

THE GEORGE WASHINGTON UNIVERSITY
GOVERNMENT PROCUREMENT LAW PROGRAM

A NEW BARRIER TO TRANSATLANTIC PROCUREMENT: THE EUROPEAN UNION'S FOREIGN SUBSIDIES REGULATION

APRIL 18, 2023
9:00 ET - 15:00 CET

Welcome

Professor Christopher Yukins
GW Law School

- Recording and materials at www.publicprocurementinternational.com
- Questions & Answers (Q&A)
- All speakers' statements are in their personal capacities



Agenda



- Introductions
 - Christopher Yukins, GW Law School
- Understanding the FSR's impact on procurement
 - Pascal Friton, Max Klasse & Ramona Ader, Blomstein (Berlin)
- Discussants:
 - Jean Heilman Grier – issues in transatlantic trade
 - Robert Anderson – FSR and WTO agreements (GPA and Subsidies Agreement)
 - Christian Filippitsch, Reed Smith (Brussels): Preparing for the FSR



Panelists and Discussants



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A new barrier to transatlantic procurement: The European Union's Foreign Subsidies Regulation

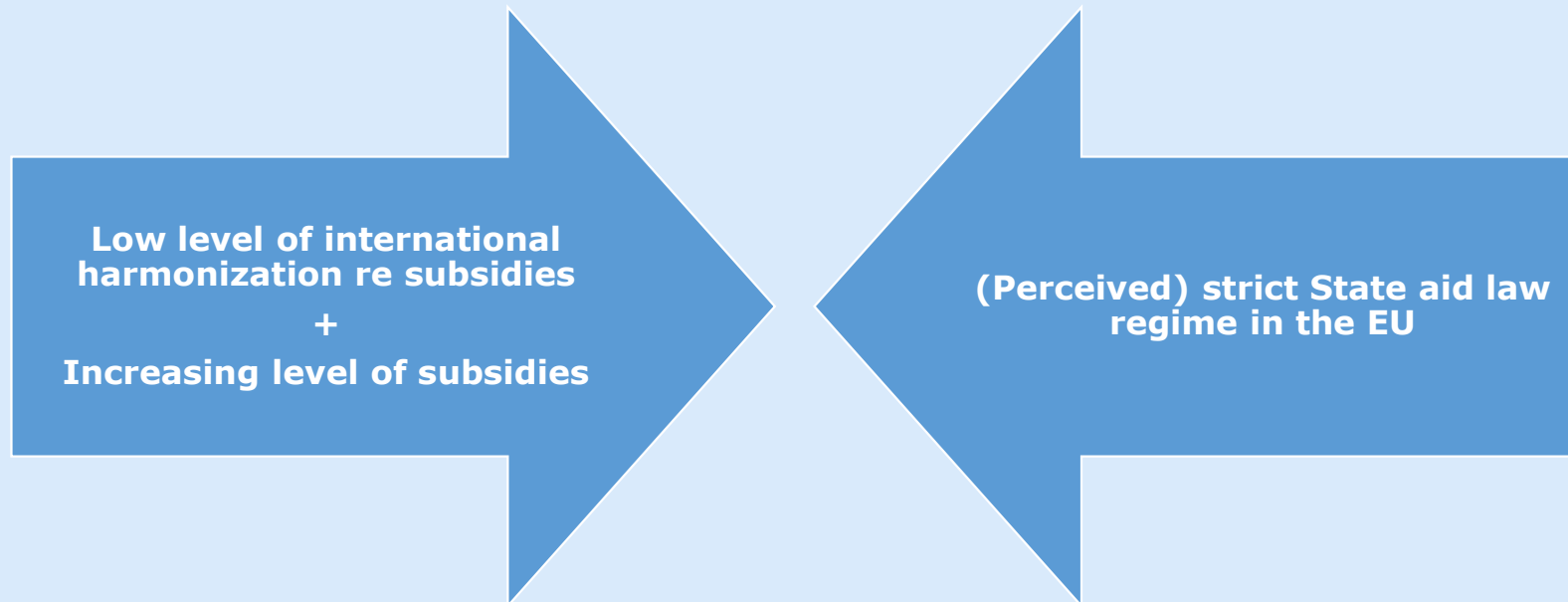
Dr. Pascal Friton, LL.M.

