

# 5. The FSR: effective tool for fair competition in public procurement procedures or a paper tiger?

M.C. VAN HEEZIK, D.M. VAN BROECKHUIJSEN AND O. DE WIT

The Foreign Subsidies Regulation (FSR) aims at preventing distortions of competition for large volume procurement projects caused by foreign subsidies directly or indirectly facilitating unduly advantageous tenders. It provides for new exclusive tools which empower the Commission to review notified financial contributions in relation to procurement procedures organised in the Member States. The Commission can intervene in these procedures by requiring redressive measures or commitments from tenderers, or ultimately by prohibiting the award of the contract. Despite the objective of levelling the playing field for European tenderers, in practice these new tools may cause a significant burden for both tenderers and contracting authorities. They can also cause substantial delays in the award of the contract and thus the delivery of governmental projects.

## 1. Introduction

As part of a broader package of initiatives intended to level the playing field between EU operators and their competitors from third countries,<sup>1</sup> the FSR<sup>2</sup> aims to close the regulatory gap regarding foreign subsidies impacting competition on the internal market.<sup>3</sup> Before its entry into force, competition distortions caused by ‘subsidised’ tenders could only be addressed on the basis of the EU public procurement rules<sup>4</sup>

which empower contracting authorities to exclude offers containing abnormally low prices. However, under these rules, contracting authorities were not in all cases obliged or able to exclude such tenders.<sup>5</sup> The FSR closes this gap by introducing far-reaching ex ante review powers, allowing the European Commission (Commission) to directly intervene in public procurement procedures initiated by contracting authorities or entities in the Member States. Although the new tools introduced by the FSR reinforce the fair competition objective that underlies the public procurement directives, they imply a significant burden for both contracting authorities and tenderers when preparing and designing the procurement process respectively their tenders.

This contribution builds on the general introduction of the FSR in this edition and discusses for both contracting authorities and tenderers the impact of the new tools: the obligation to notify or declare the financial contributions received from third countries in the three years before the submission of the tender (section 2) and the practical consequences of the ex-ante review by the Commission and its powers in that regard (section 3). We conclude with final remarks on the balance between the regulatory burden and the expected effects on the level playing field on the internal market (section 4).

- 1 Other measures are amongst others the Carbon Border Adjustment Mechanism (Regulation (EU) 2023/956), the amended proposal for an International Procurement Instrument (COM/2016/034 final) and FDI Screening Regulation (Regulation (EU) 2019/452).
- 2 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.
- 3 Traditional trade defense instruments, such as Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union and the anti-dumping regulation, have only tackled competition distortions caused by subsidised traded goods.
- 4 Directive (EU) 2014/23 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1); Directive (EU) 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive (EC) 2004/18 (OJ L 94, 28.3.2014, p. 65); Directive (EU) 2014/25 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 and repealing Directive (EC) 2004/17 (OJ L 94, 28.3.2014, p. 243); Directive (EC) 2009/81 of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives (EC) 2004/17 and (EC) 2004/18 (OJ L 216, 20.8.2009, p. 76).

- 5 See the Commission's White Paper on levelling the playing field as regards foreign subsidies, COM(2020)253/final, p. 11.

## 2. Notification obligation

### a. General introduction obligation to submit a notification or a declaration

In order to enable the Commission to assess foreign contributions, Art. 28 of the FSR introduces a notification obligation in case two thresholds are both met: (i) the estimated value of the public procurement amounts to EUR 250 million or more, and (ii) the foreign financial contributions received in the three years before the submission of the tender amount to at least EUR 4 million per third country. For the latter threshold, not only foreign financial contributions received by the tenderer have to be taken into account, but also the ones granted to the undertaking it belongs to: its subsidiaries without commercial autonomy, its holding companies, and where relevant its main subcontractors and suppliers.<sup>6</sup> In case of a procurement procedure in which the contract is divided into lots, an additional threshold applies regarding the value of the project: the lot or the aggregate value of all the lots for which the tender is submitted must be equal or greater than EUR 125 million.<sup>7</sup>

If all thresholds are met, a detailed notification form must be submitted together with the tender.<sup>8</sup> If however the financial contribution per third country remains below this threshold, a declaration is required which contains less detailed information on the financial contributions received (if any).<sup>9</sup> The practical consequences for contracting authorities and tenders will be discussed in sections 2.b and 2.c.

