

# ***Legal Issues in the European Union's Anti-Cross Border Subsidy Measures: A Study***

**Tianziran Li<sup>1,a,\*</sup>**

<sup>1</sup>*Fujian Normal university, No.8 Xuefu South Road, Minhou, China*

*a. Lichillin8@gmail.com*

*\*corresponding author*

**Abstract:** This article provides a panoramic overview of the "Foreign Subsidies Regulation" that passed on June 30, 2022 and officially took effect throughout the European Union on July 13, 2023. It conducts a deep analysis of the Foreign Subsidies Regulation through the background analysis and discusses why is the Foreign Subsidies Regulation made. Then the basic provisions of the Foreign Subsidies Regulations are discussed in detail from the aspects of the definition of foreign subsidies, distortive effects, review procedures of foreign subsidies, and implementing agencies. In future, most of the non-EU companies doing business in Europe could be subject to the European Commission's new rules on foreign subsidies. Then this article provides an objective analysis of access for companies investing in Europe. By discussing the possible influence, this article identifies strategies for non-EU countries' companies investing in Europe from four aspects: compliance management, corporate mergers and acquisitions and investment, public procurement and corporate financing. Hope the suggestions in this article can be helpful.

**Keywords:** European Union, subsidy, Foreign Subsidies Regulation

## **1. Introduction**

Working along with Europe and Japan, the United States leverages the breakthrough of subsidy concerns in the global economic scene to increase its influence in trade and economic rule-making. The European Union expresses worry about the absence of a uniform legislative framework for the distorting impacts of foreign subsidies, even as it actively participates in trilateral negotiations with the US and Japan. The political unity and solidarity of the EU may be threatened if member states decide to act independently as a result of this worry[1]. In addition, the "Agreement on Subsidies and Countervailing Measures" (SCM Agreement) of the World Trade Organization (WTO) focuses mostly on countervailing measures and subsidies for non-agricultural commodities, with limited authority to regulate foreign subsidies[2].

In response, the European Union approved the "Foreign Subsidies Regulation" on June 30, 2022, which went into effect on January 12, 2023. Its goal is to govern foreign subsidies in investments made within the EU as well as in services that are supplied to it. The "Anti-subsidy Law" of the EU is currently being widely applied. In its ruling on March 1, 2023, the EU General Court addressed the "China-Egypt Glass Fiber Fabric Case"[3], ruling that preferential loans from Chinese financial institutions and capital support from China—including funding from China National Building Materials Group—to Egypt's Giant Rock and Eternal Stone companies constituted subsidies. By

interpreting the actions as belonging to Egypt and implementing the "Foreign Subsidies Regulation" by the "Draft National Responsibility Clause" Article 11[3], the court implemented counter-subsidy measures. This demonstrates how the EU is moving toward upholding fair trade and economic stability through stronger and more thorough legislative interpretation and practical execution.

## **2. Legal Provisions of the EU Foreign Subsidies Regulation**

### **2.1. Legislative Process of the Foreign Subsidies Regulation**

On June 17, 2020, the European Commission adopted the Foreign "Subsidies White Paper"[4], initiating a public discussion on the issue of distortive foreign subsidies. Subsequently, a 14-week public consultation was launched and concluded on September 23, 2020. The consultation results indicated widespread agreement among member states to address the distorting effects of foreign subsidies through legal regulations.

The Commission conducted an initial impact assessment from October 6 to October 29, 2020, to lay the foundation for future actions. This was followed by a phase of opinion collection involving public authorities, expert groups, consumers, small- and medium-sized business representatives, and stakeholders from third countries[5]. The Regulatory Scrutiny Board released an evaluation report on March 3, 2021. The EU Council and the European Parliament finally came to an agreement on June 30, 2022, concerning the EU Foreign Subsidies Regulation, after the Commission's May 2022 proposals. The law becomes operative on January 12, 2023.

### **2.2. Basic Provisions of the Foreign Subsidies Regulation**

#### **2.2.1. Definition of Foreign Subsidies**

According to the Foreign Subsidies Regulation, foreign subsidies are sums of money given by foreign governments to encourage the manufacture, export, or production of commodities. Subsidies can come in a number of ways, such as loans that don't reflect market circumstances, tax offsets, and direct cash handouts. The phrase is dissected into its "foreign" and "subsidy" components for analysis.

"Foreign" refers to nations that are not part of the European Union, including those that have particular trade agreements with the EU as well as members of the European Economic Area (Iceland, Liechtenstein, and Norway)[6]. Contributions from foreign governments or other tiers of public authority are included in third-country involvement. Public entities' (such state-owned corporations') interventions are acknowledged, as per Article 3(2)(2) of the FSR, as are private entities' interventions.

The term "subsidy" describes financial aid given, either directly or indirectly, to certain businesses or sectors of the economy participating in the EU market with the intention of bringing about particular advantages.

Furthermore, the FSR stipulates that the EU state assistance framework, the concentrative operator notification system, and public procurement regulations shall be cited in the interpretation of "foreign government subsidy". The EU anti-subsidy system and the WTO anti-subsidy system, in particular the Agreement on Subsidies and Countervailing Measures, serve as the foundation for this interpretation.

Direct grants, interest-free or low-interest loans, tax breaks, state-funded R&D, government contracts, and the free giving of property rights are all considered forms of financial aid under the FSR.

### 2.2.2. Distortive Effects

As per Article 3 of the Foreign Subsidies Regulation, foreign subsidies pertain to the provision of financial support by third nations to firms that are involved in domestic market operations, with the aim of assisting one or more industries or enterprises. The rule goes on to include other forms of foreign subsidies, such as government contracts, state-funded R&D, tax benefits, interest-free or low-interest loans, direct gifts, and the free giving of property rights.

According to Article 4 of the Foreign Subsidies Regulation, a foreign subsidy is deemed to have significantly distortive consequences if it increases a company's competitiveness but has current or prospective negative impacts on EU market competition. Factors for judgment include the nature and amount of the subsidy, its purpose and conditions, the company's situation and relevant markets, and the role of the foreign subsidy in the EU market.

However, the definitions and standards of the above review criteria are quite broad and challenging to assess in practice. Therefore, Article 4 of the Foreign Subsidies Regulation supplements five scenarios most likely to distort the EU market:

1. Providing foreign subsidies to a struggling company without a viable restructuring plan to prevent its closure or bankruptcy.
2. Offering unlimited guarantees for a company's debt or liabilities as a form of foreign subsidy, with no restrictions on the amount or duration of the guarantee.
3. Export financing measures that do not comply with the OECD Agreement on Officially Supported Export Credits.
4. Directly facilitating the concentrative operation of foreign subsidies.
5. Providing foreign subsidies to enable a company to submit an offer with an unfair advantage and win public procurement contracts.

Simultaneously, the Foreign Subsidies Regulation establishes three exceptions to increase certainty standards for distortive effects:

1. The total amount of foreign subsidies given to a company in three consecutive financial years is below €4 million.
2. The total amount of foreign subsidies given to a company in three consecutive years does not exceed the amount specified in Article 3 of Regulation (EU) 1407/2013.
3. Foreign subsidies to a company are intended to compensate for damage caused by natural disasters or special events.

The European Commission believes that when companies receiving foreign subsidies fall into one of these three situations, the likelihood of distorting the internal EU market is extremely low, and they will not fall under the Commission's review.

### 2.2.3. Review Procedure for Foreign Subsidies

Three grounds exist for which foreign subsidies may start review procedures: public procurement, concentrative operator, and ex officio reviews. Due to variations in the subject's initiative, review intervention time, procedural norms, legal duties, etc., these three procedures take on diverse forms. As a result, the author will categorise these three factors as either favourable or bad reviews and then address each one's particular content in turn[7].

Concentrative operator review and public procurement review are classified based on the type of business activities conducted by the reporting entity. Both are procedures initiated voluntarily by company operators based on their specific situations and are similar and comparable in content. Therefore, the author will summarize and summarize the specific situations of the two through the table 1 below.

Table 1: compare with the CRO and the PPR

	Concentration of Review by Operators	Public Procurement Review
meaning	This procedure is akin to existing corporate merger control systems. If a business merger, equity or asset acquisition, or the establishment of a joint venture meets the following criteria, it is necessary to submit a pre-notification to the European Commission after the transaction agreement is signed and before the transaction is completed.	In public procurement procedures (i.e., procurement activities organized by EU government agencies or those involving public services) where bidders accepting foreign subsidies are involved, if a European Union public procurement procedure meets the following criteria, the bidding party is required to declare the details of its financial support acceptance.
Standard	<p>1. At least one merging undertaking, acquired undertaking, or joint venture has been set up within the EU, and the total turnover generated within the EU amounts to at least 5 billion euros; and</p> <p>2. All participating undertakings in the concentration have been granted a total of more than 50 million euros in foreign financial support in the three financial years preceding the notification.</p>	<p>1. The estimated value of a public procurement project, or a procurement framework agreement, or a specific procurement in a dynamic procurement system, reaches or exceeds 2.5 billion euros; and</p> <p>2. The participating tenderers, including all their non-autonomous decision-making subsidiaries, parent companies and their main subcontractors and suppliers (if applicable), have received a total financial support exceeding 4 million euros in the three financial years prior to the declaration.</p> <p>Or, in the case of a public procurement divided into several lots:</p> <p>1. The estimated total value of the public procurement reaches or exceeds 2.5 billion euros;</p> <p>2. The total value of the lots in which the tenderers participate reaches or exceeds 1.25 billion euros; and</p> <p>The participating tenderers, including all their non-autonomous decision-making subsidiaries, parent companies and their main subcontractors and suppliers (if applicable), have received a total financial support exceeding 4 million euros in the three financial years prior to the declaration.</p>
Legal responsibility	Revenue of 10% or less from the previous fiscal year	

Note: The contents of this form are derived from Articles 11, 25, and 31 of the Foreign Subsidies Regulations.

