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## Article

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# The FSR and Public Procurement

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## Abstract

Distortions caused by foreign subsidies in public procurement procedures are one of the specific concerns addressed by the Foreign Subsidies Regulation (FSR). This article analyses both the substantive provisions of the FSR and specifically the notion of ‘subsidies’ and the procedure managed by the European Commission to countervail the effects of subsidies in procurement procedures. The first in-depth investigation concerning a public procurement procedure is also outlined.

## Keywords

Public procurement; Subsidies; Foreign suppliers; European Commission

## 1. Introduction

Distortions caused by foreign subsidies in public procurement procedures are one of the specific concerns addressed by the Foreign Subsidies Regulation (hereinafter “FSR”), given the ‘economic significance in the internal market’ of public procurement as well as ‘the fact that it is financed by taxpayers’ funds’ (Recital 40 FSR). Indeed, 14% of the European GDP, approximately EUR 2 trillion per year, is spent for the purchase of services, works or supplies by more than 250 000 public authorities. The Commission estimates that even a slight efficiency gain of 1% can lead to a total amount of EUR 20 billion in savings (European Commission, 2022), therefore it is crucial to prevent distortions caused by foreign subsidies to fair competition among companies when participating to public tenders in the internal market.

To address the effects on foreign subsidies on the functioning of the internal market, great attention has been devoted to the definition of what qualifies as foreign subsidy. Drawing on the definition of State aid, at Union level, and subsidy at WTO level, the FSR aims at overcoming the loopholes of existing legislation, firstly by providing a broad understanding when it comes to the types of financial contributions encompassed by Article 3(2) FSR. The latter covers a wide range of financial support such as capital injections, grants, loans, fiscal incentives, tax exemptions and the provision of goods and services. Most notably, the wording ‘*inter alia*’ indicates the non-exhaustive nature of the list provided by paragraph 2. This suggests that an extensive interpretation will be employed by the Commission in assessing the presence of the “financial contribution” element for the finding of a foreign subsidy. In addition, the FSR extends the understanding of potential actors capable of granting a financial contribution. Article 3(2) lays down that a financial contribution provided by a third country includes assistance rendered both through public or private entities (in addition to financial contributions provided directly by the government) (Article 3(2) of Regulation 2022/2560). What is particularly relevant is that this Article encompasses a broad number of elements that the Commission can take into consideration for the purpose of assessing attribution. *Inter alia*, the ‘economic environment prevailing in the third country’ of the entity at issue can be considered. This may also entail analyzing ‘the government’s role in the economy of that country’ (Recital 17 of Regulation 2022/2560).

Once the Commission ascertains the presence of a foreign subsidy, the distortive effect on the internal of the latter must be determined. Contrary to the State aid regime, it is relevant to note that such requirement has been separated by the definition of foreign subsidy itself. This is because, as outlined in Recital 17 of the FSR, ‘foreign subsidies are not generally prohibited’, therefore a separate, and subsequent, analysis shall be carried out to determine their distortive effect on the internal market. A distortion in the internal market is found where a foreign subsidy is responsible for improving the competitive position of an undertaking, which results in a distortion of competition in the internal market (Article 4(1) of Regulation 2022/2560). Due to the lack of transparency in the realm of foreign subsidies (Recital 18 of Regulation 2022/2560), the FSR provides for a non-exhaustive list of indicators that the Commission may employ to assess whether a distortion exists or not.

This article will firstly scrutinize the distortions caused by foreign subsidization of undertakings performing an economic activity in the Union (§1), which is instrumental to identify the regulatory gap that the FSR intends to cover (§2). Through a comparative analysis, a closer scrutiny will be devoted to the concept of ‘unduly advantageous tender’ introduced by the FSR (§3). In addition, this article will

provide an overview of the *ex ante* notification procedure enshrined in the Regulation and will touch upon the implications for public procurements when considering the *ex officio* procedure (§4). Finally, a brief analysis of the first in-depth investigation concerning a public procurement procedure will be outlined (§5).

## **2. Distortions caused by Foreign Subsidies in Public Procurement**

Before scrutinizing the newly established instruments provided by the FSR, it is central to highlight the distortions arising from the participation to public tenders of subsidized actors.

