

# The EU Foreign Subsidies Regulation: Public procurement procedures



The Foreign Subsidies Regulation ('FSR') is applicable in the EU from 12 July 2023. It introduces a control regime for foreign subsidies, with a view to address distortions caused by such subsidies on the internal market and to ensure a level playing field.

In short, the FSR requires notification to and prior approval from the European Commission ('Commission') of concentrations (mergers, acquisitions and creation of JVs) and of foreign financial contributions in connection with public procurement procedures meeting certain thresholds. In addition, the Commission will be able to examine alleged foreign subsidies on its own initiative (*ex officio* investigations) – in terms of public procurement such investigations concern already awarded contracts. Further, the Commission will be able to request notification of foreign financial contributions in any public procurement procedure not meeting the thresholds (*ad hoc* notifications), if it suspects that foreign subsidies have been granted to the concerned economic operator in the three years prior to the submission of the tender.

This article focuses on the FSR provisions relating to public procurement procedures,

aiming to help undertakings prepare their organisation on the basis of currently available information. As the legislation is new, there is unfortunately no Commission practice or EU Court of Justice case law to lean on and Commission guidelines are not expected any time soon.

Below is a short description of the main elements of the FSR relevant for public procurement procedures and in the annex, we propose a checklist with measures to be taken when getting started with the preparations.

## Foreign financial contribution v. foreign subsidy

The FSR notification procedures and the *ex officio* investigations are triggered by foreign (i.e. non-EU) financial contributions provided, directly or indirectly, by non-EU public authorities or public or private entities whose actions can be attributed to a non-EU country. 'