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Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement

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Article	Abstract
<p>Keywords: FSR, public procurement, SOEs</p> <p>Article History Received: Nov 14, 2024; Reviewed: Jan 14, 2025; Accepted: Jan 28, 2025; Published: Jan 31, 2025.</p> <p>DOI: 10.28946/slrev.Vol9.Iss1.3048.pp114-136</p>	<p>The EU Foreign Subsidies Regulation (FSR), effective from July 2023, aims to create a level playing field in the EU internal market by addressing concerns about non-EU companies gaining unfair advantages through subsidies from their home countries. By granting the European Commission extensive investigative powers, particularly in public procurement and mergers, the FSR aims to ensure fair competition and fill regulatory gaps in the EU's existing legal framework. However, the regulation's impact on the participation of non-EU companies in the EU public procurement market remains insufficiently explained. This article examines the impact of the FSR on non-EU companies, focusing on its effects on public procurement, especially case studies from the Commission's investigations into two Chinese state-owned enterprises (SOEs). It offers a detailed interpretation of the FSR's rules on foreign subsidies in the context of EU public procurement from both procedural and substantive perspectives. Additionally, the article provides practical recommendations for non-EU companies seeking to navigate the FSR's requirements and minimise its negative impacts while maintaining their participation in EU public procurement markets.</p>

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INTRODUCTION

The EU Foreign Subsidies Regulation (FSR) entered into force on 12 January 2023 and will start to apply from 12 July 2023.¹ After two years of implementation, the impact of this regulation on foreign companies is beginning to emerge. This regulation aims to establish a level playing field for all companies in the EU internal market, particularly in concentrations and public procurement procedures. The enactment of this regulation is predicated upon the presumption that certain companies, particularly those of Chinese origin with significant market shares in the EU, receive substantial subsidies from their respective governments. It

¹ 'Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market', accessed 9 September 2024, <https://eur-lex.europa.eu/eli/reg/2022/2560/oj>.

represents a proactive measure to safeguard European industry against the encroachment of state-subsidised Chinese enterprises, particularly in critical strategic sectors such as vital raw materials, energy, semiconductor manufacturing, and infrastructure development.²

According to the EU Commission, the FSR was developed in response to concerns that non-EU companies may gain an unfair advantage in the EU's internal market through received subsidies. The FSR gives the Commission extensive powers to investigate financial contributions granted to non-EU companies, which may impact the economic activities of non-EU companies that are already active in or intend to enter the EU internal market and may be affected by this regulation. The function of the FSR is closely tied to geopolitical considerations.³ This is reflected in the tighter restrictions on subsidised imports of products like solar panels and electric vehicles. The regulation has significantly impacted sectors such as renewable energy, technology, and infrastructure, where state subsidies play a crucial role. In practice, it has introduced new challenges in areas such as merger reviews, public procurement, and compliance, compelling foreign businesses to adjust their strategies to navigate the EU market effectively.

In the EU's public procurement market, Chinese companies, which are highly competitive in some major industrial areas and have been accused of being among the biggest beneficiaries of Chinese government subsidies, could be particularly affected by this regulation. Of the first four FSR investigations, three are about Chinese companies, and two are about Chinese companies' competition in the EU public procurement market. These investigations raise concerns for Chinese companies and all non-EU businesses looking to compete in the EU internal market. They add to non-EU companies' legal uncertainty when doing business in the EU internal market.⁴ To respond to such concerns of legal uncertainty, this research aims to analyse the impact of the FSR on non-EU companies participating in EU public procurement competitions, using Chinese companies as a case study. This research will explore the potential effects of the FSR on these non-EU companies. The central question addressed in this article is: What are the impacts of the FSR on non-EU companies in EU public procurement competitions?

RESEARCH METHODS

To answer the research question, this article primarily adopts a doctrinal research approach to explore the effects of the FSR on companies in practice. Doctrinal research, which focuses on analysing legal principles, rules, and concepts, will be used to examine the legal framework and interpret the FSR's implications for businesses.⁵ This method is particularly suitable for understanding the significance of the FSR in the broader context of legal studies. As the FSR interacts with other regulations, such as the EU's public procurement rules, this article will

² Scott Lavery, 'Rebuilding the Fortress? Europe in a Changing World Economy', *Review of International Political Economy* 31, no. 1 (2 January 2024): 330–53, <https://doi.org/10.1080/09692290.2023.2211281>.

³ Sarah Bauerle Danzman and Sophie Meunier, 'The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator', *Journal of Common Market Studies* 62, no. 4 (3 March 2024): 1097–1115, <https://doi.org/10.1111/jcms.13599>.

⁴ Pascal Friton, Max Klasse, and Christopher R Yukins, 'The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage', 2023.

⁵ V. M. Gawas, 'Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards the Research Development', 2017, <http://irgu.unigoa.ac.in/drs/handle/unigoa/5046>.

refer to these relevant legal acts where necessary to enhance the analysis of the impact of FSR on public procurement. Additionally, key supporting policies associated with the FSR will also be addressed to provide a more comprehensive understanding of its regulatory landscape. To support our doctrinal research, this article will use case studies based on investigations by the Commission. These case studies are meant to enhance the doctrinal analysis, not to be examined in detail alone. Instead of analysing each case individually, this article will focus on the Commission's decisions and non-EU companies' reactions in these investigations.

ANALYSIS AND DISCUSSION

Overview of the FSR

Legal background of FSR: filling the regulatory gap of foreign subsidies in the EU public procurement market

The introduction of the FSR aims to fill a major gap in the EU's regulatory framework regarding foreign subsidies.

Before the FSR, the EU Commission focused on preventing subsidies within the EU that gave certain countries or sectors unfair advantages, as outlined in Article 107 of the Treaty on the Functioning of the European Union (TFEU).⁶ These rules were designed to ensure a level playing field by prohibiting Member States from granting state aid that distorts competition between their domestic companies and companies from other Member States. However, these regulations only applied to subsidies granted by EU Member States, not covering foreign subsidies received by non-EU companies.

EU sector-specific regulations also fail to address the issue of foreign subsidies sufficiently. This was particularly problematic in the EU public procurement market, which accounts for 14% of the EU's GDP annually.⁷ The European Commission argued that foreign subsidies gave non-EU companies an unfair advantage, allowing them to offer lower prices and win contracts, thus limiting opportunities for EU-based companies.⁸ The FSR complements existing regulations by introducing a framework to investigate and remove the impact of foreign subsidies on competition in the EU procurement market.

