THE EU FOREIGN SUBSIDIES REGULATION: GREEN SUBSIDIES TREADING THE LINE BETWEEN THE FSR, STATE AID, AND WTO LAW

BY LILIANE GAM & ARGYRIOS PAPAEFTHYMIOU[1]

1 Liliane Gam is a Counsel at Linklaters LLP in Brussels and Argyrios Papaefthymiou is an Associate at Linklaters LLP in London. The views expressed here are the authors' alone and should not be attributed to Linklaters LLP.

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This article provides an overview of the ongoing regulatory 'competition' between major global economies to boost renewable energy through public resources, i.e. through subsidies. Against this backdrop, the article focuses on the 'extraterritorial' perspective of these initiatives (i.e. efforts to counter within one jurisdiction the effects of subsidies stemming from another), in order to probe how these competing approaches will play out under the international trade rules that are established on a multilateral level under the WTO. The article examines the new EU Foreign Subsidies Regulation and the brewing green subsidies war – specifically the likely implications of the new EU regime on the U.S. Inflation Reduction Act's green subsidies – as a case study on the likely interaction of these different legal disciplines at the international level.

I. INTRODUCTION

On December 23, 2022, the European Union adopted the Foreign Subsidies Regulation ("FSR"),[2] which introduces mandatory notification requirements for concentrations and public tenders involving financial contributions from non-EU countries (if certain thresholds are met). The FSR, which entered into force on January 12, 2023, also gives the European Commission ("EC") the power to investigate all other market situations (including M&A and public tenders falling below the thresholds) where there may have been financial contributions from non-EU countries (*ex-officio* investigations).

While as of July 12, 2023 the FSR will start to apply and the EC will be able to commence *ex officio* investigations, the notification obligation for M&A deals and public procurement will only be effective as of October 12, 2023.

It is timely that the adoption of the FSR comes at a time when subsidies in general, and subsidies to boost green energy transition in particular, are on the rise. This new regulatory tool sits within a broader context of EU nervousness about falling behind the other global economies' efforts to support their own national champions through subsidies, with EU countries unable to strike back due to the combined effect of a strict competition policy and an adherence to international trade rules. There was uproar in France and Germany in 2019 when the EC blocked the proposed acquisition of French Alstom by German industrial powerhouse Siemens.[3] At the core of this criticism was the perception that, without consolidating their power, the two European railway market leaders would soon collapse under intense competitive pressure from CRRC, a Chinese State-controlled supplier of trains, which benefits from intense subsidization by the Chinese State.

In response to this criticism, EU Competition Commissioner, Margrethe Vestager turned the focus on the trade dimension, noting that, although competition rules in the EU will continue to be enforced on a merits-based, case-by-case basis, "*we must also ensure a global level playing field for European companies. Control of subsidies is weaker outside the EU […]*."[4] The FSR is the EU's response to the perceived need to neutralize distortive foreign subsidies at their source, thereby ensuring a level playing field for all the companies operating in the EU.

This article discusses the broader context under which the FSR was adopted as well as its policy drivers (including the ongoing green subsidies race) (II), before providing an overview of its key provisions, while highlighting their similarities/differences with State aid and international trade rules (III). The article then examines the U.S. Inflation Reduction Act's ("IRA") subsidies for electric vehicles ("EVs"), as a test study on the potential interaction between the FSR and the World Trade Organization ("WTO") Agreement on Subsidies and Countervailing Measures ("SCM Agreement") (IV).

II. THE POLICY DRIVERS BEHIND THE ADOPTION OF THE FSR

A. Green Subsidies: A Global Free-for-all

With an enhanced focus on energy transition, various measures have been deployed by governments around the world to promote green energy.

For instance, China, which is the world's largest producer of renewable energy, has promoted the growth of its renewable energy sector, by offering billions of dollars in subsidies to domestic manufacturing. A report by the Center for Strategic & International Studies ("CSIS") estimates that China spent the equivalent of 1.73 percent of its 2019 Gross Domestic Product (approx. $248 billion or €233 billion) in various 'industrial policy' instruments such as direct subsidies (e.g. grants), tax incentives, below-market credits, and state investment funds.[5] While China is outspending most economies, other countries have followed suit.

