

Untangling the Foreign Subsidies Regulation

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This article provides an overview of the main features and implications of the EU Foreign Subsidies Regulation (FSR), which entered into force in 2023 to address the distortive effects of foreign subsidies on the EU internal market. It discusses the key concepts and thresholds for the notification and review of transactions and public procurement procedures involving foreign financial contributions, as well as the ex officio investigation tool and enforcement powers of the European Commission (EC). The article also highlights the challenges and uncertainties that the FSR poses for companies and their counsel, and the need for further guidance and clarification from the EC. The article looks at the decision practice and case law in related areas of EU law, such as State aid, trade, and competition law, to analyse the principles and procedures of the FSR.

Keywords: Foreign subsidies; EU filing; public procurement

I. Introduction – FSR basics

On 12 October 2023, the last layer of the new EU Foreign Subsidies Regulation (FSR), the mandatory notification regime, became applicable. The FSR and its key terminology—financial contributions, foreign subsidies, *ex officio* review—will now be familiar to followers of the EU legal space. The increasing familiarity of those terms should not lead companies and their counsel to underestimate the importance of the FSR's impact on dealmaking and public tenders in Europe.

The FSR addresses what was perceived as a major gap in EU legislation. It equips the European Com-

mission (EC) with a tool to counter the distortive impacts of foreign subsidised investments in the EU. While EU State aid law prevents EU Member States from subsidising their national companies, no similar tool existed for non-EU countries. The FSR ensures a level playing field in this regard by applying EU State aid-like principles to financial support received from non-EU countries.

It is the scope of the FSR which makes the regulation so novel, rather than its principles and processes. The EU legislator drew on the EC's vast experience in State aid, trade, and competition law to design a sophisticated toolbox. To name a few examples, practitioners did of course recognise the notification process taken from EU merger control, and the notions of subsidies (trade law) and distortions (State aid). With the FSR the EC will be, in a broad sense, applying existing legal principles to transactions or companies that had until now not been subjected to them.

The FSR requires prenotification of certain large M&A transactions and public tenders involving companies that receive “financial contributions” directly or indirectly from governments outside the EU. The FSR empowers the EC to block or impose remedies in M&A transactions or public tenders that involve

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a foreign subsidy that distorts competition in the EU internal market and that cannot be justified by overriding public policy benefits. The FSR also empowers the EC to conduct ad hoc investigations into any company or sector (*ex officio* review).

The FSR took effect on 12 January 2023. As of 12 July 2023, the FSR empowered the EC to launch investigations. As referred to above, notifications became mandatory as of 12 October 2023.

Notifications are mandatory and suspensory if the M&A transaction or public tender meets the relevant combined notification thresholds. One of the thresholds is met if the parties received a relatively low amount of “financial contributions” from non-EU countries, which a significant number of companies are expected to exceed.

From a practical perspective, notifications will be administered by two different Directorate-Generals (DGs) of the EC. While public procurement related notifications and questions will be handled by the EC’s DG for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), the DG for Competition (DG COMP) will be in charge of covering all other aspects of the FSR outside the area of public procurement, in particular *ex officio* investigations and investigations of transactions.

The FSR framework is instituted by two regulations: the actual FSR (Regulation (EU) 2022/2560),¹ setting out the main principles of the FSR regime as discussed above, and its Implementing Regulation.²

By January 2026, the EC must publish guidelines regarding the criteria for determining the existence of a distortion, the application of the balancing test, the application of its power to request a notification in otherwise non-notifiable deals and bids, and the assessment of a distortion in public procurement. At the time of writing, November 2023, we expect that the EC is likely to publish preliminary guidance on the scope of the FSR in 2024. To acquire an appropriate level of experience before providing such guidance, the EC is insisting that companies approach the EC directly and engage in pre-notification discussions to resolve any doubts. On this basis, the EC is in parallel providing its answers to the most frequently asked questions in a Q&A section on its website.

Below, we discuss in detail the main principles of the FSR, the challenges they present and how they are likely to be implemented in practice by the EC.

II. Beware of the Confusion: Financial Contribution vs. Foreign Subsidy

The FSR targets “foreign subsidies” if they distort the common market. But the thresholds for notifications are based on the amount of “financial contributions” received from third countries. To understand and apply the FSR framework, it is important to distinguish these two key notions. The distinction can be confusing at first sight. The starting point of the distinction is that foreign subsidies are a subcategory of financial contributions.

The FSR provides that a “foreign subsidy” should be understood as a “financial contribution” which is provided directly or indirectly by a third country, which confers a benefit, and which is limited to one or more undertakings or industries.³ All foreign subsidies involve a financial contribution but not all financial contributions lead to a foreign subsidy. A foreign subsidy requires a financial contribution that is limited to one or more undertakings and confers a benefit to the undertaking/undertakings. Four distinct, cumulative, conditions therefore need to be met for a measure to qualify as a foreign subsidy: financial contribution, granted by a third country, selectivity and benefit. We discuss these four conditions in more detail below.

1. Financial Contribution

The concept of “financial contributions” is very wide. It draws some inspiration from existing concepts in EU State aid law and trade regulations but without any formal link to these regulations. It remains therefore to be seen whether the interpretation will follow State aid rules or trade regulations or a separate path. The concept of “financial contributions” includes a broad range of support measures, such as:

- the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal in-

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

2 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 OJ L 177.

3 FSR (n 1) art 3(1).

centives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;

- the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
- the provision of goods or services or the purchase of goods or services.⁴

The tremendous scope of the notion of “financial contribution” becomes immediately clear with this enumeration, as is the difficulty that companies will face in practice when determining what constitutes a “financial contribution” under the FSR. How should companies assess whether tax exemptions or special rights qualify as financial contributions, and where exactly to draw the line?

The third type of measure listed in the regulation, “the provision of goods or services or the purchase of goods or services” is incredibly broad in itself. Any purchases from, or sales to, public entities qualify as financial contributions and their full amount needs to be taken into account. A government contract worth EUR 60 million should therefore be accounted for as EUR 60 million of financial contributions, irrespective of whether it is concluded at market terms or not.

