THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

THOMSON REUTERS®

Vol. 65, No. 11 March 22, 2023

Focus

¶ 63

FEATURE COMMENT: The EU Foreign Subsidies Regulation: Implications For Public Procurement And Some Collateral Damage

Subsidies to companies have long been in the realm of national politics, apart from some constraints under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures and bilateral agreements between states. In the EU, however, there are uniform rules (known as "State aid" rules) on subsidies for all Member States, which are intended to ensure that competition in the internal market is not distorted, especially in favor of companies from Member States with deeper pockets, such as Germany and France. To counter (perceived) disadvantages of EU companies when competing with companies from non-EU countries not subject to the EU subsidies regime, the EU has adopted the Foreign Subsidies Regulation (FSR), which entered into force in January 2023. The measures provided for in this regulation, which will for the most part begin to apply from Oct. 12, 2023, pose significant challenges for companies from outside the EU (such as the U.S. or China) that hope to compete in procurement procedures or mergers and acquisitions (M&A) involving the EU.

This article focuses on the FSR's requirements for contractors from abroad that will compete in EU Member States for covered procurements, including defense procurements. As the discussion below reflects, contractors that intend to compete in EU Member State procurements should begin preparing immediately for the FSR's requirements regarding government support those contractors may receive outside the European Union. See, e.g., Michael Bowsher, Pascal Friton, Paul Lalonde, Andrea Sundstrand & Christopher Yukins, *International Procurement Developments in 2022: New Perspectives in Global Procurement,* 2023 Gov't Contracts Year in Review Briefs 4, Subpart II.A.

Background—The fight against market-distorting effects of subsidies has been the subject of international efforts for a long time. Within the WTO, attempts were made with the General Agreement on Tariffs and Trade (GATT) (particularly Articles VI and XVI) and—later—with the Agreement on Subsidies and Countervailing Measures (ASCM). See, e.g., William Alan Reinsch & Sparsha Janardhan, *Crossing the Line: Transnational Subsidy* (CSIS Jan. 14, 2022) (discussing anti-subsidies rules and EU FSR), *www.csis.org/analysis/crossing-line-transnational-subsidy*; William Alan Reinsch & Kaycee Ikeonu, *Transatlantic Treatment of Transnational Subsidies* (CSIS July 22, 2022) (comparing U.S. and EU efforts to address transnational subsidies), *www.csis.org/analysis/transatlantic-treatment-transnational-subsidies*; S.1187, Eliminating Global Market Distortions To Protect American Jobs Act of 2021, 117th Cong., 1st Sess. (2021) (bill would have amended U.S. law to respond to market distortions by addressing cross-border subsidies).

Although the ASCM fixed some of the GATT's major problems, including the lack of a fixed terminology regarding subsidies, and thus took an important step towards making WTO subsidy rules effective, its actual impact remains modest. In particular, the WTO agreements' scope is limited to goods, while a major part of economic activity in the industrialized countries now falls

within the services sector. There are several other reasons for the ineffectiveness, including the lack of incentives for the actual notification of subsidies by states and the fact that subsidies are often granted through state-owned enterprises, which have not been covered so far, or at least not far enough. See, e.g., *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the USA and the EU in January 2020* ("The current rules of the ASCM do not provide for any incentive for WTO Members to properly notify their subsidies. Therefore, the state-of-play of subsidies notifications is dismal."), *www.ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union*; Victor Crochet & Vineet Hegde, *China's "Going Global" Policy: Transnational Production Subsidies Under the WTO SCM*, 2020 J. Int'l Econ. L. 1, 14–15 (discussing limitations under ASCM in curbing transnational subsidies).