To counter China's dominance in green capacity, in August 2022, the United States passed the IRA, which provides an economic pack-

2 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022, L 330/1–45.

3 Leigh Thomas, *France, Germany step up pressure over Alstom-Siemens deal*, Reuters (Jan. 21, 2019), https://www.reuters.com/article/us-alstom-m-a-siemens-idUSKCN1PF0PK.

4 Press Release, EC, Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland (Feb. 6, 2019), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_889.

5 Gerard DiPippo, Ilaria Mazzocco & Scott Kennedy, *Red Ink – Estimating Chinese Industrial Policy Spending in Comparative Perspective*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (May 2022), https://www.csis.org/analysis/red-ink-estimating-chinese-industrial-policy-spending-comparative-perspective.

age of $369 billion for American households, in the form of grants, loans and tax credits heavily geared towards green and renewable energy.[6]

The IRA provides for a consumer tax credit of $7,500 for EV purchases, but only subject to the condition that the EV is assembled in North America.

The EU is not to be outdone in this regard. The EU's "Green Deal Industrial Plan for the Net-Zero Age" announced by the EC on February 1, 2023 provides for an expansion of EU Member States' flexibility to support the deployment of renewable energy. This will take place through the Temporary Crisis and Transition Framework ("TCTF"), which allows for more lax State aid policy for "*accelerating the rollout of renewable energy and energy storage, and schemes for the decarbonisation of industrial production processes*" until the end of 2025.[7] The TCTF has been accompanied by the latest revisions to the EU General Block Exemption Regulation ("GBER")[8] to expand EU Member States' regulatory space for introducing support measures focusing on the "*transition to climate neutrality and to a net-zero industry.*" Notably, this new Temporary Framework includes the option for EU countries to implement "*investment support schemes for production of strategic net-zero technologies, including the possibility of granting higher aid to match the aid received for similar projects by competitors located outside the EU while ensuring the proportionality of such aid.*"[9] The purported rationale behind this is to address the "*real risk of investments being diverted away from Europe*" by allowing Member States to provide either the amount of support a beneficiary could receive for an equivalent investment in that alternative location ("matching aid"), or the amount needed to incentivize the company to locate the investment in the EEA (the so-called "funding gap") – whichever is the lowest.

Although there are a number of add-on requirements that need to be fulfilled for this type of aid to be lawfully granted by Member States, it is still notable to see the EU introduce this type of "matching clause" into the toolkit for clean energy State aid. Mix all of the above, and what you get is what looks like the ingredients for a green subsidies war.

While subsidies can play a positive role in supporting the transition to a more sustainable economy by incentivizing the development of clean energy sources, they may also confer an unfair advantage to their beneficiaries over foreign companies, leading to market distortions and potential harm to industries and employment in other countries.

B. The Deficiency of International Trade Rules to Tackle (Unfair) Subsidies

The EU regime is a global singularity since it is the only regime that lays down a quasi-presumption of unlawfulness for State subsidies ("State aid" in EU parlance).

Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that State aid is in principle incompatible with the common market (and therefore illegal) where the granting of aid involves the transfer of State resources, entails an economic advantage, distorts, or threatens to distort competition by selectively favoring certain beneficiaries and affects trade between Member States. The concept of State aid is very broad and covers any economic advantage to the recipient company granted through State resources. The principle of incompatibility of State aid with the common market is not absolute. Article 107(2)-(3) TFEU contains a number of exemptions under which State aid may be considered acceptable by the EC. Article 108(3) TFEU imposes a standstill obligation on EU Member States preventing them from putting into effect proposed aid measures until the EC has reviewed (following their notification) and approved them (save for the measures falling under the GBER).

