

Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination

François-Charles Lapr v te and Wanjie Lin*

Table of Contents

A. Introduction	444
I. A mixed heritage – key sources of inspiration for the FSR’s procedural rules	444
1. International trade law	444
2. State aid law	446
3. Antitrust law	448
II. The principle of non-discrimination and the FSR’s procedure	450
B. Conclusion	452

Abstract

The FSR intends to fill a regulatory gap between trade law, State aid and antitrust law, and achieves this through a unique blend of familiar concepts and rules, drawing from the rich legal traditions of the EU State aid, antitrust, and trade defense regimes. This legal inheritance can be observed throughout the FSR’s procedural framework, including the structure of its review procedures, the Commission’s investigative powers, and the rights of defence of undertakings. Given its legacy, there will be a continuing dialogue between the FSR and these other regulatory systems, possibly with the FSR exerting its own influence, such as on due process rights under the State aid regime.

Keywords: Foreign Subsidies Regulation, Trade Defence, State Aid, Antitrust, Regulation 1/2003, Procedure, National Treatment, GATT, GATS, ASCM, Rights of Defence, Remedies, Investigation, Facts Available

* Attorneys, Cleary Gottlieb Steen & Hamilton LLP. This paper only reflects the views of the authors and does not represent or engage the position of Cleary Gottlieb Steen & Hamilton LLP or its clients. Emails: fclaprevote@cgsh.com; wlin@cgsh.com.

A. Introduction

On June 30, 2022, the Council, the Parliament and the European Commission reached political agreement on the EU’s Foreign Subsidies Regulation (the “FSR”), which is now expected to be adopted and published in the fall of 2022, to enter into force by mid-2023.¹ This text is the first attempt by the EU to comprehensively address a perceived regulatory gap in the handling of potentially distortive subsidies granted by third countries to undertakings active on the single market, beyond the usual trade defence instruments that allow additional customs duties (so-called “countervailing measures”) to be imposed on subsidized imports. To the authors’ best knowledge, it is also the first attempt of its kind in the world and is likely to set a regulatory precedent that will have broad implications for the EU’s relations with the external world, and on international trade generally.

Since the perceived regulatory gap sits between the fields of trade law, antitrust law and State aid law, the Regulation has been carefully designed to fit within the interstices of this complex legal tapestry. As a result, it is a unique instrument that weaves together concepts and rules from the EU’s State aid, antitrust and trade defence regimes (this latter regime being subject to and heavily based on WTO law, in particular the ASCM)² in order to achieve its legislative objective while ensuring conformity with the EU’s international obligations and minimizing the compliance burden on businesses.

This mixed heritage of the FSR is also apparent with respect to its procedural rules, which draw inspiration from the three fields of law mentioned above. This article outlines the main elements of this mixed heritage (1.) and focuses on a key objective and legal constraint that might have inspired the legislator in this respect, the principle of non-discrimination (2).

I. A mixed heritage – key sources of inspiration for the FSR’s procedural rules

1. International trade law

The FSR concerns the EU’s external trade relations, as it imposes disciplines on investments and other commercial activities in the EU that are affected by foreign subsidies. As such, the primary legal basis for the FSR is Article 207 of the Treaty on the Functioning of the European Union (TFEU). Article 207 TFEU empowers the European Commission to define the European Union’s common commercial policy, which encompasses “the conclusion of tariff and trade agreements relating to trade in goods and services”, “foreign direct investment” and “measures to protect trade such as those to be taken in the event of dumping or subsidies”. The other le-

1 This article is based on the latest provisional public version of the legislation at the time of writing: the provisional agreement submitted to the Committee on International Trade of the European Parliament dated July 11, 2022.

2 Agreement on Subsidies and Countervailing Measures.

gal basis for the FSR is Article 114 TFEU, which provides for measures to harmonize national rules with the object of the establishment or functioning of the internal market.

The FSR's international dimension has key implications for the regulation's design and its procedural rules. First, the FSR applies to private undertakings active in the EU, as the EU cannot directly intervene in the decisions of sovereign states to grant subsidies. For the same reason, the FSR only applies to foreign subsidies that have been granted, and not to proposed subsidy grants. This is in contrast to the EU's regime to regulate State aid by its Member States, which involves a bilateral process between the European Commission and Member States to secure *ex ante* Commission approval of new aid (under block exemptions or on a case-by-case basis).

