

The Foreign Subsidies Regulation in public procurement – (not just) another tool in the toolbox

Introduction

In a noble attempt to address distortions caused by foreign subsidies to the detriment of fair competition, the EU has introduced the [Foreign Subsidies Regulation](#) ('FSR'), which will take its full effect on 12 October 2023. Starting out as a welcome initiative, it was the overwhelmingly negative reception in the industry and by stakeholders that made sure the final adoption of the FSR did not go unnoticed.

Unfortunately, many concerns voiced (quite loudly) seem justified. In the context of public tenders, the FSR creates additional filing and notification obligations when undertakings that are (equally) active outside the EU aim to participate in large tenders. In order to comply with these obligations, the FSR imposes requirements that necessitate the monitoring of financial contributions and the gathering (and interpreting) of information in an unprecedented way, resulting in an extremely complex administrative ordeal. The template of the detailed list undertakings need to complete is illustrative of the amount of red tape involved.

Receiving entity	Granting entity	Third-country to which the financial contribution is attributable	Type of financial contribution	Was the financial contribution the result of a tender procedure?	Amount of the financial contribution	Date of granting
		Country A				
		Country A				
		Country A				
Total financial contributions Country A						
		Country B				
		Country B				
Total financial contributions Country B						
		Country C				
		...				
[Note: the financial contributions must be listed in alphabetical order of the granting third-country. Within each third country, they must be ordered chronologically]						

Foreign contributions include any form of direct or indirect financial contribution from a non-EU country. Examples are capital injections, private sector investments, loans, guarantees, tax exemptions, state loans, government contracts, support packages for COVID-19 and green initiatives such as US Inflation Reduction Act tax incentives, investment programmes to reduce renewable energy costs for organisations and even the provision of goods

A granting entity will not only include (local) government, but also foreign public and private entities whose actions can be attributed to that country, taking into account all relevant circumstances.

A bit of context

Traditionally, financial support granted to companies by EU Member States has been subject to strict rules on State aid control in order to create a level playing field in the EU. In the context of public tenders, such an advantage could help the subsidised companies undercut their rivals. However, no such rules have previously existed to subject financial support granted to companies participating in the EU internal market by non-EU countries ('third countries') to similar scrutiny.

Since the financial contributions obtained from non-EU funding may provide undertakings with a competitive edge in public tender procedures over other tenderers, the FSR's goal is to set up a review process in order to assess whether distortions in the internal market may occur and, in the event of actual or potential distortions, to address them.

A framework with the European Commission at its centre

The European Commission stands at the helm of this assessment and of the redress measures. The FSR sets forth a number of subsidies that are likely to distort the internal market, such as unlimited debt or liability guarantees or subsidies granted to ailing undertakings. However, the Commission's assessment should occur on a case-by-case basis, *e.g.* taking into account the absolute or relative size of the contribution (as compared to the value of a public contract), what contributions may be earmarked for (OpEx contributions usually having a more distortive effect) and to what extent the market in question is saturated in terms of activity. In addition, positive effects on the internal market, *e.g.* in light of policy objectives or what is on offer in the internal market, may be taken into account.

The European Commission can make such assessments on its own initiative (*ad hoc* or pursuant to developed lines of policy, including with respect to public procurements below the thresholds) or it may act upon information shared by Member States, competitors or other persons (including the relevant undertakings). Somewhat similar to State aid cases, the European Commission will conduct its review in two steps; after a preliminary review of the case, an in-depth investigation may ensue. If it finds, upon balancing the effects of the financial contribution on the internal market, that negative effects prevail, the Commission can impose measures. These measures may comprise accepting specific commitments from undertakings (that sufficiently address concerns regarding distortion, *e.g.* divestment of certain assets or refraining from investments), but may go further (*e.g.* a repayment of subsidies). According to the [latest proposed implementing regulation](#), the European Commission may even appoint trustees to oversee compliance or may indeed prohibit the award of a contract.

Additional obligations on undertakings

Pursuant to the FSR a public tender should be notified if:

- (i) a public contract's estimated value equals or exceeds 250 million euros or is divided in lots equal to or exceeding 125 million euros; and
- (ii) tenderers (including subsidiaries without commercial autonomy, holding companies or main contractors and suppliers) have been granted aggregate financial contributions of at least 4 million euro per non-EU country in the last three years.

A duty to notify is incumbent upon tenderers, main subcontractors, and main suppliers (with some limited exceptions). Even if the tenderer is not required to notify the contracting authority as such, it must still declare, after listing all foreign financial contributions granted, that the latter are non-notifiable. The main tenderer or concessionaire is responsible for other economic operators involved, main subcontractors and main suppliers making a declaration or notification.