Even once it has been identified, the mere collection of the relevant information is likely to prove very burdensome for companies. The notion of “financial contributions” cuts across several corporate functions such as tax and business operations and does not correspond to any existing accounting or reporting metric. Companies will therefore need to adapt their internal data reporting processes, including adding new functions in their reporting software and training their teams specifically about reporting financial contributions.

As already mentioned, and as will be further detailed below, reportability under the FSR is determined on the basis of “financial contributions” and not on “subsidies”. As a result, companies will have

to assess the amount of financial contributions they have received not only to determine whether they have received a foreign subsidy but also to determine reportability of transactions and public tenders. Given the almost limitless scope of financial contributions, many companies will exceed the financial contribution notification thresholds. Companies will need to put internal processes in place for this novel type of information gathering exercise covering the various forms of financial contributions that may need to be reported in case filing under the FSR is triggered.

2. Granted Directly or Indirectly By Third Country

A financial contribution can be granted by:

- the central government and public authorities of a non-EU State at any level;
- public entities whose actions can be attributed to a non-EU State; or
- private entities whose actions can be attributed a non-EU State.⁵

In interpreting this condition, companies can rely by analogy on the extensive EC case law in State aid around the notion of “State resources”. While the wording of the FSR differs from that of Article 107(1) of the TFEU (“by a Member State or through State resources” (State aid) becomes “directly or indirectly provided by a third country” (FSR)), it does not appear to also entail any deviations in terms of content.⁶ In fact, the FSR expressly provides that it should be applied and interpreted in light of the relevant EU legislation, including State aid rules.⁷ However, whether or not an action by a public company or private actor is imputable to the State is already a much debated aspect under State aid law which often leads to challenging delineation issues in practice, let alone for non-EU States beyond the EC’s oversight. The first FSR complaints against football clubs owned by royal family members in Qatar and the United Arab Emirates already illustrate this additional layer of complexity. Having to determine what exactly can be attributed to the Chinese government and what not is another example alluding to the upcoming challenges in the practical application of the FSR. Companies are therefore best advised to take a conservative approach and, in case of doubt, consider that their interlocutor is related to the State.

4 *ibid* art 3(2).

5 *ibid*.

6 Johannes Zöttl and Philipp Werner, ‘Vive l’Industriepolitik – M&A unter der neuen Drittstaatensubventionsverordnung’ [2022] NZKart 475, 478.

7 FSR (n 1) Recital 9.

For the purposes of the FSR, a financial contribution should already be considered granted as soon as the company obtains an entitlement to receive the financial contribution and not only upon its actual disbursement.

3. Benefit

A financial contribution can only amount to a foreign subsidy if it confers a benefit on an undertaking that could not have been obtained under normal market conditions. The existence of a benefit should be determined on the basis of comparative benchmarks, such as investment practice of private investors, financing rates obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service.

In many cases, such as grants or tax exemptions, it is relatively simple to assess whether they have been granted under normal market conditions. However, in cases where companies engage in commercial transactions with States or State-owned companies, this will be relatively difficult as it will typically require that a so-called “market economy operator principle” (MEOP) test (or one of its variations) developed by the EU courts is carried out. If the MEOP test finds that in similar circumstances, a private economic operator of a comparable size operating in normal conditions of a market economy could have been prompted to grant the financial contribution in question, the financial contribution will not be considered as having conferred a benefit on the company. Conducting such assessment requires, however, either expert opinions or comparisons with similar market transactions between private parties, neither of which may be readily available.

Normal market conditions are not only a central element in the assessment of the existence of a foreign subsidy but may also play a role already when determining which provisions or purchases of goods or services are reportable under the FSR and which are exempt from reportability (see below).

Importantly, while a financial contribution provided to a group company located outside the EU needs to be taken into account for the purpose of assessing reportability and needs to be included in the reporting, it will only be caught as a foreign subsidy in the substantive FSR assessment if it confers a benefit on

a company active “in the internal market.”⁸ Consequently, if the government from foreign country X grants a subsidy to a national company, which, in turn, relays the benefit to its subsidiary so the subsidiary can make an unduly advantageous bid in a public tender in the EU, the FSR applies. On the other hand, if the national company uses the financial contribution to build a plant in country X, this will not qualify as a foreign subsidy under the FSR.

4. Selectivity

The benefit should be conferred on one or more undertakings or industries and not be generally applicable to all undertakings.

Here also, the parallel with EU State aid is obvious, and the EC’s case law in that regard is a helpful reference. However, it is important to also note that selectivity is often stated to be the most difficult of the State aid conditions to define and apply in practice.⁹ It is true that in many cases it is rather straightforward to classify an action as selective, for example, where a financial contribution is granted to just one company to carry out a particular activity, such as R&D – especially when other companies in a similar situation (such as competitors) do not receive similar support.¹⁰ However, in a large number of cases, for example, where a financial contribution is a scheme that *prima facie* applies to all companies who fulfil certain criteria, the distinction between a selective and a non-selective financial contribution is hardly as clear cut – such scheme could still be qualified as *de facto* selective. Many recent judgments in the field of State aid are centred around debates on the selectivity criterion, and in particular in the field of direct taxation, there is still no settled case law and the selectivity test is under continuous development and refinement.¹¹ The EC’s FSR practice might thus shed further light on this aspect.

⁸ FSR (n 1) art 3.

⁹ See eg Case C-379/98 *PreussenElektra* [2001] ECR I-02099, Opinion of AG Jacobs, para 157.

¹⁰ Michael Honoré, ‘Distortion of Competition and Effect on Trade’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control – Law and Economics* (Wolters Kluwer 2017) 119-120.

¹¹ See eg *Alleged aid to Apple* (Case SA.38373) Commission Decision 2014/C 369/04 [2014] OJ C 369/22.

III. Notification Requirements: a Beginner's Guide

1. Transactions

In setting obligations for transactions, the FSR relies on the familiar merger control notions of “concentration” and “change of control on a lasting basis” to institute a mandatory *ex ante* notification scheme similar to the EU merger control process, with notified transactions having to hold off closing while the FSR review is pending.