### b. Practical consequences for contracting authorities

Contracting authorities will be obliged to ensure the submission of the notifications and declarations by tenderers and to forward them to the Commission.<sup>10</sup> The practical consequences of this notification obligation should not be underestimated, as it places an extra workload on contracting authorities when preparing and designing large volume procurement projects, such as large infrastructural projects or significant orders for the supply of military vehicles or airplanes, which are already complex anyway.<sup>11</sup>

Ensuring the timely submission of a correct and complete notification or a declaration by each tenderer, not only prevents delays of the procurement procedure, but also reduces the risk that tenders will be considered irregular and will have to be rejected.<sup>12</sup> Given the often limited number of tenderers in large volume procurement procedures, the obligation to reject a tender could lead to a failure of the procurement procedure due to the absence of competition between the tenders. In such case, the contracting authority would have to redo the procurement procedure, which could involve substantial expenses and delays of the delivery of the governmental project.

Ensuring the timely submission of a correct and complete notification or a declaration by each tenderer, not only prevents delays of the procurement procedure, but also reduces the risk that tenders will be considered irregular and will have to be rejected

The contracting authorities' obligation to inform the Commission of any suspicion of foreign subsidies, in case a declaration was submitted, coincides with and partly replaces their duty under the public procurement rules to examine whether tenders contain abnormally low prices.<sup>13</sup> In case the suspicion regarding the price included in the tender is solely based on the possible presence of a foreign subsidy, the contracting authority may no longer exclude such tender.<sup>14</sup> The assessment whether the tender is unduly advantageous resorts to the Commission's exclusive competence in such case. Contracting authorities are therefore not able to circumvent delays caused by the Commission's review by simply excluding the tenders being reviewed on the basis that they are abnormally low. It is likely that it will equally be impermissible for contracting authorities to design a procurement procedure in such a way that its estimated value remains below the notification threshold of the FSR. In the same way that the public procurement rules prohibit splitting a contract or a work for the sole purpose of keeping the value thereof artificially low in order to stay below the procurement thresholds.<sup>15</sup> Moreover, the interest in doing so seems limited, since the Commission may also

6 Art. 28(1) under b FSR.

7 Art. 28(2) FSR.

8 See the Form FS-PP included in Annex II to 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 (FSR Implementing Regulation).

9 Art. 29(1) FSR. The declaration exists in the parts 1, 2, 7 and 8 of the notification form referred to in footnote 5.

10 Art. 29(2) and (7) FSR.

11 Andreas Haak and Barbara Thiemann, 'Fostering Tech Sovereignty with a Level Playing Field on State Aid and Foreign Subsidies', *European State Aid Law Review* 2022/1, p. 30.

12 Art. 29(3) and (4) FSR. Pursuant to Art. 18(1)(b) FSR, the Commission may revoke its decision where it was based on incomplete, incorrect or misleading information.

13 Art. 69 of Directive (EU) 2014/24. See Art. 29(7) FSR which states: '(...) Without prejudice to the powers of contracting authorities or contracting entities, laid down in Directives 2014/24/EU and 2014/25/EU, to examine whether a tender is abnormally low, the contracting authority or contracting entity shall not perform an assessment of whether a tender is abnormally low where such an assessment would be initiated on the suspicions indicating a possible presence of foreign subsidies alone. (...)'

14 Art. 29(7) FSR.

15 Art. 5(3) of Directive (EU) 2014/24.

request a notification in case the notification threshold is not met.<sup>16</sup>

### c. Practical consequences for tenderers

The practical consequences of the notification obligation are particularly burdensome for companies belonging to a global group with activities in multiple third countries and for portfolio companies of investment funds which operate worldwide. Contrary to the EU State aid rules that only require a notification of measures that fulfil the cumulative conditions of the definition of State aid,<sup>17</sup> the FSR notification obligation and declaration obligation concern financial contributions by third countries irrespective of whether these confer a selective benefit to the beneficiary. As a consequence of the broad definition of a financial contribution, companies have to assess many foreign funds and contracts with third States or State-owned companies, such as contracts with State-owned energy suppliers. The definition is broader than the definition of economic advantage under the EU State aid rules. It covers not only the transfer of funds by third States, such as capital injections, grants or loans, and the foregoing of revenue that is otherwise due, such as tax exemptions, but also the provision of goods or services or the purchase of goods or services.<sup>18</sup> A second difference with the State aid rules is that the notification obligation lies with the tenderers, that may not possess the required information on the aid measures; the third country granting the subsidy may possess the required information. Consequently, tenderers may depend on the third countries concerned to obtain the information necessary for the notification, such as whether the measures underlying the financial contribution is selective, whether it corresponds to market terms, whether it is liable of distorting the competition in the procurement procedure and whether it aligns with EU public policy objectives.

