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Investments in Seaport Infrastructures and State Aid Law – The Most Recent Perspectives on Maritime Silk Road in Europe



The EU regime on State Aid

Before analysing public financing of infrastructures, it is useful to make reference to Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union.

In particular **Art. 107 (1) TFEU** reads as follows:

«1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market».

The aim of these provisions:

- prevent trade between Member States from being affected by advantages granted by public authorities.
- Internal market
- freedom of circulation of goods and services
- Level playing field



Exceptions (Art. 107 (2) and (3) TFEU)

This general principle is qualified by:

- **mandatory exceptions** expressly listed in **paragraph 2** (aid having a social character or in favour areas interested by natural disasters or exceptional occurrences) → always compliant with the internal market
- **discretionary exceptions** (paragraph 3), assessed by Commission on a case by case basis.

Moreover, Commission has the power to adopt Regulations setting out **block exemptions** for some **categories of state aid**

- like GBER (2008), amended by Regulation n. 2017/1084 which extend discipline to seaports; effects extended in 2023
- Regulation n. 2014/651, declaring compatibles some categories of aid; Regulation n. 1998/2006 on *De Minimis* aid (OJ L379/5);



Art. 108 (3) TFEU – Notification to EU Commission

Article 108(3) TFEU obliges Member States to notify the Commission of **any plan or project to grant an aid (before)**

But

In case of an aid falling within a block exemption the notification to the EU Commission is not required.

Under GBER Regulations (Reg. 1084/2017 concerning seaports)

Exemption from the obligation to notify the Commission

→ For the construction of port infrastructure is not necessary prior notification to the Commission if public funding is less than 150 million Euros



The concept of State aid

The concept of State aid is clarified by the ECJ.

It shall be stressed that it is **not relevant what form the benefit may take** or what particular **goal of policy** it may be devoted to.

Because prohibition in Art. 107 (1) does not distinguish between measures of state intervention by reference to their causes or aims but defines them in relation to their **effects**.

The aid may take the following forms:

Direct subsidies, exemption from duties and taxes, exemption from parafiscal charges, preferential interest rates, guaranteed of loans, making land or buildings available on especially favourable terms, direct or indirect state participation in share capital, etc...



Cumulative conditions under art. 107 (1) TFEU

1. An intervention by the **State** or through **public resources**

The public control or influence must have affected the decision to grant the aid (discretionary).

Traditionally, in Italy, the development of port infrastructures falls within State's competences, with few contribution by private undertakings

By contrast, if resources are directly awarded by the **EU**, with no discretion on the part of the national authorities, they do not constitute State resources ex. Trans-European Transport Network (TEN-T) or Next generation EU

2. The effect of the measure is **a distortion** of /threat to distort **competition**, that affects **trades between Member States**

3. the recipient favoured is an **undertaking**, either public or private, or a subject performing economic activities, notwithstanding its qualification under the domestic law

4. **Selective** financing

5. The market at stake is **open to competition** and has **EU relevance**



Public financing of transport infrastructures should be considered as an illicit State aid?

Each MS has its own concept of infrastructures

Italian law (art. 2, paragraph 2, Ministerial Decree 26 November 2010) states that :

*“infrastructures are defined as capital goods with the **predominant purpose of providing collective services**, with individual or aggregate demand aimed at families and businesses [...] regardless of the proprietary nature of the owners of rights in rem on these assets”*

With reference to transport infrastructures, in particular, in the last years, the management and model of governance changed, from a static to a dynamic role

→ *Aéroports de Paris v Commission of the European Communities*, 12 December 2000, case T-128/98.