In the broader context of international trade, the World Trade Organization (WTO) regulates subsidies but does not cover subsidies from non-WTO members or those within public procurement.⁹ The FSR fills this legal gap, providing the EU with an effective tool to

⁶ 'Consolidated Version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on Competition - Section 2: Aids Granted by States - Article 107 (Ex Article 87 TEC)', 115 OJ C § (1957), http://data.europa.eu/eli/treaty/tfeu_2008/art_107/oj/eng.

⁷ 'Public Procurement - European Commission', accessed 9 September 2024, https://single-market-economy.ec.europa.eu/single-market/public-procurement_en.

⁸ 'Foreign Subsidies Regulation - European Commission', accessed 1 September 2024, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy/foreign-subsidies-regulation_en.

⁹ Surya P. Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level Is the "Level Playing Field"?', *Netherlands International Law Review* 53, no. 2 (August 2006): 276, <https://doi.org/10.1017/S0165070X06002737>.

regulate foreign subsidies and reduce their potential to distort competition in the EU internal market.¹⁰

Recent investigations

1. Investigation into CRRC Qingdao's Participation in Bulgarian Public Procurement

On 22 January 2024, the European Commission received a notification from CRRC Qingdao Sifang Locomotive Co., Ltd. (CRRC Qingdao), a Chinese state-owned CRRC Corporation subsidiary.¹¹ On 16 February 2024, the Commission initiated its first in-depth investigation into CRRC Qingdao. This investigation concerns the company's bid to supply electric "push-pull" trains and related services for a public procurement tender launched by Bulgaria's Ministry of Transport and Communications.¹² In the notification submitted to the Commission, the CRRC Qingdao is required to clarify the financial support it received, especially from China. After assessing the notification, the Commission deemed sufficient indications that CRRC Qingdao's participation could distort competition within the EU internal market because the foreign financial contributions received by CRRC Qingdao conferred a selective advantage, which allowed it to submit an unduly advantageous bid. The Commission decided to launch an in-depth investigation to determine whether the foreign financial contribution qualifies as a subsidy that directly or indirectly provides a selective benefit to the company and assess whether this advantage enables the company to submit an unduly competitive tender, potentially disadvantaging other companies in the public procurement process and leading to lost sales opportunities.¹³ Before the Commission started the in-depth investigation, the CRRC Qingdao withdrew from the tender.¹⁴ As of the latest update, the procurement process has not progressed, as no tenders or applications were received or all were rejected.¹⁵

2. Investigation of Chinese Firms in Romanian Solar Photovoltaic Public Procurement

Another investigation into public procurement involves Chinese companies in the solar photovoltaic sector. It was carried out by a Romanian contracting authority, Societatea Parc Fotovoltaic Rovinari EST S.A., in relation to a tender for the design, construction, and operation of a photovoltaic park in Romania with a capacity of 454.97 MW, partially financed by the European Union.¹⁶ In April 2024, the European Commission continued its in-depth

¹⁰ Nuno Cunha Rodrigues, 'Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field within the Internal Market', *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU*, 2021, 209.

¹¹ 'Summary Notice Concerning the Initiation of an In-Depth Investigation in Case FSP. 100151, Pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560 (OJ C, C/2024/2830, 22.04.2024', accessed 10 September 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C_202401913#ntr2-C_202401913EN.000101-E0002.

¹² 'Foreign Subsidies Regulation: Commission Opens Investigation', Text, European Commission - European Commission, accessed 10 September 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887.

¹³ 'Foreign Subsidies Regulation: Commission Opens Investigation', Text, European Commission - European Commission, accessed 2 September 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887.

¹⁴ 'Statement Commissioner Breton', Text, European Commission - European Commission, accessed 10 September 2024, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_1729.

¹⁵ '003259-2024 - Резултат', TED, accessed 10 September 2024, <https://ted.europa.eu/bg/notice>.

¹⁶ 'Commission Closes Two In-Depth Investigations in the Solar Photovoltaic Sector Following the Withdrawal of the Companies from Public Procurement | Public Buyers Community', 7 June 2024, <https://public-buyers-community.ec.europa.eu/news/commission-closes-two-depth-investigations-solar-photovoltaic-sector-following-withdrawal>.

investigation into two consortia involved in a public procurement procedure under the FSR. The first consortium comprises the ENEVO Group, a Romanian engineering and consulting services provider, and LONGi Solar Technologie GmbH, a German subsidiary fully owned by LONGi Green Energy Technology Co., Ltd. The second consortium includes Shanghai Electric UK Co. Ltd. and Shanghai Electric Hong Kong International Engineering Co. Ltd., both fully owned by Shanghai Electric Group Co. Ltd., a state-owned enterprise in China.¹⁷ Similar to the first case, the Commission assumes the information provided in the submitted notification indicates a high likelihood that both companies have received foreign subsidies that distort the internal market. So, the Commission has decided to proceed with an in-depth investigation. Following the initiation of the investigation before the in-depth investigation started, both consortia withdrew from the public procurement process.¹⁸ As a result, the Commission will close its in-depth investigations into their participation.

3. An ex officio investigation into Chinese companies

The European Commission launched an unannounced investigation into Chinese companies supplying turbines for wind farms in Bulgaria, Spain, France, Greece, and Romania.¹⁹ This marks the first time the Commission has used its powers under the FSR to conduct such an investigation, which is not tied to any previously notified mergers or public tenders. These surprise inspections are a preliminary step to examine suspected distortive foreign subsidies without prior notification. If the Commission finds enough evidence of distortive subsidies, it will proceed with a full-scale investigation. As far as the news reports go, the investigation was conducted rather crudely. During the inspections, the Commission seized IT equipment and employees' mobile phones, reviewed office documents, and demanded access to relevant data.²⁰

EU Public Procurement and FSR

Overview of the EU public procurement market and its regulatory framework

Public procurement refers to activities of the public authorities, such as government departments and local authorities, purchasing works, goods, and services from companies through an open and competitive process.²¹ Over 250,000 public authorities in the EU spend around 14% of GDP (around €2 trillion per year) on public procurement every year.²² The regulatory framework of public procurement in the EU consists of three directives on procurement activities: Directive 2014/23 on the award of concessions, Directive 2014/24 on

¹⁷ 'Commission Opens Two In-Depth Investigations under the FSR', Text, European Commission - European Commission, accessed 6 September 2024, https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1803.

¹⁸ 'Commission Closes Two In-Depth Investigations in the Solar Photovoltaic Sector Following the Withdrawal of the Companies from Public Procurement | Public Buyers Community', 7 June 2024, <https://public-buyers-community.ec.europa.eu/news/commission-closes-two-depth-investigations-solar-photovoltaic-sector-following-withdrawal>.

¹⁹ 'Daily News 23 / 04 / 2024', Text, European Commission - European Commission, accessed 13 September 2024, https://ec.europa.eu/commission/presscorner/detail/en/mex_24_2247.