The notification requirement is based on a double, cumulative threshold.¹² Concentrations are subject to the FSR notification requirement when:

1. One of the merging companies, the target that is being acquired or the joint venture that is being set up is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and
2. In aggregate, all parties to the transaction have over the last three years received more than EUR 50 million of financial contributions from non-EU governments.

a. First Threshold

Several elements of the first threshold are worth highlighting. By setting the threshold at EUR 500 million, double the merger control threshold, the EU showed its intent to focus on the “big fish”,¹³ ie the transactions which could indeed have a substantial impact on the single market. By focusing only on the merging parties, the target or the joint venture, the effect-based approach of EU merger control was adopted. Interestingly, the threshold contains a no-

table improvement concerning joint ventures in the sense that it is only the joint venture itself, and not its parents, which is relevant for the purpose of establishing whether the threshold is met.¹⁴ In case of creation of a greenfield joint venture, this threshold is not met since the joint venture will have no revenue of its own.¹⁵ EU merger control rules include the JV's parent companies in the turnover calculation exercise, leading to an unduly broad scope of the notification requirement and a vast number of JV notifications without any real relevance under competition law.

The EC has now provided guidance on the notion of “established in the EU”.¹⁶ This notion should be understood in accordance with the case law of the Court of Justice and includes the incorporation of a subsidiary in the EU, as well as a permanent business establishment in the EU. It therefore seems that the hypothetical scenario of an acquisition of a company achieving more than EUR 500 million in the EU but without a local legal entity or a permanent business establishment would not be covered by the FSR notification requirement, marking another notable difference with EU merger control.

Turnover calculations for the purpose of establishing whether or not the first threshold is met rely on the EU competition law notion of “undertaking”, similarly to EU merger control, and are based on the same methodology (ie turnover is calculated on a group-wide basis).¹⁷

b. Second Threshold

The second threshold, EUR 50 million of financial contributions from non-EU governments, may at first sight look difficult to meet. Non-practitioners tend initially to think of financial contributions as mere grants, and cash handouts of EUR 50 million tend to be limited. However, a closer look at the threshold shows how exceedingly low the EU legislator has in fact set the bar:

- The notion of financial contributions was discussed above and, in itself, significantly contributes to the large scope of the second threshold. The broad definition of this notion, as provided in the FSR, catches a wide variety of financial transactions, including most market transactions with public entities or State-owned enterprises as well as payments for the provisions of goods or services following the award of a tender. All electricity and

¹² FSR (n 1) art 20.

¹³ Margrethe Vestager stated that “the Foreign Subsidies Regulation is a net designed to catch the big fish because only big fish have the teeth to do damage to the internal market”. Margrethe Vestager, ‘Keynote of EVP Vestager for the Concurrences Conference on the Foreign Subsidies Regulation’ (Brussels, 6 March 2023).

¹⁴ Similarly to EU merger control, only “full-function” JVs are caught by the FSR.

¹⁵ European Commission ‘Questions and Answers’ (Question 5, updated on 12 July 2023) <https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/questions-and-answers_en> accessed 19 February 2024.

¹⁶ Fn 6 of the Form FS-CO published as Annex I to the Commission Implementing Regulation (n 2).

¹⁷ FSR (n 1) art 22.

gas supplies from a public energy provider, for instance, should be included.

- In addition to this broad definition, the FSR provides that, for the purpose of establishing whether the EUR 50 million financial contribution threshold is met, parties should look at the aggregate of (i) all parties to the transaction (ie including the acquirer or the joint venture parents), (ii) all non-EU governments and (iii) over the last three years.

Like the first threshold, the second threshold relies on the EU competition law notion of “undertaking”, meaning that financial contributions are to be calculated at group level (before they are, in a second step, aggregated with those of the other parties).¹⁸ A favourable corporate tax regime granting a selective advantage to a parent company in a non-EU State, for instance, needs to be taken into account for the purpose of establishing the FSR reportability of a transaction relating to a subsidiary, and vice-versa.

c. Catch-all: Commission Discretion to Request Notifications

Relying on its experience in merger control, the EC was able to design a relatively straightforward notification test, providing some level of certainty for companies’ transactional activities. However, the EC was concerned that some potentially distortive transactions would not be caught. Next to the formal notification thresholds, the FSR therefore grants the EC full discretion to request a notification of *any* transaction for which it suspects that parties benefited from foreign subsidies in the preceding three years (ie even transactions not meeting the thresholds), provided that the EC would do so before the transaction at stake is implemented.¹⁹

For companies, keeping in mind the standstill obligation and extended duration that it can take to obtain FSR clearance, the potential huge implications of this provision, Article 21(5) FSR, cannot be understated. This power is unparalleled in the other fields that served as inspiration for the FSR regime. The EC’s power to review transactions under Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) had already led to significant controversy. However, this article fell short of providing actual full discretion to the EC, as it depended on a referral by an EU Member State, which is not required for the Article 21(5) FSR mechanism.

d. Scope of the Notification Requirement in Practice

Despite the fact that the FSR was launched with the objective of ensuring a level playing field between EU companies and foreign companies, the result of the broad scope of the notification threshold is that the notification requirement applies indistinctively both to EU and non-EU companies, which lead to significant criticism from EU businesses.

Companies caught by the first threshold (EUR 500 million of turnover in the EU) will in the vast majority of cases be large multinational companies active on a global scale. It is obvious that, for such global companies dealing with numerous non-EU public entities, the second threshold related to financial contributions will easily be met. The reality of the FSR regime will therefore be that, when companies meet the first (high) turnover threshold they will virtually always also meet the (low) financial contributions threshold.

Until the EC can develop an extensive body of precedents, significant uncertainty will remain as to whether certain measures constitute a financial contribution or not. In case of doubt over a specific measure for which no guidance is available yet, companies meeting the first threshold are in any event likely to adopt a conservative approach and consider such measures as qualifying as financial contributions, potentially leading to a higher volume of notifications in the first years of the FSR.