Although the information on the individual foreign financial contributions that must be stated in the notification is limited to foreign financial contributions equal to or in excess of EUR 1 million in the three years prior to the notification<sup>19</sup> that fall into any of the most distorting

categories,<sup>20</sup> both the notification form and the declaration require tenderers to state the total foreign financial contribution per third country.<sup>21</sup> In the context of a review of the notification, the Commission can also request information on other foreign financial contributions, which request is likely to come with relatively short timelines.<sup>22</sup> Moreover, the Commission can request for the notification in case the notification threshold is not met or initiate an ex ante investigation.<sup>23</sup>

The practical consequences of the notification obligation are particularly burdensome for companies belonging to a global group with activities in multiple third countries and for portfolio companies of investment funds which operate worldwide

Tenderers will have to assess the feasibility of determining on an ad hoc basis whether the notification threshold is met at the moment of the submission of a tender. If they are active in various third countries, this seems not feasible. In such case, they will have to monitor and record all foreign financial contributions on a permanent basis to be able to comply with their obligations. Such permanent monitoring of all foreign financial contributions – or at least the contributions of EUR 1 million or more – seems advisable anyhow, taking into account the detailed information that must be provided and the complexity of the assessment of direct and indirect foreign financial contributions, which can take any form, i.e. a loan, tax exemptions or even the provision of goods or services or the purchase of goods or services. Moreover, a permanent monitoring system avoids delays and the risk of exclusion due to a failure to complete missing information within the tight time frame (i.e., ten

16 Art. 29(8) FSR.

17 On the basis of Art. 107(1) TFEU a measure qualifies as State aid if it (i) confers an economic advantage to one or more undertakings, (ii) is financed with State resources and attributable to the State, (iii) potentially distorts competition, and (v) potentially affects trade between Member States.

18 Art. 3(2) FSR.

19 In line with Art. 4(3) of Regulation (EU) 2022/2560, foreign financial contributions of which the total amount per third country is lower than the amount of de-minimis aid. This provision still refers to Art. 3(2), first subparagraph, of Commission Regulation (EU) No 1407/2013(16) that sets the de-minimis threshold at EUR 200,000. However, this regulation is repealed and replaced with Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de-minimis aid which increases this threshold to EUR 300,000 over the consecutive period of three years.

20 Art. 5(1) FSR lists the following categories of foreign subsidies that most likely do distort the internal market: (a) a foreign subsidy granted to an ailing undertaking; (b) a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking; (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) a foreign subsidy directly facilitating a concentration; (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.

21 See Table 1 and 2 of Section 8 of the notification form laid down in Annex II to the FSR Implementing Regulation. See also section 7.3. of the FSR Implementing Regulation that states that non-notifiable foreign financial contributions, which are of a value below EUR 1 million but above the value of de-minimis aid can be declared as aggregate without indicating their values. When requested by the Commission, such foreign financial contributions must be reported individually.

22 Art. 28(5) of the FSR empowers the Commission to request for a notification in tenders below this threshold before the award of the contract. This competence is without prejudice to the Commission's power to start an ex officio investigation.

23 See Art. 29(8) FSR.

days maximum).<sup>24</sup> In addition, such a system reduces the risk of significant fines that tenderers face for intentionally or negligently providing incorrect or misleading information.<sup>25</sup> Finally, the oversight of the cumulative foreign financial contributions allows tenderers to better assess their chances in the procurement procedure and to strategically choose the main subcontractors and suppliers whose financial contributions have to be included in the notification or declaration (see also section 3.c below).

### 3. The Commission's ex ante review and enforcement instruments

#### a. General introduction on the Commission's ex ante review and enforcement powers

The Commission's review is divided in two phases: the preliminary review stage and the in-depth investigation. Prior to these formal stages, companies are encouraged to engage in pre-notification discussions with the Commission before submitting their notification with their tender. Such pre-notification is not mandatory, but can be useful to determine the precise amount of information required in a notification, to ensure that the notification is complete and to obtain waiver from the obligation to submit certain information required by the form.<sup>26</sup> The preliminary review stage starts on the day of the receipt of a complete notification by the Commission and may not exceed 30 working days.<sup>27</sup> Within this time limit the Commission must decide whether it initiates an in-depth investigation or whether it has no objections against the financial contributions notified to it.<sup>28</sup> If the Commission concludes that the notification is incomplete, it declares the tender irregular and requests the contracting authority to reject the tender or, in case of a multi-stage procedure, reject the request to participate.<sup>29</sup> The second stage starts on the day of the Commission decision to initiate an in-depth investigation and may not exceed 130 working days after the receipt of the complete notification by the Commission.

During its assessment in both phases the Commission may request all necessary information from the tenderers, other companies and third countries.<sup>30</sup> In case of a lack of cooperation, or incorrect, incomplete or misleading information, the Commission can impose penalty payments or fines of up to 1% of the economic operator's turnover in the preceding year. The maximum fine for the failure to notify or circumventing the notification requirements or attempts

thereto is 10% of the said turnover.<sup>31</sup> In the context of its investigation, the Commission may conduct interviews by consent<sup>32</sup> and inspections,<sup>33</sup> while it may also conduct inspections both within and outside the EU. The latter inspections are only possible if the government of the third country in question raises no objections. In the absence of cooperation by the third country, the Commission could prohibit the award to the economic operator concerned.<sup>34</sup>

#### b. Consequences for contracting authorities

The FSR obliges contracting authorities to reconsider their 'timelines' for the implementation of their procurement procedures for large volume contracts. The standstill obligation during the Commission's preliminary assessment or in-depth inquiry, prevents a contracting authority from awarding the contract to a tenderer that is under review, but it does in principle not prevent the contracting authority from continuing with all other steps of their procurement procedure, like the selection of tenderers in a multi-stage procurement procedure and the assessment of received requests to participate and tenders.<sup>35</sup> In any event, it may delay the public procurement procedure significantly if the Commission's final decision is not forthcoming. Although the standstill obligation effectively applies to the contracting authority, no fines can be imposed on the contracting authority if it awards the contract in violation of this obligation. However, the risk of annulment of the award seems sufficient to withhold contracting authorities from such violation.

The FSR obliges contracting authorities to reconsider their 'timelines' for the implementation of their procurement procedures for large volume contracts

Apart from delays, contracting authorities will also have to consider the possible drawbacks of the fact that it might have to award the contract to the second best tenderer in case the Commission prohibits the award of the contract to the economically most advantageous tender.<sup>36</sup>

Anticipating delays due to the Commission's review, contracting authorities are likely to publish their large volume procurements even earlier. This may negatively impact the prices included in the tenders, due to the fact that tenderers will have to anticipate future developments for a longer term, such as possible price increases. It might also lead to longer required validity periods for submitted tenders, as contracting authorities will want to prevent these to lapse while the Commission carries out

<sup>24</sup> Art. 29(3) FSR.

<sup>25</sup> Art. 33(2) FSR. A fine of up to 1% of the aggregate turnover in the preceding year may be imposed by the Commission.

<sup>26</sup> See Annex II, par. 6 to the FSR Implementing Regulation.

<sup>27</sup> Art. 30(2) FSR provides for a time limit of 20 working days after the receipt of a complete notification, which period may be extended by 10 working days.

<sup>28</sup> See also Art. 10 (3) and (4) FSR.

<sup>29</sup> Art. 29(4) FSR.

<sup>30</sup> Art. 13 FSR.

<sup>31</sup> Art. 33(3) FSR.

<sup>32</sup> Art. 13(7) FSR.

<sup>33</sup> Art. 14 and 15 FSR.

<sup>34</sup> Art. 16(1) jo. 31(2) FSR.

<sup>35</sup> Art. 32(1) FSR.

<sup>36</sup> Art. 32(4) FSR.

its review. Contracting authorities also run the risk that their procurements will attract fewer tenderers, since the latter will most likely only participate if it is estimated that their tenders have a reasonable chance and the financial contributions received will not eliminate their tenders or require far-reaching commitments. Considering the often-limited number of tenderers to large volume procurements, contracting authorities face an increased risk of failure of the procurement procedure due to the lack of sufficient suitable tenderers.

Finally, contracting authorities will have to take into account the possibility that the award of the contract becomes the subject of various legal proceedings even if such award is in accordance with the final Commission decision.