Contracting authorities must send notifications and declarations to the European Commission for review. If, upon inquiring further with undertakings, such notifications or declarations are not submitted, the contracting authority must declare a request to participate or a bid made, irregular or an irregular tender. Likewise, the European Commission may declare a tender irregular if the undertaking does not complete the notification, despite requests made. When contracting authorities assess whether tenders are abnormally low, they must contact the European Commission if this assessment is initiated on suspicions indicating the possible presence of foreign subsidies alone. The latter will then decide whether the tender is unduly advantageous and may impose measures.

Though the European Commission's preliminary review in principle must be carried out within 20 working days of receipt of the notification, the Commission has no less than 110 working days to adopt a decision pursuant to a complete notification. A slightly adapted procedure has been foreseen in multi-stage procedures. Although the European legislature pays lip service to the need to limit administrative burdens, in essence by only imposing obligations on undertakings aiming to conclude sizeable public contracts, it may still develop policies to investigate *ex ante* certain other bids and it may even assess concluded contracts.

Although during preliminary reviews and in-depth investigations, the public procurement procedure may continue, the contract cannot be awarded until the European Commission terminates its review or until the applicable time limit has passed.

Enforcement

In conducting its investigations, the European Commission is granted a wide range of inspection powers (*e.g.* entering any premises, examining any business records, interviewing staff or other representatives). Moreover, the European Commission may impose hefty fines on undertakings that provide incomplete, incorrect, or misleading information, or otherwise fail to cooperate with the European Commission's investigation.

Whereas the fines thus imposed cannot exceed 1% of the aggregate turnover in the preceding financial year, periodic penalty payments may reach up to 5% of the average daily aggregate turnover. In the event of non-compliance with (interim) decisions or with commitments made, the fines may be even higher (up to 10% of the aggregate turnover). Although the European Commission must consider the nature, gravity and duration of infringements, it is quite evident that the risks incurred by undertakings are sizeable.

Aside from that, the FSR may be enforced by courts adjudicating tender disputes, *e.g.* by preliminarily referring questions to the European Court of Justice.

First assessment

The FSR aims to apply a balanced approach to a whole range of subsidies by third countries. Moreover, the fact that the foreign subsidies may unduly impact the operations of tenders, is beyond reasonable dispute.

However, by granting far reaching (and exclusive) powers to the European Commission, which will need to review a substantial number of (large) public procurement procedures, a lot of new red tape is being created which may be difficult to work with in practice. Not to mention the fact that current resources are far from sufficient to (timely) provide the necessary people to review and monitor notifications. Not only concerns with respect to delays and costs, but also regarding professional secrecy and confidentiality of information are perhaps not sufficiently addressed within the current framework.

Although the latter topic will be further addressed in the proposed implementing regulation, the fact remains that within the context of public procurement *a lot* of new information will have to be shared. If such information should be shared line-item by line-item, this may impose undue burdens upon the (large) companies that will be first and foremost subject to the new regulation.

General advice

Since, in spite of vigorous lobbying and protest, the FSR has now been adopted, undertakings aiming to participate in large (infrastructure) projects should start working internally to monitor and gather the information related to foreign financial contributions so that it may be shared in due time.

Currently, no clarity has yet been provided on more detailed guidelines, on the precise format that should be used, or on the exact scope of the information required. However, it is expected that the European Commission will not only request a list of financial contributions, but will also require the undertaking to explain the rationale of foreign contributions and to substantiate why such contributions do not make a tender unduly advantageous.

The FSR is set to apply from 12 July 2023. However, the notification requirements will apply from **12 October 2023**. This additional period allows companies time to prepare. Since the notification is tied to the broad definition of financial contributions and concerns three years prior to application of the FSR, extensive data must be compiled in a readily accessible form. It is advisable to assess which parts of the company may have received any financial contributions outside the EU and start the preparations of the overview. Also, it would be advisable to design and put in place monitoring and compliance mechanisms to track future eligible financial contributions.

As for contracting authorities, they may revisit the procedures adopted to procure their goods, services and works in excess of the threshold amounts. Since there will be a prohibition to award such contracts prior to the European Commission having finalised its review, it may be useful to restructure and improve the tendering process with the new time frames in mind.

All in all, for large public procurement projects (often infrastructure projects), both contracting authorities and undertakings will face a substantial increase in workload when organising or participating in tender procedures.

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