

The European Union's New Anti-subsidy Policy as per the Regulation on Foreign Subsidies (2022)

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Abstract: Although the European Union (EU)'s Regulation on Foreign Subsidies, which took effect in 2023, is based on the WTO's anti-subsidy regulations, it has made significant departures from the same in many respects, reflecting the new trend in the west in the field of anti-subsidy regimes. The prominent manifestation of this is that in terms of territory, the traditional domestic subsidies are extended to overseas subsidies; in terms of fields, the traditional trade in goods has been expanded to investments, government procurement, competition and other fields; in terms of measures, the previous mode of relief of a single countervailing measure has been changed, and a combination of countervailing measures and competition measures have been introduced. Various new changes will have a significant impact on China's economic and trade activities, such as the Belt and Road overseas cooperation and investment projects and China's investment in Europe, and will also make the coping more difficult. This paper will discuss some of the changes introduced by the new anti-subsidy regulations of the EU.

Keywords: Foreign Subsidies, Public Bodies, Declarations of Public Procurement Procedures, Declarations of M&A Transactions

INTRODUCTION

The European Union (EU)'s Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market (hereinafter referred to as the "Regulation on Foreign Subsidies") officially took effect on January 12, 2023.¹ The proposal for this Regulation was released one year

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¹ Foreign Subsidies Regulation: Rules to Ensure Fair and Open EU Markets Enter into Force, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_129 (Last Visited on January 14, 2023).

ago,² and the proposal was based on the White Paper on Levelling the Playing Field as Regards Foreign Subsidies (hereinafter referred to as the “White Paper”) of the European Commission (the Commission).³ It may, thus, be seen that the Regulation, a result of two years of consideration by the EU, gives the Commission the right to review overseas countries’ subsidies provided to their companies engaged in economic activities in Europe. The Regulation applies to economic activities such as mergers and acquisitions (M&As) and government procurements within the European Union.⁴ The Regulation provides the Commission with three review tools: first, reviews based on declarations of M&A transactions involving non-EU government subsidized M&As, with an applicable threshold of EUR 500 million or more of turnover in Europe and EUR 50 million or more of accumulated foreign subsidies received; second, reviews based on declarations of public procurement procedures, involving non-EU government subsidized public procurement tenders, with an applicable threshold of EUR 250 million or more of the estimated value of procurement and at least EUR 4 million of total financial contribution received from each third country; third, post-event intervention reviews, mainly targeting other smaller-scale M&A transactions and public procurement procedures whereby the Commission can initiate its own review and has the right to require special declarations.⁵ The subsidies covered by the Regulation are based on the WTO’s Agreement on Subsidies and Countervailing Measures (the SCM Agreement), but the Regulation has made significant departures from the same in many areas. It includes the following changes: Firstly, in terms of definition, the Regulation has relaxed the criteria for the identification of public bodies, making it

2 Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf (Last Visited on January 10, 2023).

3 White Paper on Levelling the Playing Field as Regards Foreign Subsidies, https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf (Last Visited on January 10, 2023).

4 European Commission, Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, <https://data.consilium.europa.eu/doc/document/PE-46-2022-INIT/en/pdf> (Last Visited on January 8, 2023).

5 Articles 18(3) and 27(2) of the Regulation on Foreign Subsidies.

easier for some subjects (such as state-owned enterprises) to be identified as public bodies; Secondly, in terms of territory, the new rules have extended anti-subsidy measures for domestic entities to overseas entities as well, which has a great impact on China's Belt and Road overseas cooperation investment projects; Thirdly, in terms of fields, it has gone beyond the traditional field of trade in goods and has been extended to investment, finance, industrial policy and other fields; Lastly, in terms of measures, the new rules have broken through the previous framework of a single countervailing measure, and combined anti-subsidy policies with competition law, antitrust review, etc., to build a new combination of measures as a tool to regulate the adverse effects that foreign enterprises receiving subsidies may have on the EU market in various ways. Although it is not made explicit in the Regulation, it is clearly aimed at China's Belt and Road overseas cooperation investment projects.