Still, thanks to the importance of the first turnover threshold, the number of companies potentially subject to a FSR notification requirement in a transaction context will remain limited. The EC has indicated that it expects less than a hundred filings a year, a sizable difference compared to the 400-500 filings a year under EU merger control. As of 22 November 2023, the EC had received 8 notifications and 26 pre-notifications.²⁰ One area that will be key to watch for companies is how the EC will make use of its discretionary power under Article 21(5) FSR: whether or not it plans to use it only in exceptional circum-

18 Under EU law, separate legal entities constitute one economic unit, ie an “undertaking”, based on controlling shares or other functional, economic and organic links.

19 FSR (n 1) art 21(5).

20 Eddy De Smijter, ‘Subsidies, screening and M&A: the EU’s new regulatory order’ (MLex conference, 22 November 2023).

stances of obviously distortive cases falling below the thresholds. Complaints are likely to play an important role in determining the EC's use of this provision.

2. Public Procurement

Prior notifications or declarations of foreign financial contributions may also be required in the context of public procurement procedures, in which case companies cannot be awarded a contract before the notifiable public procurement procedure has been cleared by the EC. The notification requirement applies to a wide range of contracts subject to EU public procurement rules, but there are a number of exceptions such as public procurement in the defence and security sectors.²¹

The FSR entails an obligation for companies to notify foreign financial contributions in the context of public procurement procedures when:

1. The estimated value of the public procurement or framework agreement is at least EUR 250 million;²² and
2. The aggregate financial contributions involved in the three years prior to notification were at least EUR 4 million per non-EU country.²³

When the thresholds are met, the economic operator at stake must notify the relevant contracting authority of all foreign financial contributions meeting the minimum threshold per third country and list all foreign financial contributions in a notification. The contracting entity must then transfer the notification to the EC without delay.

a. First Threshold

Similar to the turnover threshold for transactions, this first threshold is meant to focus FSR notification obligations on more sizeable tenders.

For the calculation of the threshold of EUR 250 million, the EU rules on public procurement on the calculation of the estimated value of a procurement apply. These rules apply to public procurements, framework agreements as a whole or a specific procurement under the dynamic purchasing system, always net of VAT.

b. Second Threshold

For the calculation of the second threshold, any financial contributions granted in the most recent three years to the "economic operator" (as defined under EU rules on public procurement), including its subsidiary companies "without commercial autonomy", its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure need to be taken into account.

c. Prior Notification or Declaration

Where the above conditions for the notification of financial contributions are met, economic operators participating in a public procurement procedure are required to notify the contracting entity of all foreign financial contributions as defined in the second threshold.²⁴ The contracting authority then has to transfer the notification without delay to the European Commission. It can be expected that this procedure will experience some growing pains as it involves additional responsibilities not only for the EC (DG GROW) but also for all contracting authorities and guidance will be required not only for notifying parties but also for contracting authorities.

Interestingly, the FSR provides for a mandatory reporting process even in cases where the thresholds are not met. Concretely, for all covered public procurement cases that do not meet the thresholds, economic operators need to list in a declaration all foreign financial contributions received so in order to obtain confirmation that the foreign financial contributions received are not notifiable in accordance with the second threshold.²⁵

The obligation to notify foreign financial contributions in the context of public procurement procedures applies to economic operators, groups of economic operators, as well as to main subcontractors and main suppliers known at the time of submission of the complete notification or declaration. Under the

21 However, the foreign subsidies in the context of such contracts may be examined in an *ex officio* review (FSR (n 1) art 28(3)).

22 Or when the overall tender value is at least EUR 250 million and the value of the lot or the aggregate value of all the lots to which the tenderer applies is at least EUR 125 million (FSR (n 1) art 28(1)).

23 FSR (n 1) art 28(1).

24 *ibid* art 29(1).

25 *ibid* art 29(1).

FSR, a subcontractor or supplier is deemed to be main where its participation ensures key elements of the contract performance and in any case where the economic share of its contribution exceeds 20 % of the value of the submitted tender.²⁶

d. Catch-all: Commission Discretion to Request Notifications

As for transactions, where the EC 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, the EC may before the award of the contract also request the notification of the foreign financial contributions provided by non-EU countries to that economic operator in any public procurement procedure which do not meet the above notification thresholds. As a result, any financial contribution called in by the EC will be deemed to be notifiable.²⁷

3. (Dis?)alignment with EU Merger Control Procedure

One of the stated objectives of the FSR process was to, in a transactional context, allow parties to run the FSR clearance process in parallel with EU merger control. At first sight, both processes appear tightly aligned. Both the FSR transaction review process and the EU merger control process provide for a pre-notification, followed by a first phase review of 25 working days and, where necessary, a second phase in-depth review of 90 working days, starting from the date of submission of a complete notification.

The FSR reliance on a turnover threshold enables some synergies for companies. The turnover data necessary for establishing reportability of a transaction under EU merger control is also relevant for the purpose of establishing whether the first FSR threshold is met.

However, despite their similarities, a parallel process for FSR and merger control is unlikely to be achieved in practice. Several elements will lead to a differentiated timeline. The FSR process does not allow for the possibility of remedy discussions during the first phase review. The possibility for such “quick fix” under EU merger control has been instrumental in shortening the merger control process in numer-

ous cases. Another notable difference is that merger control has more possibilities for extensions than the FSR process.

FSR notifications are also significantly more data-intensive than merger control procedures. Given the nascent phase of FSR, companies will still need to invest significant efforts in educating themselves and adapting their internal data reporting processes to reflect FSR data requirements. For these reasons, it should be expected that it will take companies some time to collect the data necessary for a FSR filing, and several exchanges with and clarifications from the EC should be expected before companies are eventually ready to make their filing. While the merger control and FSR processes each provide for a prenotification, the FSR prenotification process will therefore likely last longer than that of merger control.