²⁰ 'CCCEU Expresses Serious Concern over the European Side's Unannounced Raids on Chinese Companies Operating in Europe', accessed 15 September 2024, http://en.ccceu.eu/2024-04/24/c_4219.htm.

²¹ Christopher Bovis, *EU Public Procurement Law* (Edward Elgar Publishing, 2012), 6.

²² 'Public Procurement - European Commission', accessed 1 October 2024, https://single-market-economy.ec.europa.eu/single-market/public-procurement_en.

public procurement, and Directive 2014/25 on procurement of specific facilities and services.²³ The main one is Directive 2014/24, which generally applies to all public procurement activities at the EU level.²⁴ Here, we must emphasise that the Member States also have their own domestic public procurement regulations, only when the transaction cost of the procurement is above the threshold set in Directive 2014/24 or involves cross-border interest with the risk of breaking principles in the EU internal market, especially the principles of free movement, the EU directive applies. Considering Directive 2014/23 and Directive 2014/25 take the main procurement requirement, such as the selection of the economic operator and criteria to award the contract, this article will only mention Directive 2014/24 on public procurement when discussing the impact of the FSR on the public procurement in the EU internal market.

In the EU internal market, both EU and non-EU companies can participate in the competition, with the EU's commitment to granting market access to certain goods and services to promote openness.²⁵ Although the European government and companies pay close attention to non-EU companies participating in EU market competition, non-EU companies have a relatively small presence in the EU public procurement market. As of recent data, only about 4.5% of large public tenders (those over €1 million) were awarded to non-EU companies, including their local subsidiaries. Additionally, direct cross-border procurement accounts for around 5% of all contract awards.²⁶ To ensure that the participation of these non-EU companies does not violate EU values, such as sustainability, the EU has also provided guidance to help public buyers navigate the complexities of dealing with third-country bidders, emphasising not only price but also high European standards.²⁷

The EU is concerned that subsidies received by non-EU companies may distort competition within its public procurement market, where subsidised companies offer prices or terms that would not be feasible without such backing, potentially driving EU companies out of the market.²⁸ These subsidies can create an uneven playing field, allowing non-EU firms to underbid EU-based competitors not based on efficiency or quality. In public procurement, this influence can result in contracts awarded to subsidised firms, not because they are the most

²³ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

²⁴ Bovis, Christopher H. 2024. "The Ten-Year Anniversary of Public Procurement Reforms: A Critical Assessment of the European Union Public Procurement Directives." *ERA Forum* 25 (2): 203–19. <https://doi.org/10.1007/s12027-024-00798-5>.

²⁵ 'Public Procurement - European Commission'.

²⁶ 'Improving Construction Tenders in Europe | McKinsey', accessed 1 October 2024, <https://www.mckinsey.com/capabilities/operations/our-insights/building-across-borders-the-state-of-internationalization-in-european-public-construction-tenders>.

²⁷ 'Guidance on the Participation of Third Country Bidders and Goods in the EU Procurement Market | Public Buyers Community', 24 July 2019, <https://public-buyers-community.ec.europa.eu/resources/guidance-participation-third-country-bidders-and-goods-eu-procurement-market>.

²⁸ 'Foreign Subsidies Distorting the Internal Market: Provisional Political Agreement between the Council and the European Parliament', Consilium, accessed 1 October 2024, <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/>.

suitable but because of their artificially low bids.²⁹ The aim of regulating the subsidies in the context of public procurement in the EU internal market is to prevent companies from submitting an unduly advantageous tender which will cause or has the potential to cause distortion in the procurement procedure under normal market conditions, excluding procurement in situations of natural disasters, unforeseeable extreme urgency, or defence.³⁰ The distortion shall be determined based on indicators, such as the amount and nature of foreign subsidies, the undertaking's economic situation in the EU internal market, and the purpose and conditions attached to this subsidy.³¹

FSR investigation process regarding public procurement

The FSR introduces specific notification requirements for subsidised undertakings participating in EU public procurement. Companies must **notify** the contracting authority if the estimated total procurement value exceeds EUR 250 million and they have received financial contributions of at least EUR 4 million per third country in the previous three years.³² Even below this threshold, companies are required to **declare** all foreign financial contributions.³³

This regulation empowers the Commission with authority and mandates a thorough check of all subsidies received by non-EU companies operating within the EU market. The investigation process under the FSR follows four key steps.

First, the Commission may initiate an investigation (*ex officio*) based on information from any source about potentially distortive foreign subsidies.³⁴ Once the Commission suspects a foreign subsidy may exist, it gathers the necessary information through formal requests or inspections, which can be conducted inside and outside the EU.

Next, if the Commission finds sufficient grounds, it opens a “preliminary review” of the undertaking.³⁵ Should this review indicate that the foreign subsidy distorts the internal market, the Commission will then launch an “in-depth investigation”.³⁶ During this phase, the Commission requests further details and may issue a “negative decision” if it confirms that the foreign subsidy causes market distortions. If a negative decision is reached, the undertaking under investigation has the opportunity to offer commitments to remedy the situation. If these are not sufficient, the Commission will impose redressive measures.³⁷ These can range from repayment of the foreign subsidy to divestiture of assets, restrictions on market operations, granting access to infrastructure, or issuing licenses. These remedies align with established measures under competition law.

²⁹ ‘EU Foreign Subsidies Regulation to Impact EU and Cross-Border M&A Antitrust Review Starting in 2023’, *McDermott Will & Emery* (blog), accessed 1 October 2024, <https://www.mwe.com/insights/eu-foreign-subsidies-regulation-to-impact-eu-and-cross-border-ma-antitrust-review-starting-in-2023/>.

³⁰ Article 4.4, FSR.

³¹ Article 4.1, FSR; Article 28.3, FSR; Article 32(2)(c), Directive 2014/24. The procurement of defence is regulated in Directive 2009/81 on procurement of defence, which neither falls within the scope of Directive 2014/24 on public procurement.

³² Article 28, FSR.

³³ Article 29, FSR.

³⁴ Article 9, FSR.

³⁵ Article 10, FSR.

³⁶ Article 11, FSR.

³⁷ Article 11, FSR.

At the end of its in-depth investigation, the Commission may make the decision to (i) accept commitments proposed by the company if they fully and effectively remedy the distortion, (ii) prohibit the award of the contract, or (iii) issue a no-objection decision.³⁸ Failure to comply may result in significant fines, up to 10% of a company's aggregate turnover, and potential exclusion from the procurement process if the Commission determines foreign subsidies distort competition.³⁹

Impact on non-EU Companies Participating in EU Public Procurement

The FSR ensures that companies benefiting from foreign subsidies do not gain an unfair competitive edge over EU companies, particularly in public procurement. The FSR promotes greater transparency in procurement activities by mandating the disclosure of foreign subsidies. The FSR interacts with Directive 2014/24 on public procurement, especially when non-EU companies receive foreign subsidies that may distort competition. Suppose a company is found in breach of the FSR. In that case, this can lead to its exclusion from procurement procedures under Directive 2014/24, linking procedural outcomes of the FSR to substantive actions in procurement.

