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¶ 331 FEATURE COMMENT: EU Foreign Subsidies Regulation Update: Risks And Responsibilities For Foreign Firms In EU Public Procurement Markets

The European Union’s Foreign Subsidies Regulation (FSR) (Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market) has now entered into force, along with an implementing regulation which provides important clarifications for foreign firms competing for major awards in EU procurement markets.

The FSR is the EU’s effort to address distortive foreign government subsidies in the EU internal market, including in public procurement. The EU restricts Member States’ power to subsidize domestic firms under the EU’s “State aid” doctrine; the FSR is an effort to level the playing field by constraining foreign subsidies to foreign vendors as well. Companies competing in EU markets must now give special notice—“notifications”—if they have received foreign government financial contributions and if the transactions at issue (procurements and other transactions, such as mergers and acquisitions) exceed certain monetary thresholds.

The FSR’s “ex officio” tool—an independent authority that allows the European Commission (Commission), on its own initiative, to conduct reviews of apparently distortive foreign subsidies—has also come into force. The “ex officio” tool is especially important to the defense industry, because although the FSR exempts most EU defense procurement, the Commission retains authority to launch “ex officio” inquiries into perceived subsidies in the defense sector. See FSR recital (41) (“Public procurement for the award of [defense] contracts should ... 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.”).

At the same time, EU officials have signaled that the FSR does not primarily target subsidies granted by the U.S., but is instead focused on Asian countries such as China. See, e.g., Varg Volkman, *EU Strapped for Staff to Combat Chinese Subsidies*, POLITICO, Oct. 5, 2023; Chinese Companies Concerned About EU’s Foreign Subsidies Regulation, *Global Times*, Mar. 8, 2023 (“While there has been no clear indication of which country the regulation targets, it is widely believed it is aimed at fending off competition from China.”); European Commission, *Press Release, European Commission President Von Der Leyen Issues Remarks on EU-China Relations*, Mar. 31, 2023 (“We have given ourselves the tools to counter economic distortions, notably through the Foreign

Subsidies Regulation.”). For example, a representative of the Commission was quoted by the press as saying that the FSR is not meant to deal with financial assistance afforded under the U.S.’s massive infrastructure legislature, the Inflation Reduction Act. See Parry, EC Won’t Use Foreign Subsidies Tool to Address Distortions Caused by US Inflation Reduction Act, Says Official—EU Competition Day, PaRR, Oct. 17, 2023.

Nonetheless, precisely because the European Commission has left the door open to more probing reviews, including reviews of U.S. Government subsidies, the regulation is likely to trigger considerable additional administrative burdens for U.S. companies (and firms from other nations) competing in EU public procurement markets. Indeed, EU Commissioner Margrethe Vestager has specifically stated that companies benefitting from the Inflation Reduction Act—primarily U.S. firms—may be required to notify their subsidies to the EU. See European Commission, *Answer Given by Executive Vice-President Vestager on Behalf of the European Commission*, Mar. 23, 2023 (“Under the Foreign Subsidies Regulation, the Commission will be able to investigate financial contributions granted by non-EU countries to companies engaging in an economic activity in the EU. ... If the Commission finds that such financial contributions constitute foreign subsidies that distort the internal market, it can impose redressive measures or accept commitments to remedy their distortive effects, or prohibit a concentration or the award of a public procurement contract. ... Financial contributions pursuant to the [U.S.] Inflation Reduction Act, granted primarily in the form of tax credits, are expected to be granted to companies engaging in an economic activity in the US. The application of the Foreign Subsidies Regulation will therefore need to be assessed on a case-by-case basis.”); Stolton, EU’s Vestager: Biden’s Green Subsidies Could Face Probes in Brussels, POLITICO, Mar. 30, 2023. In sum, though there are indications that the EU’s enforcement of the FSR will be focused on China, in situations where the FSR applies, U.S. companies may still need to retain extensive records on financial assistance received from governments outside the EU for possible review by the Commission.