I. RELAXING THE CRITERIA FOR THE IDENTIFICATION OF PUBLIC BODIES: MAKING IT EASIER FOR SOME SUBJECTS TO BE IDENTIFIED AS PUBLIC BODIES

According to Article 1.1(a)(1) of the SCM Agreement, the subjects providing subsidies include the governments and public bodies.⁶ However, since the SCM Agreement does not give a specific explanation of the concept of public bodies, how to identify public bodies in practice has become the focus of controversy in anti-subsidy disputes. Under the garb of WTO reforms, developed countries represented by the United States, Japan and Europe have gradually expanded the identification scope of "public bodies" by including state-owned enterprises (SOEs) and state-owned commercial banks in the meaning of public bodies on the ground that "enterprises or banks controlled by the state or government have certain connections with the government and its public

⁶ Agreement on Subsidies and Countervailing Measures, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (Last Visited on January 12, 2023).

policies”, which tends to generalize the identification of “public bodies”.⁷ The definition of “public body” under the EU Regulation on Foreign Subsidies is also a broad and expansive one and includes not only the central government and public authorities at all other levels, but also foreign public bodies and any private entity whose actions can be attributed to the third country.⁸ There is no further explanation on what else “can be attributed to the country” under the Regulation on Foreign Subsidies. However, the EU’s previous anti-subsidy investigation has certain reference value. For example, in the case of *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, considering that the South Korean government owned 100% of the equity of the Korea Development Bank and had the obligation to implement the decisions made by the government, the Commission identified the Bank as a public body whose actions can be attributed to the country.⁹ In the anti-subsidy case of *Chinese Rubber Pneumatic Tyres*,¹⁰ the Commission identified China’s state-owned policy banks as the main providers of subsidies, arguing that loans from a syndicate of state-owned policy banks and equity contributions from government investment funds can be attributed to the country.

As for the process of determination of elements/actions which can be attributed to the country, a glimpse can be had from previous relevant cases. In the case of *Brazilian Soya Meal*,¹¹ the Commission’s determination of elements/actions that “can be attributed to the country” focused on the following: first, whether the government had control over the subject, and second, whether the

7 Liu Bin, Gong Fangming and Li Chuanchuan, US, Japan and Europe WTO Subsidy Rules Reform Program and Its Challenges to China, *International Business*, No. 2, 2020, p. 58.

8 Article 3 of the Regulation on Foreign Subsidies.

9 Konstantinos Adamantopoulos, Maria J. Pereyra – Friedrichsen, *EU Anti-subsidy Law and Practice*, 2nd edition, Palladian Law Pub Ltd., 2007, p. 120.

10 Commission Implementing Regulation (EU) 2018/1690 of November 9, 2018, Imposing Definitive Countervailing Duties on Imports of Certain Pneumatic Tyres, New or Retreated, of Rubber, of a Kind Used for Buses or Lorries and with a Load Index Exceeding 121 Originating in the People’s Republic of China and Amending Commission Implementing Regulation (EU) 2018/1579 Imposing a Definitive Anti-dumping Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Certain Pneumatic Tyres, New or Retreated, of Rubber, of a Kind Used for Buses or Lorries, with a Load Index Exceeding 121 Originating in the People’s Republic of China and Repealing Implementing Regulation (EU) 2018/163.

11 Commission Decision of 16 April 1985 Terminating the Anti-subsidy Proceeding Concerning Imports of Soya Meal Originating in Brazil.

subject carried out a public policy objective. Accordingly, the Commission considered that the policy bank involved in the case was a public body that carried out subsidy programs in the name of the government. Whether the government had control over the subject is manifested in that the government appointed key management positions and owned most of the capital of the bank, which all indicated the close relationship between the bank and the government. In the case of *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, the South Korean government owned 100% of the equity of the Korea Development Bank, and the bank played the role of implementing government decisions and, indeed, had the obligation to implement the decisions made by the government. Therefore, the Commission recognized the Bank as a public body whose actions could be attributed to the country.¹² The Regulation on Foreign Subsidies affirms such methods of determination by the European Union and adopts an even more expansive interpretation of the definition of “public bodies.” Not only policy banks, but also state-owned commercial banks and even SOEs are more likely to fall into the category of “public bodies” whose actions can be attributed to the country, and this will have an adverse impact on a series of businesses of the Export-Import Bank of China. The Export-Import Bank of China is dedicated to the development of China’s foreign economy, trade and investment. Taking its business in the Regional Comprehensive Economic Partnership (RCEP) region as an example, by the end of October, 2022, the Export-Import Bank of China had had more than 1,400 projects in RCEP member countries, with a loan balance of RMB 800 billion yuan.¹³ This Bank has supported a large batch of projects in RCEP member countries, including infrastructure construction, people’s livelihood, green development and economic and trade cooperation. The broad identification of public bodies under the Regulation on Foreign Subsidies will significantly increase the risk that projects in China’s overseas

¹² *Supra* n. 11.