Although the legislator tries to prevent the FSR from lowering non-EU companies' interest in entering the EU public procurement market, the FSR nonetheless complicates the process. It imposes both substantive and procedural burdens on non-EU firms, making it increasingly challenging for them to enter and compete effectively in EU public procurement.⁴⁰

Procedural impact

The FSR can prolong the public procurement process, which may lead to greater uncertainty regarding the outcome of contract awards. The effects of the FSR manifest in several ways. First, it increases the time and scope of responsible parties to prepare and submit additional documents before they can compete. Second, companies must now submit required documents along with their bidding submissions on time. Finally, the FSR may also delay contracting authorities in awarding the contract.

Regarding the extensive time and scope for responsible parties, all companies above the threshold must disclose all foreign contributions received three years before their notification. The relevant disclosure thresholds can be determined in two ways: either by the estimated value of the public procurement contract, which must be €250 million or more, or by the total financial contributions received by the economic operator and its holding and subsidiary companies, as well as its main subcontractors, which must also total €4 million or more.⁴¹ Notably, these thresholds are higher than those established in Directive 2014/24, which sets the maximum threshold for public works contracts at approximately €5 million.⁴² This indicates that procurements involving non-EU companies within the EU, which apply the EU Directive 2014/24 on public procurement, do not automatically trigger the notification requirement under

³⁸ Article 11, FSR.

³⁹ Article 17, FSR.

⁴⁰ Pascal Friton, Ramona Ader, and Christopher R Yukins, 'EU Foreign Subsidies Regulation Update: Risks And Responsibilities For Foreign Firms In EU Public Procurement Markets', 2023, 2.

⁴¹ Article 28.1, FSR.

⁴² Article 4, Directive 2014/24.

the FSR. However, every non-EU company participating in EU public procurement must still submit a declaration detailing all foreign contributions received. Contracting authorities are encouraged to specify in the contract notice and/or procurement documents that economic operators have a notification obligation.⁴³ Additionally, the main subcontractor of the winning economic operator must submit this notification or declaration if its economic contribution exceeds 20% of the submitted tender's value.⁴⁴

The time to submit a notification or declaration is included along with the bidding submissions. In the open procedure, the notification or declaration is required to be submitted only once, along with the tender. In contrast, multi-stage procedures—such as the restricted procedure, competitive procedure with negotiation, and competitive dialogue—require the economic operator to submit the notification or declaration twice, first with the request to participate and then as an updated notification or declaration alongside the submitted tender or final tender.⁴⁵ Once the contracting authority receives the notification or declaration, it must forward it to the Commission without delay. In the case of multi-stage procedures, the Commission will then examine the complete notification.⁴⁶ After submitting the notification or declaration, non-EU companies can continue participating in the public procurement competition without waiting for the Commission's assessment result.

After receiving a complete notification, the Commission will conduct a preliminary review. Suppose the Commission identifies sufficient indications that an economic operator has received a foreign subsidy that distorts the public procurement process related to its tender. In that case, it will determine whether to initiate an in-depth investigation.⁴⁷ Importantly, the preliminary review is not a one-time process; the Commission can reopen the review if new information suggests that a submitted notification or declaration was incomplete or misleading. Suppose the Commission suspects that an economic operator is benefiting from foreign subsidies within the public procurement procedure. In that case, it may declare the submitted notification as not notifiable, failing to provide all required qualified information.⁴⁸ If the submitted notification is deemed not notifiable, the Commission can impose redressive measures and require the contracting authority to refrain from awarding the contract immediately. Such a determination can only be made prior to the contract award. Consequently, even if the Commission finds that the notification submitted by the eventual winner of the public contract is not notifiable, it cannot compel the public authority to retract its contract-award decision.⁴⁹

In addition to the standard procedures of notification and assessment, the FSR gives the Commission the exclusive power to launch *ex officio* investigations.⁵⁰ These investigations are not triggered by notifications from non-EU companies but by the Commission's own suspicion that a company may have received foreign subsidies that distort the market—such as in the

⁴³ Article 28.6, FSR

⁴⁴ Art 29.5, FSR.

⁴⁵ Art 29.1 FSR.

⁴⁶ Art 30.6, FSR.

⁴⁷ Art 10, 30, FSR.

⁴⁸ Article 29, FSR.

⁴⁹ Article 29.8. FSR.

⁵⁰ Article 9, FSR.

recent investigation of Chinese turbine suppliers in Bulgaria, Spain, France, Greece, and Romania. However, the FSR does not provide clear guidelines for these surprise investigations, raising concerns about their legality, especially regarding the requirement for prior notice.

One situation in which the contracting authority can derogate from the Commission's investigation is procurement in urgent situations.⁵¹ With the derogation clause, the public procurement directive allows the contracting authority to accelerate the procurement process both procedurally and substantively. Procedurally, contracting authorities may shorten the time limits in the case of urgency.⁵² Furthermore, in cases of extreme urgency brought about by events unforeseeable by the contracting authority and not attributable to it, the contracting authority may use the negotiated procedure without prior publication of a contract notice to call for competition.⁵³ In this sense, companies competing in procurement in urgent situations can derogate from the strict rules in FSR.

Throughout the public procurement procedure, the contracting authority must keep the Commission informed about its progress, including updates on its cancellation, rejection of tenders, and award of contracts.⁵⁴ This prompt communication can help reduce the Commission's burden by allowing it to immediately halt the review or investigation if there is no reason to proceed. However, such prompt communication could burden the contracting authority without efficient communication forms and channels.

In this sense, the FSR significantly impacts the public procurement procedure in the EU by requiring non-EU companies to disclose foreign contributions, which can trigger an additional investigation if subsidies are suspected of distorting competition. Additionally, while procedural steps can continue during reviews, the contract award cannot proceed until the Commission has completed its assessment, potentially delaying the procurement process.

Substantive impact

Regarding substantive impact, the FSR will affect the information contained in documentation that economic operators must provide at each stage of the procurement process and also the contract awarding.