The gaps in supranational regulation of subsidies coincide with a situation in which government subsidization of economic activities has grown increasingly divergent around the world. Specifically, after the end of the Cold War, countries with state-controlled economies (particularly from the Middle East and Southeast Asia, above all China) became more and more entangled in international trade. See Jan Blockx, *The Proposal for an EU Regulation on Foreign Subsidies Distorting the Internal Market. How Will It Impact Corporate Mergers and Acquisitions?*, at 2 (draft Sept. 30, 2021), www.ssrn.com/abstract=3936624; *Chinese Companies Concerned About EU's Foreign Subsidies Regulation*, Global Times, March 9, 2023, 2023 WLNR 8548251 ("Experts said that [the FSR] is mainly targeting Chinese companies, given the strong competitiveness of Chinese companies in some major fields and the lingering political bias of the EU against Chinese companies."). At the same time, measures to further industrial policy through public subsidies have grown more common in the U.S. and other industrialized nations outside the EU. See, e.g., Yukins & Green, Feature Comment: "The Inflation Reduction Act: A New Role For Green Procurement?," 64 GC ¶ 260 (discussing U.S. subsidies for green industries).

This issue was taken up by the EU in 2019, when the European Council asked the Member States and the other EU institutions to take action on safeguarding fair competition. In this context, it was first mentioned that the European Commission should "*identify ... how to fill gaps in EU law in order to address fully the distortive effects of foreign state ownership and state-aid financing in the Single Market.*" See General Secretariat of the European Council, *Conclusions of Council Meeting on 21st and 22nd of March 2019*, CO EUR 1, CONCL 1, at 2 (2019) (emphasis added), *www.data.consilium.europa.eu/doc/document/ST-1-2019-INIT/en/pdf*.

The background is that subsidies granted by EU Member States are governed by EU law, in particular Articles 107–109 of the Treaty on the Functioning of the European Union (TFEU) (the so-called EU State aid rules). See, e.g., Michelle Cini, *State Aid Control from a Political Science Perspective* ("In order to assure the credibility of EU State aid control the Commission seeks to avoid political conflicts about individual decisions. For decades, the Commission has sought to commit itself to strict State aid control by developing an increasingly complex system of soft and hard rules."), in Leigh Hancher & Juan J. Piernas López (eds.), *Research Handbook on European State Aid Law* 1 (Edward Elgar 2021).

In principle, these rules prohibit EU Member States from granting support to companies or economic areas through State aid. State aid is allowed only if certain conditions are fulfilled and if that aid has been approved by the European Commission prior to its granting. The underlying rationale is that too much freedom for the individual Member States in State aid policy is not compatible with the basic idea of the EU single market. See, e.g., European Commission, *State Aid* ("A company that receives government support gains an advantage over its competitors. Therefore [Article 107 of] the Treaty [on the Functioning of the European Union] generally prohibits State aid unless it is justified by reasons of general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that State aid complies with EU rules."), *competition-policy.ec.europa.eu/state-aid_en*. However, the rules under EU State aid law apply only to subsidies granted by EU Member States and not to subsidies from third countries

(such as, potentially, benefits under the U.S.' Inflation Reduction Act). The EU State aid law regime thus creates a level playing field between companies located in the EU, but not vis-à-vis companies from third countries.

The Commission therefore developed a new regulatory instrument to mitigate this imbalance. After presenting its first ideas in a White Paper on Foreign Subsidies in June 2020, the Commission formally proposed a draft law in May 2021. After less than one and a half years of legislative procedure, the FSR was adopted on Nov. 28, 2022, and entered into force on Jan. 12, 2023. See *Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market,* PE/46/2022/REV/1, OJ L 330, 23.12.2022, p. 1–45; European Commission, *Foreign Subsidies Regulation, competition-policy.ec.europa.eu/foreign-subsidies-regulation_en*; Christopher Yukins, *State Aid, Protectionism and Public Procurement: An Uneasy New World Order* (forthcoming, Eur. St. Aid L.Q. (Lexxion 2023)). The fast pace—from an EU perspective—of the legislative processes demonstrates the importance of the issue in the EU and underlines the EU's willingness to limit distortions of the internal market by subsidies from third countries (so-called foreign subsidies).