The consequences that stem from subsidized bidder taking part in public procurement procedures are manifold. A *prima facie* observation, which is potentially positive in the short-term, relates to the savings of public resources for contracting authorities when the selection process is based on the lowest bid price. In fact, through the participation of subsidized undertakings, lower bids will be submitted thanks to the capital injection the concerned undertaking is benefitting from (COM (2021) 223 final).

Nevertheless, the negative implications resulting from distortions caused by foreign subsidies outweigh the initial positive effects on public finances. This is the case particularly when winners are selected on a lowest bid price basis, since this selection criteria can potentially come to the detriment of quality and innovation. In addition, this results in particularly negative effects for non-subsidized competitors, which see themselves excluded from public tenders on a regular basis due to the preference given to the lowest bid price. Particularly, the bidder offering the second best economically advantageous option will suffer the greatest losses because of the unduly advantageous bid stemming from the distortive foreign subsidy. In the long run, both the disincentive to invest on innovation and quality as well as the reiterated missed business opportunities of non-subsidized competitors can lead to a desertification of the industrial scenario, due to the fact that bidders do not compete on a level playing field which goes to the detriment of non-subsidized undertakings (COM (2021) 223 final).

Furthermore, public procurement procedures can involve the issuing of a call for tenders for the works, supply or services of strategic contracts or infrastructures. Such instances might raise security concerns particularly when the third country at the origin of the distortive foreign subsidy at issue might pursue political and influence-oriented objectives abroad. Indeed, the subsidization of bidders participating to strategic public procurement procedures becomes instrumental to ascertain control over infrastructures or the award of sensitive contracts (COM (2021) 223 final).

## **3. The Regulatory Gap in Public Procurement for Foreign Subsidies**

The following analysis intends to highlight the lack of effective tools to counter the distortive effects of foreign subsidies in relation to public procurement procedures in the EU. Indeed, prior existing legislation did not provide for specific instruments to control the participation of subsidized bidders in public procurement, which is precisely the regulatory gap the FSR intends to fill.

Directive 2014/24/EU (hereinafter “Public Sector Directive”) is one of the most relevant instruments in the European *acquis* with regard to public procurement, since it establishes ‘rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests’ (Article 1(1) of Directive 2014/24/EU). Among the various powers conferred to contracting authorities in the design and assessment of public tenders, Article 69 is particularly relevant for the current discussion. This Article provides that contracting authorities shall request ‘economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services’ (Article 69 (1) of Directive 2014/24/EU).

The aim of such scrutiny is directed to assess the financial viability of an offer (COM (2020) 253 final), as well as to ensure a level playing field among competitors in public tenders (Meskens, 2022). To this end, bidders are offered the opportunity to provide explanations and evidence in relation to the abnormally low offer presented. Where the contracting authority deems the explanations provided by the economic operators not to be satisfactory to the end of accounting for the low bid, the tender may be rejected (Article 69 (3) of Directive 2014/24/EU). Most importantly, it is relevant to note that the contracting authority may reject an offer, after having consulted the tenderer. Where it is concluded that the abnormally low offer is due to EU State aid incomparable with the internal market within the meaning of Article 107 TFEU received by the economic operator. The regulatory gap that the FSR intends to fill lies in the fact that there is no corresponding provision for the scrutiny of subsidization originating outside the EU.

Hence, based on the current Public Sector Directive framework, a contracting authority could have only rejected an offer tainted by the support of foreign subsidies, where the abnormally low offer would have

impeded the execution of the contract ‘in accordance with the tender documents and all applicable legal obligations’ (C/2019/5494). Among the legal obligations just mentioned, Article 18 of the Public Sector Directive establishes that MS shall ensure the respect of environmental, social and labour law standards by economic operators in the performance of public contracts (Article 18 of Directive 2014/24/EU). Such provision could act as a shield from abnormally low tenders, since contracting authorities are entrusted with rejecting offers which do not comply with these standards. Nonetheless, the requirement of respecting specific Union standards appears to be more of a barrier from accessing the procurement market itself (Meskens, 2022), rather than an instrument able to tackle the distortive effect of foreign subsidies in public tenders.