The Commission provides a list of required information in the notification and declaration. Form FS-PP, annexed as Annex II to the Commission Implementing Regulation (EU) 2023/1441, provides clarity for notifiable foreign financial contributions in public procurement. It allows companies to present information about the positive effects of the subsidy, as detailed in Section 5 of the form.⁵⁵ Failure to provide the required notification or declaration—whether due to missing information or incompleteness—will result in the tender being declared irregular, leading to its rejection by the contracting authority.⁵⁶

⁵¹ Ioan Baci, 'The Exclusion of Third-Country Suppliers from EU Public Procurement Procedures: The Romanian Case', *Eur. Procurement & Pub. Private Partnership L. Rev.* 16 (2021): 157.

⁵² Articles 27.3&28.6, Directive 2014/24; Recital (43), FSR.

⁵³ Article 32, Directive 2014/24.

⁵⁴ Article 35, FSR.

⁵⁵ Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, https://eur-lex.europa.eu/eli/reg_impl/2023/1441/oj.

⁵⁶ Art 17 and 33. FSR.

When the Commission receives a notification or declaration, it first assesses whether the financial support received by a non-EU company has the potential to distort competition within the EU internal market. To increase the clarity of the Commission's activities, in July 2024, the Commission published a working document outlining the key criteria for determining market distortions and applying the balancing test. While this document is not legally binding, it offers valuable insights for non-EU companies on how the FSR rules will be applied. The guidance explains the steps for notifying the Commission about foreign subsidies in mergers or public procurement (Article 4(1)), how the Commission will evaluate potential distortions (Article 6), and the companies' obligations to provide information during investigations (Article 27(1)).⁵⁷

When assessing the impacts of subsidies received by non-EU companies, the Commission cannot simply assume that a foreign subsidy distorts the market only because the company operates in a competitive sector.⁵⁸ Instead, it must assess the distortion based on specific indicators, such as the amount and nature of the foreign subsidy, its purpose and conditions, and other factors tailored to different industrial sectors.⁵⁹ These indicators cover a non-exhaustive set of criteria designed to accommodate varying market situations.⁶⁰ Importantly, this implies that not all subsidised non-EU companies are barred from operating in the EU. However, suppose the suspected subsidies fall within the "Categories of foreign subsidies most likely to distort the internal market" as defined in Article 5 of the FSR. In that case, the Commission is not required to perform a detailed assessment.⁶¹ This includes cases in public procurement where a foreign subsidy enables a company to submit an unduly advantageous tender, potentially resulting in an unfair contract award.

For a foreign subsidy to be deemed distortionary in public procurement,

"There are two conditions that must be met cumulatively: (1) the tender submitted by the subsidised economic operator must be unduly advantageous in relation to the works, supplies or services concerned, and (2) there must be a link between the granting of the subsidy and the tender, demonstrating that the subsidy caused or risked causing a distortion in a public procurement procedure by enabling the undertaking, directly or indirectly, to submit an unduly advantageous tender."⁶²

Regarding the first condition, the Commission must compare the suspected bid with others, considering various factors to determine whether the bid's advantages can be justified, including the criteria for identifying an "abnormally low tender" under Article 69 of Directive 2014/24.⁶³ For instance, involving innovations or novel technical solutions may justify a lower

⁵⁷ 'Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market', accessed 15 September 2024, https://competition-policy.ec.europa.eu/document/download/b4c8bb13-839b-4bfb-8863-78b188523d22_en?filename=20240726_SWD_clarifications_on_application_of_FSR.pdf.

⁵⁸ Article 4, FSR.

⁵⁹ Article 4, FSR.

⁶⁰ Recital (18), FSR.

⁶¹ 'Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market', 3.

⁶² 'Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market', 4.

⁶³ Article 69, Directive 2014/24 "2. The explanations referred to in paragraph 1, 'abnormally low tenders' may, in particular, relate to (a) the economics of the manufacturing process, of the services provided or of the construction method; (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or the execution of the work; (c) the originality of the work, supplies or services proposed by the tenderer; (d) compliance with obligations referred to in Article

bid. The Commission may rely on information from relevant stakeholders or conduct its own investigations to assess these factors. For the second condition, the Commission's investigation is limited to examining the link between the suspected subsidy and the tender without extending to other economic activities of the company. Foreign subsidies specifically aimed at supporting the production of goods or services for a public contract clearly indicate that the subsidy may have enabled the company to submit an unduly advantageous bid.⁶⁴ In terms of proportionality, if foreign subsidies cover a significant portion of the estimated contract value in a public procurement process, they are more likely to cause market distortions.⁶⁵ When assessing distortions caused by unlimited guarantees, the Commission must consider the various forms these guarantees can take, for example, if a company secures better funding terms because creditors expect the State to intervene if the company becomes insolvent.

During the investigation, to prevent the investigation from providing an unfair advantage to the economic operator under investigation, such operators are prohibited from modifying their submitted tenders based on the investigation's findings.⁶⁶ This is particularly relevant in public procurement, where the economic operator suspected of receiving foreign subsidies is often the one that submitted the lowest-priced tender. Allowing this operator to revise its tender could enable it to maintain its low price while adjusting other aspects to meet the award criteria better, thus making its tender more advantageous—contrary to the objectives of the FSR. Companies under investigation may offer commitments to address the distortions caused by foreign subsidies. The Commission will then assess whether these commitments are sufficient to remedy the harm to competition.⁶⁷ Such commitments often involve significant monetary costs and must effectively neutralise the negative impact, such as repaying the subsidy with appropriate interest.⁶⁸ The proof standard for these commitments is high—only if the Commission determines that the commitments fully and effectively resolve the distortion will it accept them and make them binding.⁶⁹ The Commission can impose fines if a company fails to comply with its accepted commitments.⁷⁰ Exemptions from penalties may be possible if the company can pass the balancing test by showing significant benefits, such as advancing environmental protection, raising social standards, or promoting research and development. In public procurement, the Commission also evaluates whether there are alternative sources for the goods or services in question.⁷¹ Nevertheless, foreign subsidies that fall under Article 5 of

18(2); (e) compliance with obligations referred to in Article 71; (f) the possibility of the tenderer obtaining State aid.”

⁶⁴ ‘Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market’, 4.

⁶⁵ ‘Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market’, 4.

⁶⁶ Art 31.4, FSR.

⁶⁷ Art. 11.3 and 31, FSR.

⁶⁸ Recital (24), FSR.

⁶⁹ Recital (23)(35) & Article 7, FSR.

⁷⁰ Recital (32) & Article 17, FSR.

⁷¹ ‘Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market’, 6.