Under the FSR, the Commission is provided with three tools to take action against foreign subsidies:

- an ex ante tool to investigate concentrations (e.g., M&A);
- an ex ante tool to investigate tenders in public procurement procedures; and,
- an ex officio tool under which the Commission can start investigations on its own initiative in any market situation.

As noted, this article focuses mainly on the effects of the FSR on public procurement procedures, though the FSR's provisions regarding concentrations (e.g., mergers) are relevant and addressed as well.

The Ex Ante Tool in Public Procurement Procedures—At the core of the FSR are the ex ante tools that give the Commission broad competences in the context of mergers and public procurement procedures. In this context, an "ex ante" tool is one used to address legal issues *before* a covered transaction or procurement is finalized.

Mergers were chosen as one of the two areas where the ex ante tool is used because although the EU possesses trade defense instruments for goods to counter third-country subsidized imports, financial flows and investments supported by subsidies have so far fallen through the cracks. See FSR, Recital 5. The reason for choosing public procurement is, on the one hand, the great economic importance of procurement markets (about 14 percent of total EU GDP) and, on the other hand, the fact that public procurement is financed by taxpayers' funds, which (in the Commission's view) makes it particularly important that foreign governmental subsidies not distort EU public procurement markets. See FSR, Recital 40.

While EU procurement markets have so far been in principle very open, particularly to the participation of tenderers from third countries, see, e.g., Lucian Cernat & Zornitsa Kutlina-Dimitrova, CEPS Policy Inside No 2020-04, *Public Procurement: How open is the European Union to US firms and beyond?* (2020), *www.ceps.eu/wp-content/uploads/2020/03/PI2020-04_EU-procurement-openness.pdf*; European Commission, *Study on the Measurement of Cross-border Penetration in the EU Public Procurement Market* (June 7, 2021), *single-market-economy.ec.europa.eu/publications/study-measurement-cross-border-penetration-eu-public-procurement-market_en*, the FSR's ex ante tool provides the Commission with the power to investigate foreign subsidies in ongoing procurement procedures and, if considered necessary, to prohibit the award of the contract to beneficiaries of foreign subsidies. As observers have noted, this could reduce competition in public procurements in the European Union. See, e.g., Albert Sanchez-Graells, University of Bristol Law School, Feedback Ref. F2326817 (May 20, 2021), *ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-investment-addressing-distortions-caused-by-foreign-subsidies/F2326817_en*.

The Notification Obligation: To allow the Commission to investigate foreign subsidies in ongoing public procurement procedures, the FSR uses a notification obligation. Bidders are required to notify foreign financial contributions to the purchasing contracting authority if certain thresholds are met. See FSR, Article 29(1). The notification obligation applies, per Article 28(1), if:

- the procurement falls within the scope of the EU procurement directives (though the defense directive (2009/81/EC) is excluded, defense procurements are subject to the Commission's "ex officio" review, discussed below);
- the estimated total value of the contract is at least EUR 250 million; and,
- the bidder, its group or main subcontractors/suppliers were granted a covered foreign financial contribution of at least EUR 4 million in the last three years by a country outside the European Union.

The covered financial contributions—which can trigger the regulation—are at least in principle quite broad. Covered financial contributions can include (among other forms of government support) loans, capital injections or tax exemptions granted by a third country. See FSR, Article 3(2). In particular, the covered contributions are not limited to payments or supports that lend the receiving firm a market advantage. Therefore, in theory even government contracts awarded in competitive procurement procedures may qualify as a notifiable financial contribution. However, the recitals read that a government "support" is required for a financial contribution to exist. See FSR, Recital 12 ("The concept of financial contribution includes a broad range of support measures which are not limited to monetary transfers, for instance, granting special or exclusive rights to an undertaking without receiving adequate remuneration in line with normal market conditions."). It remains to be seen whether the Commission will provide further guidance on this, possibly narrowing the scope of government payments and supports that will trigger review.