¹³ Zhang Wencai, Vice President of the Export-Import Bank of China: By the End of October 2022, the Export-Import Bank of China Had Had More than 1,400 Projects in RCEP Member Countries, with a Loan Balance of RMB 800 Billion Yuan, *Beijing Business Today*, November 22, 2022, <https://baijiahao.baidu.com/s?id=1750205238498316660&wfr=spider&for=pc> (Last Visited on January 8, 2023).

cooperation zones will be subject to “foreign subsidy” investigations as a result of the support they receive from the Export-Import Bank of China.

II. EXPANDING DOMESTIC COUNTERVAILING MEASURES TO OVERSEAS ENTITIES: NEGATIVE IMPACTS ON CHINESE PROJECTS IN BELT AND ROAD COOPERATION ZONES

A. Anti-subsidy Expansion Overseas and Relevant Practices

Pursuant to the description of subsidy in Article 1.1(a) of the SCM Agreement, a subsidy shall be deemed to exist if “there is a financial contribution by a government or any public body within the territory of a Member”.¹⁴ Although this article does not specify that the granting of a financial contribution and the receiving of it must occur in the same country, from the understanding of previous cases, traditional countervailing measures mainly target domestic subsidies. In the case of *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, the Panel questioned whether a body of a different nationality from the recipient could be considered a provider of subsidies under Article 1.1(a) of the SCM Agreement.¹⁵ However, in recent years, there have been investigations in respect of overseas subsidies. For example, in the case of Chinese Glass Fibre Fabrics in June, 2020, the Commission determined that the concessional loans directly provided by China Development Bank and the Export-Import Bank of China to companies in Egypt,¹⁶ and the export credit insurance provided by the China Export & Credit Insurance Corporation to companies in Egypt¹⁷ constituted subsidies involved in the case. The providers and beneficiaries of these subsidies were located in different countries,

¹⁴ *Supra* n. 6.

¹⁵ *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 7.888.

¹⁶ Commission Implementing Regulation (EU) 2020/776 of June 12, 2020, Imposing Definitive Countervailing Duties on Imports of Certain Woven and/or Stitched Glass Fibre Fabrics Originating in the People’s Republic of China and Egypt (“Chinese Glass Fibre Fabrics” for short), para. 726.

¹⁷ The Case of Chinese Glass Fibre Fabrics, paras. 805-809.

and the financial contributions were in the form of direct transfer of funds, such as loans and insurances, which were held to constitute direct “foreign subsidies”. This case went beyond “foreign subsidies” and extended to the parent company in China, arguing that the Egyptian companies indirectly received loans and capital injections from Chinese policy banks through its Chinese parent company.¹⁸ Although the parent company, as the recipient of financial contributions, and the Egyptian subsidiaries, as the beneficiary of subsidy benefits, were two separate legal subjects, the EU still considered this subsidy to be an indirect “foreign subsidy”. The two Egyptian companies in this case were legally incorporated by their Chinese parent company, of which the Asset Supervision and Administration Commission is the ultimate beneficiary. The two companies received financial support from China and used raw materials, equipment and production technology imported from China. The European Union was an export destination for glass fiber fabrics produced by the two companies. The case found that the two companies had received “foreign subsidies” from China.¹⁹ It can, thus, be seen that this case extends subsidies from domestic zones to overseas cooperation zones of China’s Belt and Road Initiative.

B. Codifying the Practice of Expanding Countervailing Measures Overseas

The Regulation on Foreign Subsidies codifies the recent practice of expanding countervailing measures overseas and describes “foreign” subsidies in terms of the third country. According to the general definition of “foreign government subsidies” in Article 3 of the Regulation on Foreign Subsidies, four elements need to be present, namely: (i) the subject providing subsidies is a third country; (ii) the third country directly or indirectly provides a financial contribution; (iii) the financial contribution grants certain benefits to enterprises engaged in economic activities in the EU market; (iv) the benefits are limited in law or fact to a particular enterprise or industry. In the case of Chinese Glass Fibre Fabrics, the EU held that the funds provided by China to Egypt’s glass

¹⁸ The Case of Chinese Glass Fibre Fabrics, paras. 745-747 & 764.

¹⁹ The Case of Chinese Glass Fibre Fabrics, para. 659.

fibre fabrics manufacturers constituted subsidies and imposed countervailing duties, while the Chinese side argued that these were not subsidies under the SCM Agreement and the EU's imposition of countervailing duties was illegal.²⁰ After that, in order to regulate the subsidies provided by foreign countries to specific subjects engaged in economic activities in the EU internal market, the EU published the White Paper which includes the content of "foreign subsidies".²¹ The EU's practice has spillover effects. Some regional agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA) have covered "foreign subsidies", providing that a Contracting Party shall not provide non-commercial assistance to its SOEs and their investments in the territory of another Contracting Party.²² Such subsidies provided by one Contracting Party to enterprises in the territory of another Contracting Party also constitute a kind of "foreign subsidies".

The Regulation on Foreign Subsidies expands countervailing measures from domestic to overseas entities, which will have a great negative impact on China's Belt and Road overseas investment and cooperation projects. The above cases involved Chinese projects in the Egypt Cooperation Zone. According to the Agreement on the Suez Economic and Trade Cooperation Zone in Egypt by and between the Ministry of Commerce of the People's Republic of China and the General Administration of the Arab Egypt Suez Canal Economic Zone signed by China and Egypt in 2016, China and Egypt will cooperate to develop the Suez Economic and Trade Cooperation Zone, with the Egyptian government providing land, labor and tax preference, and China providing necessary financial support to Chinese enterprises in the Suez Economic and Trade Cooperation Zone.²³ The beneficiaries of the Export-Import Bank of China's financing include foreign companies as well as Chinese ones. Taking overseas investment loans as an example, eligible beneficiaries can be either enterprises

20 The Case of Chinese Glass Fibre Fabrics, paras. 656-658.

21 *Supra* n. 5.

22 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Articles 17.6.1(c), 17.6.2(c) & 17.6.3.

23 *Ibid.*

registered in China or Chinese-funded enterprises registered overseas.²⁴ In terms of interest rates and fees, the Service Price List of the Export-Import Bank of China (2021) stipulates different interest rates and fees for different financial products,²⁵ which are mainly divided into three types of price-free services, government-guided prices and market-regulated prices. If only the prices of the financial products are considered, the financial products provided by the Export-Import Bank of China are not preferential financial products. However, considering the nature of the policy bank and other factors related to financing, the financial products provided by the Export-Import Bank of China may still be considered preferential financial products. In the Glass Fibre Fabrics Case, the Commission determined that loans from the Export-Import Bank of China constituted “foreign subsidies”.

III. BREAKING THROUGH THE TRADITIONAL FIELD OF SUBSIDIES AND COUNTERVAILING MEASURES

Traditional countervailing measures are in the nature of relief/corrective measures in the field of trade in goods, while the subsidies under the SCM Agreement take into account the actions of a country’s government of providing special support to the production and sale of domestic goods. In international trade, subsidies are a disguised means of unfair competition for foreign producers of like goods, and will cause damage to the relevant industries, or other legitimate interests, of importers or third parties while distorting trade. Under the provisions of the SCM Agreement, the importing competent authority may decide to impose countervailing duties if it finds that a member’s goods are subsidized and materially injure or threaten to materially injure an established domestic industry, or materially impede the establishment of a domestic industry, or if there is a causal relationship between subsidized imports and injuries to a domestic industry. That said, the Regulation on Foreign Subsidies has

24 For specific information on overseas investment loans, see http://www.eximbank.gov.cn/business/credit/cbinvestment/201806/t20180612_3651.html (Last Visited on January 8, 2022).

25 Service Price List of the Export-Import Bank of China (2021), <http://www.eximbank.gov.cn/services/info/foreserves/fees/202101/P020210930303136285987.pdf> (Last Visited on January 9, 2023).

gone beyond the traditional field of subsidies and expanded from goods to investment, finance, competition, industrial policy and other fields.