Second, the FSR allows the Commission to make decisions based on the "facts available" if undertakings or the foreign State do not cooperate (Article 14). This means the Commission will disregard incorrect or misleading information and make its determination based on other information, such as that submitted by complainants. This is a rule employed in EU trade defense investigations into dumping or unfair subsidies,³ which are based on the WTO Anti-Dumping Agreement and ASCM.⁴ Similar to anti-subsidy trade defence investigations, FSR investigations are likely to require substantial information about foreign State financial contributions but the investigated undertakings may not be able or willing to provide this information, notwithstanding the Commission's powers to impose sanctions. Moreover, the foreign State – unlike EU Member States in State aid investigations – is not bound by a duty of sincere cooperation under Article 4(3) of the Treaty on European Union. While Article 14 of the FSR is inspired by the trade defence procedure, there are some notable differences to the "facts available" provisions in the EU's trade defence instruments. Article 14(3) allows the Commission to assume that a financial contribution "benefits" the undertaking (*i.e.*, that it is not obtained under normal market conditions) if it is controlled by the State that provided it, whereas no such assumption applies when assessing a benefit in anti-subsidy procedures. The EU's trade defence instruments also include various guardrails on the "facts available" approach, in conformity with the WTO agreements, which are not reflected in Article 14. These include an obligation on the Commission to verify its information against independent sources, and to provide a party with the opportunity to supplement information before it is rejected.

3 Article 18 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (Anti-Dumping Regulation) and Article 28 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (Anti-Subsidies Regulation).

4 Article 6.8 and Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article 12.7 of the ASCM.

Third, the FSR recognizes the Commission may require information from foreign governments or information found on their territory. As in the EU's trade defence procedures, the Commission is empowered to request information from third countries (Article 11(5)) and to carry out inspections abroad (Article 13). The FSR also allows the Commission to conduct interviews in a third country, provided that country consents (Article 11(6)), which is a new power not explicitly provided for in the EU's Anti-Dumping and Anti-Subsidies Regulations.

Finally, Article 40 of the FSR confirms that the Commission may investigate the same subsidy under both the FSR and the EU's Anti-Subsidies Regulation. An undertaking that has received foreign subsidies could thus be subject to parallel investigations, with potentially overlapping information requests and remedies. Such cases will likely raise questions about the interaction of these procedures and the application of the *non bis in idem* principle, including whether an undertaking could be penalized twice for the same benefit and whether there is a need to ensure the procedures are conducted in a coordinated manner and within a proximate time-frame.⁵ Article 40(7) also provides that the Commission shall not take any action that would amount to a specific action against a subsidy within the meaning of Article 32.1 of the ASCM. This is meant to comply with the ASCM, which prohibits "specific actions" (discriminatory, trade-restrictive actions) if they are not permitted under the ASCM or the GATT 1994.⁶ It remains to be seen, however, whether this general provision will be sufficient to secure the EU's compliance with its WTO obligations, or if individual measures taken under the FSR could be found to be "specific actions".

The Commission also recognized there could be overlaps between the FSR and the EU's free trade agreements, which seek to address subsidies through bilateral consultations or domestic State aid rules.⁷ While the White Paper suggested the Commission might have first recourse to these treaty mechanisms if it was appropriate, the FSR simply provides that the Commission could consider bilateral consultations if there are repeated instances of distortive foreign subsidies or enforcement actions involving the same third country.⁸

2. State aid law

The EU's State aid regime, which regulates subsidies provided by Member States, provides the essential inspiration and justification for the FSR. The FSR's stated purpose is to ensure a level playing field in the EU single market by addressing the distortive effect of certain subsidies – regardless of whether such subsidies are pro-

5 ECJ, Case C-117/20, *Bpost v Autorit  belge de la concurrence*, ECLI:EU:C:2022:202.

6 General Agreement on Tariffs and Trade 1994.

7 *European Commission*, White Paper on levelling the playing field as regards foreign subsidies, June 17, 2020, pp. 43 f.