Regulation (EU) 2022/2560, which are most likely to distort the market, are less likely to have their positive effects outweighed by negative outcomes.⁷²

When selecting an economic operator for the public contract award, the contracting authority must not reject a tender as abnormally low solely based on suspicions of a potential foreign subsidy.⁷³ Instead, tender assessments should consider various factors, including the procurement subject matter, life-cycle costs, and environmental, social, and labour requirements.⁷⁴ However, the Commission's decision regarding non-EU companies' commitments can influence the contract award decision. If the decision is unfavourable, the Commission will issue an implementing act in the form of a decision prohibiting the award of the contract to the affected economic operator. In such cases, the contracting authority is obligated to reject the tender upon receiving the Commission's negative decision.⁷⁵ Suppose the tender identified as the most economically advantageous is found to have received foreign subsidies before the contract award. In that case, the contract will be awarded to the next best tender instead.⁷⁶

The FSR significantly impacts EU public procurement by requiring economic operators to disclose foreign financial contributions, even if these contributions do not meet the notification thresholds. This rule also extends to main subcontractors, widening the scope of entities subject to investigation. Moreover, the FSR prohibits companies from modifying their tenders during investigations, ensuring that those under scrutiny cannot gain an unfair advantage by adjusting their bids based on the findings. The Commission's decisions can also directly influence contract award outcomes, potentially leading to the rejection of tenders found to be supported by distorting foreign subsidies.

The challenge imposed on non-EU companies of the broad definition of subsidies

The FSR aims to tackle the challenges foreign subsidies pose to competition in the EU internal market. However, its broad and often vague definitions, especially around the concept of subsidies, create uncertainty for non-EU companies. This lack of clarity stems from similarities between the FSR and EU State aid law, particularly the absence of a unified conceptual framework.⁷⁷ Critics argue that the FSR seeks to extend the EU's regulatory reach globally but without addressing the fundamental complexities that already exist in the State aid system.⁷⁸

The core elements of the FSR mirror those of the EU's State aid law.⁷⁹ Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) broadly defines "state

⁷² 'Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market', 6.

⁷³ Article 29.7 FSR.

⁷⁴ Art 67, Directive 2014/24.

⁷⁵ Art 31.2, FSR.

⁷⁶ Art 32.4, FSR.

⁷⁷ Jakub Kociubinsk, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?* (2022) 6 *European Competition and Regulatory Law Review* 56, 57.

⁷⁸ 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?', *Journal of European Competition Law & Practice* 14, no. 3 (2023): 137–51.

⁷⁹ Jan Blockx, 'The Proposal for an EU Regulation on Foreign Subsidies Distorting the Internal Market: How Will It Impact Corporate Mergers and Acquisitions?', *Available at SSRN 3936624*, 2021, 146.

contributions” as any government action that creates preferential conditions for specific market players. This broad interpretation aligns with the rationale behind international subsidy control.⁸⁰ Yet, the Court of Justice of the European Union (CJEU), in cases like *Preussen Elektra*, has clarified that such contributions must involve both “aid granted by a Member State” and the use of “State resources.”⁸¹ This narrower interpretation adds another layer of complexity when governments provide benefits through intermediaries, further complicating the detection of subsidies.⁸²

Although the concept of subsidies or state aid under the FSR is similar to that in Article 107 TFEU, the use of different terminology reflects the EU’s distinct approach to assessing the impact of foreign subsidies.⁸³ Specifically, it highlights how liable foreign subsidies are under the FSR. The European Commission’s Staff Working Paper distinguishes between the notion of a “distortion in the internal market” under Article 4 of Regulation (EU) 2022/2560 and a “distortion of competition” under Article 107(1) TFEU.⁸⁴ Under Article 107(1) TFEU, competition is considered distorted when a government provides financial assistance to a company in a competitive sector, giving it an advantage by covering costs it would normally bear.⁸⁵ In such cases, proving the distortion is relatively straightforward.

Assessing whether state aid or subsidies exist is done on a case-by-case basis. The FSR defines a foreign subsidy as a “financial contribution” that is “directly or indirectly” provided by a third country, which “confers a benefit” on an undertaking operating within the EU internal market, and is “limited, in law or in fact, to one or more undertakings or industries”.⁸⁶ The FSR lists specific scenarios that constitute a financial contribution, including the transfer of funds or liabilities, the foregoing of revenue otherwise due, and the provision or purchase of goods or services.⁸⁷ Purchasing goods or services must be distinguished from normal public procurement conducted under competitive market conditions. Importantly, the term “third country” provides such financial contributions not only to central governments and public authorities but also includes foreign public entities or private entities whose actions can be attributed to the third country.⁸⁸ In the latter case, the FSR does not specify whether the private entity is foreign or domestic within the Member States. According to the market economy

⁸⁰ Jakub Kociubinisk, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?* (2022) 6 *European Competition and Regulatory Law Review* 56, 59.

⁸¹ Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECLI-160 [58-62].

⁸² Jakub Kociubinisk, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?* (2022) 6 *European Competition and Regulatory Law Review* 56, 59.

⁸³ ‘Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market’.

⁸⁴ ‘Commission Staff Working Document Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market’.

⁸⁵ Xueji Su, ‘A Critical Analysis of the EU’s Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?’, *Legal Issues of Economic Integration* 50, no. 1 (2023): 81.

⁸⁶ Article 2, FSR.

⁸⁷ Article 3, FSR.

⁸⁸ Marios Tokas, ‘Playing the Game: The EU’s Proposed Regulation on Foreign Subsidies’, *Journal of World Trade* 56, no. 5 (2022): 798.

operator test, a transaction is considered a subsidy if it occurs under conditions that would not be acceptable to a hypothetical private investor acting purely on economic grounds.⁸⁹

When determining whether a foreign subsidy distorts competition, the FSR requires the Commission to assess each case using a set of indicators. These indicators are non-exhaustive, allowing flexibility for the Commission to adapt them based on the specifics of each case.⁹⁰ The FSR's guidance is quite broad. It instructs the Commission to consider factors such as the amount of the foreign subsidy, its nature, and the circumstances of the beneficiary company.⁹¹ The Commission has the discretion to define these indicators on a case-by-case basis, and it is not legally obligated to disclose the specific indicators used in each assessment. However, the Commission will publish guidelines on the application of those criteria by 2026.⁹² Ultimately, the determination of whether a foreign subsidy exists depends on the intent behind awarding such benefits and must be assessed on a case-by-case basis.

Commission's broad discretion increases uncertainty faced by non-EU companies

The introduction of the FSR can be seen as an attempt by the EU to export its state subsidy standards to third countries.⁹³ This has significant implications, particularly for capital-importing and capital-exporting Member States, potentially influencing their preferences due to the asymmetric effects on capital owners.⁹⁴ By influencing economic activities within the EU internal market, the FSR pressures all non-EU companies operating in the EU internal market to adjust their practices to comply with EU standards. To ensure uniform governance of foreign subsidies, the FSR grants the Commission extensive authority to intervene in non-EU companies' activities, which includes investigating their received financial contributions and imposing corrective measures if those contributions are deemed to distort competition. However, the unclear substantive and procedural requirements under the FSR, which expand the Commission's responsibilities, raise concerns about uncertainty and the regulatory burden placed on non-EU companies.