Dr. Max Klasse

Ramona Ader

18 April 2023

Background



Fear of EU companies being disadvantaged in competition with companies from countries that are subject to less restrictive state aid control

The three tools of the FSR



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Notification based tool to investigate bids in public procurements

Notification obligation

Application of Procurement Directives (except for Defence Procurement Directive)



Value of public procurement/framework agreement \geq EUR 250m



Aggregate "financial contribution" \geq EUR 4m in the last 3 years per third-country
→ Threshold applies to all contributions to the whole group of the bidder as well as main subcontractors and suppliers

Financial contribution

A “**financial contribution**” is defined widely to include

- (a) **transfer of funds or liabilities** (e.g. capital injections, grants, loans, guarantees, fiscal incentives, debt forgiveness, debt to equity swaps, rescheduling);*
- (b) **foregoing of revenue that is otherwise due** (e.g. tax exemptions, granting of exclusive rights without adequate remuneration); or*
- (c) **provision or purchase of goods or services***

- Notification obligation is **not limited to subsidies**: Financial contribution is only one element of foreign subsidies definition
- Does **not require a market advantage**

Do even government contracts awarded in competitive procurement procedures qualify as a financial contribution?

Declaration obligation

"In all other cases":
Obligation to declare all foreign financial contributions and confirm that they are not notifiable

Not applicable to:

- Procurements not covered by Procurement Directives
- Procurements under Defense Procurement Directive

Applicable to:

Procurement with value of \geq EUR 250m
+
aggregate "financial contribution"
< EUR 4m in the last 3 years per
third-country

Application unclear:

Procurement with value of < EUR 250m

Information required for notifications and declarations

- **Description** of public procurement procedure
- Information about the **party(ies)**
- Detailed **list on foreign financial contributions**
- Explanations on **positive effects** of the subsidy
- **Supporting documentation**
- Explanation to justify that the tender **is not unduly advantageous**
- Attestation of correctness and completeness

Notifications

- **Description** of public procurement procedure
- Information about the **party(ies)**
- **List of all foreign financial contributions**
- Attestation of correctness and completeness

Declarations

Obligations in effect from 12 October 2023

Two-stage review procedure

Preliminary review

Existence of a foreign subsidy?

Distortion in the internal market?

In-depth investigation

Balancing test

Sufficient commitments?

Existence of foreign subsidy

Art. 3 FSR

“For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.”

**Financial
Contribution**

**Provided by a
Third
Country**

**Conferring a
Benefit**

Selectivity

Assessment of distortion

Most likely to distort internal market

- Subsidy granted to an **ailing undertaking**
- Subsidy in the form of an **unlimited guarantee** for debts or liabilities
- **Export financing measure** not in line with OECD Arrangement on officially supported export credits
- Subsidy **directly facilitating a concentration**
- Subsidy enabling an undertaking to submit an **unduly advantageous tender**

Case-by-case assessment

Distortion exists where a foreign subsidy is

- liable to **improve the competitive position** in the internal market and
- actually or potentially negatively **affects competition** in the internal market

➔ **Significant uncertainty for majority of cases**

Distortion unlikely

- Total amount of the subsidy **≤ EUR 4m in the last 3 years**

No distortion

- Total amount of the subsidy **≤ EUR 200 000 in the last 3 years**
- Subsidy aimed at **making good damage caused by natural disasters or exceptional occurrences**

Balancing test

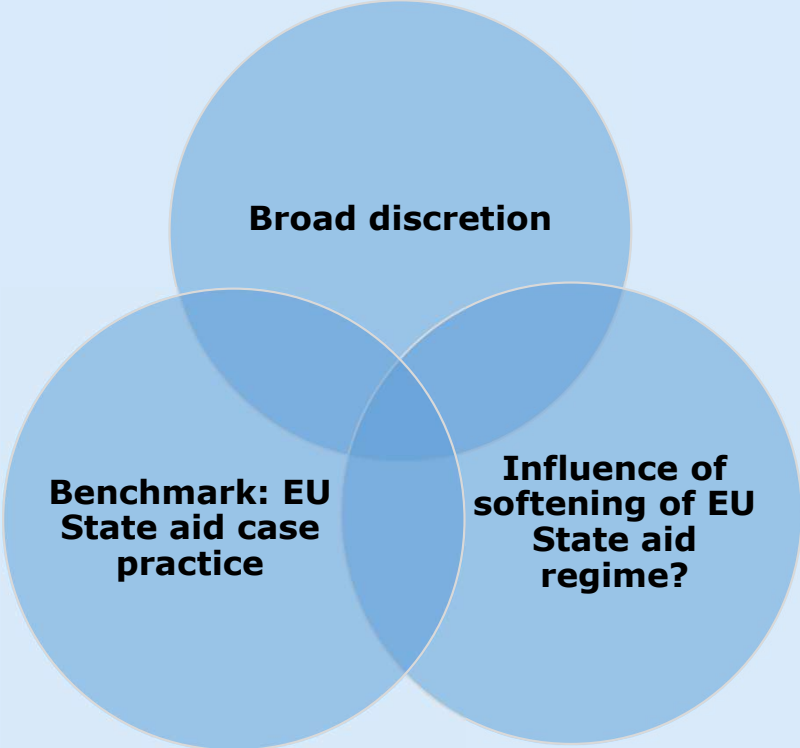
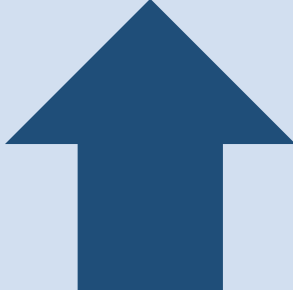
Balancing test: Commission may *balance*