8 FSR, Recital 37(c).

vided by EU Member States or third countries.⁹ As Vice-President Vestager describes: “One of the oldest rules we have is that we don’t allow subsidies which harm fair competition. For more than sixty years, our State aid rules have made sure that aid from European governments doesn’t undermine fair competition on our market. But until now, companies have been free to use foreign subsidies to buy up businesses here in Europe. [...] This new regulation – together with our State aid rules – will make us the first trading bloc in the world with tools against harmful subsidies, from both inside the Single Market and from Non-EU countries.” The fact that the Regulation “is based on principles similar to the EU State aid rules” is seen as minimizing the risk of retaliatory measures by third countries.¹⁰ Indeed, the Commission considers that “retaliatory measures would likely not be in line with WTO rules as they would be discriminatory if a third country does not have in place an equivalent system for the control of domestic subsidies.”¹¹

The FSR is therefore intended to mirror the State aid regime. This is evident in the substantive concepts employed in the Regulation, notably the definition of a foreign subsidy and the *de minimis* threshold for subsidies that will not be considered distortive. State aid jurisprudence is expected to form the basis for interpreting the FSR’s provisions, including on questions such as when a financial contribution would be viewed as conferring a benefit or be attributable to a public authority so as to constitute a subsidy, and the conditions for identifying competitive distortions and positive effects.

The FSR’s procedural rules also reflect the influence of State aid procedure, as the two phases of the Commission’s investigations are referred to as the “preliminary review” stage and the “in-depth investigation” stage. However, other considerations have been equally, if not more, important to the FSR’s procedural framework. To minimize the compliance burden on businesses, the FSR’s review procedure for concentrations is modelled on the EU merger control regime, and the timelines for the public procurement procedure are short.¹² As the Commission is able to impose sanctions on undertakings following its investigation or for non-cooperation, the FSR also provides for a number of procedural safeguards in line with the rights of defence. Indeed, a beneficiary of subsidies will have more extensive procedural rights under the FSR as compared to those in State aid procedures, as discussed in the next section.

9 FSR, Article 1(1) and Recital 5. See also *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, May 5, 2021 (Proposal for the FSR), p.48 (“The general objective of this initiative is to restore the level playing field on the internal market so that it is not distorted by foreign subsidies”).

10 Proposal for the FSR, p. 56.

11 Ibid.

12 The Commission has 20 working days for its preliminary review, and 110 working days for an in-depth review, with the possibility of extensions (FSR, Article 29). This is shorter than the timelines initially proposed by the Commission, which were 60 days and 200 days, respectively.

A key reason to ensure conformity between the FSR and the EU State aid regime, both substantively and procedurally, is to comply with the principle of “non-discrimination”. The FSR’s preparatory documents allude to this principle as relevant for compliance with the EU’s international obligations. Section 2 of this article examines the nature of this obligation and its interaction with the FSR’s procedural rules.

3. Antitrust law

EU antitrust law provides the procedural template for several aspects of the FSR: the structure and time limits of the merger module, the Commission’s powers to impose fines and remedies, and the procedural rights afforded to undertakings that have received the subsidy.

The FSR establishes a notification-based investigative tool for the Commission to review acquisitions involving target companies with at least EUR 500 million in EU turnover and foreign financial contributions exceeding EUR 50 million. This tool is modelled on the EU’s merger control regime. Both regimes involve an *ex ante* mandatory obligation to notify the Commission of transactions meeting the thresholds, and both procedures are suspensory: the transaction may not be implemented until the Commission has completed its review or the deadlines have expired. The procedures have the same structure, which includes an informal pre-notification phase, a formal Phase 1 review period of 25 working days, and an in-depth Phase 2 review period of 90 working days. These procedural alignments are intended to reduce the administrative burden for businesses and avoid delays. It remains to be seen if there will be substantial synergies in practice, since these formal review periods only begin once the Commission determines that it has received sufficient information, and the information required will be different for the FSR and merger control procedures.

As in antitrust, merger control and State aid proceedings, the FSR enables the Commission to fine undertakings if they fail to cooperate with the investigation.¹³ The level of fines in the FSR correspond to those available in antitrust proceedings under Regulation 1/2003, merger control proceedings under Regulation 139/2004, and in State aid proceedings under Regulation 2015/1589.¹⁴ The Commission can fine undertakings up to 1% of their annual turnover if they provide incorrect, incomplete, or misleading information; up to 5% of their average daily turnover for each day they fail to comply with their obligations; and up to 10% for failing to notify relevant mergers or public tenders, or for breaching a Commission decision on

13 FSR, Article 15, Article 25, and Article 32.

14 Article 23 and Article 24 of Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Article 14 and Article 15 of Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings; and Article 8 of Council Regulation (EU) 2015/1589 of July 13, 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

commitments, interim measures, or redressive measures (this last power has no counterpart in State aid proceedings, since these Commission decisions are addressed to Member States and not undertakings).

