

Targeted Response from China's New Energy Vehicle Enterprises

Analysis Based on Article 6 of FSR

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Abstract: The EU expects to reduce the carbon emissions of all new cars sold to zero by 2035, and new cars that need traditional energy will be banned from the market. This provides policy prospects for China's new energy vehicle enterprises to enter Europe, but the introduction of the Foreign Subsidy Regulation has become a new restriction. Article 6 of the FSR stipulates that the European Commission needs to balance various factors when dealing with subsidies. China's new energy vehicle enterprises can start with this article and mitigate relevant legal risks through interpretation based on the interests of the EU. China's new energy vehicle enterprises can reduce legal risks by using exception clauses, stating the rationality of prices and promoting the realization of environmental protection policy objectives of the EU based on technology.

Keywords: China-EU trade, the foreign subsidy regulation, NEV, EU environment protection

1. Introduction

The EU is ambitious in promoting energy transformation [1]. Its latest document is dedicated to the disappearance of all traditional fuel vehicles within the EU. At the same time, China's new energy vehicle enterprises are also committed to obtaining the market opened by this policy. However, the latest EU regulation on subsidies raises new legal risks.

On January 12, 2023, local time, the Foreign Subsidies Regulation ("FSR") [2] came into force. FSR mainly regulates mergers and acquisitions, bids and other economic activities of enterprises that have received foreign government subsidies in the EU market to maintain fair competition in the EU market. According to the content of FSR, private enterprises directly and indirectly subsidized by the government and state-owned enterprises controlled by the government are within the scope of regulation.

Correspondingly, in January 2023, China's national subsidy policy shifted in the field of new energy. The Chinese government is reducing subsidies for enterprises and increasing subsidies for residents' consumption when purchasing cars. Beijing, Chongqing and other cities have issued preferential services to encourage residents to recycle and replace old traditional energy vehicles with new energy vehicles.

Although such a shift exists, it does not mean that Chinese new energy vehicle (“NEV”) enterprises can completely avoid the investigation of subsidies when entering the European market. Subsidies for consumers are still in the framework of subsidies for the new energy industry [3], and China's NEV enterprises have potentially benefited from them.

Article 6 of the FSR stipulates the balance right of the European Commission in dealing with subsidies for foreign enterprises. When such subsidies have more advantages, the European Commission will allow the existence of such subsidies. This also means that Chinese NEV enterprises can reduce FSR-based investigations through adequate explanations.

This paper aims to propose an interpretation framework based on Article 6 of the FSR, which can serve as the response to the European Commission when it starts the investigation, thus reducing the legal risk of enterprises.

2. Semantic and Systematic Interpretation of Article 6 of FSR

Before looking for possible solutions based on this article, this part focuses on how to interpret Article 6.

2.1. Legal Interpretation

According to the literal meaning of Article 6 and the official interpretation from the European Commission, the application premise of Article 6 is to determine the existence of foreign subsidies.

According to Article 11 of the Whereas of the FSR, foreign subsidies are interpreted in an expansive way, and the government financial support received indirectly by enterprises and the government financial support received by the industries in which enterprises are located will be taken into account. Based on this, although the subsidies received by Chinese NEV enterprises have been greatly reduced, the preferential treatment for car buyers has reduced the price of car purchases by users, which means that Chinese enterprises are still within the scope of FSR constraints.

The negative impact mainly refers to foreign subsidies distorting fair competition in the EU market. On how to judge this distortion, Article 4 and Article 5 of the FSR provide some reference standards. The former is to judge whether a subsidy actually improves the competitive position of enterprises in the EU market and enables enterprises to gain advantages; The latter defines the specific categories of subsidies that are considered to distort the market. These two provisions constitute the source of negative effects in Article 6. Unlike the WTO's SCM agreement, market distortion is in essence a broader concept than adverse effect and injury [4], which means that the European Commission has considerable discretion.