One key issue is the vague definition of subsidies, leaving businesses uncertain about what constitutes a distortion of competition and what specific indicators the Commission will rely on in its investigations.⁹⁵ As mentioned in the previous section, the definition of financial contributions remains unclear, and submission requirements lack a definitive checklist, adding to the ambiguity.⁹⁶ The Commission expects to provide as much information as possible to

⁸⁹ Decision *Estonian Air* (Case SA.36868) [2016] OJ L174/1 [105] with White Paper 46 in final and Draft Regulation, recitals 9-10.

⁹⁰ Christian Ahlborn and Carole Maczkovics, 'What Is the Information Needed for the Commission to Conduct Its Substantive Assessment Under the New EU Foreign Subsidies Regulation', *Competition International Policy*, 2023, 5.

⁹¹ Article 4, FSR.

⁹² Article 46, FSR.

⁹³ Ondrej Blažo, 'A New Regime on Protection of Public Procurement Against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?', *International and Comparative Law Review* 21, no. 2 (1 December 2021): 158, <https://doi.org/10.2478/iclr-2021-0016>.

⁹⁴ Robert Basedow, Sophie Meunier, and Christilla Roederer-Rynning, 'Fair Play? The Politics of Evaluating Foreign Subsidies in the European Union', in *Weaponising Investments: Volume I* (Springer, 2023), 223.

⁹⁵ Weiß, Wolfgang, *The Regulation on Foreign Subsidies Distorting the Internal Market: A Path to a Level Playing Field?*. Springer Nature, 2024.

⁹⁶ Hornkohl, 'Protecting the Internal Market from Subsidisation with the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?'

ensure it can assess the impact of subsidies. Moreover, no established criteria exist to determine what constitutes “sufficient” grounds for escalating an investigation from a preliminary review to an in-depth investigation. Without a clear checklist to guide companies on the required information, it becomes easier for the Commission to conclude that the submitted data is insufficient to justify the subsidies.⁹⁷ This lack of specific guidance disadvantages companies, as the Commission can base its decision solely on the quantity or scope of the information provided rather than its relevance or quality.

The Commission’s broad discretion in applying the FSR increases the risk of its misuse, particularly in the EU public procurement market.⁹⁸ As we mentioned in the section discussing the procedural impacts on non-EU companies, the Commission is granted extensive investigative powers, with the power to require companies to collaborate with the Commission’s investigation at any stage of public procurement. The Commission can request information from any company or association based in the EU or third countries and conduct inspections both within and outside the EU (with the consent of the third country) at any time during public procurement.⁹⁹

The Commission’s final decision may also change the awarding result if the contract has not been awarded. Moreover, the potential for the Commission to reopen reviews adds to the uncertainty.¹⁰⁰ As long as the Commission has new evidence showing that the subsidies received by non-EU companies may distort competition in the EU internal market, it can reopen the review. Even though such a process reopen will not change the awarding result, the selected companies still face potential penalties from the Commission, which increase their compliance burden. In this sense, non-EU companies may be deterred from entering the EU market, fearing lengthy, intrusive investigations that could hinder their chances of successfully bidding on public contracts.

Understanding the unique characteristics of Chinese SOEs in the context of the FSR

Even though the FSR aims to regulate subsidies, it does not completely prevent non-EU companies from receiving subsidies or from participating in public procurement in the EU. The FSR targets subsidies that distort competition within the EU market. However, distinguishing between legitimate subsidies and those that distort competition can be challenging, especially for Chinese state-owned enterprises (SOEs) like CRRC, which benefit from strong government support.

Chinese SOEs benefit from extensive state support, including subsidies, favourable policies, and easier access to financing.¹⁰¹ In some cases, the advantages that SOEs receive may not come in the form of direct financial support but rather indirect benefits that give them an

⁹⁷ Luigi Gaetano Pezzotti Piccoli, ‘The New EU Foreign Subsidies Regulation’, 2024, 19.

⁹⁸ ‘European Commission - Have Your Say “Feedback from: Albert Sanchez-Graells at University of Bristol Law School”’, Text, European Commission - Have your say, accessed 14 October 2024, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12621-Trade-&-investment-addressing-distortions-caused-by-foreign-subsidies/F2326817_en.

⁹⁹ Jan Blockx and Pierfrancesco Mattiolo, ‘The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?’, *European Foreign Affairs Review* 28, no. Special (2023): 4.

¹⁰⁰ Article 30, FSR.

¹⁰¹ Jingyuan Xu, ‘State-Owned Enterprises and Market Competition: The Case of China’ (2019) 25(1) *China: An International Journal*, 1-15.

edge over other entities.¹⁰² For instance, due to the close relationship between SOEs and the government, securing loans from Chinese commercial banks is often easier, providing them with favourable financial conditions that private companies might not have access to. These advantages allow them to offer lower prices, invest heavily in innovation, and expand rapidly into global markets, giving them a competitive edge over private firms both in China and internationally. In the context of the FSR, this competitive advantage is problematic. When Chinese SOEs like CRRC benefit from state policy advantages, the Commission often determine that the company has received subsidies.

However, the Chinese government's involvement in SOEs is decreasing. In 2013, the Chinese government launched a mixed-ownership reform that aims to transform SOEs like CRRC by introducing private capital, encouraging joint ventures, and promoting market-oriented reforms.¹⁰³ Since the reform, SOEs have become more reliant on market mechanisms, such as raising capital through public offerings, rather than solely depending on state funding or subsidies.¹⁰⁴ While SOEs still enjoy some indirect benefits, the reliance on direct government funding has decreased. Major Chinese SOEs like CRRC saw significant private capital inflows as part of the reform, which reduced the State's dominance over SOE operations. The government encourages more market-driven decision-making by allowing private investors to own shares in these companies.¹⁰⁵ Many SOEs have adopted modern management practices, including market-based executive hiring and greater accountability to shareholders, further reducing direct state control.¹⁰⁶ This shift encouraged SOEs to operate more like private companies, focusing on profitability and efficiency rather than merely serving government policy objectives. In this context, when SOEs compete in the EU market, the extent to which they still benefit from state support becomes crucial. These SOEs must demonstrate their independence to justify that any advantages they receive do not distort competition.