The regulation's scope of application is further broadened by the fact that not only financial contributions received by the bidder itself are to be considered, but also those received by other companies of the same group as well by the firm's main subcontractors and suppliers. See FSR, Articles 28(1)(b), 29(5)–(6). A subcontractor or supplier qualifies as "*main*" (i) if its economic share in the contract is more than 20 percent of the tender value, or (ii) if its participation ensures key elements of the contract performance. See FSR, Article 29(5). The second criterion (participation which "ensures key elements" of performance) is particularly vague and is expected to result in considerable uncertainty as to which subcontractors/suppliers must be taken into account.

However, the scope of the notification obligation is more clearly limited by the regulatory trigger based on the contract value (i.e., minimum of EUR 250 million). Between 2015 and 2021, reportedly only 936 procurement procedures were carried out in the EU with an estimated contract value of EUR 250 million or more. See Ondrej Blažo, *A New Regime on Protection of Public Procurement Markets Against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?,* 21 Int'l & Comp. L. Rev. 138, 161 Table 1 (2022). This comparatively low number reflects the Commission's goal to use the threshold as a filter to single out procurement procedures that may have a significant impact on the level playing field for EU companies.

This does not, however, exclude the application of the FSR to smaller procurement procedures. In these cases, the Commission has the ex officio tool at its disposal (see below). Furthermore, in "*all other cases*" bidders are required to attach a self-declaration to their bid, potentially to include a list of foreign financial contributions received. FSR, Article 29(1) ("In all other cases, economic operators shall list in a declaration all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable ...."). It is not entirely clear what is required from bidders. Interpreted broadly, a declaration could be required not only if foreign financial contributions are below EUR 4 million, but also in procurement procedures in which the contract value is lower than EUR 250 million. An EU-based competitor could argue that the FSR should be read in this broad way in an effort to persuade the Commission to take action against a vendor from outside the European Union. In this respect, it is to be hoped that further clarification will be provided before the notification and declaration obligations enter into force in October 2023. See, e.g., Bruno Lebrun & Candice Lecharlier, *Foreign Subsidies Regulation: Key Dates,* 2023 WLNR 7905946 (March 3, 2023).

The result of a broad interpretation would be that companies participating in a public procurement procedure in the EU would in any case be obliged to check internally for the existence of third-country financial contributions and to disclose them

to the contracting authority. If the threshold values were exceeded, that would happen in the form of a notification or, under the broad interpretation discussed above, if the threshold values were not met, the financial contributions received might need to be listed in the referenced self-declaration.

Both notification and declaration must be made using a specific form. The Commission has published a draft of the form as part of a proposal for an Implementing Regulation on the FSR which is currently under public consultation. See European Commission, *Distortive Foreign Subsidies—Procedural Rules for Assessing Them, ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them_en*. According to the draft form for notifications, firms which trigger reporting requirements under the regulation are obliged to provide—inter alia—a detailed list of foreign financial contributions (including detailed elaborations on the main elements and characteristics of the financial contributions), explanations on any possible positive effects of the subsidy (especially on the development of the relevant subsidized economic activity on the internal market, but also on broader positive effects in relation to relevant policy objectives of the EU), as well as on whether there are any elements to justify that the tender is not unduly advantageous due to the financial contributions received. While the notification form is also to be used for declarations, notably Section 7 of the proposed form indicates that bidders which do *not* trigger notification requirements are not required to provide detailed explanations on the financial contributions received and any potential effects on the bid or the internal market; instead, they could submit a declaration which states that none "of the participating notifying party(ies) have received foreign financial contributions notifiable under Chapter 4 of Regulation (EU) 2022/2560," which covers public procurements.

Missing notifications or declarations could be made up for within 10 working days upon request by the contracting authority or the Commission. If the failure is not corrected in due time, the tender can be excluded. FSR, Article 29(3)–(4).