In terms of judging the positive effects, FSR adopts a nebulous and principled way to express them. This positive effect is mainly understood from two aspects: the “development of the relevant subsidized economic activity”, and the other is in line with the objectives of the EU's policies and regulations in broader views. In the context of this paper, the industry and policy objectives mentioned above are naturally the NEV industry and its related carbon emission reduction and environmental protection objectives. Therefore, environmental protection and promoting the European energy system to move towards the goal of a cleaner and fewer carbon emissions are also the meaning of the above goals. This is the basis for judging the above positive effects.

However, the problem here is: what is the aforementioned relevant subsidized economic activity? This definition has appeared twice in FSR in the same way, that is, as a reference factor of positive effect, but has not been directly explained.

2.2. “Relevant Subsidized Economic Activity”

From Article 6 itself, there is no doubt that the sales activities of the local NEV enterprises in the EU market are included. As China's NEV enterprises have received financial support from Chinese governments at all levels in their development in recent years, China's NEVs have been regarded as one of the main competitors of EU's NEVs due to their high-cost performance. The lower sales price is the most direct impact of subsidies. Therefore, sales behaviour is included in the economic activity here.

But this concept should be expanded. The concept of economic activities has emerged in FSR many times, and basically points to all the behaviors related to the economic interests of enterprises within the scope of the EU, that is, it has been used in a broad sense. On this basis, "relevant" and "subsidized" should also be widely understood.

This interpretation takes a factual approach. On the one hand, due to China's integrity in the new energy industry chain, Europe needs to rely on China's industry chain to complete its own development in a short time; On the other hand, the strategic independence policy promoted by Europe in recent years aims to establish an independent and complete European industrial chain. Under such a big goal, the interpretation of relevant subsidized economic activity will be future-oriented. When an action is potentially related to the realization of the European strategic autonomy goal, it may be accepted as a kind of relevant subsidized economic activity by the European Commission.

2.3. Phased Summary

From the perspective of legislators, a broad interpretation helps to increase the coverage of legal norms, which is beneficial to the realization of the objectives of FSR.

3. Balance of Legal Interest under Article 6 of FSR

Based on the understanding of Article 6, this part further discusses how to apply Article 6.

The balance of legal interests is the necessary prerequisite for the European Commission to take measures against enterprises that may violate the FSR. This balance includes two aspects. First, it is based on the balance between the positive and negative impacts of Article 6. Second, if the negative impact is greater than the positive impact, the measures taken by the European Commission need to be proportional.

3.1. Balance Between Positive and Negative Effects

The negative effect here is mainly regulated by Articles 4 and 5 of the FSR.

Article 4 stipulates reference factors and exceptions for judging market distortion. When a subsidy increases the competitiveness of foreign enterprises in the EU market, it will be considered as causing market distortion and should be regulated. However, if the subsidy received does not exceed a certain amount, it will not fall into the scope of regulation. Article 5 stipulates the specific forms of subsidies distorting the market, and enterprises are required to make detailed explanations when the above situations occur.

It can be seen that the above provisions on negative effects come from the field of antitrust law and competition law in Europe, and according to the Whereas of the FSR, the introduction of the FSR itself is a supplement to the traditional antitrust law.

The positive effects here are not listed in detail by the FSR. This legislative approach may be based on the following two considerations. On the one hand, foreign subsidies have relatively few benefits for the development of the EU market; On the other hand, it is more necessary to judge the positive impact of foreign subsidies through individual cases. In the process of legislation, there are also

opinions that promoting healthy competition and environmental protection in the EU market are positive effects here [5].

For a detailed explanation of the positive effects, FSR handed it to the Chinese NEV enterprises that need to file a complaint or respond, and the enterprises will put forward reasonable and convincing reasons for balancing by the European Commission.

This also leads to a new sub-question. The way for Chinese NEV enterprises to respond is to emphasize the positive aspects mentioned above, and then affect the process of balancing. This will be discussed in detail in the fourth part of this paper.

3.2. Proportion Between Negative Effects and Measures

Article 22 of the Whereas of the FSR stipulates that the European Commission should take appropriate measures to restrain enterprises that should be punished. This provision reflects the application of the principle of proportionality.