Article 25 of the Public Sector Directive deals with the participation of third-country bidders to public procurement procedures in the Union. This Article represents the ‘gateway to the EU procurement market’, since it lays down the conditions for goods, services and works coming from outside the EU to access European public tenders (La Chimia, 2021). Article 25 establishes that works, supplies, services and economic operators originating in countries with which the Union concluded bilateral or multilateral agreement with procurement chapter or parties to the GPA, shall be afforded ‘no less favourable treatment compared to works, supplies, services and economic operators of the Union’ (Article 25 of Directive 2014/24/EU). This implies that countries that do not fall under the requirements enshrined in Article 25 do not have secured access to the European procurement market (C/2019/5494).

Nonetheless, recent data shows that European undertakings encounter considerable difficulties in entering procurement markets of third countries, including those that have ratified international agreements with the Union in the public procurement realm (La Chimia, 2021). The Commission estimated that approximately ‘only €10 billions of EU exports (0.08% of EU GDP) currently find their way in global procurement markets’ (COM (2016) 34 final). Indeed, the US has only allowed access to its public procurement market to foreign bidders for an amount of €178 billion, while Japan only account to €27 billion. On the other hand, the EU estimated that €352 billions of EU public procurement is open to bidders from member countries of the WTO agreement on government procurement’ (COM (2016) 34 final).

Due to this lack of reciprocity, in June 2022 the Commission adopted the International Procurement Instrument (hereinafter “IPI”). The latter intends ‘to improve the access of Union economic operators, goods and services to the public procurement and concession markets of third countries’ (Article 1(1) of Regulation 2022/1031). This objective is pursued by enabling the Commission to start investigations where there is evidence of a lack of reciprocity by the third country concerned in allowing access to Union undertakings to the procurement market (Article 1(1) of Regulation 2022/1031). The potential measures the Commission is entrusted to adopt are particularly relevant to the current discussion. Namely, where the Commission concludes that a third-country measure or practice aimed at hindering access to the procurement market exists, an IPI measure may be adopted in the attempt to restore reciprocity (Bowsher et al., 2023).

Among the measures available, Article 6(6) entrusts the Commission with the possibility of requiring contracting authorities at MS level to ‘exclude tenders submitted by economic operators originating in that third country’. Hence, the outcome of excluding tenders submitted by third country operators may tackle the distortions caused by foreign subsidies, but only as a side-effect. The IPI, while being efficient in addressing obstructions by third countries in relation to EU undertakings outside the Union in the realm of public procurement, it does not address distortions caused by the participation of undertakings benefitting from foreign subsidies in the internal market (COM (2020)253 final).

Lastly, an instrument that is worth taking into consideration is Directive 2014/25/EU on procurement in the water, energy, transport and postal services sectors (hereinafter “Utilities Directive”). The text of the Utilities Directive addresses the issue of tenders comprising products originating in third countries, with which the Union did not conclude any agreement for the purpose of either opening up the procurement market or where goods and services do not have effective access in procurement procedures (Free Trade Agreements encompassing procurement chapters and WTO Agreement on Government Procurement) (COM (2020)253 final).

Pursuant to Article 85 of the Utilities Directive, where more than 50% of the presented tender products originate in a third country, contracting authorities may decide to reject the bid. This tool creates a system of conditional openness in relation to the procurement market, which is however not explicitly linked to foreign subsidies. This means that a contracting authority by rejecting a tender the proportion of the products of which exceeds 50% may safeguard the procurement market from the distortive effects of foreign subsidies. Nonetheless, similarly to the IPI, the Utilities Directive is not specifically stressing the threat of foreign subsidies in the assessment of the rejection of a tender comprising products originating from third countries. In addition, it shall be noted that the Article at issue, namely Article 85

of the Utilities Directive, almost amounts to dead letter given that this possibility has been scarcely adopted by contracting authorities at MS level (Meskens, 2022).

In spite of that, a noteworthy decision has been adopted in 2021 by a German contracting authority, which excluded the most cost-efficient offer submitted by Chinese CRRC by relying on Article 85 of the Utilities Directive (Meskens, 2022; Case Summary B4-115/19). CRRC is a state-owned holding company which, as will be more closely investigated later in this chapter, is known for receiving large amounts of subsidies from the Chinese state. In this context, the Utilities Directive has been effective in tackling the distortive effect, however, considering the poor application of the Article, a more targeted instrument was needed.