Arguably, the fact that the merger control and FSR review timelines are likely to diverge will only have limited consequences. This is because the EU merger control and FSR thresholds also diverge. When applying the two sets of thresholds, it stands out that for many cases where the FSR threshold will be met, the EU merger thresholds will not. The most obvious situation is that of a company with limited EU turnover acquiring a strong European player with more than EUR 500 million revenue. Given the limited EU presence of the acquirer, EU merger control will not apply, while the FSR notification requirement will be met. For such cases, it is in fact possible that the parties need to run the FSR notification process with merger control notification processes with several EU Member States, leading to a very challenging planning exercise.

IV. Ex Officio Reviews

The FSR combines both *ex ante* and *ex post* review tools. While the initial focus of much of the discussion was on the notification requirements discussed above, they are complemented with a general *ex officio* procedure, which can be used for any business behaviour of the beneficiary of a foreign subsidy(!), including also transactions and procurement processes below the notification thresholds. Under

²⁶ *ibid* art 29(5).

²⁷ *ibid* art 29(8).

the *ex officio* procedure, the EC may on its own initiative initiate an investigation regarding alleged distortive foreign subsidies.²⁸ Similarly to the EC's power to request notifications even for below threshold transactions, this will represent a heavy burden on companies, because of the huge discretion of the EC in initiating proceedings or not. The EC's large discretionary power in this regard is only limited by general principles of EU law such as proportionality and good administration, which have generally proven difficult to enforce vis-à-vis the EC.

In terms of time limits, the EC's *ex officio* review powers are subject to a limitation period of 10 years, starting on the day on which a foreign subsidy is granted to an undertaking.²⁹ An investigative action taken by the EC with respect to a foreign subsidy shall interrupt the limitation period. After each interruption, the limitation period of 10 years shall start to run afresh.

It is likely to take some time before the EC develops its policy in terms of *ex officio* review practice. Given the extensive efforts that will be required to deal with the first wave of notifications, the EC will probably lack the administrative resources to run an active *ex officio* review in parallel. However, over the years, as the EC FSR resources will grow and the notification process reach maturity, it can be expected that the EC will become more active in terms of *ex officio* review.

Complaints are likely to play a significant role with regard to *ex officio* review. Third parties, in particular competitors, will typically be best placed (being active on the same market) and more prone than the EC to detect foreign subsidies. Third party information at the beginning of an *ex officio* procedure will often be the EC's most important source of information. The second major source of information on which the EC will rely in using its *ex officio* review

power will undoubtedly be the financial contribution information that will be provided by companies in the context of the mandatory notification regime. Over time, the EC is likely to develop an extensive knowledge of financial support schemes provided by specific foreign countries. Other sources of information for initiating *ex officio* investigations will be Member States³⁰ and market investigations.³¹

While the FSR does not provide for any formal status or rights for complainants, unofficial complaints can be lodged to the EC.³² It is expected that such unofficial complaints will increasingly be directed to the EC, with the EC making use of its *ex officio* review power where relevant. It should be noted, however, that given the absence of a formal complainant status, the FSR does not provide for any access to the file for complainants, and the EC must not inform complainants of any decisions or have to make such decision public.³³

At the time of writing, November 2023, at least two unofficial complaints have already been brought with the EC. Interestingly, both complaints are football-related:

- On 4 May 2023, Royal Excelsior Virton, a professional football club in Belgium's second division, lodged a complaint with the EC against its competitor SK Lommel concerning alleged foreign subsidies. SK Lommel's ultimate owner is a member of the Abu Dhabi royal family, also acting as Vice President of the United Arab Emirates. The club recently received a capital injection of around EUR 16.8 M, which allowed SK Lommel to obtain its professional license from the Belgian football association. The club would otherwise not have been able to afford the license, which would have led to demotion to a lower (amateur) football division.
- In August 2023, the Spanish football association similarly lodged a complaint with the EC alleging that Paris Saint-Germain FC (PSG) has received Qatari investment amounting to distortive subsidies. PSG is owned by a subsidiary of Qatar's sovereign wealth fund. In its statement, the Spanish football association indicated that PSG has obtained Qatari funding on "non-market" terms, allowing it to sign top players and coaches and perform "well above" its normal potential.

While it remains to be seen whether the EC will take these cases (European football might not be a priority for the EC), the complaints illustrate the far-

28 *ibid* arts 9 ff.

29 *ibid* art 38.

30 The FSR expressly provides this possibility under arts 9(1) and 31(1).

31 However, the EC's power to initiate a market investigation is limited to situations where "the information available to the Commission substantiates a reasonable suspicion" of foreign subsidisation (FSR (n 1) art 36(1)).

32 FSR (n 1) arts 9(1) and 35(2).

33 Lena Hornkohl, 'The role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review and Private Enforcement' [2023] Competition Law & Policy Debate 30.

reaching scope of the FSR and its potential as a “weapon” against competitors. The two cases will also be interesting to follow with regard to the question of the extent to which third parties can legally challenge EC decisions to open or not to open *ex officio* investigations. Given the broad discretion provided to the EC, it appears unlikely that companies would have any grip on the EC’s policy in that regard.

V. Core of the Matter: the EC’s Substantive Assessment

The EC review is divided into two phases: a preliminary review to assess whether there are sufficient indications that a company has received foreign subsidies that distorts the EU internal market,³⁴ followed by an in-depth investigation. In the in-depth investigation, the EC will further assess whether the company has been granted a foreign subsidy that distorts the internal market, including an assessment whether positive effects may outweigh the distortion of the internal market and an assessment of commitments or redressive measures.³⁵ In a transaction or public procurement context, only foreign subsidies granted in the three years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest are considered in the EC’s assessment.

The test applied by the EC during in-depth investigations is essentially three-fold. The EC will first determine whether the foreign subsidies at stake are indeed distortive. If so, the EC will balance the negative effects of the subsidies against their positive effects. If the negative effects outweigh the positive effects, the EC will prohibit a transaction/tender participation, or impose redressive measures/commitments.