Article 7 of the FSR stipulates the possible measures that the European Commission will take when the negative impact of subsidies received by enterprises is greater than the positive impact, ranging from requiring enterprises to refund subsidies to stripping existing assets of enterprises. There is also a lot of room for these measures, including the amount of money, the proportion of assets and so on, which leave room for the European Commission to deal with the proportionality of subsidies in the future.

However, Chinese NEV enterprises play a small role in this part.

3.3. Phased Summary

Therefore, Chinese NEV enterprises should focus on the positive impact of a subsidy on the EU market when facing the investigation from the FSR in the EU.

4. Targeted Response in Enterprise Compliance

According to Article 21 of the Whereas of the FSR, when it comes to subsidies, Chinese NEV enterprises have the right to explain in detail the positive impact of such subsidies under the EU legal system, and the conclusions made by the European Commission based on this balancing test will affect the results of the treatment of the enterprises.

This part believes that enterprises can prove that their subsidies have positive effects through the following perspectives.

4.1. Possibility of Exemption from Constraints

According to Article 4 (2) of the FSR, small enterprises can try to prove that their subsidies have not exceeded 4 million euros in the past three years. This proof can be achieved in two ways.

One way is to prove that the preferential policies obtained during the establishment and production of enterprises are universal, not specifically for the NEV industry, and try to reduce the concept industry here from the new energy industry to the NEV industry. Since FSR faced the problem of determining indirect subsidies at the beginning of legislation [6], it is still vague, so it is also a reasonable solution to carry out targeted interpretation.; The second is to divide assets through financial means so that newly established enterprises have a cleaner background. Considering the traceability of FSR, this method is more suitable for enterprises with mature technology in the next decade.

4.2. The Rationality of Price after Subsidy

Enterprises can try to prove that the price of NEV does not constitute dumping. For example, enterprises can add data to the compliance report to prove that the gap between the price of Chinese enterprises' products and that of European enterprises under the same positioning of NEV is within a reasonable proportion, which does not constitute an obvious distortion or lead to a large number of customers abandoning the local NEV in Europe. An ambiguity of positioning is another way to demonstrate the rationality of the price of NEV of Chinese enterprises.

On this basis, Chinese NEV enterprises can further prove to the European Commission that the appropriate price does not cause the exclusion of European local NEV enterprises, but, like catfish, makes the European market full of competition and vitality, such as promoting R&D. On this basis, the European Commission will probably not make a decision to punish Chinese NEV enterprises severely.

4.3. Actual Contribution to EU Environmental Protection

In the compliance report, enterprises can also discuss the current situation of energy transformation in Europe.

The legislative plan represented by Fit For 55 sets the EU's climate emission targets until 2030. In terms of energy issues, the EU has not only set strict carbon dioxide emission standards for cars and trucks but also set energy transformation targets throughout the EU. Since the Russia-Ukraine conflict, the EU's lack of traditional energy such as natural gas has added more pressure to this transition. The lack of traditional energy and the lack of mature new energy applications have led to the fact that the EU is facing greater economic pressure. Therefore, if Chinese NEV enterprises can state in the compliance report that they can reduce the pressure on the EU in the above aspects, it will not only increase the favorable impression of the European Commission on the enterprise but also reduce the legal risk from the European Commission.

5. Conclusions

Europe has shown great ambition in environmental protection and the elimination of traditional fuel vehicles, which shows a good prospect for Chinese NEV enterprises to enter the EU market. However, the coming into force of FSR adds burdens.

In this case, Chinese NEV enterprises can state the advantages of their products to the European Commission responsible for investigating as much as possible through Article 6 of the FSR. The Chinese government's subsidies for NEV have shifted to subsidies for consumers, which reduces the pressure on Chinese NEV enterprises to comply with EU laws. The proof of exceptions by non-large enterprises and the statements made by all enterprises on the rationality of prices and the realization of the legal objectives of the EU will help Chinese enterprises to obtain more benefits in the EU market more smoothly.

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