#### **4. Comparing concepts: abnormally low offer v unduly advantageous tender**

Considering the regulatory gap stemming from existing legislation, the FSR introduced a targeted procedural mechanism specifically aimed at addressing the distortive effects of foreign subsidies in the realm of public procurement procedures. Article 27 FSR clarifies that the public procurement mechanism seeks to counter foreign subsidies which may allow an undertaking ‘to submit a tender that is unduly advantageous in relation to the works, supplies and services concerned’ (Article 27 of Regulation 2022/2560). In this context, the FSR introduces a brand-new wording in order to describe the problematic aspects it intends to tackle, namely ‘unduly advantageous tenders’. Until the adoption of the FSR, the public procurement regulatory framework only knew the term ‘abnormally low tender’. For the purposes of the current analysis, it is relevant to highlight similarities and departures between the two concepts. Firstly, when analyzing the two expressions from a linguistic point of view, a clear difference can be spotted (Blažo, 2021). The term ‘abnormal’ refers to ‘something that deviates from the usual or typical’. In the case of public procurement, the “abnormality” of an offer lies in its extraordinary nature in economic terms (Blažo, 2021). Instead when referring to a tender as ‘unduly advantageous’, the wording ‘unduly’ suggests that ‘a contradiction from legal standards’ underpins the offer. In this case, the contradiction consists in the discrepancy between the prohibition of State aid within the Union, which represent the legal standard potential distortive effect of foreign subsidies contravene. Therefore, both concepts highlight an inconsistency with “ordinary” circumstances, but the Public Sector Directive’s concept is primarily aimed at preventing the impossibility of performance of the contract stemming from abnormally low tenders, while the FSR intends to preserve a level playing field in public procurement among undertakings, that might be distorted by foreign financial contributions.

Both the Public Sector Directive and the FSR leave ‘abnormally low offer’ and ‘unduly advantageous offer’ undefined. In relation to the former concept more guidance is provided due to the fact that the Directive dates back to 2014. Indeed, unless defined by national legislation, the determination of an abnormally low tender is up to the contracting authorities. This discretion has been shaped over time by the interpretation of the CJEU. The latter stated that *prima facie* a tender may appear to be abnormally low where the reliability, genuineness and seriousness of the tender are questionable (Ølykke & Clausen, 2021). In particular, an apparent abnormally low tender shall be considered as such when it produces doubts as to the performance of the contract on its terms, but especially where the abnormally low offer appears to be incompatible with mandatory requirements in the files of social, labour or environmental law or international labour law provisions (Recital 40 and Recital 103 of Directive 2014/24/EU). In such circumstances, contracting authorities may ‘compare the price of received tenders to the estimated budget for the contract, to the price of the other tenders submitted, or to the normal market price and thereby identify tenders that appear to be abnormally low’ (Ølykke & Clausen, 2021).

When turning to the FSR, the concept of ‘unduly advantageous offer’ has not yet been clarified by the Commission. Nonetheless, further specification in relation to it will most likely be included in the Guidelines due by January 2026. In fact, Article 46 explicitly lays down that the Guidelines shall address ‘the assessment of a distortion in a public procurement procedure according to Article 27’ (Article 46 of Regulation 2022/2560). Furthermore, such as in the context of the Public Sector Directive, the meaning of this newly introduced concept will take shape over time through the practice of the Commission and the consequent interpretation of the CJEU.

In relation to the assessment stemming from the two concepts under scrutiny, substantial differences can be identified. For the purpose of comparison in the specific case at hand, the assessment of an abnormally low offer benefitting from state aid will be taken as reference.

The initiation of the procedure represents a first element of departure between the assessment of an abnormally low offer and an unduly advantageous one. In relation to the former, it is up to the contracting authority to identify an abnormally low tender and to start verifying its reliability. Instead, under to the