A. Expanding to Include the Field of Investment and Break Monopolies

The Regulation on Foreign Subsidies has gone beyond the traditional field of trade in goods. According to the Regulation, overseas enterprises will face a new pre-declaration system when their investment and business activities in Europe involve M&A transactions. Thus, as per the corresponding declaration standards, the enterprises must declare to the Commission any subsidies received involving foreign governments, and a transaction can only be completed after obtaining approval. The pre-declaration system targets M&A transactions, based on the factors taken into account in the Impact Assessment Report issued by the Commission on May 5, 2021, and focuses on investments and anti-monopoly policies that will promote healthy competition, and is conducted from a short as well as long term perspective. In the short term, enterprises that receive subsidies from foreign governments face less pressure in securing finances, while unsubsidized but efficient enterprises may be squeezed out of the M&A process because of difficulties in raising funds. In the long term, the cost advantage for subsidized enterprises will enable them to secure market dominance, leading to overall market concentration.²⁶ These all show the consideration of competition factors. It can be seen that the countervailing reviews are aimed at investment fields such as M&As and greenfield investment. The perspective of the reviews, which mainly focus on competition and anti-monopoly fields rather than the traditional countervailing field of trade in goods, is different from that of traditional countervailing reviews, which focus on damage to industries in the importing country. As far as Chinese investment in Europe is concerned, the introduction of the Regulation on Foreign Subsidies will strengthen the enforcement in this regard due to the Commission's concern about subsidies and Chinese investment in Europe. The declaration and review

26 Commission Staff Working Document Impact Assessment, 2.2 Problem 1: Distortions in Acquisitions, pp. 10-12, https://ec.europa.eu/competition/international/overview/impact_assessment_report.pdf (Last Visited on January 12, 2023).

of all kinds of information will subject Chinese enterprises to greater compliance costs and risks.

B. Expanding to the Fields of Public Procurement and Competition

The reviews of public procurement under the Regulation on Foreign Subsidies have also highlighted concerns about competition factors. The Regulation provides for a new public procurement review mechanism, which stipulates that in the EU public procurement procedures, tenderers receiving foreign subsidies are required to declare in advance if the following circumstances arise: first, if the valuation of the EU public procurement is greater than or equal to EUR 250 million;²⁷ second, if in the three fiscal years prior to the declaration, the operator participating in the tender has cumulatively received foreign financial contributions of up to EUR 4 million or more.²⁸ According to the Regulation, if the corresponding declaration standards are met, participants in EU public procurement projects must declare the foreign government subsidies they have received in the past three years, or declare that they have not received any foreign government subsidies in the past three years, before being awarded a public procurement contract upon approval. “Public procurement” under this declaration system covers tenders for projects, goods and services.²⁹ The reviews targeting declarations of public procurement, in line with the factors considered in the Impact Assessment Report, will be conducted from a competitive point of view. In the short term, an enterprise receiving foreign government subsidies may sacrifice quality and innovation, and win a tender by means of lower prices relying on the cost advantage owing to subsidies. Even if it fails to win the tender, the subsidies have sent wrong signals to the market about the price of material, quality, technology, staff wages, delivery routes and timing. In the long term, it could drive competitors out of the market and raise prices. It could also lead to foreign control of the EU’s public infrastructure.³⁰ It can, thus, be seen that contrary to the usual aim of countervailing measures, the

27 Article 27(2) of the Regulation on Foreign Subsidies.

28 Article 4.2 of the Regulation on Foreign Subsidies.

29 Article 26 of the Regulation on Foreign Subsidies.

30 *Supra* n. 26, 2.3 Problem 2: Distortion in Public Procurement, pp. 17-18.

Regulation mainly reviews public procurement from the perspective of competition.

IV. DIFFERENCES FROM TRADITIONAL COUNTERVAILING MEASURES IN TERMS OF PROCEDURE

Traditionally, anti-subsidy investigations are initiated by domestic producers in the importing country or by the investigating authority. However, an investigation of “foreign subsidies” is mainly initiated by the subject of investigation in the form of voluntary declarations in advance, which is followed by a post-event investigation by the investigating authority.

A. Voluntary Declaration in Advance in Terms of Initiation

After the implementation of the Regulation on Foreign Subsidies, enterprises operating in Europe will face two new types of pre-declaration systems. The first targets M&A transactions: if the corresponding declaration standards are to be met, the enterprises must declare to the Commission all M&A transactions involving foreign government subsidies, and a transaction can only be completed after obtaining approval. The meaning of “M&A transactions” under this declaration system is broad, and includes the merger between two enterprises, one enterprise acquiring control of another enterprise through equity acquisition, asset acquisition, contract or other means, as well as the establishment of joint ventures between several companies.³¹ The second system targets public procurement: if the corresponding declaration standards are met, participants in EU public procurement projects must declare the foreign government subsidies they have received in the past three years, and can be awarded contracts only after obtaining approval. The implementation of the pre-declaration systems under the Regulation on Foreign Subsidies will increase the burden of due diligence on M&A parties. The M&A parties will be required to review all subsidy data received at the group level from any third country in the past

³¹ Article 20 of the Regulation on Foreign Subsidies.

three years. The potential risk of a “foreign subsidy” review and its impact on the transaction timeline will need to be fully considered during the preparation of transaction documents.