Yet, these stringent rules only apply to subsidies which originate from EU Member States. Subsidies by non-EU Member States, which can distort the EU internal market just as much as "home-grown" subsidies, are not tackled by State aid rules.[10]

From the EU's standpoint, this leaves a "regulatory gap" for cases of subsidization of economic activity within the EU, by third (non-EU) countries, which are not fully addressable by trade defense instruments. As noted in Recital 5 of the FSR: "*Trade defence instruments enable the Commission to act when subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned.*"

6 *Inflation Reduction Act of 2022*, Pub. L. No. 117-169, 136 Stat. 1818.

7 Press Release, EC, State aid: Commission adopts Temporary Crisis and Transition Framework to further support transition towards net-zero economy (Mar. 9, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1563.

8 The GBER provides a "safe harbor" for categories of State aid whose generally non-market-distortive nature and significative positive externalities render them "benign" enough to escape the general mandatory notification and prior approval requirements.

9 *Communication from the European Commission, A Green Industrial Plan for the Net-Zero Age*, EC (Feb. 1, 2023), https://commission.europa.eu/system/files/2023-02/COM_2023_62_2_EN_ACT_A%20Green%20Deal%20Industrial%20Plan%20for%20the%20Net-Zero%20Age.pdf.

10 *White Paper on levelling the playing field as regards foreign subsidies*, EC, COM(2020) 253 final (June 17, 2020).

The international trade rules that come into play for subsidies are contained in the SCM Agreement, which established detailed rules and procedures for investigating and addressing subsidies that cause market distortions and harm other WTO members. Article 1 of the SCM Agreement defines a subsidy as a financial contribution by a government or any public body within the territory of a WTO member that confers a benefit on a specific enterprise or industry. This includes direct subsidies such as grants, loans, and equity infusions, as well as indirect subsidies such as tax incentives and government procurement policies that favor domestic suppliers. The SCM Agreement distinguishes between prohibited subsidies, which are generally considered to have the greatest potential for causing market distortions (namely those contingent on exports and on the use of domestic over imported components), and actionable subsidies, which are subject to countervailing measures if they cause material injury to domestic industries in other WTO members.

The EU has criticized the effectiveness of the WTO rules on subsidies, highlighting the following limitations:

· The SCM Agreement does not apply to subsidies related to the provision of services. Within the WTO legal framework, trade in services is covered exclusively by the General Agreement on Trade in Services ("GATS"), which does not provide for controls on services subsidies.[11] This means that subsidies for services can go unregulated, potentially distorting competition;

· The EC construes Article 1 of the SCM Agreement as excluding from its scope subsidies granted by WTO members to beneficiaries located in a third country. This view provided the backdrop for the EC's imposition of countervailing duties on Egyptian importers in 2020, for subsidies which they had received from China and Chinese State-owned companies.[12] This is an issue which has not received sufficient clarity from the WTO dispute settlement body, which is the primary institution competent to interpret the WTO agreements. There is a serious argument to be made – and it has been made by some – that Article 1 of the SCM Agreement does in fact provide a remedial recourse against the WTO member granting the subsidy, even if the financial contribution itself is provided to recipients outside the granting member's territory;[13]

· The effectiveness of the rules on subsidies is hindered by the lack of transparency, as most WTO members do not provide adequate notifications of the subsidies they provide, or do not disclose the full extent of the subsidies; and

· The dispute settlement process can be slow and costly, and some WTO members have been known to ignore rulings or drag out the process in order to delay compliance. The WTO Appellate Body's inability to hear appeals (since its membership has fallen below the required minimum of three members needed to hear an appeal) has led to a backlog of cases, which has in turn resulted in a paralysis of the dispute resolution process.

This perceived regulatory gap, compounded by the inefficacy of trade rules on subsidies, led to the adoption of the FSR.

III. THE FSR, EU STATE AID LAW, AND WTO LAW: COMMONALITIES AND DIVERGENCES

The core concepts of the FSR are heavily influenced by the equivalent notions under State aid and WTO rules. The FSR also draws upon trade law in that it makes use of the experience gained in EU trade remedy investigations (anti-subsidy countervailing measures).