- *EU Indifference in respect of Legal status of the recipient under National law (art. 345 TFEU)*



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First EU perspective on public financing of transport infrastructures

Traditionally, until 2000, it was considered as **general measures of public policy (exercise of public powers)** and not an economic activity → falling outside the State aid rules

Therefore Commission cannot prohibit the investment **if infrastructure is accessible to all users without discrimination**



Different perspective

Later, EU perspective completely changed because of two ECJ judgements (*Mitteldeutsche Flughafen* and *Flughafen Leipzig-Halle/Commission* (2012)):

It is the future use of the infrastructure, and its commercial nature, to determine the application of State aid rules (Functional approach)

Ex. airport runway is at stake, the activity involved is commercial

Port taxation in Italy case

Probably this is the result of factors like:

- liberalisation,
- privatisation,
- market integration
- technological progress

It is evident that public funding of seaport infrastructures is in principle subject to State aid rules and under EU Commission's control. Evaluation on a case by case basis



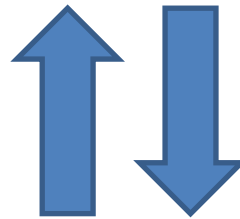
The activity of seaports

- infrastructure used for activities by exercising **public powers**
Ex. protection and resilience against extreme weather conditions, longshore drift, waves/tides, flooding and coastal erosion;
→ not subject to **State aid rules**
- **Commercial activity** → **State aid rules applicable**
- Use for **both economic and non-economic activities** (mixed use), public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities



The opposite needs

On the one hand, the **need to increase competition in seaports**, by removing all the national provisions and behaviours that are contrary to Art. 107 TFEU



on the other hand, each Member State is interested in **improving** his **seaport infrastructures** in order to promote the economical and social growth, mobility, competitiveness and to attract port traffics.

Which interest should prevail???



The EU Commission's effort to clarify the regulatory framework

- **However regulatory framework is not clear:**
- EU Commission adopts **State aid analytical grids (2012)**, reflecting the rules and case practice at a point in time (often updated by integrating new State aid rules)

- **Other provisions** are adopted:
 - **General Block Exemption Regulation** (Commission Reg. (EU) N°651/2014 + Reg. (EU) 2017/1084 extension of exemption to seaports) + **De minimis Regulation** (Commission Reg. (EC) N.1407/2013).
 - In May **2016** the Commission adopted the **Notice on the Notion of aid** ("NoA") within which it is clarified in particular when public funding for infrastructure projects falls within the scope of EU State aid control



The innovative Chinese investment plan: OBOR or the New Silk Road

This ambitious project, launched in 2013 under the leadership of the Chinese Government, aims to revive the ancient "Silk Road" of the Chinese Empire, to create a **huge and articulated network of transport routes by 2050**, a corridor, connecting 4 continents and involving railways, roads and shipping routes.

Eurasia would have become a very important economic and political hub for trade and business.

These funds would be used to invest mainly in **'hard connectivity'** (i.e. transport, energy and infrastructure projects)



Emerging issues about OBOR: new perspectives

Chinese involvement in infrastructure in the EU began long before the OBOR project.

At international level, this project has been generally shared and surely seen as a great opportunity of growth, development and prosperity, providing that its motto is '**win-win cooperation**', not only for Europe, but also for China.

Opposed:

- **indifference to the specific local needs** of the Countries involved
- **mid-to-longterm repercussions on the institutions and civil societies**

Ex. Chinese commitment to infrastructure construction in these countries is in fact exclusively entrusted to Beijing state enterprises

The **reserves of the EU countries** are **manifold** and due to: the objective **distance** between **legal systems in terms of principles and norms of community values in relation to workers' rights, contractual transparency, ban on unfair competition, counterfeiting, monopolies and state aid.**