1. Notion of “Distortions on the Internal Market”

Once the EC has established the existence of a foreign subsidy, it will assess on a case-by-case basis whether the foreign subsidy distorts the internal market. The FSR provides that a distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where,

in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market.³⁶ Interestingly, the fact that under the FSR a foreign subsidy must only be “liable” to lead to distortive effects shows that potential distortions are sufficient to meet the test.³⁷

In identifying a distortion, the FSR thus provides for a clear three-step test:

1. Improvement of the competitive situation of an undertaking in the internal market as a result of a foreign subsidy which is “liable” to do so;³⁸
2. Actual or potential negative effect on competition in the internal market;³⁹
3. Causal link between 1 and 2.⁴⁰

In the context of public procurement specifically, the FSR considers there is a distortion when foreign subsidies enable a company to submit a tender that is “unduly advantageous in relation to the works, supplies or services concerned”.⁴¹

To facilitate the self-assessment by companies, the FSR institutes a presumption that certain (broad) categories of foreign subsidies do create distortions in the internal market. These include financial contributions falling into one of the following categories:

- a foreign subsidy granted to an ailing undertaking;
- a foreign subsidy in the form of an unlimited guarantee, namely guarantees without any limitation as to the amount or the duration of such guarantee;
- an export financing measure that is not in line with the OECD Arrangement;

34 FSR (n 1) art 10.

35 *ibid* art 11.

36 *ibid* art 4(1).

37 Lena Hornkohl, ‘Protecting the Internal Market from Subsidisation With the EU State Aid Regime and The Foreign Subsidies Regulation: Two Sides of the Same Coin?’ [2023] *Journal of European Competition Law & Practice* 137.

38 A systematic interpretation of the provision suggests that the improvement of the competitive position of an undertaking in the internal market must be different from the benefit resulting from the foreign subsidy. See also Johannes Zöttl and Philipp Werner, ‘Anmerkungen zu einer Black Box – Die Binnenmarktverzerrung gem. DSVÖ’ [2023] *WUW* 654.

39 With regard to the question as to which market is relevant in this context, teleological considerations suggest that the negative competitive effects on the markets of the target companies should be taken into account. See also Johannes Zöttl and Philipp Werner, *ibid*.

40 Johannes Zöttl and Philipp Werner, *ibid*.

41 FSR (n 1) art 27.

- a foreign subsidy directly facilitating a concentration;
- a foreign subsidy enabling an undertaking to submit an unduly advantageous tender.⁴²

Still with the objective of facilitating the self-assessment by companies, the FSR includes a negative presumption threshold, under which foreign subsidies are presumed not to be distortive and a *de minimis* threshold under which foreign subsidies are automatically deemed non distortive.

- Foreign subsidies where the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over a consecutive period of three years will be regarded as “unlikely to distort the internal market”.⁴³
- Foreign subsidies to a single undertaking not exceeding the *de minimis* amount of EUR 200,000 per third country over a consecutive period of three years “shall not be considered to distort the internal market”.⁴⁴

The difference between the two thresholds is that, for foreign subsidies under the EUR 4 million threshold but above the EUR 200,000 threshold, the EC has the discretion to assess the subsidy, even though it bears the burden of proof to demonstrate that such subsidy is distortive.⁴⁵

Similarly, the FSR provides that foreign subsidies aimed at making good the damage caused by natural disasters or exceptional occurrences are automatically considered as not distortive.⁴⁶

In all cases not covered under the above presumptions or safe harbours, the distortion is to be determined in an individual assessment. The FSR identifies some indicators on which this assessment is to be based: the amount and nature of the subsidy, the

situation of the undertaking at stake, including its size and the markets concerned, the level and evolution of economic activity on the internal market and the purpose and conditions attached to the subsidy.⁴⁷ The EC has until 12 January 2026 to publish guidelines on how it will apply these indicators.

2. Balancing Test: Positive vs Negative Effects

When the EC has determined that a foreign subsidy does have distortive effects, it will assess whether it has positive effects that outweigh the identified distortive effects. For this test, the EC needs to take into account the positive effects linked specifically to the development of the subsidised economic activity but it may also consider broader positive effects.⁴⁸ Such broader effects can include, in particular, a high level of environmental protection and social standards, and the promotion of research and development.⁴⁹ While such broad policy effects can, in principle, be taken into consideration without territorial limits, the economic benefits of a specific subsidy are only relevant if they occur in the EU.⁵⁰

One key aspect that remains to be clarified by the EC is whether and to what extent the positive effects need to be linked to the internal market distortion, ie at a broader, market level, and whether and to what extent they need to be linked specifically to the transaction or the bidding procedure subject to the review.

In the context of a public procurement procedure, the EC should take into account the availability of alternative sources of supply for the goods and services concerned. The balancing can lead to the conclusion not to impose redressive measures where the positive effects of the foreign subsidy outweigh its negative effects.⁵¹

Because of the key role it has in the FSR assessment, the brief and general wording setting out the balancing test in the FSR (Article 6) is problematic in terms of legal certainty.⁵² The vague wording, balancing positive effects against negative effects, translates into broad discretion for the EC. The outcome of the EC’s assessment will therefore be difficult to predict. Aside from the obvious parallel with the compatibility assessment under State aid law, the balancing test and the broad discretion of the EC in applying the test reminds of the efficiencies defence in an

42 *ibid* art 5(1).

43 *ibid* art 4(2).

44 *ibid* art 4(3).

45 As pointed out in Hornkohl ‘Protecting the Internal Market’ (n 36).

46 FSR (n 1) art 4(4).

47 *ibid* art 4(1).

48 *ibid* art 6(1).

49 *ibid* art 21.

50 Csongor István Nagy, ‘The EU’s New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?’ [2023] *Journal of World Trade* 889.

51 FSR (n 1) Recital 21.

52 Hornkohl ‘Protecting the Internal Market’ (n 36).

trust and merger cases, for which the EC infamously set the bar exceedingly high. On the positive side, the FSR expressly provides that when the EC carries out a balancing test, it should set out its reasoning in the decision closing an in-depth investigation.⁵³ The EC's early FSR case law will therefore hopefully provide welcome guidance on this point.

