



EU Regulation 2022/2560 on foreign subsidies and its impact on public procurement procedures

On 12 October 2023, EU Regulation 2022/2560 on foreign subsidies (the “FSR”) took full effect and is henceforth applicable in all public procurement procedures exceeding the threshold of €250 million.

The FSR lays down rules and procedures targeting foreign subsidies which may potentially affect the level playing field between bidders participating in EU public procurement procedures. Prior to the enactment of the Regulation, subsidies granted to foreign companies were not checked in full contrast to subsidies granted by EU Member States that had to be scrutinised in accordance with state aid rules. This is the first time that the European Commission is authorised to take on the review and investigation of potential distortions that may potentially be created by foreign subsidies on the basis of information obtained in the context of public procurement procedures.

FSR application thresholds

The FSR introduces a notification-based procedure to investigate bids involving

financial contributions by non-EU governments. Notification requirements are triggered where the estimated contract value is at least €250 million and the bid involves a foreign financial contribution of at least €4 million per third country in the last three years. However, the Commission reserves the right to investigate bids falling below the threshold if it deems appropriate.

Entities concerned

Importantly, the contributions’ amount determining the level of disclosure is the aggregate received not only by the bidder itself, but by a large group of other entities, including the bidder’s controlled subsidiaries, holding entities, its main subcontractors, practically any entity closely linked to the bidder either at

group level and/or in the context of the tender at hand.

Notification requirements

In the open procedure, notifications or declarations are submitted with the offer, while in multi-stage procedures (restricted procedures, competitive procedure with negotiation, competitive dialogue, etc.) disclosure shall take place upon participation in both the prequalification and the binding offer stages.

Subsidies falling within the scope of FSR

Any direct or indirect financial contribution offered by a third country, which confers a benefit in the EU market, such as the possibility to submit an unduly advantageous tender. As third country qualifies (a) a third country central government and public authorities of all levels, or (b) a foreign public or private entity whose actions can be attributed to a third country.

Any benefit in the form of non-horizontal financial support, conferring an advantage to a specific entity or entities' category, may potentially distort the EU market, hence is subject to disclosure. Aggregate subsidies lower than €200,000 are not subject to disclosure, while compensation for natural disasters may be considered as lacking distortive effect.

Disclosure requirements

Bidders shall proceed to either a detailed notification of foreign contributions or a leaner declaration listing foreign contributions not subject to notification, depending on whether the aggregate

financial contributions received by the bidder and specific related entities exceed the notification threshold of €4 million per third country. Either way, bidders need to be in a position to confirm the total amount of contributions received per country over the last three years by a number of entities more or less closely linked to the bidder in terms of business activity.

A walk through the EU Commission's investigation

▪ Preliminary review

Initiated upon receipt of notifications and/or declarations, it may either be terminated on grounds of lack of distortion or escalated to an

▪ In-depth investigation,

on the grounds of indications of distortion.

▪ Distortion and commitments

An in-depth investigation resulting in findings of distortion may lead to a decision approving specific commitments offered by the tenderer in remedy of the subsidies' distortive effect.

▪ Distortion without commitments

In the absence of offered commitments or should those offered be deemed unsatisfactory, the Commission's decision shall prohibit the award of the contract to the tenderer scrutinised.

▪ No distortion

In the absence of findings of distortion further to the in-depth investigation or should a distortion be found to be outweighed by positive effects of the development of the relevant subsidised economic activity on the internal market, the award may be finalised (subject to applicable legal remedies).

What is at stake?

- **Awarded public contracts**

may be subjected to an ex officio review from the FSR compliance perspective, in the interest of eventual distortive effects.

- **Public tenders issued from 12.10.2023 onwards**

may be affected to the point of the award being blocked on the basis of disclosed information or on account of a provisional contractor's failure to comply with its declaration/notification obligations.

- **Monetary sanctions**

- **Incomplete disclosure**

through a bidder's fault or negligence shall entail fines of up to 1% of its aggregate turnover of the preceding financial year.

- **A bidder's failure to disclose or attempts at circumvention**

of FSR notification/declaration obligations shall entail fines of up to 10% of its aggregate turnover of the preceding financial year.

A difficult road paved with good intentions

The FSR confers to the Commission significant powers of protection against distortive effects which would have otherwise gone undetected, such as those entailed by the acceptance of an unduly advantageous offer made possible on account of foreign subsidies. The necessary assessment pertains to a significantly wide scope of means of financial support received by a significant number of entities whose

financial activity is considered to affect the bidder's participation.

Considering the **risks** incurred by the sole bidder or Consortium including a bidder subject to FSR disclosure obligations, both in terms of the **award** of the contract at hand, as well as of the potential **monetary sanctions** for breach of compliance with the FSR notification/declaration obligations, the preparation of an offer having potential for success shall from now on include an exhaustive **due diligence** of foreign subsidies received at group level, potentially extended to cover partners in a specific tender opportunity and **constantly updated** in the interest of **preparedness within any covered jurisdiction**.

The road is indeed long, but ultimately longer for the non-compliant competitor, who might in the end justify the diligent bidder's exertion in the interest of transparent participation.

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