

Legal Update

Public tenders in the EU

Ensuring Compliance with new foreign subsidy rules for EU and non-EU Companies

Introduction

Over the past few months, a new regime tackling foreign subsidies has begun to take effect in the European Union. The EU Foreign Subsidies Regulation (“FSR”) started to apply in part in June 2023, and more fully in October 2023.¹

The FSR empowers the European Commission (“**Commission**”) to address the effects of distortive subsidies granted by non-EU countries to companies operating in the EU. It is a broad and new tool for the Commission adding to the already existing merger control, foreign direct investment and State Aid rules, covering (i) concentrations and (ii) public procurement procedures. This memo focuses on the latter.²

The FSR establishes new mechanisms to ensure competitive, transparent and non-discriminatory public procurement procedures throughout the EU. To that effect, the FSR places on economic operators that participate in public procurement procedures significant obligations to **report the foreign (non-EU) subsidies they receive** and grants the Commission the power to launch *ex officio* investigations in relation to these.

While the FSR first and foremost aims to tackle subsidies from *outside* the EU that cause distortions and undermine the level playing field in the EU markets, it nonetheless equally applies to *all EU companies* that receive such contributions.

KEY TAKE-AWAYS

- The FSR introduces new mandatory reporting requirements, for both EU and non-EU companies participating in public procurement procedures covered by the EU procurement directives:
 - » Above certain thresholds, an FSR notification must be submitted to the contracting authority with the response to the tender; or
 - » Below the relevant thresholds, foreign subsidies may still have to be reported in a declaration.

¹ [Foreign Subsidies Regulation \(europa.eu\)](#)

² For more information on how the FSR applies in a M&A context see: Key Takeaways: [The European Union Foreign Subsidies Regulation | Perspectives & Events | Mayer Brown](#)

- Companies that frequently participate in such public procurement procedures should therefore:
 - » implement internal monitoring systems to track foreign financial contributions on an ongoing and consistent basis, using templates that already include most of the information that needs to be reported
 - » make sure the results are made accessible to all persons/entities that may submit tenders
 - » engage with the Commission as early as possible to seek advice in case of uncertainty and build time for this into the timetable for any bid
 - » monitor their competitors' activities and reach out to the Commission if they believe a contract was awarded to a company that received distortive subsidies.

I. When is there a reporting requirement?

1. WHAT ARE FOREIGN SUBSIDIES?

Under the FSR, foreign subsidies are:

- financial contributions (as defined below);
- provided directly or indirectly by a non-EU country (e.g. a public authority, a foreign public entity or a state-owned private entity);
- which confers a benefit (i.e. it could not have been obtained under normal market conditions); and
- which is limited to one or more undertakings or industries (i.e. are selective in nature).

2. WHO IS SUBJECT TO THESE REPORTING REQUIREMENTS?

Reporting obligations apply to the economic operator and groups of economic operators participating (e.g. bidding consortia) to tenders in the EU, irrespective of whether these operators are based in the EU or not. They also extend to the main subcontractors and main suppliers known at the time of the submission of the notification or declaration. "Main" in this context means that their participation ensures key elements of the contract performance or where the economic share of their contribution exceeds 20% of the value of the submitted tender.

3. WHAT TENDER PROCEDURES ARE COVERED?

The FSR applies only to public procurement procedures covered by the relevant EU procurement directives.³ Private tender procedures are not in the scope of the FSR.

The FSR applies to tender procedures:⁴

- for the conclusion of a public contract under Directive 2014/24/EU on public procurement;
- for the conclusion of a supply, works and service contract under Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors;
- for the award of a works or a service concession under Directive 2014/23/EU on the award of concession contracts;

³ Directive 2014/23/EU; Directive 2014/24/EU; Directive 2014/25/EU; Directive 2009/81/EC.

⁴ In addition, the FSR applies to tender proceedings for public contracts and concessions which the contracting authority is obliged to award or organize in accordance with procedures different from those laid down in Directive 2014/23/EU, Directive 2014/24, and Directive 2014/25/EU, established by a legal instrument creating international law obligations, such as an international agreement concluded in conformity with the TFEU between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories, Article 2 (3) point (d) FSR in connection with Article 10(4), point (a) of Directive 2014/23/EU; Article 9(1), point (a) of Directive 2014/24/EU; Article 20(1), point (a) of Directive 2014/25/EU.

- for awarding contracts falling under Directive 2009/81/EC 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.⁵

In each case, the FSR only applies to public procurements meeting the requirements and thresholds of the relevant Directive. For example, for works contracts⁶ and concessions,⁷ the net value must be estimated to be at least EUR 5,382,000.