Strategies for non-EU companies to participate in the EU public procurement

Non-EU companies, with Chinese SOEs as representatives, face many challenges entering the EU public procurement market due to the EU's FSR. To navigate these legal obstacles effectively and maintain competitiveness while complying with the new regulatory environment, non-EU companies can consider the following strategies:

First, non-EU companies must be fully transparent about any financial contributions they receive from foreign governments, including subsidies, loans, or other favourable terms. More importantly, they must prove that these subsidies were not used in the specific tenders under investigation. Given the complexity of the FSR, it is crucial to establish specialised compliance

¹⁰² Przemyslaw Kowalski et al., 'State-Owned Enterprises: Trade Effects and Policy Implications', 2013, 16.

¹⁰³ Ming Du, 'Unpacking the Black Box of China's State Capitalism', *German Law Journal* 24, no. 1 (2023): 135–36.

¹⁰⁴ Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm', *Geo. LJ* 103 (2014): 678.

¹⁰⁵ Tao Bai, Stephen Chen, and Youzong Xu, 'Formal and Informal Influences of the State on OFDI of Hybrid State-Owned Enterprises in China', *International Business Review* 30, no. 5 (2021): 2.

¹⁰⁶ Helen Wei Hu and Dean Xu, 'Manager or Politician? Effects of CEO Pay on the Performance of State-Controlled Chinese Listed Firms', *Journal of Management* 48, no. 5 (2022): 1161.

teams dedicated to handling notifications, declarations, and interactions with the Commission. Building a proactive relationship with the Commission early in the procurement process can help these companies better understand potential issues and address concerns before an in-depth investigation is launched.

Non-EU companies should also be prepared to justify their bids based on commercial factors, such as innovation, efficiency, or technical advantages, rather than relying on government support. Under Article 69 of the EU's Directive 2014/24 on abnormally low tenders, non-EU companies must ensure that their bids reflect genuine market conditions and are not artificially lowered due to subsidies. Providing clear documentation on how costs were calculated and demonstrating the legitimate basis for offering competitive prices can strengthen their position and ensure fair competition.

Second, non-EU companies should also take a legal approach to protect their legitimate rights under the FSR. For instance, if a foreign subsidy is under investigation, they can leverage the “balancing test” provided by the regulation, arguing that their subsidies have a net positive impact, such as promoting environmental sustainability, fostering innovation, or supporting social welfare. By preparing evidence that their activities align with broader EU policy goals, non-EU companies can counterbalance potential concerns about market distortion. The EU has recently shown a growing willingness to promote its own industrial policies through subsidies, a shift from its historical approach of focusing mainly on research, development, and technology support.¹⁰⁷ Non-EU companies can be strategic in entering sectors that are less likely to trigger FSR-related investigations—such as renewable energy, technology innovation, or environmental services—and that align with current EU priorities.¹⁰⁸

Additionally, non-EU companies can two key directives apply to public procurement complaints and review procedures: the Public Sector Remedies Directive (89/665/EC) and the Utilities Sector Remedies Directive (92/13/EC) (both amended by Directive 2007/66/EC) when their rights are violated in the public procurement process.¹⁰⁹ These directives establish a ten-day standstill period between the award and signing of a public contract, ensuring that all bidders are informed of the outcome. They also allow interim measures to prevent further damage, set aside unlawful decisions, and award damages or penalties. While these provisions provide avenues for protection, they also respect the procedural autonomy of EU member states, meaning companies must navigate both EU law and national legal traditions effectively.

Third, governments of non-EU countries should actively participate in shaping international rules and guidelines on foreign subsidies. Evaluating state aid is not just a legal

¹⁰⁷ Michael Landesmann and Roman Stöllinger, ‘The European Union’s Industrial Policy: What Are the Main Challenges?’ (Policy Notes and Reports, 2020).

¹⁰⁸ Quantifying the Role of State Enterprises in Industrial Subsidies.” 2025. OECD. 2025. https://www.oecd.org/en/publications/quantifying-the-role-of-state-enterprises-in-industrial-subsidies_49f39be1-en.html.

¹⁰⁹ Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC); Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

matter; it also involves significant political factors. In a market economy, governments are often involved in various market activities, and this involvement could be seen as state aid or subsidies. This becomes even more complex globally, where the distinction between the direct recipient of aid and the ultimate beneficiary can be blurred. By engaging in international rulemaking, governments can help ensure that foreign subsidy regulations are fair and balanced and that they reflect the realities of global trade and market dynamics. This proactive involvement is crucial for protecting the interests of non-EU companies and ensuring a level playing field in international markets.

CONCLUSION

In summary, the added value of the FSR in standardising public procurement activities in the EU internal market includes enhancing transparency, promoting cooperation, establishing a level playing field, and providing legal certainty. These measures can ensure that public procurement activities are conducted fairly and competitively, and that the EU internal market remains open, transparent, and non-discriminatory. The FSR represents a significant shift in the EU's approach to maintaining fair competition within its internal market, especially in public procurement. By extending scrutiny to foreign subsidies, the FSR aims to level the playing field for companies competing in the EU, ensuring that subsidies from non-EU governments do not create unfair advantages. However, the broad discretion granted to the European Commission, the complex notification requirements, and the lack of clear criteria in some areas introduce challenges, particularly for non-EU companies. While the regulation seeks to enhance market fairness, it also raises concerns about legal uncertainty and administrative burdens. To address these issues, it is essential to refine the implementation of the FSR, limiting unnecessary notifications and providing clearer guidelines for both companies and contracting authorities. Doing so will safeguard competition and promote a more predictable and efficient procurement process in the EU, as for non-EU companies in the EU public procurement market. To navigate legal obstacles imposed by the FSR, they must prioritise transparency about government financial contributions, emphasise commercial strengths in their bids, and use legal mechanisms to safeguard their rights. Additionally, non-EU governments should contribute to shaping international rules on foreign subsidies to ensure fair competition.

Moreover, the FSR may indirectly deteriorate international trade dynamics. For non-EU countries, especially those reliant on Chinese investments, the FSR could raise concerns about shifting trade priorities and potential barriers to market access.¹¹⁰ It may also discourage Chinese SOEs from participating in key EU infrastructure projects, potentially disrupting supply chains that depend on Chinese technology and manufacturing. This could force EU stakeholders to seek alternative suppliers, potentially increasing costs and complicating project timelines. Additionally, the FSR might contribute to trade tensions, particularly between the EU and China, with the risk of retaliatory measures impacting businesses on both sides. While the regulation addresses gaps in the WTO's subsidy framework, it also raises questions about its alignment with global trade rules, potentially shaping how multilateral negotiations and

¹¹⁰ Bauerle Danzman, Sarah, and Sophie Meunier. "The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator." *JCMS: Journal of Common Market Studies* (2024).

international economic cooperation evolve.¹¹¹ These broader impacts warrant further analysis in the future.

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