As the FSR enters fully into force, it is even more

important for companies competing in the EU Member States’ public procurement markets to be familiar with the implementing requirements. In March 2023, several of the authors here provided an initial overview of the FSR, see Friton, Klasse and Yukins, “The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage,” [65 GC ¶ 63](#). In that prior article some questions had to be left unanswered because the EU’s strategy was not yet clear; many of those points have been clarified by the EU since then. This article focuses on new developments relevant for firms (especially government contractors) that are potentially subject to the notification and declaration obligations of the FSR, including obligations under the FSR’s Implementing Regulation (FSR-IR), see Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market.

The FSR in a Nutshell—As noted, since July 2023 the Commission has had the power to assess subsidies potentially distorting the internal market on its own initiative under the Commission’s “ex officio” authority. See FSR, Art. 9 et seq. Subsidies in the defense procurement sector could, in principle, be scrutinized by the Commission under that authority. See, e.g., [65 GC ¶ 63](#).

In addition to this general authority to investigate, the FSR specifies two circumstances under which firms must notify the Commission of foreign financial assistance, to allow Commission review. First, firms must notify the Commission of concentrations (mergers or acquisitions) prior to their implementation where:

- the combined 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 foreign financial contributions of more than EUR 50 million in the three financial years preceding the conclusion of the

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agreement, the announcement of the public bid, or the acquisition of a controlling interest. See FSR Art. 21(1).

The second circumstance requiring notification involves public procurements. A firm which has received financial assistance from a foreign government which exceeds EUR 4 million, see FSR Art. 28(1)(b), from a single country in the last three years, and which is participating in a public procurement procedure with an estimated contract value of at least EUR 250 million, see *id.* Art. 28(1)(a), must notify the Commission of the foreign financial assistance, see *id.* Art. 29(1).

After a vendor notifies the Commission of a potentially covered foreign government subsidy, the Commission will carry out an *ex ante* assessment (before the procurement proceeds) of the third-country financial assistance. Following the notification, the Commission will use a two-stage procedure to assess whether the notified financial contributions qualify as foreign subsidies which distort the internal market. See, e.g., [65 GC ¶ 63](#).

The Implementing Regulation—A Beacon of Hope for Less Administrative Burden?—Shortly before the “*ex officio*” tool entered into force on July 12, 2023, the Commission adopted the FSR’s Implementing Regulation, which provides details on the conduct of proceedings under the FSR. While it seems on its face to be rather technical, the Implementing Regulation has a direct practical impact on the scope and interpretation of the FSR.

The first draft of the Implementing Regulation, which was published in February 2023, was subject to a hailstorm of criticism in the following public consultation. See, e.g., European Commission, *Distortive Foreign Subsidies—Procedural Rules for Assessing Them* (collecting comments), available at www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them_en). Most of the negative feedback was directed at the immense administrative burden for the firms concerned, which was a result of, among other things, the broad definition of financial contributions in the FSR.

Generally, as noted a firm must give notice of all third-country financial contributions received in the three years preceding the submission of the notification. See FSR Arts. 28(1)(b) & 29(1) sentence 1. The term “financial contribution” is not closely defined by the FSR; Art. 3(2) merely lists some examples of possible financial contributions, and recital (12) to the FSR notes that the “concept of financial contribution includes a broad range of support measures which are not limited to monetary transfers.” Thus, the Commission has suggested that the term “financial contribution” should be understood broadly and, in addition to relatively clear-cut cases such as capital injections, loans and grants, may include more indirect financial contributions such as tax holidays and payments from public contracts concluded with third countries. See generally European Commission, *Foreign Subsidies Regulation—Questions and Answers*, Question 5, https://single-market-economy.ec.europa.eu/single-market/public-procurement/foreign-subsidies-regulation/questions-and-answers_en.

A financial contribution can include any financial measure taken by a government or government associated institution. The FSR’s concept of a “financial contribution” casts a broad net, and does not of itself require any benefit to the receiving firm. Whether a financial contribution actually qualifies as a subsidy benefiting the recipient firm is to be determined by the Commission in its review. This broad concept of a financial contribution creates, in practice, a potentially significant burden for firms which must notify the Commission of “financial contributions” covered by the FSR.

Notably, it was not only firms *outside* the EU which complained of this burden; many firms *inside* the EU complained as well. Because EU-based firms often have subsidiaries outside the EU that receive foreign government support, EU firms can also be burdened by the FSR’s notification obligations.

With the final version of the Implementing Regulation, the Commission has partially remedied the administrative burden to address criticism from industry, but (as is discussed below) a significant burden remains for firms, especially in collecting the necessary data on time.

What Must Still Be Notified?—The Implementing Regulation provides an extensive form template in its annex for the notification in public procurement procedures (Form FS-PP). The Form FS-PP specifies the information that a firm must provide when submitting a notification. The information includes:

- A brief description of the public procurement.
- Information about the notifying party(ies).
- Information about foreign financial contributions.
- A (non-mandatory) justification explaining why the foreign financial contributions do not lend the notifying firm an undue advantage (in terms of enabling the firm to submit an unduly advantageous tender (bid)); per Sections 4.1 and 4.2 of Form FS-PP, the justification may point, for example, to the economics of the contractor's production process.
- Explanations of possible positive effects of the foreign financial contributions (also not mandatory).
- A list of supporting documents (e.g., under Section 6 of Form FS-PP, documents demonstrating that the tender does not enjoy an undue advantage, such as tax declarations or business plans and market research underlying the decision to participate in the public procurement procedure).

Furthermore, an attestation is to be signed that all information given in the notification is true, correct, and complete.

In Section 3 regarding information on foreign financial contributions, Form FS-PP streamlines the reporting insofar as the company need not submit detailed information on all financial contributions. Rather, the financial contributions are divided into three different categories which are subject to differing reporting obligations.

The firm must present detailed information on all foreign financial contributions over EUR 1 million that fall within certain categories of subsidies most likely

to distort the internal market, listed in FSR Art. 5. These include subsidies to an ailing company, unlimited government guarantees for debts or liabilities, and export financing measures not in line with the Organisation for Economic Co-operation and Development arrangement on officially supported export credits. In addition, the implementing materials say that financial contributions that enable a firm to submit an unduly advantageous tender in a public procurement procedure should be considered as particularly likely to distort the internal market.

In practice, this notification process shifts a complex assessment to the reporting firm. The question whether a subsidy enables a company to submit an unduly advantageous tender is central to the question of whether a distortion in the internal market exists. See FSR Art. 27. To address the question of an undue advantage, affected companies thus themselves may need to assess whether a foreign government's financial contribution distorts the internal market to determine how to fill out the notification form, although the Commission (not the contractor) is supposed to assess the distortive effect. Thus, it remains to be seen how strict the Commission will be reviewing firms' assessments, and whether the Commission may take the position that firms' assessments—if deemed incorrect—could trigger fines under the FSR.

The second category potentially to be disclosed includes contributions over EUR 1 million that do not fall under one of the above-mentioned categories. Those contributions must be notified using Table 1 in Form FS-PP. Here, the respective contributions can be grouped per type (such as direct grant, loan/financing instrument, tax advantage) and per foreign country. For each type of financial contribution, the company must provide a brief description of the purpose and the granting entities. Furthermore, it must quantify (at least in a range) the aggregate amount of the financial contributions granted by a single foreign government. For this residual category, there are several exceptions from the reporting requirements which may reduce the administrative burden for affected firms. Deferrals of payment of taxes and/or of social security contributions, tax amnesties and tax holidays or normal depreciation and loss-carry forward rules that are of general

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application do not have to be included in the table. The same applies to certain forms of tax relief for avoidance of double taxation, as well as the provision or purchase of goods or services at market terms in the ordinary course of business.

This last exception is important for vendors in public procurement markets, because it generally means that government purchases of goods or services following a competitive procedure need not be reported as “financial contributions” under the FSR. See Implementing Regulation, Form FS-PP, notes to Table 1, no. 6; see also European Commission, *Questions and Answers*, Question 5 (“[A]s indicated in the Form FS-PP published as Annex II to the Commission Implementing Regulation ... information on the provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business do not need to be reported in the notification, unless they fall into any of the categories of Article 5 of Regulation (EU) 2022/2560 [on uniquely distortive subsidies].”).