Review and Investigation: Upon receipt of a notification, the Commission assesses whether the financial contribution under examination constitutes a foreign subsidy and whether it distorts the internal market. Notifications are subject to a preliminary review and—if necessary—followed by an in-depth investigation. Both stages are in principle subject to strict review periods so as not to unduly delay the ongoing procurement procedure.

The initial focus of the Commission's review is on whether the notified financial contributions qualify as foreign subsidies at all. "*Foreign subsidies*" are defined as financial contributions by a third country which confer a selective benefit on a company engaging in an economic activity in the internal market. See FSR, Article 3. While the wording of the definition of foreign subsidies used in the FSR differs from the definition of State aid according to Article 107(1) TFEU, the recitals to the FSR suggest that the criteria are essentially the same. However, the FSR definition is *in application* broader, for it lacks the limiting criterion, applicable under State aid rules, which looks to a (potential) distortion of competition and effects on trade between EU Member States. Under the FSR, these criteria are assessed separately (see below).

It remains to be seen whether the Commission will interpret the concept of foreign subsidies under the FSR in line with the notion of State aid under EU State aid law. Considering the objective of the FSR to create a level playing field regarding state subsidies for companies from the EU and third countries, a synchronization of definitions seems possible. This could be welcome as firms, which are in any case burdened by the FSR, would at least be given some legal certainty.

If the Commission concludes that foreign subsidies exist, it determines whether the foreign subsidy distorts the internal market. In general, according to Article 4(1) of the FSR, a subsidy has a distorting effect if it is likely to improve the competitive position of the respective company in the internal market and if it affects or is likely to affect the internal market. That determination is made based on indicators of whether a distortion exists, which can include, in particular, the following: the amount of the foreign subsidy, the nature of the foreign subsidy, the situation of the company (including its size and the markets or sectors concerned), the purpose and conditions attached to the foreign subsidy, as well as its "use" (presumably its actual utilization) on the internal market.

Furthermore, the FSR sets out certain categories of foreign subsidies most likely to distort

the internal market. See FSR, Article 5. These include subsidies to an ailing company without a restructuring plan, unlimited guarantees for debts or liabilities of a company, export financing measures not in line with the OECD *Arrangement on Officially Supported Export Credits*, and subsidies directly facilitating an acquisition. Specifically in the context of public procurement procedures, these include subsidies facilitating the submission of an unduly advantageous tender. Recital 53 notes that, in explaining an apparently "unduly advantageous" tender, the vendor may "justify that the tender is not unduly advantageous, including by adducing the elements referred to in [the EU procurement directives] ... regulating abnormally low tenders," which are known as "unrealistically" low tenders in the U.S. procurement system.

As a second step, the Commission, where warranted, considers the market-distorting effects of the foreign subsidies and balances these against potential wider benefits (the so-called balancing test, per Article 6 of the FSR). Positive effects shall include broader positive effects related to relevant EU policy objectives. While the EU State aid compatibility test and case practice are expected to serve as a benchmark for the balancing test under the FSR, the Commission has a considerable amount of discretion in determining whether a foreign subsidy is considered distortive. This discretionary "EU interest test" was criticized by a leading German industry association, the Bundesverband der Deutschen Industrie, which argued that tolerating "competition-distorting third-country subsidies due to current, general political goals of the EU ... neither protects competition nor promotes a 'level playing field.' " Feedback Ref. F870458 (Oct. 29, 2020), *ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-investment-addressing-distortions-caused-by-foreign-subsidies/F870458_en*.

During the preliminary review and the in-depth investigation, the contracting authority is generally not allowed to award the contract to the vendor under investigation unless the Commission decides not to raise objections. If, on the other hand, after the two-stage investigative process the Commission finds that a foreign subsidy exists and that it distorts the internal market, there are two options: If the company under investigation offers commitments (e.g., repayment of the foreign subsidy, see below) that fully and effectively remedy the distortion in the internal market, the Commission may adopt a decision which reflects those commitments. See FSR, Article 31(1). If this is not the case, the Commission will prohibit the award of the contract to the company concerned. Id., Article 31(2).