B. Post-event Intervening Reviews in Terms of Scope

Where an M&A or public procurement transaction does not meet the voluntary declaration pre-conditions, it cannot be assumed that everything is just fine, because in terms of the scope of review, the Regulation on Foreign Subsidies entitles the Commission to post-event intervening reviews of foreign government subsidies that may have distorted the EU market in the past five years.³² For smaller-scale M&A transactions and public procurement procedures, the Commission can initiate reviews and has the power to request special declarations. In such cases, the Commission may require the relevant subjects to provide all necessary information for review, including information in respect of M&A transactions and green-field investments that do not meet the declaration standards. The post-event review system set up by the Commission under the Regulation on Foreign Subsidies applies retroactively to foreign subsidies received within five years prior to the date of enforcement of the Regulation. The said voluntary declaration review of M&A transactions or public procurements can be conducted independently and simultaneously with the post-event review by the the Commission. Therefore, it is not excluded that the the Commission, in the process of reviewing M&A transaction declarations and public procurement declarations, may initiate post-event intervening reviews at the same time to further examine other foreign government subsidies related to the same M&A and public procurement beyond the three-year scope but within the five-year scope.

C. Focusing on Reviewing Distorting Factors in Terms of Content

Under the Regulation on Foreign Subsidies, the core concern of the Commission in its substantive review is to determine whether “foreign subsidies” may have a distorting effect on the EU market. Distorting effect refers to the

³² Article 44 of the Regulation on Foreign Subsidies.

phenomenon of a foreign subsidy improving the competitive position of the relevant operator which has an actual or potential adverse impact on the EU market. The improvement of competitive position here not only means that the foreign subsidy directly helps the relevant operator to obtain a higher market share, but also that it enables the relevant operator to obtain a stronger competitive advantage than it would have in a situation without the subsidy. In specifically assessing the distorting effect, the Regulation on Foreign Subsidies will consider a comprehensive assessment of a number of factors, including: the amount of the subsidy, the nature of the subsidy, the situation of the operator and the relevant market, the level of economic activity of the operator within the EU market, and the purpose and conditions of the subsidy and its use in the EU market.³³ The assessment of the distorting effect needs to be carried out on a case-by-case basis. In different cases, the same indicators may have different weightage in the EC's reviews.

A “negative list” of several categories of foreign subsidies most likely to have distorting effects have been specified under the Regulation on Foreign Subsidies.³⁴ The list includes the following — a foreign subsidy granted to an ailing enterprise which will likely go out of business in the short or medium term, a guarantee without any limitation as to the amount or the duration, an export financing measure that is not in line with the OECD Arrangement on Officially Supported Export Credits, a foreign subsidy directly facilitating a specific M&A transaction, a foreign subsidy enabling an enterprise to submit an unduly advantageous tender targeting public procurement. Of course, even if the subsidies an enterprise has received fall into the category of subsidies specified in the “negative list”, the enterprise still has the right to defend itself by providing information to prove that the subsidies it has received do not distort competition in the EU market.³⁵ Certainly, the Regulation has specified the minimum amount which does not constitute distortion, i.e., where the total amount of a foreign government subsidy does not exceed EUR 4 million over

³³ Article 4(1) of the Regulation on Foreign Subsidies.

³⁴ Article 5 of the Regulation on Foreign Subsidies.

³⁵ Article 5(2) of the Regulation on Foreign Subsidies.

any consecutive period of three years, that foreign subsidy shall be considered unlikely to have a distorting effect.³⁶ Where the total amount of a foreign government subsidy provided by a single non-EU government to a single operator does not exceed the amount of EUR 200,000 over any consecutive period of three years, that government subsidy shall also not be considered to distort the EU market.³⁷

V. BREAKING THROUGH THE TRADITIONAL FRAMEWORK OF MEASURES

In terms of measures, the Regulation on Foreign Subsidies has broken through the existing framework of subsidies and countervailing duties, and has combined countervailing measures with competition law, anti-monopoly measures, prohibition decisions, etc., so as to build a new framework to regulate foreign enterprises that may receive subsidies which, in turn, may have adverse effects on the EU market in various respects.