II. Notification and declaration requirements

1. NOTIFICATION OBLIGATION WHERE THE THRESHOLDS ARE MET

Since 12 October 2023, a notification is mandatory if the following two conditions are met:

- the estimated **value** of the public procurement or framework agreement is at least **EUR 250 million**,⁸ and
- the economic operator, including its subsidiary companies without commercial autonomy,⁹ its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure received aggregate **financial contributions** in the **three years** prior to notification of at least **EUR 4 million in a non-EU country**.

It is unclear at this stage whether all other affiliates under common control (i.e. all other entities of the group concerned, e.g. sister companies of the “economic operator”) should also be included under the term “holding companies” for the purpose of assessing whether this threshold is met. The wording in Article 28 (1)(b) of the FSR would suggest that they are not to be included¹⁰, but the Commission has not publicly given further guidance in this respect so far.

In case the contracting authority divides the procurement into lots, a third cumulative condition also has to be met: the lot or the aggregated value of the lots to which the tenderer applies must be **at least EUR 125 million** (Article 28 (2) FSR).

2. DECLARATION OBLIGATION WHERE THE EUR 4 MILLION THRESHOLD IS NOT MET

Even where they do not meet the EUR 4 million threshold, economic operators participating to a tender covered by the EU Directives mentioned above are required to list in a declaration all foreign financial contributions received and confirm that these are not notifiable in accordance with the above (Article 29). Therefore, even if only part of the information that would be expected in a notification has to be provided in this declaration, it remains nonetheless very burdensome for EU and non-EU companies participating to large tenders in the EU to collect this information and submit it.

There is a carve out exemption for the award of contracts in the defense and security sector that fall under Directive 2009/81/EC (Article 28 (3) FSR).

⁵ Such procedures are only caught by the FSR within the limits of Article 346 TFEU, which provides in particular that EU Member States any Member State may take such measures they consider necessary for the protection of the essential interests of their security which are connected with the production of or trade in arms, munitions and war material and that Member States shall not be obliged to supply information the disclosure of which they consider contrary to the essential interests of their security

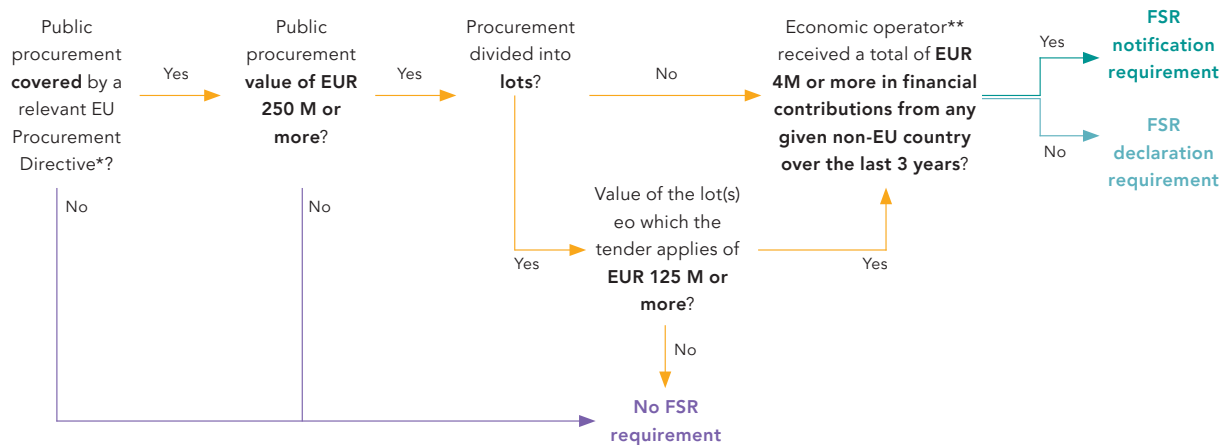
⁶ Article 4 Directive 2014/24/EU, Article 15 Directive 2014/25/EU, Article 8 Directive 2009/81/EC.

⁷ Article 8 Directive 2014/23/EU

⁸ Net of VAT, calculated in accordance with the provisions laid down in Article 8 of Directive 2014/23/EU, Article 5 of Directive 2014/24/EU and Article 16 of Directive 2014/25/EU, or a specific procurement under the dynamic purchasing system.

⁹ This notion was not defined more precisely by the FSR or the Commission at this stage. It is likely that further guidance will be made available in the coming years but it can be assumed in the meantime that at least all fully owned subsidiaries, as well as most solely controlled entities, should be taken into account.

¹⁰ The notion “holding companies” is not defined more precisely by the FSR or the Commission at this stage. The term used in the French version of the FSR for “holding companies” is “sociétés mères” which suggests that sister companies are not included.