In cases where there is no notification required because the thresholds are not reached, "where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior" to the tender, the Commission may, after having received the mandatory declaration, nevertheless request the bidder to notify the foreign financial contributions according to Article 29(8). Following such a request, the procedure outlined above is carried out.

Alternatively, the Commission may initiate proceedings ex officio after completion of the award procedure (see below).

The Ex Officio Tool in Public Procurement Procedures—In addition to the specific instruments in public procurement procedures based on a notification or declaration, the Commission may act on its own initiative under the ex officio tool. The ex officio review provided for in the FSR's Articles 9 et seq. is not limited to mergers and procurement procedures. Rather, the Commission may review all natural or legal persons for foreign subsidies that distort the internal market. With regard to public procurement, the ex officio tool provides the Commission with the power to conduct investigations even if the respective thresholds for the ex ante tools are not met (e.g., in case of smaller procurements). The ex officio tool also applies to defense procurements falling within the scope of Directive 2009/81/EC that are exempted from the ex ante tool. See FSR, Recital 41 ("The balance between the development of a European defense and security equipment market, which is essential for maintaining a European Defense Technological and Industrial Base, and the protection of the national security of the Member States requires a specific regime for defense and security contracts covered by Directive 2009/81/EC ... Public procurement for the award of such contracts should therefore not be subject to notification requirements under this Regulation. Nonetheless, it should be possible to examine the foreign subsidies in the context of such contracts in an ex officio review.").

However, in contrast to ex ante reviews, the ex officio examination of bids in public procurement procedures for third-country subsidies distorting the internal market is only possible after the completion of the procurement procedure in question. Furthermore, the examination may not lead to the cancellation of the award decision or the termination of a contract. See FSR, Article 9(2). As a result, it should not be possible for the Commission to interfere with an ongoing and exempted defense or security public procurement procedure by means of the ex officio tool.

If, after an ex officio investigation, the Commission concludes that there is a third-country subsidy distorting the internal market and the affected firm does not offer sufficient commitments, the Commission may adopt a decision imposing redressive measures. See FSR, Article 11(2). The redressive measures shall be proportionate, and should fully and effectively remedy the distortion caused by the foreign subsidy in the internal market. Id., Article 7(3).

Article 7(4) of the FSR provides a non-exhaustive catalogue of examples for possible redressive measures, which also applies to commitments. However, most of these measures are tailored to distortive subsidies related to mergers (e.g., granting access to infrastructure). In the end, repayment of the subsidy in question may be the only enumerated measure that could reasonably also be applied to procurement procedures. Apart from the measures set out in the catalogue, the Commission is free to determine other remedies it considers suitable regarding public procurement procedures. As already mentioned, redressive measures may not be designed in a way that will result in the termination of the contract.

Ex officio investigations can be initiated for a period of 10 years after the granting of the subsidy. FSR, Article 38(1). This long limitations period could lead to considerable legal uncertainty for companies benefitting from foreign subsidies. While it is to be expected that the ex officio tool will be applied only in extreme cases, theoretically companies that have received foreign financial contributions—even below the relevant thresholds—could be subject to a decision of the Commission ordering the repayment of the subsidy up to 10 years after a foreign subsidy has been granted.

Excursus: the Ex Ante Tool in Concentrations—As was already noted, the FSR provides another ex ante tool in the case of concentrations. This tool is relevant to firms from abroad that may merge (or otherwise integrate) with firms in the EU—an increasingly common occurrence in a globalized procurement market. Concentrations trigger a notification obligation if two thresholds are met:

- The aggregate turnover of at least one of the merging undertakings, the acquired undertaking or the joint venture established in the EU, exceeds EUR 500 million in the EU, and
- All undertakings involved in the concentration were granted combined aggregate foreign financial contributions of more than EUR 50 million in the three financial years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

The term "*undertaking*" refers to the wider group of companies, i.e., it is not only the subsidiary involved in the transaction that is relevant.

The Commission has estimated that approximately "only" 40 to 50 transactions per annum exceed the turnover threshold, and that only a small part of these will also involve the amount of subsidies to trigger the notification obligation under the FSR. However, as was explained above, the broad notion of foreign financial contribution may make it difficult to sort out, with a sufficient degree of legal certainty, cases where the foreign financial contribution does not exceed EUR 50 million. If a notification obligation applies, the review and investigation procedure is subject to comparable rules as in the context of public procurement procedures. There is no obligation to submit a declaration in cases that do not reach the threshold values. However, the Commission may request the prior notification of any non-notifiable concentration at any time prior to its implementation where it suspects that foreign subsidies may have been granted to the undertakings concerned in the three years preceding the concentration. See FSR, Article 21.

Where a notification is required or requested by the Commission, the concentration cannot be completed until approved by the Commission (the so-called "standstill" obligation). While the review periods provided for in the FSR follow the timelines

under the EU Merger Regulation (EUMR), the review procedures under the FSR and EUMR will be completely independent. If the Commission finds that a foreign subsidy distorts the internal market, it can request the parties to remedy the distortion by imposing redressive measures or accepting commitments offered by the respective undertaking(s). Such measures may consist, inter alia, of offering access under fair, reasonable, and non-discriminatory conditions to an infrastructure acquired or supported by the subsidy, reducing capacity or market presence, refraining from certain investments or requiring the companies concerned to adapt their governance structure. The Commission may prohibit the concentration where it finds that the foreign subsidy distorts the internal market and the positive effects do not outweigh the negative effects, taking into account redressive measures or commitments. See generally Timothy McIver, Sergej Bräuer, Anne-Mette Heemsoth, Kayleigh Anderson & Megan MacDonald, *New European Union Foreign Subsidies Regulation Targets Inbound M&A Activity*, 27 M & A Law. NL 4 (March 2023).

Consequences for Firms Active in the EU—The obligations under the FSR are associated with considerable additional administrative burdens for firms active on the EU public procurement markets and in M&A transactions, for which they should prepare well in advance. From July 12, 2023, the Commission will be able to use its ex officio competences, and from Oct. 12, 2023, the notification and declaration obligations for foreign financial contributions in procurement procedures and concentrations will start to apply. It is advisable for firms subject to the obligations under the FSR to have their internal processes adjusted and launch preparations for the additional obligations imposed by the regulation.

At first glance, it might seem that only companies that have received large amounts of foreign subsidies and are planning to participate in major concentrations or large procurement procedures in EU Member States are affected by the obligations under the FSR. At a closer look, however, the fact that the notion of "*financial contributions*" is very broad and that all parties to a transaction, or the bidder and main subcontractors/suppliers in procurement procedures, must be taken into account, significantly extends the scope of the notification obligation. Furthermore, the ex officio tool, which provides the Commission with additional powers in market situations not covered by the notification obligation, and vendors' potential obligation to submit a self-declaration stating that the notice requirements are not triggered in public procurement procedures below the thresholds, considerably broaden the range of application.

It is to be expected that the FSR will become increasingly important for U.S. companies active on EU markets in the next years. This is not least due to the Inflation Reduction Act and other measures taken during the pandemic and in response to the increasingly difficult global situation, through which the U.S. Government has provided U.S. industry financial supports in the billions of dollars.

According to Annex 2 to the draft Implementing Regulation to the FSR, at page 5, the Commission plans to provide firms subject to notification obligations with the possibility to engage in pre-notification discussions. A pre-notification to the Commission allows the affected firm to discuss, among other things, the precise amount of information required in the notification, and may result in a significant reduction of the amount of information to be submitted in the notification. The concept of pre-notification, which is also an established step in EU merger control and State aid procedures, can thus be used to significantly limit the administrative burden and ideally shorten the overall duration of the investigation procedure before the Commission. It is therefore advisable for companies for which considerable effort and time delays are to be expected as a result of the investigations under the FSR to take advantage of pre-notification discussions.