Possible forms of investments

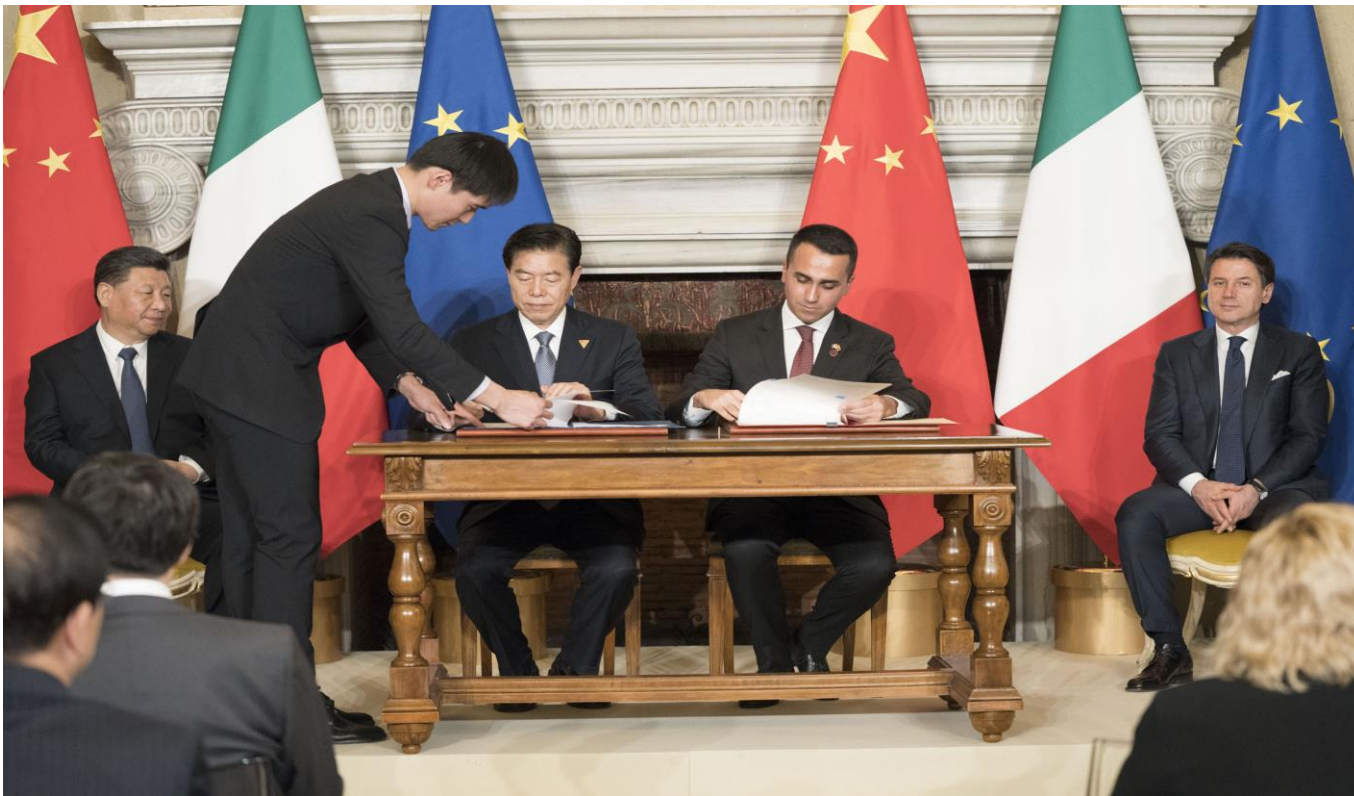
- **acting as a contractor**, bearing the risks associated with constructing the infrastructure to the relevant EU or national standards
- **holding shares** (“equity”) in infrastructure companies. The shareholder bears the risks associated with the profitability of the company and of its expansion.
- **Chinese companies or banks may lend** (provide loans) to infrastructure businesses, either individually and directly or, for **large loans**, through a consortium of lenders. In these circumstances, the lender bears the risk that the loan is not repaid

The form largely chosen is last one. **Multimillion dollar loans** are provided by Chinese financial institutions and the Asian International Infrastructure Bank (AIIB).



MEMORANDUM OF UNDERSTANDING BETWEEN ITALY AND CHINA ON COOPERATION WITHIN THE FRAMEWORK OF THE SILK ROAD ECONOMIC BELT (MoU)

The Memorandum was signed in March 2019.