In cases where the negative effects prevail, the balancing test is also relevant to help to determine the appropriate nature and level of the commitments or redressive measures that are required. In that sense, given that the balancing test considers the positive effects of a foreign subsidy, it is in any event to have a positive effect for the companies at stake: it will either show that positive effects outweigh negative effects, in which case no commitments or redressive measures are required, or show how the positive effects in any event reduce the negative effects, limiting the need for commitments or redressive measures. The FSR specifies that in deciding whether to impose redressive measures or to accept commitments, the EC shall take the balancing assessment into account.⁵⁴

3. Solutions? Commitments and Redressive Measures

In case of distortive foreign subsidies, the FSR provides that the EC may impose redressive measures, unless it has accepted commitments by the company that would fully and effectively remedy the distortion in the internal market actually or potentially caused by the foreign subsidy. If the distortive foreign subsidies are not addressed, the EC also has the power to prohibit a concentration⁵⁵ or the award of a contract⁵⁶ before it takes place.

The FSR sets out a non-exhaustive list of examples of commitments or redressive measures.⁵⁷ This list stems from a range of different existing instruments (including EUMR behavioural and structural remedies and State aid rules). They may consist, inter alia, of the following:

- offering access under fair, reasonable, and non-discriminatory conditions to infrastructure, including research facilities, production capabilities or essential facilities;
- reducing capacity or market presence, including by means of a temporary restriction on commercial activity;

- refraining from certain investments;
- the licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;
- the publication of results of research and development;
- the divestment of certain assets;
- requiring the undertakings to dissolve the concentration concerned;
- the repayment of the foreign subsidy, including an appropriate interest rate;
- requiring the undertakings concerned to adapt their governance structure.⁵⁸

The most obvious measure to which the EC will turn relates to the repayment of the distortive subsidy. If the company at stake offers to repay the subsidy with an appropriate interest rate, the EC needs to accept the repayment, provided it is “transparent, verifiable and effective, while taking into account the risk of circumvention”.⁵⁹ However, one might wonder how in practice such repayment would work and be monitored given that it would have to take place in non-EU countries. Alternatively, if the distortive effects can be lifted without repayment, the EC may use corrective measures: it may adopt, by means of a redressive measure or commitments, structural or behavioural corrective measures to remedy the distortion and thereby obviate the need for repayment.⁶⁰

VI. Procedural Aspects

1. Overview of Reporting Requirements For Notifications

a. Detailed Reporting

Financial contributions from non-EU countries that the FSR deems to be “most likely distortive” are re-

53 FSR (n 1) Recital 21.

54 *ibid* art 6(2).

55 *ibid* art 25(3).

56 *ibid* art 31(2).

57 *ibid* art 7(4).

58 *ibid* art 7(4).

59 *ibid* art 7(6).

60 Csongor István Nagy, ‘The EU’s New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?’ [2023] *Journal of World Trade* 889.

portable in detail in all notifications. That requirement applies to assistance to failing firms that would otherwise exit the market, unlimited guarantees, non-OECD compliant export financing, and the direct facilitation of M&A transactions or unduly advantageous bids. Such detailed reporting requirement exists for all “most likely distortive” financial contributions received over the past three years prior to the notification which have an individual amount of at least EUR 1 million.

Detailed reporting means that the notifying party must disclose, for each financial contribution separately, the nature and amount of the financial contribution, the granting country and entity, the economic rationale, any potential conditions attached to the contribution and the main characteristics of the contribution (eg, date, rates, duration, market terms). Importantly, the notifying party will also need to submit supporting evidence, including internal documents about the financial contribution such as annual reports, financial statements, board/management presentations, tax returns, business plans, and market reports.

The provision of incomplete, incorrect or misleading information can lead to the imposition of significant fines. But the Implementing Regulation also specifies that notifying parties are only responsible for data related to financial contributions granted to them (ie, an acquirer cannot be held responsible for incorrect data provided by a target company).

b. Summary Reporting

As for other financial contributions, the notifying party must only provide an overview in the form of a summary table, together with information about the type of contributions received (eg, government loans or guarantees). The notifying party does not need to list the value of each financial contribution individually but may use ranges for the aggregate value of each type of contribution per non-EU country. This information only has to be provided for countries where the total amount of all financial contributions received by each notifying party over the past three years prior to the notification exceeded EUR 45 million (for M&A notifications) or EUR 4 million (for public procurement notifications), respectively.

Certain financial contributions do not have to be included in the summary reporting and do not need to be taken into account for the calculation of the EUR 45 million and EUR 4 million reporting filters:

- Financial contributions with an individual value less than EUR 1 million;
- Provision/purchase of goods/services (except financial services) received in the ordinary course of business at market terms;
- Deferrals of taxes and/or of social security, tax amnesties and tax holidays, normal depreciation and loss-carry forward rules of general application;
- Tax relief for avoidance of double taxation in line with bilateral/multilateral agreements.

Although parties need not provide details about those financial contributions in the filing, they must still count those financial contributions for the purposes of the notification thresholds, which many companies are likely to exceed.

For M&A notifications, investment funds and their portfolio entities do not need to count financial contributions granted to other investment funds managed by the same investment company but have a majority of different investors measured according to their entitlement to profit, if their commercial transactions with those other funds (such as by a sale of assets or shares, loans, credit lines or guarantees) were “non-existent or limited”.

2. Transactions⁶¹

The FSR provides that transactions subject to the notification requirement cannot close before they obtain FSR approval. The EC’s review starts with a prenotification period during which the parties and the EC exchange drafts of the notification, to ensure that the notification will be considered complete. It is only when a notification considered by the EC as complete is filed that the formal review period starts.

After the date of reception of the complete notification, the FSR provides for an initial 25-working day review period. The EC may then decide to initiate an in-depth investigation. Parties are allowed to close their transaction after the lapse of the 25-working day period if the EC does not initiate such in-depth investigation. Where the EC does decide to initiate such review, parties need to wait for an additional 90 working days before they can close their transaction,

61 FSR (n 1) arts 24 ff.

potentially extended by 15 working days where the parties offer commitments. At the end of the in-depth investigation, the EC will adopt a decision with commitments, a no objection decision, or a prohibition decision. If no decision is adopted within the 90 working days (+ potential 15 working days extension), the parties can close the transaction. In case the EC requests information from parties and the parties fail to provide the complete information in the prescribed time limit, the FSR enables the EC to suspend the time limits (similar to the “stop-the-clock” procedure in EU merger control).⁶²

In case of violation of the above principles, the EC may dissolve transaction and or impose fines and periodic penalty payments.