Conclusion—It remains to be seen how strict the Commission will be in the application and execution of its competences in practice, and how the standards for prohibiting the award of public contracts and concentrations will develop under the FSR. For example, too strict application of the FSR could have a negative impact on competition on the European procurement markets, because it may exclude competitors offering low prices and thus indirectly also burden the taxpayer. See, e.g., Andrea Biondi, Michael Bowsher, Christopher Yukins, Luca Robini & Gabriele Carovano, *The EU Gives Foreign Subsidies Its Best Shot,* Int'l Econ. L. & Pol. Blog (2020), *www.ielp.worldtradelaw.net/2020/10/guest-post-the-eu-gives-foreign-sub-*

sidies-its-best-shot-one-take-on-white-paper-on-levelling-the-pla.html.

However, the EU seems more willing than ever to take action against competitive practices that are perceived as unfair, particularly in public procurement procedures. This is demonstrated not least by the fact that another instrument with a similar objective entered into force in 2022, the International Procurement Instrument (IPI). See Regulation (EU) 2022/1031, 2022 O.J. (L 173) (June 30, 2022); Pascal Friton, *International Public Procurement Law: Key Developments 2021—Part IV: The EU's Persistent (and Sometimes a Little Desperate) Pursuit of a Resilient Economy*, 2022 Gov't Contracts Year in Review Briefs 7. The IPI enables the Commission to restrict access to the EU procurement markets for firms from third countries in which EU-based firms are not granted the same access as domestic vendors.

Furthermore, the Commission has emphasized in its *Green Deal Industrial Plan* published in February 2023 its intention to make use of the opportunities offered by the FSR to counter foreign government subsidies. See European Commission, *A Green Deal Industrial Plan for the Net-Zero-Age: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee of the Regions*, COM(2023) 62 final, at 19 (Brussels Feb. 1, 2023), *commission.europa.eu/document/41514677-9598-4d89-a572-abe21cb037f4_en*. Notably, though, the draft plan also foresees that the EU itself will relax its State aid rules. Id. at 8. To the extent that the Commission allows more generous leeway for subsidies *inside* the EU under established State aid rules, this new more flexible approach may apply equally to third-country subsidies covered by the FSR.

As the discussion above reflects, the FSR may have a direct impact on firms from the U.S. and other countries which seek to compete for major procurements in the European Union. Article 44 of the FSR makes clear, however, that the regulation will not prevent the European Union from "fulfilling its obligations under international agreements." Existing agreements, such as the reciprocal defense procurement agreements between the U.S. and European allies which guarantee open markets in defense materiel and services, and the WTO Government Procurement Agreement, which affords parties (including the U.S.) similar rights to nondiscrimination in civilian procurements, may shape how the FSR is applied, see, e.g., Ondrej Blažo, supra, at 139–42, 158, as may bilateral agreements between the European Union and third countries such as the U.S. Until the potential impact of the FSR is clarified, vendors competing from abroad in the EU Member States can prepare for the new regulation by assessing foreign government subsidies that could, under the FSR, exclude them from public procurement awards in EU Member States.

♦

***This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Pascal Friton, Max Klasse *and* Christopher Yukins. *Dr. Pascal Friton, LL.M. and Dr. Max Klasse are partners at BLOMSTEIN, a law firm based in Berlin, Germany, specialized in Public Procurement, Antitrust, State Aid and Trade Law. Prof. Yukins is the Lynn David Research Professor in Government Procurement Law at the George Washington University Law School. A free GW Law webinar on the FSR will be held on April 18, 2023 at 9 am Eastern, 15:00 CET; information at* publicprocurementinternational.com.**