Memorandum's value

- The MoU **does not constitute an international agreement which may lead to rights and obligations under international law.**
- The MoU **will be interpreted in accordance with the legislations of the Parties** and as well as applicable international law and, as for the Italian Party, **with the obligations arising from its membership of the EU.**
- Issue: the MoU will soon expire at the end of this year
- It seems that Italy is not interested in a renewal



The main Memorandum's provisions

“[...] the Parties will promote bilateral cooperation based on the following principles:

(i) Guided by the purposes and principles of the UN Charter the Parties will work for common development and prosperity, deepened mutual trust and beneficial cooperation;

***(ii) In accordance with their respective domestic laws and regulations, consistent with their respective international obligations,** Parties will strive to promote the smooth progress of their cooperation projects [...]*”

Areas of cooperation

*“Parties will cooperate in the **development of infrastructure** connectivity, including financing, interoperability and logistics, in areas of mutual interest (such as roads, railways, bridges, civil aviation, **ports**, energy—including renewables and natural gas –and telecommunications). The Parties express their interest in developing synergies between the Belt and Road Initiative, the Italian system of transport and infrastructure, such as -inter alia- roads, railways, bridges, civil aviation and ports and the EU Trans-European Transport Network (TEN-T)”.*



EU specific reserves on State aid in recent years

- Reserves are mostly related to the **particularities of the Chinese political economy**, where **state interference prevails over market** and the lines between the public and the private sector are blurred
- competition
- For M&A deals, State owned enterprises can defeat their competitors
→unfair competition
- **the respect of EU relevant laws on competition, state aid and public procurement, also regarding infrastructures projects**



Notwithstanding the rigid framework, insofar...

By virtue of Article 107(3) TFEU, aid may, however, be found **compatible** with the internal market:

- if it is granted for the purpose of **supporting economic development in disadvantaged regions** and for **creating economic activities and jobs** (both criteria should be met)

(Guidelines on Regional State Aid for 2014-2020)

- **Deemed compliant by the EU Commission** after notification testing for the goal of a **common interest**, **appropriateness** and **proportionality** of the aid measure, **effects on competition** and trade, and transparency
- If it meets the conditions required under GBER Regulations



Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies distorting the Internal Market

Starting point:

- « A strong, open and competitive internal market enables both European and foreign undertakings to compete on merits. The Union benefits from a sophisticated and effective system of State aid control, aiming at ensuring fair conditions for all undertakings engaging in an economic activity in the internal market. This State aid control system prevents Member States from granting State aid that unduly distorts competition in the internal market.
- (2) At the same time, **both private undertakings and public undertakings which are directly or indirectly controlled or owned by a state, might receive subsidies from third countries, which are then used, for instance, to finance economic activities in the internal market in any sector of the economy**, such as participation in public procurement procedures, or the acquisition of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies. **Such foreign subsidies are currently not subject to Union State aid rules.**



Scope of application of EU Regulation 2560/2022

- **all economic sectors**,
- including those that are of **strategic interest** to the Union and
- critical infrastructures (Art. 4, (1) a) Reg. EU 452/2019: critical infrastructure, whether physical or virtual, including energy, **transport**,, as well as land and real estate crucial for the use of such infrastructure)
- Application: from July 2023
- Aim: ensure **level playing field** and protect the internal market, address distortions caused, directly or indirectly, by foreign subsidies



The concept of foreign subsidy: to whom it is addressed

- The undertakings, even public, exercising an economic activity foreign subsidies granted to an undertaking, including a public undertaking which is directly or indirectly controlled by the State, engaging in an economic activity in the internal market
- Among others, **an undertaking acquiring control of or merging with an undertaking established in the Union** or an **undertaking participating in a public procurement procedure** in the Union is considered to be engaging in an economic activity in the internal market.



Existence of a foreign subsidy (Article 3)

a foreign subsidy shall be deemed to exist where a **third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited**, in law or in fact, to one or more undertakings or industries.