A. Establishing a Combination of Measures

Traditional countervailing measures are mainly temporary countervailing duties. The relief mechanism provided under the Regulation on Foreign Subsidies is a combination of measures. After the substantive review, the Commission may make three kinds of decisions: unconditional approval, additional restrictive commitments, and prohibitions. Possible additional restrictive commitment measures can be summarized as follows:³⁸ The first refers to structural relief, including the divestment of certain assets and the dissolution of completed M&As. The second refers to behavioral relief, including 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 way of the foreign subsidies), reducing capacity or market presence, refraining from certain investments, the licensing on fair, reasonable

³⁶ Article 4(2) of the Regulation on Foreign Subsidies.

³⁷ Article 4(3) of the Regulation on Foreign Subsidies; Article 3(2) of De Minimis Regulation, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1407&from=EN> (Last Visited on January 15, 2023).

³⁸ Article 7 of the Regulation on Foreign Subsidies.

and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies, the publication of results of research and development, and the repayment of the foreign government subsidy, including an appropriate interest rate. Regarding public procurement, the award of contracts may be suspended.³⁹ The Commission may impose a fine not exceeding 10 percent of the total turnover of the previous operating year if the enterprise concerned deliberately or negligently fails to declare the subsidies received by it in accordance with the regulations in the public procurement procedures.⁴⁰ If the Commission finds, upon review, that the tenderer has not benefited from foreign subsidies that distort the EU internal market, a no-objection decision shall be made.⁴¹

Of course, traditional countervailing measures still apply, and under Article 10 of the SCM Agreement, any imposition of countervailing duties by WTO Members must be in accordance with Article 10 of the SCM Agreement and Article VI of the GATT 1994. Since the subsidies subject to countervailing duties may eventually be imposed countervailing duties, the relief measures should be taken in accordance with the provisions of Article 10 of the SCM Agreement and Article VI of the GATT 1994 to ensure the certainty and binding nature of the relief measures. Since the SCM Agreement only covers subsidies in the field of trade in goods, the subsidies subject to countervailing duties also only include subsidies in the field of trade in goods. Subsidies in the field of service and investment are not involved. In the case of Chinese Glass Fibre Fabrics involving China, the remedy was “countervailing duties”, which makes the importer liable under the rules for countervailing duties. The difference is that this case extends traditional domestic subsidies to cooperation zones outside China.

B. Introducing Competition Rules in Newly Developed Restrictive Operation Measures

Over the course of the construction of the above combination of measures, the most prominent has been the introduction of “restrictive operation” measures

³⁹ Article 31 of the Regulation on Foreign Subsidies.

⁴⁰ Article 32 of the Regulation on Foreign Subsidies.

⁴¹ Article 11.4 of the Regulation on Foreign Subsidies.

having the color of competition rules. The “restrictive operation” measures require recipients of “foreign subsidies” to correct market distortions caused by subsidies by divesting assets, giving up certain investments, de-concentrating, repaying foreign subsidies, and offering access under fair, reasonable and non-discriminatory conditions to infrastructure.⁴² Once implemented, these measures will have a restrictive effect on the production and business activities of the subsidy recipients. The emergence of restrictive operation measures partly reflects the tendency of anti-subsidy rules to borrow from competition rules. Restrictive operation measures are similar to remedies in competition law, and both can maintain fair competition by regulating the behaviors of related enterprises and restricting operations.⁴³

From the perspective of market disruption, the Regulation on Foreign Subsidies focuses on three types of situations. First, the market disruption of EU corporate M&As; second, the disruption of the EU’s public procurement market; third, other disruptions to the EU’s internal market. The last one is covered in the miscellaneous clause of the Regulation on Foreign Subsidies, which gives the investigating authorities the right to conduct post-event reviews. If there is evidence that certain sectors, certain types of economic activities, or foreign subsidies based on certain subsidy instruments, may distort the internal market, the Commission can conduct investigations into certain sectors, certain types of economic activities or the use of certain subsidy instruments. In the course of such market investigations, the Commission may request the enterprises concerned to provide necessary information. The Commission may also require the Member States concerned or relevant third countries to provide information.⁴⁴ The said investigations will scrutinize market distortions and competitive positions, where countervailing duties alone as coping measures are not sufficient to eliminate the effects, and hence competition-type measures are introduced under the Regulation on Foreign Subsidies. It can, thus, be seen that restrictive operation rules focus on competitive positions and are analyzed and