FSR, the scrutiny of an unduly advantageous offer is triggered by the notification thresholds enshrined therein. Some leeway is left to contracting authorities only where suspects in relation to the presence of foreign subsidies arise during the examination of tenders (Article 29(7) of Regulation 2022/2560). In such circumstance, contracting authorities' concerns shall be communicated to the Commission without delay. Under the Public Sector Directive, once an abnormally low offer has been identified, contracting authorities shall request the economic operators concerned to provide explanations regarding the price or cost proposed based on the fields enshrined in Article 69(2) of the Public Sector Directive, which includes 'the possibility of the tenderer obtaining State aid.' In the context of reviewing the economic operators' explanations, the contracting authority itself is entrusted to conduct a formal assessment in relation to the compatibility of the aid (Biancardi, 2018). The scrutiny is restricted to the appraisal of 'whether the aid was either approved by the Commission or fell within one of the exemption Regulations' (Biancardi, 2018). On the other hand, the assessment of whether a foreign subsidy may have enabled an economic operator to present an 'unduly advantageous offer' is entirely devoted to the Commission. In fact, pursuant to Article 29(2) of the FSR, contracting authorities are under a duty to send notifications or declarations to Brussels without delay. In addition, paragraph 4 of the same Article underlines the centralized character of the FSR system by specifying that the examination of the notifications' content is in the hand of the Commission, which will eventually communicate the outcome of such scrutiny to the contracting authorities.

In addition, the scrutiny pursuant to Article 69 of the Public Sector Directive examines the compatibility of State aid *in abstracto* (Blažo, 2021). Indeed, the benefit conferred by the aid to the offer under investigation is specifically analyzed only where the economic operator fails to provide sufficient evidence in relation to the compatibility of the financial contribution. On the other hand, Article 27 FSR limits the assessment of the distortive effect of a foreign subsidy to the public procurement procedure from which the notification originated (Recital 46 of Regulation 2022/2560).

In spite of the different aims and procedural mechanisms underpinning the Public Sector Directive and the FSR, overlaps in the assessment of abnormally low tenders and unduly advantageous offers may be envisaged. Article 29(7) FSR intends to clarify the relationship between the two concepts. The text of the Article establishes that the procedural framework introduced by the FSR does not prejudice the powers of investigation of contracting authorities in relation to abnormally low offers. Nonetheless, contracting authorities are precluded from scrutinizing an abnormally low offer when 'an assessment would be initiated on the suspicions indicating a possible presence of foreign subsidies alone' (Article 29(7) of Regulation 2022/2560).

## 5. Ex Ante Notification Procedure in Public Procurement

The notification procedure introduced in the realm of public procurement is among the most striking features established by the FSR. This *ex ante* tool, based on notification obligations, resembles the now well-established system of merger control aimed at preventing the creation of dominant actors potentially impairing competition in the internal market. In the same vein, the FSR seeks to counter the distortive effect of foreign subsidies by scrutinizing them before a contract for works, services or supply is awarded (Friton, 2023).

Under the public procurement procedure set out in Chapter 4 of the FSR, only financial contributions awarded in the previous three years are potentially subject to notification requirements (Article 27 of regulation 2022/2560). Pursuant to Article 28 FSR, an economic operator shall notify a foreign financial contribution where: '(a) the estimated value of the that public procurement (...) is equal to or greater than EUR 250 million; and (b) the economic operator (...) was granted aggregate financial contributions in the three years prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4 million per third country' (Article 28(1) of Regulation 2022/2560).

Therefore, two cumulative requirements need to be met for a financial contribution to be notifiable. This double threshold represents an improvement compared to the initial proposal of the FSR, which only included point (a) referring to the estimated value of the public procurement procedure. Under the text of the draft proposal of the FSR, this meant that any foreign subsidy in the context of a public procurement procedure amounting to or greater than EUR 250 million would have been subject to notification (COM/2021/223 final). Commentators and partitioners pointed to the overly burdensome requirement for undertakings participating in public procurement procedures as opposed to notification obligations foreseen in the context of concentrations, where only an aggregate subsidy of more than EUR 50 million was going to be subject to the Commission's assessment (Blažo, 2021). The disproportionate treatment between undertakings participating in M&A transactions and the ones participating to public

tenders prompted the Commission to introduce a comparable threshold in the context of public procurement.

Notification obligations arise not only when the financial contribution is granted to the economic operator participating to the public tender, but also when a foreign subsidy benefits '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' (Article 28(1)(b) of Regulation 2022/2560). For the purposes of notification, a 'main' subcontractor or supplier is considered as such when 'their participation ensures key elements of the contract performance and (...) where the economic share of their contribution exceeds 20% of the value of the submitted tender' (Article 29(5) of Regulation 2022/2560).

