WITH FOREIGN SUBSIDIES REGULATION, EU CASTS WORLDWIDE STATE AID NET INCLUDING ON THE CARIBBEAN

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As a consequence of recent geopolitical developments, the EU has adopted several new legislative instruments to protect its interests, particularly the internal market.[2] On 30 June 2022, the European Parliament and Council of the EU reached a provisional political agreement on the text of the foreign subsidies regulation (FSR).[3] With this regulation, the EU aims to prevent distortions of the level playing field within its internal market that are caused by subsidies given by third countries to undertakings which are active on the EU market. Although the EU cannot prohibit third countries from providing subsidies,[4] the FSR imposes obligations on recipient undertakings when doing business in the EU.[5]

The new regulation pursues the same goal as (a) EU state aid rules which try to prevent the distortion of competition by Member States; and (b) the provisions concerning subsidies in the EU-UK Trade and Cooperation Agreement (TCA) following Brexit.[6]

With the FSR, the rules combating distortions of competition by States (either Member States under the EU state aid rules, or third countries under the new FSR) becomes worldwide. This also affects the Caribbean region. In that region, one will find (i) third countries; (ii) jurisdictions which are part of a third country, such as the British overseas jurisdictions; and (iii) jurisdictions which are part of a Member State, such as overseas countries and territories (OCT) and outermost regions. These jurisdictions are not known for providing large amounts of subsidies, instead they have the reputation of having advantageous tax regimes. And it goes that a lot of multinational undertakings make use of those regimes. The question to be answered in this article is to what extent the EU anti-subsidy rules apply to Caribbean states and jurisdictions and more specifically to their tax legislation.

TAXATION AS STATE AID OR SUBSIDY

To began with the latter, subsidies have been defined very broadly in the FSR proposal by the European Commission and should not be understood in the narrow sense of a direct payment of public money to an undertaking. When a third country foregoes revenue that is otherwise due by an undertaking this is also considered a foreign subsidy, such as tax exemptions. Tax legislation of third countries might therefore fall within the broad scope of the FSR. Article 2(2) FSR explicitly mentions taxation benefits provided by third countries, such as fiscal incentives, setting off of operating losses and debt forgiveness. An advantageous tax measure provides the company with a benefit which distorts competition; not so much because the company actually receives money from the government, but because the company has to pay less to the government and the tax advantage therefore reduces the company's costs. Under EU state aid law, similar fiscal benefits have been characterised as state aid, for example tax waivers, tax exemptions (either individual or general), reductions in the taxable base, lower rates and advantageous tax rulings.

CARIBBEAN THIRD COUNTRIES

The EU has concluded two multinational agreements with a lot of third countries in the Caribbean region. Although the 2008 EU-Cariforum Economic Partnership Agreement contains rules equivalent to EU competition rules, it does not contain anti-subsidy rules equivalent to the EU state aid rules.[7] The 2021 agreement between the EU and the Organisation of African, Caribbean and Pacific States (OACPS)[8] to which 16 Caribbean countries are party does contain such rules. According to Article 52(5) of that agreement parties have to undertake to implement "rules and policies to effectively tackle anti-competitive business practices, including subsidies related to economic activities granted by the Parties, which have the potential to distort the proper functioning of markets". Whether distortion by subsidies will be prevented therefore depends on national law of the third countries. Regardless of that national legislation, the FSR will apply to undertakings which have been granted a subsidy by a Caribbean third country, including benefits arising from their tax legislation.

BRITISH OVERSEAS JURISDICTIONS

Spread around the world are overseas jurisdiction which are part of the United Kingdom of Great Britain and Northern Ireland (UK). In the Caribbean these include: Anguilla, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands. The UK became a third country upon withdrawal on 1 February 2020[9] and while from 1 January 2021, EU legislation does not apply anymore to the UK, the rules of the withdrawal agreement and TCA still apply. The TCA contains subsidy rules which are similar to the EU state aid rules. However, the TCA does not apply to the British overseas jurisdictions at all and therefore neither the TCA subsidy rules.[10] Consequently in relation to the EU, the British overseas jurisdictions are in the same position as a third country with which no trade agreement has been concluded. Therefore, the FSR will apply to undertakings which are subject to British overseas tax legislation that qualifies as a subsidy.

OCT AND OUTERMOST REGIONS OF MEMBER STATES

State aid rules do apply to the outermost regions since they are part of the internal market, such as the French Caribbean jurisdictions of Guadeloupe, French Guiana, Martinique and Saint Martin. The OCT are not part of the EU's internal market. The state aid rules do therefore not apply to the OCT, such as the Caribbean jurisdictions which are part of the Kingdom of the Netherlands[11] and the French Saint Barth. Article 355(2) TFEU provides that the EU-OCT association regime applies in relation to the OCT and more specifically the OCT Association Decision. The Commission had proposed to incorporate subsidy rules in the current OCT Association Decision which are similar to the state aid rules, but the Council and EP watered down Article 60(d) of the OCT Association Decision 2021/1764[12] to only a transparency obligation for OCTs when subsidising goods.[13] In the TBG Limited-case, a free movement of capital case involving the OCT, the European Court of Justice (ECJ) interpreted a free movement of capital provision in the OCT Association Decision along the lines of internal market provision Article 63 TFEU on the free movement of capital. According to the ECJ, it could interpret the provision of the OCT Association Decision similar to Article 63 TFEU because it "has a particularly wide scope, close to the scope of [Article 63 TFEU]".[14] With regard to subsidies under the OCT Association Decision, the EP and Council have explicitly chosen to limit Article 60 of the OCT Association Decision and to deviate from the Commission's proposal which in its proposed form was close to the EU state aid rules. Article 60 of the OCT Association Decision has therefore a very narrow definition of subsidies which is not along the lines of the EU state aid rules. Therefore, I am of the opinion that an analogy with the TBG Limited-case where a provision of the OCT Association Decision was interpreted along the lines of another provision of EU law because of their similarity cannot be made with Article 60 of the OCT Association Decision and the EU state aid rules. If the EU legislature would have wished otherwise, EP and Council should have followed the Commission's proposal and not have narrowed down the scope of Article 60 of the OCT Association Decision. Consequently, the OCT Association Decision does in general not apply to subsidies in the form of fiscal advantageous regimes of the OCTs.

The remaining question is whether the FSR applies to undertakings which (i) are active within the EU's internal market; and (ii) have been granted subsidies by the OCTs. I think it is important to underline that the FSR does not impose obligations on the OCT, but on undertakings which want to be active on the EU's internal market. The FSR tries to prevent the distortion of competition in the internal market by undertakings which received subsidies and tries to create a level playing field because undertakings can in principle not receive state aid from Member States. When it comes to other rules of EU competition law, they apply to undertakings which are active in the internal market (by selling their products and services there) regardless of their place of residence. The EU's jurisdiction in such a case was confirmed by the ECJ in several judgements, most recently in the Intel-case. It considered the EU to have jurisdiction under public international law when the undertakings conduct "has anticompetitive effects liable to have an impact on the EU market."[15] In my view, the same could be argued for undertakings to which subsidies have been granted which distort competition on the EU market. The fact that those subsidies were granted by third countries does not eliminate the EU's jurisdiction.

A more technical and institutional counterargument against the application of the FSR to undertakings which were granted subsidies by OCTs is the legal basis of the FSR. It is based on two provisions: (i) Article 114 TFEU which is the basis for harmonising legislation in the internal market; and (ii) on Article 207 TFEU which is the basis for common commercial policy with regard to third countries. The basis of the OCT Association Decision is Article 203 TFEU and that provision should have been used as a basis for the FSR to also include subsidies from the OCT. Now it is only "targeted" at the internal market and third countries, but the EU legislature forgot to include Article 203 TFEU to "target" the OCT as well.

However, the following might invalidate this counterargument. The OCTs are not third countries, since they are part of a Member State. Nevertheless, they do not belong the EU's internal market and are therefore at par with third countries. With regard to the free movement of capital under Article 63 TFEU which applies both within the internal market and in respect of capital movements with third countries, the question arose whether it was applicable to movements of capital from OCTs to the internal market. Therefore, similar to the FSR which is "targeted" to the same areas as well. In the Prunus-case the ECJ ruled that this provision necessarily applied to the OCT as well because of the "unlimited territorial scope of that provision".[16] In that case advocate-general Cruz Villalón could not reconcile "free movement of capital which excludes OCTs while embracing all third countries (...) [and concluded that] in the absence of a specific set of rules in the decisions on association, Article 63 TFEU is applicable to OCTs."[17] When making an analogy between the Prunus-case in order to answer whether the new FSR is applicable to subsidies granted by OCTs, we must first conclude that the FSR also has a similar unlimited territorial scope as Article 63 TFEU. Secondly, given the legal basis of the FSR it "targets" both the internal market and third countries, just as Article 63 TFEU does. Therefore, the lack of Article 203 TFEU as a basis for the FSR to apply to OCT subsidies can be "repaired" by reasoning along the same lines as theECJ did in the Prunus-case.

CONCLUSION

Since the FSR explicitly mentions beneficial tax regimes, fiscal legislation of third countries may be affected, also in the Caribbean. This includes tax regimes in the British overseas jurisdictions, since they fall within the scope of the FSR and not within the subsidy rules of the EU-UK TCA after Brexit. Outermost regions are already subject to state aid rules and fiscal state aid also falls within the scope of those rules. With regard to the OCT, the EU state aid rules do not apply and no provision similar to state aid is included in the OCT Association Decision. The question is therefore whether the FSR can apply to undertakings which have been granted a subsidy by OCTs, including preferential OCT tax regime. Since the FSR is not addressed to the OCT, but to undertakings which are active on the internal market, the FSR might be considered to apply, just as other EU competition rules apply to those undertakings, regardless of their place of residence, or regardless of the jurisdiction which granted them a subsidy. The nexus with EU-territory is whether there are "anticompetitive effects liable to have an impact on the EU market", regardless of the place of its origin. According to the ECJ this effects-based approach complies with the principle of territoriality. The legal basis of the FSR "targets" the internal market and third countries. It lacks, however, a legal basis to "target" the OCT. In a similar situation in the Prunus-case that did not prevent the ECJ to declare the free movement of capital provision to apply in respect of the OCT even though that provision also only "targeted" the internal market and third countries. Therefore, it might be concluded that the FSR is also applicable to beneficial tax regimes of the OCT.

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[2]Such as export control under Regulation 2021/821 (OJ 2021, L206/1) and the coordination of foreign direct investment (FDI) screening between Member States under Regulation 2019/452 (OJ 2019, L79I/1).
[3]The final text still has to be published in the OJ, but a provisional text hast been published by EP online: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf.
[4] Although some subsidies might fall within the WTO Agreement on Subsidies and Countervailing Measures.
[5]Such as obligations to notify the receipt of those subsidies to the European Commission when they want to take over a company in the EU or when they want to participate in a public procurement by one of the EU Member States.
[6]OJ 2021, L149/1.
[7]Article 126 of that agreement (OJ 2008, L289/3).
[8]The agreement of 15 April 2021 has not been ratified yet, but is applied provisionally according to Article 98(4); https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf
[9]This is in accordance with the procedure provided for in Article 50(1) and (2) TFEU. This has become known as the Brexit.
[10] Article 774(4) TCA.
[11]Aruba, Bonaire, Curaçao, Saba, Saint Eustatius and Saint Maarten.
[12]OJ 2021, L355/6.
[13]Provided the subsidies have a significant negative effect on trade or investment between the Union and an OCT.
[14]ECJ, 5 June 2014, Joined case C-24/12 & C-27/12, X BV and TBG Limited, ECLI:EU:C:2014:1385, par. 48-49.
[15]ECJ, 6 September 2017, Case C-413/14 P, Intel Corporation Inc. (ECLI:EU:C:2017:632), par. 40-46, specfically 45.
[16]ECJ, 5 May 2011, Case C-384/09, Prunus SARL and Polonium SA (ECLI:EU:C:2011:276), par. 20.
[17]Opinion of 9 December 2010, Case C-384/09, Prunus SARL and Polonium SA (ECLI:EU:C:2010:759), par. 57-58.