42 Article 7(3) of the Regulation on Foreign Subsidies.

43 Sun Jin and Li Shengli, *Study on Competition Law*, Wuhan University Press, 2011, pp. 257-264.

44 Article 34 of the Regulation on Foreign Subsidies.

considered mainly from the perspectives of the amount of foreign subsidies, the nature of foreign subsidies, the sizes of enterprises and the relevant markets or sectors, the level and evolution of enterprises' economic activities in the EU internal market, as well as the purpose and additional conditions of grant of foreign subsidies and their use in the EU internal market.⁴⁵ The purpose and objective of traditional subsidy rules, such as those in the SCM Agreement, is to eliminate the adverse effects caused by subsidies, but the aim of maintaining fair competition is not directly mentioned. In contrast, the purpose of restrictive operation rules is more similar to the objectives of competition law.

VI. CONCLUSION

The Regulation on Foreign Subsidies will have a significant impact on investments and transactions in Europe. Chinese enterprises planning to invest and participate in public procurement and other activities in Europe, in their efforts to invest and conduct M&As in the EU, will be subject to pre-conditions of making prior declarations of government subsidies received, which will create more obstacles for them to invest in Europe. Companies tendering for EU public procurement projects worth more than EUR 250 million, besides their declaration obligations, will also face stricter reviews, which may undermine their tendering competitiveness. From the above analysis, it can be seen that the Regulation on Foreign Subsidies reflects the new trend of the EU in respect of countervailing measures. The most prominent manifestation is that in terms of territory, countervailing measures have been expanded and made applicable to domestic as well as overseas enterprises, and the new Regulation will have a negative impact on Chinese government subsidies provided in China's foreign cooperation zones. The new trend is obviously aimed at restricting the Belt and Road "going out" investment subsidies. In terms of measures, it has broken through the previous framework of countervailing duties, and constructs a new framework of countervailing and competition law, anti-monopoly measures,

⁴⁵ Article 4 of the Regulation on Foreign Subsidies.

etc., in order to regulate foreign enterprises receiving subsidies. Driven by the West's agenda to curtail China's potential, the passing of the Regulation on Foreign Subsidies has helped start a trend. For example, while the EU issued the Regulation on Foreign Subsidies and other competition measures, the United States also declared its resolution to follow the EU in developing anti-trust measures by way of its own rules and regulations.⁴⁶ The CPTPP also basically copied relevant rules and provisions on "non-commercial aid" provided under the USMCA. The Regulation on Foreign Subsidies will undoubtedly increase the transaction costs, particularly the costs of information collection, investigation, declaration and time, as well as increase transaction uncertainty. Subjects planning M&A activities in the EU will need more time to complete due diligence processes. On the one hand, the said trend is a breakthrough in the area of traditional countervailing regulations; on the other hand, it also reflects the abuse of countervailing measures. If it is allowed to spread further, it will definitely harm the development of international subsidy rules. Therefore, we should not only actively make use of the existing multilateral economic and trade rules to limit the abuse of the existing rules on "foreign subsidies", but also promote the formation of new international economic and trade rules to limit the further spread of ill-intentioned rules on "transnational subsidies". China should take the initiative to apply to the multilateral system of the WTO. On the one hand, relevant disputes can be referred to the WTO dispute settlement mechanism; on the other hand, it is advisable to use the trade policy review mechanism to review relevant regulations, and urge relevant countries to modify the existing unreasonable regulations on "foreign subsidies" so as to maintain the healthy operation of the multilateral system of international trade.

46 US-China Economic and Security Review Commission, 2020, Report to Congress of the US-China Economic and Security Review Commission, p. 22; Lawyers: Portman, Brown-backed Bill Could Bring Big Changes to AD/CVD Laws, August. 22, 2021, <https://insidetrade.com/daily-news/lawyers-portman-brown-backed-bill-could-bring-big-changes-adcvt-laws>; Portman, Brown Urge Administration to Work with Congress to Develop New Trade Remedy Tools, May, 2018, <https://www.portman.senate.gov/newsroom/press-releases/portman-brown-urge-administration-work-congress-develop-new-trade-remedy> (Last Visited on January 12, 2023).