* or specific procurement under the dynamic purchasing system.

** including its subsidiary companies without commercial autonomy, its holding companies, and its main subcontractors and suppliers.

The Commission may also initiate ex officio reviews into alleged foreign subsidies distorting competition in the EU, based on information from any source, but such investigations can only concern already awarded contracts.

3. WHAT ARE “FINANCIAL CONTRIBUTIONS”?

The concept of “financial contributions” under the FSR is very broad and extensive. Therefore, most difficulties in the practical implementation of the reporting obligation can be expected in relation to this classification.

Financial contributions in the scope of the FSR include:

- any contribution, direct or indirect;
- granted by the public authorities/central government of a non-EU country, or by a public or private entity whose actions can be attributed to a non-EU country;
- which may include:
 - » any capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;
 - » any foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
 - » the provision of goods or services or the purchase of goods or services, including on market terms.

All financial contributions are relevant to determine whether the thresholds for a notification requirement are met e.g., irrespective whether the provision or purchase of goods or services was based on market terms. Only for the purpose of reporting information on financial contributions in the notification (or declaration), certain facilitations and exemptions apply e.g., provide aggregated information or exclude sales on market terms.

In particular financial contributions in the form of the “provision of goods or services or the purchase of goods or services” is very far reaching because it includes the full amount of all **payments received from** a third country government or relevant public/private entity in relation to such provision of goods or services and all **payments made to** such third country for the purchase of goods or services (e.g. energy supplies by a state owned utilities company).

The above list is non-exhaustive and proper guidelines will likely be published by the EU Commission only in several years once it will have acquired sufficient experience in dealing with these new rules and all associated practical questions.

In the meantime, in many cases uncertainties will arise as to what should be considered a “financial contribution” (and consequently, in some cases, as to whether a filing is required) – reaching out in advance to the Commission to obtain guidance can help obtaining legal certainty.

Companies that are frequently subject to such requirements are therefore advised to implement internal monitoring systems on an ongoing basis.

III. Timing and Procedure

1. WHERE TO NOTIFY?

The economic operator must submit the notification or the declaration to the contracting authority (i.e. – different from FSR notifications for concentrations – not directly to the Commission). If groups of economic operators are participating (e.g. bidding consortia or applicable main subcontractors), only one notification for all parties is required. The contracting authority will in turn submit such notification or declaration to the Commission without delay.

2. HOW TO NOTIFY?

Notifications (and declarations) shall be made using the standardized forms provided by the Commission with the Implementing Regulation (the Form FS-PP). The Commission prefers the use of an online form provided at DG GROW’s website.

The Form FS-PP specifies the information that must be provided when submitting a notification or declaration. It is divided into eight sections. In particular, the following information is required:

- Information on the public procurement, including a link to the published TED (Tenders Electronic Daily) document;
- Information about the notifying parties;
- Information on the foreign financial contributions, such as the form, the non-EU country, the amount of each contribution, the purpose and rationale for granting the contribution, whether there are conditions attached to the contribution, the main elements and characteristics of the contribution;
- Potential justifications for the absence of an unduly advantageous offer (for example, by explaining the price or costs proposed in the offer where it could appear to be abnormally low in relation to the works or services, e.g., by providing details on the technical solutions chosen or the economics of the services provided);
- Possible positive effects on the development of the relevant subsidized economic activity; and
- Supporting documentation.

The Form FS-PP distinguishes between different types of financial contributions. For contributions that are most likely to distort the internal market, detailed information is requested. Other financial contributions can be summarized in a table. As set out in more detail in the Form FS-PP, for certain types of financial contributions, in particular financial contributions below the individual amount of EUR 1 million and certain tax reliefs, no detailed information is required.

In case of a declaration of no notifiable foreign financial contributions, only selected sections of the Form FS-PP must be filled out, primarily with basic information on the public procurement, the notifying parties and the contributions received.

3. WHAT IS THE REVIEW PROCESS AND TIMELINE?

The Commission strongly encourages the notifying parties to engage in pre-notification discussions.¹¹ Such pre-notification exchanges are likely to last longer during the first years of this new regime, as the Commission will be learning how to use the FSR and will have to define how to handle its implementation to facts of specific cases as well as wider policy considerations.

The formal review process involves an initial “preliminary review” phase of 20-30 working days. Within this time limit, the Commission decides whether to clear the award, or initiate an in-depth investigation, which can in general last up to 110 working days, but can be extended by 20 working days in certain cases (Article 30 FSR).

The Commission has a wide range of investigative powers under the FSR, including (i) sending information requests to companies, (ii) carrying out inspections, entering any premises and examine books and records, and (iii) launching market investigations.

Decisions of the Commission can be appealed to the CJEU.

4. HOW DOES THIS AFFECT THE PUBLIC PROCUREMENT PROCEDURE?

During the preliminary review and during the in-depth investigation, all procedural steps in the public procurement procedure may continue. However, the contract may not be awarded during this period (Article 32 (1) FSR).

IV. Assessment and Outcome

1. WHEN MIGHT A FOREIGN SUBSIDY BE PROBLEMATIC?

The FSR addresses foreign subsidies that are liable to distort the internal EU market by improving the competitive position of an undertaking and where that foreign subsidy actually or potentially negatively affects competition.

Whether this is the case is determined in particular on the basis of the amount and nature of the foreign subsidy, the situation of the undertaking and the level of its economic activity on the internal market, and the purpose and the conditions attached to the foreign subsidy.

- The Commission will take a balancing approach, weighing positive and negative effects of the foreign subsidy, when assessing the foreign subsidy: certain foreign subsidies are considered **unlikely to distort the internal market**, for example, if the total amount of foreign subsidies to an undertaking does not exceed EUR 4 million over a period of three years.
- Foreign subsidies that are considered **most likely to distort the internal market** include, for example:
 - » foreign subsidies enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the contract;
 - » foreign subsidies granted to an ailing undertaking; or
 - » foreign subsidies in the form of an unlimited guarantee for debts or liabilities.

2. WHAT ARE THE POSSIBLE OUTCOMES OF THE REVIEW PROCEDURE?

If the Commission finds during an in-depth investigation that the foreign subsidy distorts the internal market, the Commission may adopt a decision to make bindings commitments offered by the economic operator that remedy the distortion. The Commission may also impose redressive measures in such case. Such measures may for instance include repaying a foreign subsidy, divesting certain assets or reducing capacity or market presence.

¹¹ Implementing Regulation Annex II, Form FS-PP, Introduction, para 12.

The Commission will issue a decision to raise no objection if the preliminary assessment as set out in the decision to initiate an in-depth investigation is not confirmed, or if the distortion in the market is outweighed by positive effects.

If the undertaking under investigation does not offer commitments that would fully and effectively remedy the identified distortion, the Commission will adopt a decision prohibiting the award of the contract.

3. ANY OTHER CONSEQUENCES?

The Commission may issue fines and periodic penalty payments.

In particular, the Commission may fine the economic operator

- up to 10% of its aggregate turnover where the economic operator fails to notify the foreign financial contributions or circumvents the notification requirements
- up to 1% of its aggregate turnover in the preceding financial year, where the economic operator supplies incorrect or misleading information in a notification or a declaration.

The Commission may fine also the economic operator up to 10% of its aggregate turnover in the preceding financial year, where the economic operator fails to comply with commitments or with redressive or interim measures adopted by the Commission during the investigation process.

4. WHAT SHOULD COMPANIES THAT RESPOND TO TENDERS TAKE INTO ACCOUNT NOW?

Companies that regularly participate in tender procedures should specifically consider:

- **Adopting a monitoring tool which is accessible to all entities of a group and easy to use.** To avoid losing time in a tender procedure and to be able to promptly answer any requests for information by the Commission, companies are advised to collect data on foreign financial contributions on an ongoing basis. With respect to the extensive notification and declaration obligation, data collection should be comprehensible and instituted for all group entities — the parent, subsidiaries and JVs that are controlled by the group.
- **Engaging with the Commission before submitting a tender in case of uncertainty.** The novelty of the FSR is sure to leave companies with doubts on the need to notify and what contributions to declare. The competent authority for the application of the FSR on tender procedures is DG GROW which has encouraged companies to seek informal advice in case of uncertainties, including through pre-notification exchanges. Where possible, such exchanges should be initiated sufficiently ahead of the procurement procedure in order to be effective.
- **Monitoring decisions concerning their competitors.** While the notification and declaration of foreign financial contributions is confidential, the Commission will publish any decision where a contribution was found to be distortive in the Official Journal.
- DG GROW can also be contacted if a company believes that a tender was awarded to a company that received distortive subsidies (GROW-FSR-PP-NOTIFICATIONS@ec.europa.eu), which may lead the Commission to use its powers (inspections, requests for information, etc.) to investigate.
- **Keeping up to date on the implementation of the FSR in practice.** The Commission itself has conceded that it will take some time to figure out how to implement the FSR in practice. As rules and regulations tend to evolve with experience, companies should actively follow any new developments.

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If you would like any further information on the above, please do not hesitate to get in touch.

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