Under Article 6 of the FSR, the Commission has sweeping powers to impose redressive measures to remedy distortions caused by foreign subsidies. These include structural and behavioral undertakings, such as divestments, capacity reductions, access commitments, and governance structure changes. Article 6 is similar in breadth to the Commission's enforcement powers in antitrust investigations under Regulation 1/2003, which permit the Commission to "impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end". This is different from the State aid regime where the Commission may only prohibit the aid or order its repayment by way of remedies.¹⁵ In practice, the two regimes may not be so far apart considering that the Commission can also impose remedies in the form of commitments or conditions to its decisions approving State aid, and that such commitments can be very detailed and take the form of restructuring plans. However, these "remedies" are formally imposed on the granting Member State and not the undertaking that received the aid.

The rights of the defence are recognized in antitrust and merger control proceedings, as in all proceedings in which sanctions, especially fines or penalty payments, may be imposed.¹⁶ The nature and scope of these rights have been elaborated in the case law of the Court of Justice of the European Union ("CJEU") and they are now partially codified in Regulation 1/2003 and Regulation 139/2004. This is unlike the situation for State aid proceedings, where the undertakings that are (potential) beneficiaries of the aid are considered mere interested parties and have no formal right to be heard or access to the Commission's file.¹⁷

The FSR necessarily institutes due process rights for undertakings that have received foreign subsidies, as they may be targeted with potential fines and sanctions. Article 38 of the FSR sets out the procedural guarantees for undertakings that are under investigation, and it is modelled on the corresponding provisions of Regulation 1/2003 (Article 27) and Regulation 139/2004 (Article 18). It provides that undertakings shall have "the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision", that the Commission may only base its decision on such grounds, and that the undertaking shall have access to the file, subject to the need to protect business secrets and other confidential information. The Commission's guidance documents on procedural best practices in antitrust and merger proceedings could, therefore, also be relevant to the interpreta-

15 Council Regulation (EU) 2015/1589 of July 13, 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 9(5) and Article 16.

16 See e.g., ECJ, Case C-3/06 P, *Groupe Danone v Commission*, ECLI:EU:C:2007:88, para. 68.

17 See e.g., ECJ, Case T-613/97, *Ufex v Commission*, ECLI:EU:T:2000:304, paras. 85–90.

tion of Article 38.¹⁸ In time, the Commission may also develop specific guidance for FSR procedures (such as for information obtained from third country governments, which are rarely implicated in antitrust and merger proceedings), as contemplated under Article 42 of the FSR.

Under Article 38 of the FSR, recipients of third country subsidies would generally benefit from a much richer slate of procedural rights compared to (potential) recipients of aid from Member States under the Commission's State aid review procedures, as summarized in the table below. This could strengthen calls for State aid beneficiaries to have greater due process rights. In such event, it would seem that after having drawn inspiration from the State aid, trade and antitrust regimes, the FSR might itself prompt procedural changes in these areas, or at least to the State aid system.

	Investigations under the Foreign Subsidies Regulation	Investigations under the State aid regime
Right to be informed that the Commission is investigating State aid in the preliminary phase	Yes	No
Right to submit comments	Yes	Only in the formal procedure (the in-depth investigation stage)
Right of access to the file	Yes	No
Right to be informed of the grounds for a decision	Yes	No
Right to appeal to the hearing officer	Yes	No
Right to an oral hearing	Yes	No

II. The principle of non-discrimination and the FSR's procedure

The principle of "non-discrimination" is fundamental to the FSR's spirit and design. The FSR aims to achieve a "level playing field" by eliminating distortions from subsidies – regardless of their country of origin. This implies it should accord equivalent treatment to foreign subsidies and EU State aid. To do otherwise would be contrary to this aim and create more distortions in the EU single market.

18 These include, in particular, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU and the Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

The principle of “non-discrimination” is also a basic rule of the WTO legal order, of which the EU and individual EU Member States are members, as well as of a number of regional and bilateral trade agreements to which the EU and its Member States are parties. The “non-discrimination” principle encompasses two rules, the most-favored-nation obligation (which prohibits discrimination among different foreign exporters or services suppliers) and the national treatment obligation, which is most relevant to the present discussion. The national treatment obligation requires WTO members to treat foreign and local products and services sold on their market equally.