Ex officio review procedure differs from the two reporting processes mentioned earlier. It is initiated by third-party reports, prompting the European Commission to investigate the reported entity ex officio based on the allegations. In this sense, it bears similarity to the anti-subsidy investigations in the EU trade remedy regulations[8].

The ex officio review comprises two stages: preliminary review and in-depth review.

During the preliminary review, the European Commission can request information from relevant parties and conduct investigations to determine the existence of foreign subsidies and whether they distort the EU market.

If, during this stage, the Commission finds that the subject of the review does not receive foreign subsidies or there is no evidence of their impact on the EU market, the preliminary investigation concludes, and no further in-depth review takes place.

However, if the Commission has substantial evidence indicating the presence of foreign subsidies distorting the EU market, it has the authority to proceed with the second stage - the in-depth investigation.

In the in-depth review, the Commission can request information from the operator, other operators, industry associations, and relevant third countries. If, in the end, the Commission concludes that foreign subsidies have distorted the internal market, it can initiate remedies or accept commitments from the operator.

It's important to note that both stages of the ex officio review do not have explicit time limits. Regarding the in-depth investigation process, Article 11(5) of the Foreign Subsidies Regulation stipulates that the Commission should strive to make a decision within 18 months of the start of the in-depth investigation. However, the term "should" does not imply an absolute time limit; adjustments should be made based on the actual circumstances of the investigation.

#### **2.2.4. Enforcement Agencies**

In the three legal procedures mentioned above, the European Commission is the sole executor of the FSR. The Directorate-General for Competition (DG COMP)[9] is responsible for enforcing FSR concerning concentrative operators, initiating general procedures to address distortions in the internal market caused by foreign subsidies outside public procurement. The Directorate-General for Internal Market, Industry, Entrepreneurship, and SMEs (DG GROW)[9] is responsible for enforcing FSR regarding financial assistance in public procurement procedures, initiating and resolving procedures to address the distorting effects of foreign subsidies in public procurement processes.

### **3. Implications for Businesses Targeting the EU and Strategies to Address Them**

Four primary areas of a company's operations might be impacted by the draft legislation: finance channels, mergers and acquisitions, public procurement and bidding, and compliance management for foreign subsidiaries. Finding a compliant route in the European market is a crucial factor for non-EU enterprises under the FSR[10].

Businesses looking to invest in Europe are encouraged to evaluate the risks associated with subsidy reviews during trade talks in order to manage compliance. They should gain an understanding of the regulation's entities and procedural norms, organize relevant information based on the text, plan transactions and declaration schedules, and proactively address potential issues. Given the FSR's combined approach of ex ante and ex post reviews, which is broad and uncertain, companies engaging with European counterparts should negotiate detailed contract terms to minimize risks of non-compliance and breaches.

For companies already investing in Europe and engaging in frequent business transactions, the Commission has indicated that greenfield investments, service provisions, and mergers or tenders not

meeting pre-notification standards could trigger ex officio foreign subsidy investigations. These companies should estimate the government subsidies they have received, scrutinize all subsidies obtained since 2018 according to the FSR's 5-year retroactive provision, and actively prepare for review processes.

It's noteworthy that the FSR focuses on state-owned enterprises. According to Article 3 of the FSR, financial assistance in various forms provided by operators with government backgrounds, such as state-owned enterprises, state-owned banks, and sovereign wealth funds, may be considered foreign subsidies. While there's room for interpretation in recognizing state-owned enterprises, the Commission will judge based on the nature of funds used for transactions and procurement. State-owned enterprises participating in EU internal acquisitions and mergers or public project tenders should arrange project financing sources reasonably to reduce financing risks and minimize the likelihood of regulatory violations.

Regarding mergers and investments, companies should clearly define project responsibilities, choose investment projects carefully considering project types and policy guidance, adjust corporate concepts flexibly to adapt to the shrinking EU market, and avoid excessive financial pressure leading to non-compliance due to government subsidy constraints. Establishing internal mechanisms to collect and record relevant information for mergers and acquisitions is crucial. However, due to the complex administrative structure and spatial distance limitations of multinational companies, the information collection mechanism for these operations is not yet fully developed.

Furthermore, at the level of public procurement and bidding, safeguarding core technology security and maintaining a cutting-edge market share are among the market objectives of this regulation. Therefore, businesses intending to enter the European market should adhere to their own quality and innovation, cultivate unique advantages, strengthen innovation capabilities, and enhance business proficiency to avoid succumbing to homogeneous competition and survive in the market[11].