- Shall include, 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**
- C) the **provision of goods or services** or the purchase of goods or services



The concept of «third country»

include a financial contribution **provided** by:

- the **central government and public authorities** at all other levels
- a **foreign public entity** whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy
- a **private entity** whose actions can be attributed to the third country, taking into account all relevant circumstances



Distortions in the internal market (Art. 4)

exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy **actually or potentially negatively affects competition in the internal market.**

Determined on the basis of the following indicators:

- Amount
- Nature
- situation of the undertaking, including its size and the markets or sectors concerned
- level and evolution of economic activity of the undertaking
- Purpose, conditions, use



Thresholds: no distortion

- Where the total amount of a foreign subsidy to an undertaking does not exceed **EUR 4 million over any consecutive period of three years**
- Where it does not exceed the amount of **de minimis aid (200.000 euros)** per third country over any consecutive period of three years,
- to the extent that it is aimed at making good the damage caused by **natural disasters or exceptional occurrences**



Categories of foreign subsidies most likely to distort the internal market (art. 5)

1. A foreign subsidy is most likely to distort the internal market where it falls under one of the following categories:

- (a) a foreign subsidy granted to an ailing undertaking, namely an undertaking which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and that plan includes a significant own contribution by the undertaking;
- (b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee;
- (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits;
- (d) a foreign subsidy directly facilitating a concentration;
- (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.



Powers of the Commission

Balancing test (art. 6) operated by EU Commission between positive and negative effects

Power to address or impose **redressive measures** or to accept **commitments** (proportionate and fully and effectively remedy)

For instance:

(a) offering access under fair, reasonable, and non-discriminatory conditions to infrastructure, including research facilities, production capabilities or essential facilities, that were acquired or supported by the foreign subsidies distorting the internal market unless such access is already provided for by Union legislation;

(b) reducing capacity or market presence, including by means of a temporary restriction on commercial activity;

(c) refraining from certain investments;

(d) the licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;



EX OFFICIO REVIEW AND GENERAL PROVISIONS FOR THE REVIEW OF FOREIGN SUBSIDIES (Chapter 2)

Commission may on its own initiative examine information from any source, regarding alleged foreign subsidies distorting the internal market

Preliminary review, request information, exclusive power to conduct inspections (art. 10)

When sufficient indications → decision informing the undertaking, MS or authority concerned and publish a notice in the Official Journal

insufficient indications close the preliminary review, inform the undertaking

In-depth investigation (Article 11)

Result: **'decision with redressive measures'** or **'with commitments'**

'no objection decision' where it finds that:

(a) the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or

(b) a distortion in the internal market is outweighed by positive effects



Other provisions:_ EC powers

- Adoption of Interim measures (Art. 12) to prevent irreparable damage
- request for information (on future concentrations and public procurement procedures (art. 8) for a certain time)
- Inspections within the Union or outside the Union
- impose fines or periodic penalty payment in case of no reply, misleading information

- **PUBLIC PROCUREMENT PROCEDURES** (from next October)
- Notification thresholds in public procurement procedures (art. 28) to the public authority: prior control if:
 - the estimated **value of that public procurement** or framework agreement is equal to or greater than **EUR 250 million**
 - Addressees (broad): the **economic operator**, including its subsidiary companies without commercial autonomy, its holding companies, and, its main subcontractors and suppliers involved was granted **aggregate financial contributions in the three years** prior to notification equal to or greater than **EUR 4 million per third country**



Future expectations? Rise and fall of NSR in EU?

Predictions not materialised

Italian government: no renewal of the MoU

Causes? Decline in transportation demand, decline in maritime freight rates for container shipments in 2022

Trade relation between countries never taken off: deficits in the bilateral trade balance evident

Few economic benefits

Issues: applicability of the rules also for financing already given

After Covid-19 crisis and the recent adoption of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies distorting the Internal Market?



Conclusive remarks

- Before December 2022, EU rules on state aid suffered from two **major deficiencies**: they only cover **aid granted by Member States** and do **not** fully consider the event of aids granted by **foreign governments**
- **For this reason, adoption of Regulation 2560/2022**
- **Implementation?**
- New era of Protectionism towards Chinese investments?





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Thank you for your kind attention!

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