PPD it remains silent. For the identification of the relation between the proposed instrument and the PPD, the purpose and legal basis must be evaluated. The Draft RFSDIM is based on Art. 207 TFEU (common commercial policy) and Art. 114 TFEU (harmonization on internal market). The PPD is based on Art. 114 TFEU as well, but also explicitly on other provisions of freedoms of the internal market. The basic purpose of the PPD is to remove obstacles to free circulation of goods and services within the internal market. On the other hand, the Draft RIFDIM is apparently an instrument of the common commercial policy as it tackles protection of the internal market against disruptive influences from third countries' governments. The Draft RFSDIM is described as "…a new tool to effectively deal with distortions in the

62 Art. 26 Draft RFSDIM.

63 Art. 31(2) Draft RFSDIM.

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internal market caused by foreign subsidies… (Rec. 5) and "[n]o existing Union instruments address distortions caused by foreign subsidies." (Rec. 4). Hence the purpose of the PPD and RFSDIM are different and the Draft RFSDIM explicitly declares that the scope of its application is not covered by other instruments of the EU law, nothing prevents parallel application of Art. 26 and seq. Draft RFSDIM and Art. 69 PPD. The contracting authority cannot be prevented from challenging the bid of an economic operator based on abnormally low tender. Even the no objection decision of the EC under Art. 9(4) and Art. 30(3) Draft RFSDIM cannot shield the beneficiary of foreign subsidy from rejection of the tender based on Art. 69 PPD. Indeed, the contracting authority cannot use the argument of illegality of received subsidy cleared by the EC's decision.

**5 Decisions and possible consequences**

The enforcement of the protection against foreign subsidies is centralized and only the EC shall evaluate notifications of foreign subsidies and their distortive effects. Thus, the contracting authority which can be more aware of the market or other circumstances has no competence to investigate the effects of the foreign subsidy on the tender in issue. The investigation by the EC does not fully suspend the public procurement procedure, the contracting authority is prevented to award the contract sooner than 60 days after the EC has received notification on the foreign subsidy.[64] Hence, the contracting authority can evaluate bids, exclude tenderers, or reject bids, and also cancel the whole procedure. The contracting authority may award the contract to an undertaking, that has notified foreign subsidy, before the EC makes any decision or before the 200-day time limit "only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender."[65] The EC can, after an investigation, adopt three types of decisions: a commitment decision, a decision prohibiting the award of the contract, or a no objection decision. Since all decisions of the EC are subject to judicial review by the CJ EU, the 200-day suspension period can be, in fact, prolonged by this review proceeding. Therefore, it is not pure fantasy to imagine that the contracting authority will try to avoid awarding the contract to a recipient of foreign subsidy by any measure. Apparently, the EC was aware of this possible outcome of the proposed regime and stressed that the investigation cannot lead to non-observance of the principles governing public procurement, including proportionality, non-discrimination, equal treatment, and transparency, regarding the investigated recipient of foreign subsidy.[66]

As it was mentioned above, the investigation itself can be challenged under the claim of violation of the WTO rules that can open another front of legal

64 Art. 29(1) Draft RFSDIM.
65 Art. 29(3) Draft RFSDIM.
66 Art. 31(7) Draft RFSDIM.

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dispute. Since the Draft RFSDIM limits the scope of investigation by the international law, in particular rules of the WTO, it created, in this context, *de facto* the right of individuals to directly claim application of the WTO rules and also all free trade agreements concluded by the EU.

## 6 Conclusions

The Draft RSDIM was created as a robust measure for defence of the EU's internal market against aggressive trade policies of third countries, in particular China. In fact, it is also "exporting" the EU standards of state subsidies to the third countries, i.e., recipients of state subsidies provided by third-country governments must be aware, that they will not be under scrutiny of domestic laws and the WTO rules but also "extraterritorialized"[67] EU law. However, it can, due to its shortcomings, become "a statue with feet of clay". Its effectiveness can be crippled by claims of violation of the WTO rules or violation of other bilateral free trade agreements concluded by the EU. Moreover, the link with the PPD and its concept of "abnormally low tender" are unclear. This legal uncertainty can raise tensions regarding the EU's commitment to rule of law as a principle of the EU integration.[68] Apart from systematic solutions, e.g., creation of the WTO, at least plurilateral, system of the protection against foreign subsidies,[69] or employment of the WTO dispute resolution system,[70] the solution can be seen in more careful drafting of the trade defence in order to fit into exemptions under Art. XX(d) GATT and XIV(c) GATS. One of the options is to directly include the proposed regime into the framework of the competition law and the public procurement rules and not to design it as a protective measure against subsidies but as one of the elements for enforcement of the existing rules applied on the internal market that are not contrary to the WTO legal regime.

67 To this concept see e.g., MÜLLER-GRAFF, Peter-Christian. Legal Europeanization Outside the European Union. *Bratislava Law Review* Vol. 1, no. 1, 2017, pp 6–14. https://blr.flaw.uniba.sk/index.php/BLR/article/view/67.

68 E.g. ŠIŠKOVÁ, Naděžda. The EU Concept of the Rule of Law and the Procedures de lege lata and de lege ferenda for its Protection. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 116–130. DOI: 10.2478/iclr-2019-0017; MURAVIOV, Victor. Principles and Values of the European Union as a Legal Basis for European Integration. *European Studies*, vol. 6, 2019, pp. 73–93.

69 CROCHET, Victor, GUSTAFSSON, Marcus. Lawful remedy or illegal response? Resolving the issue of foreign subsidization under WTO law. In *World Trade Review* [online]. 2021, vol. 20, no. 3. ISSN 14753138. DOI: 10.1017/S1474745621000045, p. 335.

70 NAGY, Csongor István. Foreign Subsidies, Distortions and Acquisitions. In *Central European Journal of Comparative Law* [online]. 2021, vol. 2, no. 1. ISSN 2732-1460. DOI: 10.47078/2021.1.147-162. pp.161–162.

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