One key concept from which the EC will derive its jurisdiction is the notion of "financial contribution." The *ex ante* notification obligation for concentrations will apply where the EU turnover of the target (for an acquisition), the joint venture, or one of the merging parties (for a merger) is at least €500 million and the companies involved have received more than €50 million (in aggregate) of non-EU financial contributions in the three years preceding the signing of the deal, the announcement of the public bid or the acquisition of a controlling interest (Article 20(3) FSR). As for public tenders, the notification obligation will be triggered where the estimated value of the contract is at least €250 million and the companies involved have been granted non-EU financial contributions from third countries of at least €4 million (in aggregate) per third country (Article 28(1) FSR).

The notion of financial contribution is extremely broad and is capable of catching a variety of financial payments or advantages conferred

11 Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, 20 WORLD TRADE REVIEW, 343 – 366 (2021).

12 Marios Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, 5 JOURNAL OF WORLD TRADE 56, 797 (2022); *Commission Implementing Regulation (EU) 2020/776*, EC (June 12, 2020); *Commission Implementing Regulation 2020/870*, EC (June 24, 2020).

13 Crochet & Gustafsson, *supra* note 11, at 349.

by foreign governments. This includes various types of transfer of funds, foregoing of revenue that is otherwise due, but also all dealings that an entity has with governments / public entities outside the EU (e.g. the provision or purchase of goods or services). To be foreign, a financial contribution has to be provided by a third country and this not only involves governments and public authorities, but it can involve any foreign public entity or even private entities whose actions can be attributed to a non-EU country.

This wide reach will be burdensome for companies meeting the filing thresholds, as they would need to disclose to the EC each non-EU financial contribution they have received which is equal to or in excess of €200,000, provided that the total amount of financial contributions per third country and per year is equal to or in excess of €4 million.[14] Companies would need to submit a filing, regardless of whether the non-EU financial contributions have distortive effects in the EU or whether they come from friendly countries, although this is likely to be relevant for the assessment of their potential distortive effects.

It is only after a filing has been submitted that the EC will assess whether the financial contributions received constitute distortive "foreign subsidies" by conducting a balancing exercise, taking into account the objectives pursued by the measures (e.g. whether they cover investment or operating costs), their amount, their beneficiaries (e.g. large or small companies) and whether they align with EU public policy objectives (e.g. net zero targets). The FSR provides that foreign subsidies not exceeding €4 million over a consecutive period of three years are unlikely to distort the internal market (Article 4(2) FSR), and that financial contributions which do not exceed the amount of *de minimis* aid as per State aid rules (i.e. not more than €200,000 per third country over any period of three fiscal years) are non-distortive subsidies (Article 4(3) FSR). On the other hand, certain categories of subsidies are highlighted in the FSR as most likely to be distortive, namely: (i) subsidies to a failing company (absent any restructuring plan); (ii) unlimited guarantees; (iii) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (iv) subsidies directly facilitating a concentration; and (v) subsidies enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract (Article 5(1) FSR).

As for the notion of "foreign subsidy" itself, it mirrors the notion of State aid, as well as the notion of subsidies under the SCA Agreement, as the EC acknowledged itself in its 2020 White Paper, which laid the groundwork for the FSR: "*the definition of a subsidy according to the SCM Agreement by and large coincides with the definition of a subsidy* [in the FSR]."[15]

Apart for the "financial contribution" element, the definition of "foreign subsidy" under Article 3 of the FSR requires the (i) conferral of a benefit (ii) on a *de jure* or *de facto* basis to a limited number of undertakings. WTO and State aid law practitioners will recognize the economic advantage and selectivity requirements. The relevant case law interpretations are certainly going to affect the interpretation of those terms.