The third category includes foreign financial contributions which fall below EUR 1 million per foreign government. For such contributions, the firm need not report anything. The Commission may, based on a case-by-case assessment, require additional information on financial contributions below the threshold amount. See European Commission, *Questions and Answers*, Question 2 (“The Commission may, based on a case-by-case assessment, require additional information on financial contributions below [the] threshold (i.e. EUR 1 million as an individual financial contribution granted by a single third country) at any stage of the assessment.”).

Even though the overall effort for companies participating in public procurement procedures remains high even after the streamlining afforded by the Implementing Regulation, the division into the three categories will result in simplifications, particularly for smaller subsidies and payments made under government contracts.

All actors covered by the notification obligation (i.e., the main contractor, including its subsidiary

companies under common control, its holding companies, and, where applicable, its main subcontractors and suppliers) need to submit a single joint notification according to Art. 5(1) of the FSR Implementing Regulation. The main contractor must submit the declaration. See FSR Art. 29(6); FSR-IR, Art. 3(2). However, each participant is responsible only for the correctness of the data linked to its own foreign financial contributions, see FS-IR Art. 3(2) (“Each notifying party shall only be responsible for the correctness of information linked to the foreign financial contributions that have been granted to it.”), which may be particularly relevant if an enforcement action is brought for providing false or incomplete information.

Per the terms of the FSR, failure to comply with the notification obligation may result in severe fines and penalties. If a firm supplies incorrect or misleading information in a notification, fines up to 1 percent of the firm’s aggregate turnover in the preceding financial year may be imposed. If a firm fails to notify foreign financial contributions during the public procurement procedure or circumvents or attempts to circumvent the notification requirements, the fines can rise to up to 10 percent of the firm’s aggregate turnover in the preceding financial year. See FSR Art. 33.

When Does the Declaration Obligation Apply?—In addition to the notification obligation, the FSR requires a declaration of all foreign financial contributions “*in all other cases.*” See FSR Art. 29(1) sentence 2. From the wording of the FSR itself it was unclear whether a firm must submit a declaration even if the financial thresholds (EUR 250 million contract, EUR 4 million foreign contributions per country) are not met.

These ambiguities have been resolved by the Implementing Regulation. Annex II, Section 7.1 of the FSR Implementing Regulation explains that the submission of a declaration is required only if the contract value amounts to at least EUR 250 million. This clarification considerably limits the scope of application of the declaration obligation, as such a high contract value is rarely reached in public procurement in the EU Member States. See, e.g., [65 GC ¶ 63](#) (“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.”).

If this contract value-related threshold is not met, per the terms of the Implementing Regulation there is generally no obligation either to notify or to declare any foreign financial contributions. However, pursuant to the FSR’s Art. 29(8), the Commission still has the authority to request that all foreign financial contributions be subject to the notification obligation (called an “ad hoc” notification obligation). *Id.* (“Without prejudice of the possibility for the Commission to start an ex officio procedure, where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may before the award of the contract request the notification of the foreign financial contributions provided by third countries to that economic operator in any public procurement procedure which are not [otherwise] notifiable.”).

The required declaration in cases where the contract value reaches EUR 250 million, but the financial contributions received per third country fall below the threshold of EUR 4 million, must be submitted using the Form FS-PP. In contrast to the notification, however, in a declaration of this kind the firm needs to supply much less information. Only the following are required:

- A brief description of the public procurement
- Information about the notifying party(ies)
- Declaration of foreign financial contributions
- Attestation that all information given in the notification is true, correct, and complete.

In the declaration of foreign financial contributions, the notifying party(ies) must confirm that none of them have received foreign financial contributions which are notifiable under the provisions of the FSR. See Form FS-PP, Section 7.1. Furthermore, the firm(s) must submit a list of all foreign financial contributions received in the last three years. *Id.* Section 7.2. The disclosing parties can declare contributions which are

of a value below EUR 1 million in aggregate without indicating their values. They can group the contributions by country with only a brief description of the financial contributions by each contributing country. See FSR-IR, Annex II, Table 2. Foreign financial contributions of which the total amount per third country is lower than EUR 200,000 do not have to be reported in the declaration, see Form FS-PP, Section 7.4, reducing the workload associated with the requirements of the FSR for smaller financial contributions.