Article 28 FSR foresees exclusions from the notification obligations arising from Chapter 4. Namely, public tenders in the fields of defense and security are not covered by the public procurement procedure (Article 28(3) of Regulation 2022/2560).

Where the thresholds set out in Article 28 are met, the economic operator shall notify the contracting authority of the financial contributions received in the previous three years. Nonetheless, economic operators, whose financial contributions do not meet the amount set by Article 28 FSR, are still under an obligation to forward a declaration listing all granted foreign financial contributions, while at the same time attesting that they do not amount to notifiable financial contributions (Article 29(1) of Regulation 2022/2560).

Notifications and declaration shall be sent to the Commission by the contracting authority, which acts as a mere intermediary when it comes to the scrutiny of foreign subsidies. On the other hand, contracting authorities may urge economic operators to submit notifications or declaration where such documentation is missing. Following the 10 working days designated for the economic operator to reply to the contracting authority's request, the contracting authority shall reject the tender in question on grounds of irregularity in case such request is being disregarded (Article 29(3) of Regulation 2022/2560). The Commission shall be informed thereof.

The assessment of the notified foreign subsidies is entirely left in the hands of the Commission, which shall firstly verify whether the notification is complete. Economic operators can supplement incomplete notifications within 10 days, following the expiry of which, the tender shall be declared irregular by the Commission. Based on such declaration, the contracting authority will consequently reject the irregular tender (Article 29(4) of Regulation 2022/2560).

Suspensions relating to unnotified financial contributions can be communicated by contracting authorities to the Commission, even in spite of the presence of a declaration. When such doubts directly stem from the Commission, the latter may request the economic operator concerned to submit a notification accounting for the foreign financial contributions granted, even if they are not notifiable under Article 28(1). Despite the broad leeway left to the Commission under this Article, the FSR specifies that such notification requests still fall under the procedural mechanism of Chapter 4, i.e. *ex ante* notification mechanism, and shall not be regarded as an *ex officio* procedure (Article 29(8) of Regulation 2022/2560). The scrutiny conducted by the Commission consists of a two-step approach such as in the case of an *ex officio* procedure (Article 30(1) of Regulation 2022/2560). The initial preliminary review shall last no longer than 20 working days from the complete submission of the notification (Article 30(2) of Regulation 2022/2560). The Commission shall eventually decide whether to open an in-depth investigation in conformity with Article 10(3) FSR or close the preliminary review. The latter may be reopened if case new information suggests the presence of distortive foreign subsidies (Article 30(4) of Regulation 2022/2560). Following an in-depth investigation, where there is evidence that an economic operator benefits from a foreign subsidy distorting the internal market, the Commission shall either adopt a decision with commitments in accordance with Article 11(3) FSR, where the concerned undertaking offers commitments (Article 31(1) of Regulation 2022/2560), or a decision prohibiting the award of the contract, in case of non-collaboration by the economic operator (Article 31(2) of Regulation 2022/2560). The decision prohibiting the award shall be implemented by the contracting authority by rejecting the tender in question.

Throughout the scrutiny of notified financial contributions, procedural steps linked to the public procurement procedure can be conducted, apart from the award of the contract (Article 32(1) of Regulation 2022/2560). In fact, Article 32 FSR introduces a standstill obligation, which prevents contracting authorities to award a public contract to economic entities whose foreign financial contribution are under scrutiny, until the Commission reaches a decision on the merit. This means that the economic operator potentially being awarded the contract will remain uncertain until the Commission reaches a conclusion in relation to the distortive nature of the foreign financial contribution, since despite offering the most advantageous tender it may be excluded in light of the distortion caused on the internal market (Blažo,

2021). Indeed, in case the Commission adopts a decision prohibiting the award of the contract, the contracting authorities will exclude the economic operator from the public procurement procedure.

In January 2024, the Commission reported on the first 100 days since the start of the notification obligation of public procurement procedures. Unlike the detailed set of information provided in relation to notifications in the realm of concentrations, the Commission merely stated that a total of more than 100 submission, comprising both notifications and declarations, were sent by economic operators since October 12<sup>th</sup>, 2023 (European Commission, 2024).