Under the FSR, the legal onus to make the relevant subsidy filing falls on the undertaking. This notification requirement comes with an additional burden, as it entails the submission of numerous internal documents as indicated in the Draft IR. For example, the Draft IR provides that the notifying parties would need to submit analyses, reports, studies surveys, presentations and any comparable documents from the grantor and the recipient of the foreign financial contribution discussing the purpose and economic rationale of the foreign financial contribution as well as its possible positive effects.[16] For concentrations, the notifying parties would need to provide detailed information regarding the bidding process, including how many other bidders were involved, how many expressed interest, who withdrew and at what stage.[17] As for the financial contributions that are likely to be distortive (as noted above), the notifying parties would need to provide copies of all the supporting official documents relating to the financial contributions granted in the three years preceding the notification.[18]

Failure to adequately understand and comply with the new FSR requirements does not come cheap, with companies facing the threat of significant fines for failing to appropriately notify the subsidy. In case of breach of the standstill and/or notification obligations, the EC can impose fines of up to 10 percent of the company's group annual turnover (Article 26(3) FSR). In addition, if companies intentionally or negligently provide incorrect, misleading, or incomplete information, the EC can impose fines of up to 1 percent of their aggregate annual turnover or periodic penalty payments of up to 5 percent of the average daily aggregate turnover to ensure compliance with the FSR (Articles 17(2)-(3) and 26(2) FSR).

This is another departure from both State aid law – where in principle the EU Member State that wants to grant the aid must make the relevant notification – as well as WTO law, which works ex post by laying out dispute settlement procedures through which a WTO Member can

14 Draft FSR Implementing Regulation ("Draft IR"), Annex 1, Article 5.1.

15 EC White Paper, *supra* note 10, at Annex 1: Definition of Foreign Subsidy.

16 Draft IR, Annex 1, Article 8.1.

17 Draft IR, Annex 1, Article 6.1.

18 Draft IR, Annex 1, Article 8.1.

challenge another Member's subsidies as WTO-incompatible, although the countervailing measures (in the form of increased duties) apply to the imported goods that have benefited from government subsidies.

IV. THE INTERPLAY BETWEEN THE FSR AND THE SCM AGREEMENT: THE IRA AS A CASE STUDY

With the FSR now in place, a key question is how this new regulatory tool will interact with the EU's obligations under international trade law.

Article 44(9) of the FSR provides that no action shall be taken under it which would amount to a specific action against a subsidy falling within the scope of the SCM Agreement.[19] This provision mirrors Article 32.1 of the SCM Agreement, which prescribes that "*no specific action against a subsidy of another* [WTO] *Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement*." This means that subsidies falling within the scope of the SCM Agreement are shielded from actions taken in application of the FSR. While companies will still be under the obligation to disclose the non-EU subsidies they received to the EC, the EC will not be able to use to FSR to implement corrective measures. If the subsidies are not subject to the SCM Agreement, the EC will be able to apply the FSR fully.

The debate on exactly which subsidies fall under the SCM Agreement, and which do not, is far from settled. The SCM Agreement only covers trade in goods and as such does not apply to subsidies related to the provision of services. This means that the FSR is applicable to foreign subsidies relating to trade in services in the EU. For trade in goods, the issue of the geographic location of the beneficiary of non-EU subsidies has been addressed above: given that the rationale of the FSR creation was largely based on the EU perception that the SCM Agreement does not cover subsidies where the granting authority and the beneficiary are not in the same territory, we can safely assume that the EC will apply the FSR on concentrations, public procurement bids or other investments (under the catch-all *ex officio* tool) wh ich involve undertakings that have benefited from goods subsidies by third (non-EU) countries.

By way of example, if we look at the IRA specifically, the question remains as to whether the EC will be able to review the financial contributions granted under it, in application of the FSR. The IRA is arguably a textbook case of a subsidy that is prohibited under Article 3 of SCM Agreement, seeing as its granting is "*contingent [. . .] upon the use of domestic over imported goods*" (Article 3(1)(b) SCM Agreement). It is also most likely in breach of the United States' national treatment obligation under Article III:4 of the General Agreement on Tariffs and Trade, as it accords to domestically assembled EVs treatment more favorable than that accorded to 'like' imported EVs.