Finally, concerning financing channels for businesses, during the early stages of trade negotiations, it is essential to clearly define financing items and amounts, maintain records, establish risk regulations, and devise market expectation plans before entering the EU market. In cases where market expectations are less favorable, there is a need to proactively shift financing strategies. For the gradually contracting EU market, a comprehensive consideration of multiple market factors is crucial. Planning for delisting and retaining funds to prevent potential bankruptcy crises is recommended.

#### 4. Conclusion

This article delves into the motivations and legal evolution of the FSR. Through regulatory analysis of the foundational elements and declaration procedures of the Foreign Subsidies Regulation, it elucidates the implementation path and regulatory measures of this legislation. From an international trade perspective, the article provides a market-oriented impact analysis for businesses venturing into Europe after the enactment of the new regulation and suggests viable strategies for the trade process. In general, the foreign subsidies regulation serves as the European Union's regulatory measure for investment and trade from non-EU countries, exhibiting regional and inherent limitations. This study systematically explores its legal changes and solutions, leaving the potential trade impacts and development directions speculative at a macro level. Specific conclusions depend on subsequent legal practices by the European Commission and EU member states.

FSR is a crucial regulation for the entire EU internal market and even the broader European market in the context of globalized economies. The rule's hierarchy suggests that the core provisions of the current WTO "Subsidies and Countervailing Measures Agreement" may be influenced by the EU's newly established subsidy rules, posing significant challenges for non-EU companies. While the EU has matured in rule creation, with universally applicable legislation accepted by other countries, it



takes a proactive stance compared to the EU, the US, and Japan, who have issued multiple statements on subsidies and state-owned enterprises without specific operational rules or effective solutions.

Moreover, this regulation came into effect on July 12, 2023, implementing comprehensive and strict oversight that will result in foreign companies engaging in economic activities directly within the EU internal market or indirectly through subsidiaries. Companies operating in the EU may face parallel declarations and stricter scrutiny under the EU Commission's new foreign subsidy rules, EU or member state merger control regulations, or the EU's foreign direct investment regulations. This undoubtedly increases transaction time, costs, and uncertainty, posing more obstacles for foreign businesses operating in Europe. Therefore, companies dealing with the new subsidy regulations should enhance their understanding of the regulations and the EU legal environment, integrate into the new regulatory framework proactively, and ensure smooth operations in this new environment. Simultaneously, companies should focus on self-innovation, refining management procedures, and optimizing legal structures to establish a solid foundation for their operations in the European market.

## References

- [1] European Parliament. (2022). *Position of the European Parliament adopted at first reading on 10 November 2022 with a view to the adoption of Regulation (EU) 2022/... of the European Parliament and of the Council on foreign subsidies distorting the internal market.*
- [2] Blockx, Jan. (2021, October 5). *The proposal for an EU Regulation on foreign subsidies distorting the internal market: how will it impact corporate mergers and acquisitions?*, SSRN, 2
- [3] Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission. (2023).
- [4] Brussels. (2020, June 17). COM(2020) 253 final WHITE PAPER on leveling the playing field as regards foreign subsidies.
- [5] European Commission. (n.d.). *Trade-investment-addressing-distortions-caused-by-foreign-subsidies*. Retrieved from [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-investment-addressing-distortions-caused-by-foreign-subsidies/F872436\\_zh](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-investment-addressing-distortions-caused-by-foreign-subsidies/F872436_zh)
- [6] Decision of 5 May 2008, declaring a concentration to be compatible with the common market and the EEA Agreement, Case No COMP/M.4956, STX/Aker Yards, C (2008) 1693 final, para. 79.
- [7] Friton, Pascal, Klasse, Max, & Yukins, Christopher R. (2023, March 22). *The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage*. 65 Government Contractor ¶ 63. GWU Legal Studies Research Paper No. 2023-18, GWU Law School Public Law Research Paper No. 2023-18. Available at SSRN: <https://ssrn.com/abstract=4403363>
- [8] Weiß, W. (2022). *Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures*. Zeitschrift Für Europarechtliche Studien, 25(3), 467–476. <https://doi.org/10.5771/1435-439X-2022-3-467>
- [9] Wikipedia. (n.d.). *Directorate-General-for-Competition*. Retrieved from [https://en.wikipedia.org/wiki/Directorate-General\\_for\\_Competition](https://en.wikipedia.org/wiki/Directorate-General_for_Competition)
- [10] China Business News. (2022, December 2). *EU Foreign Government Subsidy Regulations Approved, How Do Chinese Companies Respond?* Retrieved from <https://m.yicai.com/news/101612203.html>
- [11] AllBright Law Offices. (n.d.). <https://www.allbrightlaw.com/CN/10475/2f616f24b1bb63f7.aspx>