In addition to the dedicated *ex ante* notification procedure, foreign subsidies in the realm of public procurement can be investigated by means of an *ex officio* investigation tool as well. This double course of action effectively widens the powers of the Commission due to the fact that the *ex officio* procedure allows the scrutiny of financial contributions that do not meet the thresholds for the *ex ante* mechanisms. This possibility is counterbalanced by the fact that only awarded contracts can be subject of an *ex officio* review (Article 9 of Regulation 2022/2560). Furthermore, the potential outcome of an *ex ante* procedure greatly differs from the one allowed under an *ex officio* review. Indeed, in the latter scenario, where the Commission identifies the presence of a foreign subsidy distorting the internal market, the public contract under scrutiny cannot be terminated and the decision awarding such contract cannot be revoked. On the other hand, the Commission is entitled to impose redressive measures pursuant to Article 7 FSR.

In addition, the *ex officio* tool can be applied to defense, and security contracts covered by Directive 2009/81/EC, which is instead exempted from notification obligation under Chapter 4 of the FSR (Recital 41 of Regulation 2022/2560).

## 6. First In-depth investigation under the FSR

On February 16<sup>th</sup> 2024, the Commission has launched its first in-depth investigation under the powers of the FSR following an *ex ante* notification in relation to a public procurement procedure (IP/24/887). The notification originated from a public procurement tender opened by the Ministry of Transport and Communications of Bulgaria for the project ‘Bulgaria-Sofia: Railway and tramway locomotives and rolling stock and associated parts’ (C/2024/1096). The estimated value of the project amounts to EUR 613 765 903,66, therefore meeting the threshold enshrined in Article 28(1)(a) FSR (C/2024/1096). The public procedure at hand calls for the supply of ‘20 single deck zero-emission electric ‘push-pull’ trains with a maximum speed of 200 km/h and a capacity of at least 300 seats each’, maintenance services for a period of 15 years and staff training. One of the two tenderers that submitted offers in the context of this public procurement procedure, forwarded a notification pursuant to Article 29(1) FSR (C/2024/1096).

The Notifying party is a subsidiary of CRRC Corporation Limited (hereinafter “CRRC”), the world's largest rolling stock manufacturer. In the notification, the Commission reported that CRRC Sifang Co., Ltd did not highlight any foreign subsidy most likely to distort the internal market pursuant to Article 5 FSR, nor did it report for financial contributions equal or greater than EUR 4 million per third state (C/2024/1096). Nevertheless, the Commission requested the notifying party to provide further documentation with regards to its ownership structure and more in depth information on any financial contribution meeting the threshold included in Article 28(1)(b) FSR has been granted to subsidiaries of the holding company (C/2024/1096). The information forwarded by the notifying party provided the Commission with sufficient indications pointing to the presence of foreign subsidies distorting the internal market.

In particular, by analyzing the requested annual reports for financial statements, the Commission detected a total amount of EUR 1.745 billion in foreign financial contributions, split in public procurement contracts awarded to CRRC or to its subsidiaries and in government grants (C/2024/1096). The amount of foreign subsidies received potentially justifies the fact that the offer submitted by CRRC Sifang Co., Ltd is approximately half that of the other tenderer, Spanish Talgo (Bounds, 2024).

Nonetheless, due to the withdrawal of CRRC Sifang Co., Ltd from the public procurement tender in Bulgaria, the in-depth investigation has already been closed. The news issued on March 26<sup>th</sup>, 2024, by Commissioner Breton comes only a few weeks after the announcement of the initiation of such investigation. The Commissioner added that while ‘the single market is open for firms that are truly competitive and play fair’, the introduction of the FSR toolbox ‘has already yielded results’ and the Commission ‘will continue to take all necessary measures to preserve Europe’s economic security and competitiveness (...)’ (STATEMENT/24/1729).

In spite of the recent termination of the in-depth investigation, it still remains paradoxical that the first ever resort to this newly introduced tool addressed CRRC. In fact, this state-owned Chinese enterprise is an old acquaintance of the Commission in the field of European merger. The Chinese railway manufacturer was at the center of the debate concerning the famous Siemens/Alstom merger case,