Does the FSR Apply to Subsidies Covered by Multilateral Agreements?—Another interesting question—especially for U.S. companies—is whether the obligations under the FSR are affected if the financial contributions appear to fall within safe harbors established by multilateral trade agreements, such as the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The argument has been that to the extent foreign government subsidies are already countenanced by those agreements, the FSR in essence would override those agreements were it to impose new and unilateral anti-subsidy requirements. Art. 44 of the FSR states that the regulation will not prevent the European Union from “*fulfilling its obligations under international agreements.*” In line with that, the Commission has made clear in its *Questions and Answers* that subsidies falling within the scope of the ASCM are not to be redressed under the FSR. However, to the extent that those subsidies constitute foreign financial contributions, they nevertheless need to be taken into account for determining whether the notification thresholds are met. See European Commission, *Questions and Answers*, Question 7.

How to Further Reduce the Workload Associated with the FSR?—The Implementing Regulation has already led to a material reduction in the amount of information required of bidders in EU public procurements. Nevertheless, the notification and declaration obligations can still cause considerable burdens for firms, especially if they have many subsidiaries to be included. An additional way to minimize the informational burden is the pre-notification procedure, which has also been introduced by the Implementing Regulation. See, e.g., European Commission, *Questions and Answers*, question 12 (“Pre-notification by

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notifying parties should take place in sufficient time prior to the notification, preferably on the basis of a draft Form FS-PP, with a view to preparing the preliminary review of foreign subsidies in the context of a published public procurement procedure.”).

The pre-notification phase, which is an established step in EU merger control and State aid procedures, could potentially lead to a significant reduction in the amount of information to be submitted to the Commission. During this pre-notification phase, firms can engage with the Commission to discuss whether it would be possible to waive especially onerous requirements for information. This approach—a voluntary pre-notification—is therefore advisable for firms which could face considerable efforts and delays through, for example, investigations under the FSR, or where there are persistent uncertainties as to whether the conditions of the FSR are triggered.

What Are the Next Steps for Vendors?—With the entry into force of the FSR, it is even more important for companies to prepare themselves properly for the new procedures. Companies which benefit from financial contributions from countries outside the EU and which operate in EU Member States’ public procurement markets may opt to take the following steps:

- Identify/designate a corporate function tasked with collecting information on financial contributions received (including those received through affiliates), and review the FSR’s reporting requirements.
- Identify the information required for notifications/declarations, including which items are covered by the term “financial contributions.” Based on this, a firm could develop a consistent, enterprise-wide workflow, based on internal requests for information, to gather and present that information.
- Identify the functions within and outside the firm

from which information might be needed (e.g., legal, accounting, etc.).

- Distribute the requests for information and enter the resulting data into a system based on the requirements of the Implementing Regulation Annexes.
- Implement ongoing reporting mechanisms to keep data up to date.
- For upcoming public procurement procedures, consider whether documents from additional entities are required (to be obtained through an extension of the request for information), consider whether a pre-notification would be efficient and worthwhile and could result in streamlining waivers by the Commission, and review relevant disclosure materials to ensure they are up to date.

While it appears likely that subsidies from the U.S. Government under the Inflation Reduction Act will not trigger a decision barring the recipient vendor under the FSR, this does not release U.S. companies competing for major contracts in the EU public procurement markets from their obligation to comply with the FSR’s broad notification and disclosure obligations. Those obligations are especially important because of the potentially severe fines in cases of non-compliance—risks that firms can seek to avoid by careful compliance with the FSR.

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Pascal Friton, Ramona Ader and Christopher Yukins. Dr. Friton is a partner, and Ms. Ader is a senior associate, at the BLOMSTEIN firm in Berlin, Germany, where they practice public procurement law. Professor Yukins serves as the Lynn David Research Professor in Government Procurement Law at the George Washington University Law School.