On March 23, 2023, the EU Competition Commissioner answered a question from a Member of the European Parliament regarding the potential applicability of (and the EC's intention to apply) the FSR to the IRA by highlighting three key points: first, the IRA's *prima facie* scope of application is confined to "*companies engaging in an economic activity in the US*" and would therefore be assessed on a case-by-case basis in the context of the FSR. Second, the SCM Agreement is still applicable to "*the manufacture, production or export of goods granted by non-EU countries*," and it remains an option "*to launch a dispute settlement procedure at the World Trade Organization*." Third, the EC retains the option to impose countervailing duties under the EU's anti-subsidy Regulation[20] if it finds that "*an EU industry is harmed by imports of a product that are subsidised coming from a non-EU country*."[21]

For trade in goods, it therefore seems that while companies have a disclosure obligation, if the measures fall under the SCM Agreement, the EC will only be able to impose countervailing measures in the form of duties. The question in the IRA context then becomes: would the application of the FSR to the provision of services that may have *indirectly* benefited from the IRA's subsidies – which in principle target goods – be considered a "*specific action against a subsidy*" in the meaning of Articles 44(9) of the FSR and 32(1) of the SCM Agreement, so as to render such application WTO-incompatible? An indicative example, in the context of the EV subsidies, could be the provision of aftermarket services for such EVs in the EU. Would such services be captured by the FSR, even though the "original" subsidy for the assembly of the EV will fall under the SCM Agreement and will thus likely be excluded from the FSR's scope by virtue of Article 44(9) of the FSR?

19 In accordance with Article 32.1 of the SCM Agreement.

20 *Regulation 2016/1037 on protection against subsidized imports from countries not members of the European Union*, OJ L 176/55.

21 Answer given by Executive Vice-President Vestager on behalf of the European Commission (Mar. 23, 2023), https://www.europarl.europa.eu/doceo/document/P-9-2023-000441-ASW_EN.html.

WTO case law would likely argue against such an interpretation. The WTO Appellate Body has made clear that Article 32(1) of the SCM Agreement refers to actions against a subsidy as such, not against the imported products in particular.[22] So an application of the FSR against the provision of ancillary services of a producer who has benefited from the IRA subsidies, would likely be considered a *"specific action against a subsidy."*

In view of the above, a company benefiting from the IRA's EV tax credit subsidy may find some relief in Article 44(9) of the FSR, since the SCM Agreement takes precedence over the FSR in terms of applicability to the IRA's subsidies. Thus, the only recourse against these subsidies is likely to be the WTO dispute settlement system, which functions at the State-to-State level. Such a dispute may or may not end up before a WTO panel depending on political considerations. For example, it is unclear what role the U.S-.EU Task Force on the IRA,[23] which was established in October 2022 as a discussion forum for the U.S. and the EU to deal with various contentious IRA-related issues arising in their bilateral relation, would have on the prospects of the EU bringing a WTO complaint against the U.S. on the basis of the IRA EV tax credit policy's incompatibility with the SCM Agreement. Even if such a dispute would eventually end up being adjudicated at the WTO, these processes take relatively long to complete, and this unavoidably creates significant legal uncertainty for the affected companies.

In any event, with considerable uncertainty lingering as to the precise delineation between subsidies that fall under the SCM Agreement and those that do not, the arguably most prudent approach for companies benefiting under the IRA's subsidies and are planning concentrations or public procurement bids in the EU would be to engage in some informal pre-notification discussions with the EC. The Draft IR provides for (and encourages companies to make use of) voluntary pre-notification contacts with the EC, to help determine whether a foreign subsidy assessment is involved in the context of a concentration.

The question remains as to how the *ex officio* tool (the third pillar of the FSR alongside the concentrations and public procurement tools) could interact with the IRA subsidies. Even if there is no concentration or public procurement bid on the horizon, if an IRA EV subsidy beneficiary has significant economic activities in the EU (e.g. large EV export volumes), they should be prepared for potential requests for information from the EC.

22 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US-Offset Act (Byrd Amendment))*, WT/DS217/AB/R; WT/DS234/AB/R (Jan. 16, 2003), at para. 251.

23 Press Release, EC, Launch of the EU-U.S. Task Force on the Inflation Reduction Act (Oct. 26, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6402.