The latter's final decision may be challenged before the General Court and subsequently the European Court of Justice (ECJ), by the tenderer that was the subject of the Commission's review or even by other tenderers aiming to have their competitors excluded. In particular the second best tenderer is likely to meet the high admissibility thresholds for such action.<sup>37</sup> We note that such proceedings will not suspend the Commission's final decision, nor the award of the contract, and in principle the contracting authority will be able to award the contract after the Commission's final decision has been taken.<sup>38</sup> The risk of parallel legal proceedings before the national courts concerning the award of the contract cannot be entirely excluded either. Although we consider it unlikely that a national court will suspend the award of the contract pending the appeal against the Commission, considering – as said before – that the FSR explicitly entitles contracting authorities to award the contract after the Commission's final decision.<sup>39</sup>

A contracting authority should lastly take note of the possibility of the annulment of the Commission's final decision by the General Court or the ECJ after the contract has already been awarded. It remains an open question if this will give a tenderer any form of recourse against the contracting authority, such as annulment of the awarded contract or an action for damages. Both seem unlikely to succeed in our view.<sup>40</sup>

<sup>37</sup> In order to initiate an action for annulment on the basis of Art. 263 TFEU against the Commission's final decision that is addressed to the contracting authority, the competitor must demonstrate that that decision is of 'direct and individual concern' to him. Direct concern means that the legal rights of those persons are immediately affected by the Commission's final decision. Individual concern means that the decision affects them differently from all other competitors.

<sup>38</sup> Art. 32(4) and (5) FSR.

<sup>39</sup> This would in fact also entail a judgment of the national court on the validity of the final decision of the Commission, which would be within the jurisdiction of the Court of Justice of the European Union (also see recital 56 FSR).

<sup>40</sup> An action for non-contractual liability against the Commission is unlikely to be successful either. See also General Court 20 December 2023, T-415/21, ECLI:EU:T:2023:833 (*Banca Popolare di Bari SpA v. Commission*), paras. 112-116.

### c. Practical consequences for tenderers

The most important consequence of the FSR is that European tenderers will be less likely to be confronted with competition distortions by unduly advantageous tenders due to foreign subsidies. However, the FSR could also negatively impact the competition in procurement procedures. Before engaging in large volume procurement procedures, potential tenderers are likely to conduct a risk assessment on the most likely outcome of the Commission's review of the foreign financial contributions they will have to notify or declare. Such review procedure and in particular the in-depth investigation may entail burdensome information requests, the deployment of the Commission's far-reaching investigational powers and the possibility for interested parties, amongst which other participants in the procurement procedure, to submit their views on the foreign financial contributions under investigation.<sup>41</sup> Despite the potential burdensome procedure, we consider it not likely that this will withhold tenderers from competing for large volume contracts if they estimate their tenders have a fair chance. However, in case of a potential negative outcome of the Commission's review, tenderers will weigh the considerable efforts needed for the preparation of the tender against the likeliness that the Commission will prohibit the award of the contract or that it will require far-reaching redressive measures or commitments.

The most important consequence of the FSR is that European tenderers will be less likely to be confronted with competition distortions by unduly advantageous tenders due to foreign subsidies

In order to determine the most likely outcome of the Commission's review, tenderers will have to assess the risk that the Commission finds the financial contributions distorting the competition in the procurement procedure and the kind of redressive measures or commitments it may require to remedy such distortion. Also, tenderers will have to anticipate the likely outcome of the Commission's 'balancing test'.<sup>42</sup> Although the outcome of this test for foreign subsidies is still uncharted waters, also for the Commission, tenderers can to a certain extent rely on the conditions set out in the EU State aid guidelines regarding compatible and incompatible aid. Moreover, the Commission State aid decisions approving State aid measures with comparable public policy objectives and characteristics as the financial contributions under investigation, provide guidance on the outcome of the balancing test.

<sup>41</sup> Art. 10(3) sub d FSR.

<sup>42</sup> See Art. 6 and 11(4) sub b FSR. In this test, the Commission weighs the positive and negative effects of the financial contribution in a comparable way to the assessment of EU State aid measures.