eventually cleared in 2019 (Killick et al, 2024). Indeed, the German and French enterprises, backed by their respective governments, announced their intention to merge in order to counter the fierce competition of the state-owned CRRC (Liran, 2020). The merger between Siemens and Alstom would have created a so-called “European champion” in the market of railway manufacturing (Nourry & Rabinowitz, 2020). Nonetheless, this scenario would have effectively created a dominant actor on the market, which is the reason that led the Commission to block the transaction. It is worth noting that in relation to the external competition exercised by CRRC, the Commission ironically stated that: ‘market entry by CRRC (...) does not appear likely, timely or sufficient to deter or defeat any potential anti-competitive effects of the Transaction in both the overall market encompassing high-speed and very high-speed rolling stock, as well as in the potentially narrower market for very high-speed rolling stock’ (C(2019) 921 final). Furthermore, it is interesting to note that CRRC already entered the European market in 2020 by acquiring the German Vossloh Locomotives, leading in the market for diesel-powered shunters manufacturing (Renner et al, 2024). The German competition authority eventually approved the merger on grounds of a constant decrease in competitiveness of Vossloh despite its strong market position in the EU and Switzerland (German Competition Authority, 2020). Andreas Mundt, President of the German Competition Authority, stated that the presence of foreign subsidies and the considerable technological resources at CRRC’s disposal were taken into consideration in the assessment of the merger (German Competition Authority, 2020). Despite the concerns on distortion of competition highlighted by a survey conducted by the German competition authority, the latter approved the merger in view of the minor role played by CRRC to this day in the European market (Craig, 2020). Notwithstanding the fact that the in-depth investigation at issue is the only one of its kind until now, the actors involved and the outcome that resulted from the announcement of the opening of such investigation provide an initial picture as to the effectiveness of the newly introduced Regulation. In fact, CRRC precisely represents the kind of economic operator capable of distorting the internal market due to the massive injection of subsidies received by the Chinese state. As evidenced by the documentation requested by the Commission as part of the notification procedure, the offer presented in the public procurement procedure in Bulgaria completely “out-bid” the one submitted by the Spanish enterprise. Due to the early withdrawal of the Chinese undertaking, the Commission will not be able to provide a decision on the matter, but it is reasonable to imply that the Commission would have detected foreign subsidies capable of distorting the internal market during the in-depth scrutiny, since the total sum of financial contributions amounted to approximately five times the value of the bid presented in the public procedure at issue (C/2024/1096). It is still to be seen whether the FSR will effectively acts as a deterrent for such heavily subsidized economic operators to enter the internal market, or whether the Commission will be submersed by notifications without having the personnel and time to address the most distortive subsidies for the internal market.

## 7. Conclusion

The overarching aim of the FSR is to protect the internal market from foreign subsidies capable of undermining ‘the level playing field of various economic activities in the Union’ (Recital 4 of Regulation 2022/2560). Such threats primarily originate from third countries, such as China, which are not aligned with the predominant market-liberal policies pursued at EU level. On the other hand, the public interventionist governance exercised outside the EU may potentially cause significant distortions in the internal market as well. As a result, the Commission responded to the growing dissatisfaction with the unfair conditions for participation in the internal market by seeking to extend state aid rules to companies benefiting from foreign subsidies. Nonetheless, this attempt of ‘extraterritorialisation’ of Eu law could lead to increased discontent in the WTO context.

Frustration in relation to the obligations stemming from the FSR also emerge from firms taking part to the European internal market. In fact, the notification and declaration obligations foreseen by the Regulation represent an increased administrative burden for companies involved in M&A transactions and public procurement procedures. In relation to the latter, the FSR provides for the notification of information with regards to contractors, subcontractors and suppliers potentially involved in the performance of the public contracts. This entails that contractors are required to systemically gather financial data from the preceding three years, not only in relation to their own firm, but also from their subcontractors and suppliers (Kania & Andhov, 2023). As a result, companies operating in the internal market which could fall under the obligations introduced by the FSR may need to implement reporting mechanisms as well as designating specific corporate functions to comply with the Regulation (Friton et al., 2023). For this reason, smaller sized companies may face significant obstacles when it comes to the participation to public procurement procedures in the EU, which is in contrast with the declared objective

of the Commission of 'reducing burdens and simplifying legislation' for SMEs (COM/2020/103 final). Implementing Regulation 2023/1441 partly addresses such concerns by providing a pre-notification procedure, fostering dialogue between the Commission and potentially notifying firms, and by splitting the notification obligations into three categories (Friton et al., 2023), nonetheless the negative consequences on access to public procurement procedures for SMEs may still result to be significant.

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