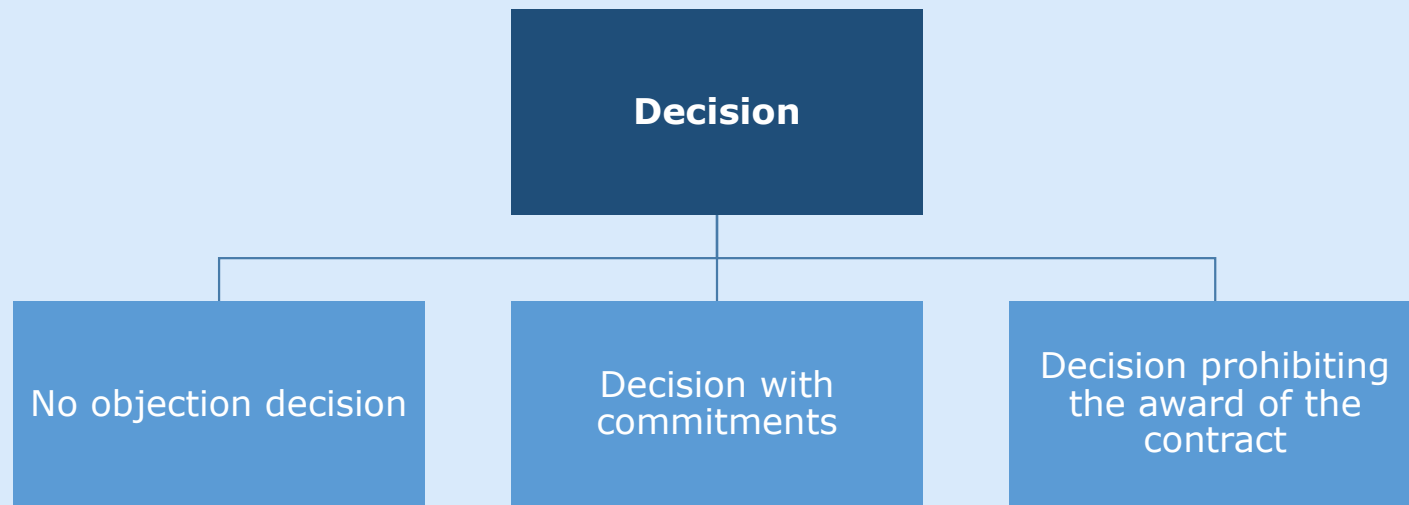
negative effects of a foreign subsidy in terms of distortion



positive effects on the development of the relevant subsidized economic activity on the internal market



Decision by the European Commission



Decision is binding for the contracting authority

Award of contract to bidder under investigation is not allowed during Commission's assessment

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General investigation tool (*ex-officio*)

General investigation tool: Application in public procurement procedures

Applicable to **all Procurement Directives**

(also defence and security contracts under Dir. 2009/81/EC)

Commission may **on its own initiative** examine alleged foreign subsidies distorting the internal market

Procedure generally corresponds to **procedure after notification**

But:
ex officio reviews are limited to awarded contracts and **no cancellation** of award decision or termination of a contract

Instead:
Commission may adopt a **decision with redressive measures** (e.g. repayment of subsidy)

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Notification based tool to investigate concentrations

Notification based tool to investigate concentrations

Turnover threshold: acquired company, one of merging parties or JV generates an EU turnover of \geq **EUR 500m**



Financial contribution threshold: foreign financial contribution of \geq **EUR 50m** in three previous years



Mandatory notification requirement

Stand-still obligation (gun-jumping)

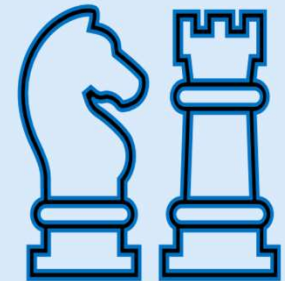
Ad hoc notification request: Commission may request notification at any time prior to implementation of a concentration if it suspects that undertakings concerned have received foreign subsidies in three previous years



Concentrations: Deal Planning

Keep in mind: When negotiating SPA...