For the type of remedies or redressive measures, the FSR sets out a non-exhaustive list of possible structural and behavioural measures, such as the repayment of the foreign subsidy including an appropriate interest rate.<sup>43</sup> However, as to whether and when such remedies or redressive measures may be required, tenderers have little guidance from other areas of EU law. The most relevant reference may be the exclusion of abnormally low tenders under the public procurement rules.<sup>44</sup> When assessing possible commitments, tenderers will also have to weigh the potential advantages of the award against the impact on their relation with the granting third country and the consequences for the foreign financial contribution (i.e., the conditions for a grant or subsidy). Procurement procedures of the Member States thus may become the platform for geopolitical battles between States.

#### 4. Final remarks, balance between burden and level playing field

We wonder whether the regulatory burden for both tenderers and contracting authorities is outweighed by the advantages of a more level playing field than before the FSR. Although the scope of the FSR is not limited to notifiable financial contributions, the Commission has indicated that these contributions will be its main focus, at least at the start of the application of the FSR. The Commission expects about 36 notifications a year.<sup>45</sup> Taking into account the limited number of large volume tenders, the proportionality of the administrative burden the FSR places on both tenderers and contracting authorities, may be questioned. However, it is too early to conclude whether the significant burden outweighs the distortion of competition that the FSR aims to remedy and to what extent it will impact the success rate of large volume tenders.

The efficacy of the FSR highly depends on the Commission's clout and hence its capacity to swiftly review all notifications and declarations within the tight deadlines, without causing many delays to the tender procedure. The Commission initially envisaged 145 full-time employees for the FSR taskforce,<sup>46</sup> however, currently this taskforce exists of a handful dedicated officials.<sup>47</sup> With such limited

capacity it seems challenging to provide both tenderers and contracting authorities with the guidance they would need, in particular in the first period, to tackle the numerous uncertainties on the application of the FSR in practice.<sup>48</sup> The Commission's first decisions will provide important guidance on how the Commission applies the new tools in practice. A first decision is on the horizon since the Commission announced the opening of the first in-depth investigation on 16 February 2024. The investigation follows the notification of a subsidiary of a Chinese State-owned train manufacturer. It concerns a public procurement procedure launched by Bulgaria's Ministry of Transport and Communications, relating to the provision of several electric 'push-pull' trains as well as related maintenance and staff training services.<sup>49</sup>

The efficacy of the FSR may also be impacted by the current subsidy race between States and in particular by the increased flexibility on State aid for the green and digital transition in the EU that was introduced as a response to the US Inflation Reduction Act. Consequently, competition distortions resulting from a foreign subsidy meeting the conditions of permissible State aid in the EU, will not be tackled irrespective of whether EU tenderers actually benefit from similar State aid.<sup>50</sup> Disparities in the level playing field resulting from lawful state aid are inherent to the latter instrument.<sup>51</sup> A competition between States with the deepest pockets can only be solved by common rules on permissible subsidies which falls within the remit of the WTO and cannot be tackled at EU level.

*This article was finalised on 20 February 2024.*

##### About the authors

**M.C. (Greetje) van Heezik**  
Counsel at Houthoff.

**D.M. (Daan) van Broeckhuijsen**  
Associate at Houthoff.

**O. (Olav) de Wit**  
Senior Associate at Houthoff.

<sup>43</sup> Art. 7(4) FSR.

<sup>44</sup> See also footnote 11.

<sup>45</sup> Legislative financial statement to the proposal for the FSR, para. 3.2.2.

<sup>46</sup> See the Legislative financial statement attached to the proposal for the FSR, para. 1.4.3.

<sup>47</sup> According to the press, the FSR taskforce only counts five employees (see 'EU strapped for staff to combat Chinese subsidies', *Politico.eu* 5th of October 2023).

<sup>48</sup> See also 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 and Practice*, 2023, Vol. 14, No. 3.

<sup>49</sup> Commission Press Release, 16 February 2024, 'Commission opens first in-depth investigation under the Foreign Subsidies Regulation': [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_887](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887)

<sup>50</sup> The current public procurement rules only provide for a possibility to reject a tender in case it benefits from incompatible State aid. See Art. 69(4) of Directive (EU) 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive (EC) 2004/18, OJ L 94, 28.3.2014, p. 65.

<sup>51</sup> See also ECJ 28 September 2023, case C-320/21 P, ECLI:EU:C:2023:712 (*Ryanair v Commission*), para. 108, and ECJ 23 November 2023, case C-209/21 P, ECLI:EU:C:2023:905 (*Ryanair DAC v Commission*), para. 32.