3. Public Procurement⁶³

During the review of a notifiable foreign financial contribution in a public procurement procedure, all procedural steps in the public procurement procedure may continue, except for the award of the contract.⁶⁴

Similarly to transactions, the EC’s review starts with a prenotification period. Upon receipt of a complete notification, the EC has 20 working days to carry out its preliminary review but in duly justified cases may extend this time limit by 10 working days once.⁶⁵ The EC may then decide to initiate an in-depth investigation. The contract may be awarded to any economic operator, including the operator submitting the notification if after the lapse of the 20 working day period (+ potential 10 working days extension) the EC does not initiate such in-depth investigation.⁶⁶ Where the EC does decide to initiate such review, the EC needs to close the in-depth investigation no later than 110 working days after it has received the complete notification - potentially extended by 20 working days once, after consultation with the contracting authority or contracting entity, in duly justified exceptional cases including the investigations where the public procurement procedure is a multi-stage procedure.⁶⁷ At the end of the in-depth investigation, the EC will adopt a decision with commitments,⁶⁸ a decision prohibiting the award of the contract to the economic operator concerned,⁶⁹ or a no objection decision.⁷⁰ If no decision is adopted within the 110 working days (+ potential 20 working days extension), the contract may be awarded.⁷¹

4. Ex Officio

When the EC decides to initiate an *ex officio* investigation, the first step consists of a preliminary review.⁷² In that review, the EC could request “all the information it considers necessary” from the companies at stake, their parent companies and any other company, association, EU Member State and non-EU government that is deemed relevant to the review. When, following the preliminary review, the EC finds sufficient indications that distortive foreign subsidies have been granted, it can initiate an in-depth investigation. It is only when the EC initiates an in-depth investigation that it has a legal obligation to inform the company under investigation. This means that the EC’s preliminary review could take place without the company concerned being aware, even though in practice the EC’s fact gathering process (with market stakeholders or the company itself) will often already have made the alarm bell ring.

At the end of its in-depth investigation the EC will adopt a decision with redressive measures, a decision with commitments from the company at stake, or a no objection decision. The FSR does not provide for any time limits for the EC’s *ex officio* investigations, but states that the EC should “endeavour to adopt a decision within a period of 18 months” from the start of the in-depth investigation.⁷³

VII. Commission's Procedural and Investigative Powers

The FSR equips the EC with broad procedural and investigative tools. The EC may gather information from all stakeholders, including from the company

⁶² However, the fact that the time limit could be suspended needs to be specified in the request for information (FSR (n 1) art 25(5)).

⁶³ *ibid* art 30 ff.

⁶⁴ *ibid* art 32(1).

⁶⁵ *ibid* art 30(2).

⁶⁶ *ibid* art 32(2).

⁶⁷ *ibid* art 30(5).

⁶⁸ *ibid* art 31(1).

⁶⁹ *ibid* art 31(2).

⁷⁰ *ibid* art 31(3).

⁷¹ *ibid* art 32(2).

⁷² *ibid* art 10.

⁷³ *ibid* art 11(5).

at stake and any other company by way of request for information (RFI). Requests for information to companies not under investigation or involved in the notification process should take due account of the principle of proportionality. Arguably, this principle could of course also be used by the company concerned in case an EC RFI clearly misses the mark, eg in requesting a too broad amount of information.

Concerning *ex officio* review, the EC may order interim measures where there are sufficient indications that distortive foreign subsidies are involved and that there is a risk of serious and irreparable damage to competition.⁷⁴ The EC may also impose interim measures in a notification context.⁷⁵

In the context of *ex officio* investigations also, the EC may also conduct inspections (dawn raids) both inside and outside the EU.⁷⁶ However, to make use of such power and to avoid fishing expeditions the EC must show reasonable grounds for the inspection.⁷⁷ Outside of the EU, such inspections are subject to consent from the relevant company and government.

The EC has also powers to act against non-cooperation and impose fines and periodic penalty payments. In case of non-cooperation, the EC can take decisions “on the basis of facts available”, creating a strong incentive for companies and non-EU governments to cooperate.⁷⁸

As indicated before, in cases where the EC determines the existence of distortive foreign subsidies, it may impose redressive measures (such as ordering to dissolve a transaction) or, if the company con-

cerned offers satisfactory commitments, adopt a decision making those commitments binding.

VIII. Conclusion

The main novelty of the FSR is its scope of application and its objective. It is an additional instrument for the review of transactions, tenders and business behaviour in addition to merger control, foreign direct investment, State aid and trade rules.

The FSR draws on existing EU tools, but it applies to transactions and/or companies that had hitherto not been subjected to such tools. However, while EU merger control and EU State aid law, as well as trade law, constitute helpful references for the interpretation of FSR principles, substantial differences exist between those fields of EU law and the FSR.

Ensuring FSR compliance will initially require important efforts by companies and in its first year(s) it should be expected that the new regulation will translate into significant delays in deal making and public procurement. The FSR is based on the key notion of “financial contribution” which does not correspond to any existing accounting metric. Companies will therefore need to adapt their corporate reporting processes. After such changes will have been put in place, FSR compliance will become less burdensome.

The FSR institutes several different procedures which will initially be challenging to navigate. A lot of uncertainty remains as to how certain key FSR principles will be applied, in particular with regard to the FSR’s substantive assessment. The wide discretion and broad investigative powers granted by the FSR to the EC translate into additional legal uncertainty for companies. It is hoped that the EC’s guidelines and preliminary guidance will bring greater clarity, legal certainty and manageability to the FSR.

74 *ibid* art 12.

75 *ibid* art 25(7).

76 *ibid* arts 14 and 15.

77 *ibid* art 14(3)(a): EC must specify the subject matter and purpose of the inspection.

78 *ibid* art 16.