The national treatment obligation is contained in various WTO agreements, including the GATT and the GATS.¹⁹ It takes different forms depending on the trade restriction involved and its application to the FSR will require careful analysis. In its public statements on the FSR, the Commission has generally affirmed its commitment to the principle of non-discrimination and stated that the FSR “will apply in an objective and non-discriminatory manner to all undertakings active in the EU irrespective of their ownership and thus [...] will be consistent with the EU’s international obligations”.²⁰ And indeed the FSR is ostensibly “origin-neutral”: its rules apply to all undertakings receiving third country financial contributions, regardless of their country of incorporation or ownership.

However, the FSR could still infringe the national treatment principle if its procedure gives rise to less favorable conditions for imported goods, services or service suppliers, compared to those originating in the EU.²¹ This might be the case if the FSR gives rise to *de facto* discrimination against third country goods, services or suppliers, for instance if (i) recipients of third country subsidies tend to be non-EU undertakings and (ii) the FSR procedures are demonstrably less favorable than like procedures aimed at investigating “domestic” EU subsidies. The EU’s State aid regime would be the clear benchmark here, since it governs the conditions aid provided by Member States governments, even though it does not cover subsidies granted by the EU directly (a point that in itself could give rise to claims of discrimination under the FSR).

Assuming the national treatment obligation applies, the differences between the enforcement procedures of the FSR and the State aid regimes would not necessarily be inconsistent with this obligation. As mentioned above, it might even be claimed that in light of the limited due process rights granted to beneficiaries in State aid proceedings, the FSR procedures might be more favorable to beneficiaries of foreign

19 See e.g. the General Agreement on Tariffs and Trade 1947 (GATT), Article III and the General Agreement on Trade in Services (GATS), Article XVII.

20 Proposal for the FSR, p. 57.

21 The national treatment obligation applies not only to substantive rules, but also to procedural laws, regulations and requirements (see a precedent under the GATT, *United States – Section 337 Tariff Act* (1989)). This case concerned a US procedure targeting imports of products alleged to infringe US patents (Section 337) that was held to be less favourable than the procedure for allegedly infringing US-origin products, because it had stricter time limits, did not allow respondents to raise counterclaims, and provided for broader remedies, among others.

subsidies. But on a number of specific points, the FSR could nevertheless be challenged:

- First, recipients of third country subsidies are subject to *ex ante* notification obligations for mergers and public tenders (unlike recipients of State aid) and must bear the cost of responding to the Commission’s investigation (whereas this burden is formally borne by the Member State in State aid proceedings). However, it may be said that these specificities only reflect the fact that, under the FSR, the Commission intervenes in foreign subsidies after they are granted. This *ex post* system is arguably more favorable than the *ex ante* screening of the EU’s State aid system, since recipients can skip the cost and delays of obtaining approval before benefiting from government support.
- Second, as discussed above, recipients of third country subsidies are potentially subject to more severe and wide-ranging remedies compared to recipients of State aid, where the only formal “remedies” are the recovery of the aid provided or a prohibition of the grant of aid. There could therefore be less favorable treatment owing to the more onerous remedies under the FSR, unless remedies (including the cost of compliance) are capped at the value of the subsidy received. Consistent with this, Article 6(6) of the FSR obliges the Commission to accept repayment of the subsidy as a remedy if it can be satisfied that such repayment can be properly effected and monitored. In merger and public procurement procedures, this may also require the Commission to weigh the value of the commercial opportunity (the acquisition or joint venture, or the contract award) against the value of the subsidy before issuing a prohibition. The Commission’s decision-making practice and future guidelines on remedies will play an important role to ensure that the non-discrimination principle is properly applied.

B. Conclusion

The FSR is a ground-breaking legislative endeavour to regulate offshore subsidies that affect competition in the EU’s internal market. It seeks to fill a regulatory gap left by trade law, State aid and antitrust law and is deliberately inspired by the concepts and rules of these regimes. This legal inheritance can be observed throughout the FSR’s procedural framework, including the structure of its review procedures, the Commission’s investigative powers, and the rights of defense of undertakings. Given its legacy, there will be a continuing dialogue between the FSR and these other regulatory systems, possibly with the FSR exerting its own influence, such as on due process rights under the State aid regime.