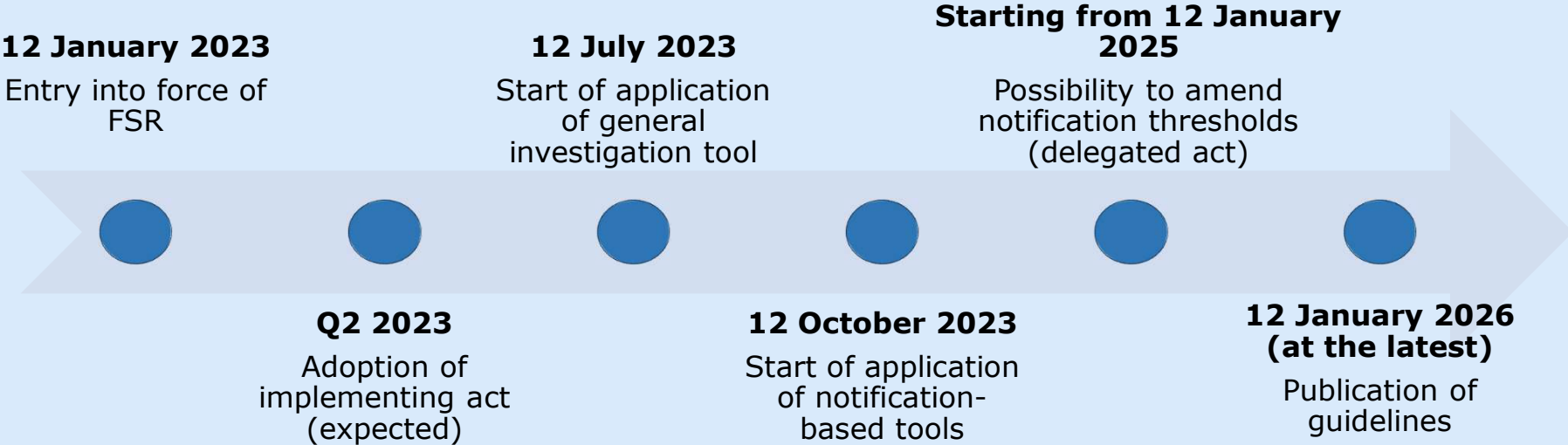
- Conditions precedent
- Covenants for Purchaser filing obligations (e.g., regarding information sharing, document gathering, pre-notification, timing, redressive measures)
- Seller to provide information and documents on Target and bidding process
- High uncertainty regarding deal timing → Long-stop date / Remedies



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Conclusion and outlook

Relevant events



Impact on US companies

“
Review of US subsidies
will be the ‘absolute
exception’ ...

”



“
subsidies that are given
in the United States will
be relevant to notify in
the EU

”

**Be
prepared**

Significant additional burden

- Gathering information on foreign financial contributions, including wider group and (in public procurement procedures) main subcontractors and suppliers
- Notification / declaration

Potentially significant consequences (e.g., exclusion from public procurements, blocking of transactions)?

- Commission claims broad discretion
- Impact of current relaxation of EU State aid rules?

(Potential) mitigation?

Pre-notification procedure with the European Commission?

Draft implementing regulation:

- Possibility for companies to engage in pre-notification discussions
- Companies can ask for waivers to submit certain information required by notification form
- Pre-notification may result in significant reduction of the amount of information to be submitted

May criticism make the European Commission rethink?

EUROPEAN COMMISSION, EUROPEAN UNION, FOREIGN SUBSIDIES, FOREIGN SUBSIDY REGULATION

Be Careful What You Wish For... The Foreign Subsidies Regulation Triggers Buyer's Remorse

EU firms urge Commission to address 'disproportionate' scope of foreign subsidies rules

28 March 2023 | 16:41 CEST

In a letter addressed to the European Commission (EC) heads for Competition, Internal Market, and Trade, **Cisco, AstraZeneca, thyssenkrupp AG** along with 18 others have urged the authority to address shortcomings of the Foreign Subsidies Regulation (FSR), an emailed statement shows today (28 March).

The FSR rules are aimed at addressing distortions caused by foreign subsidies in the single market. The new EU rules **entered** into force on **12 January** and will start applying on 12 July. The companies have to notify to the EC of concentrations and participation in public procurement procedures meeting the relevant notification thresholds from 12 October.

The signatory companies are AstraZeneca, **BASF SE, Bayer AG, Cisco, Clariant, Deutsche Telekom, E.ON SE, Evonik Industries AG, Intel Panasonic, Raytheon Technologies, Robert Bosch GmbH, RWE Aktiengesellschaft, ServiceNow, Siemens AG, Siemens Energy AG, Siemens Healthineers, Skanska AB, Solvay, Telefónica**, and thyssenkrupp AG.

The 21 companies have expressed fear that the practical implementation of the FSR will result in an extremely complex administrative ordeal. Important M&A transactions may be disrupted, and public tender procedures may come to a stand-still or suffer a significant reduction in the number of competitive bids that are submitted, according to the letter.

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Discussion

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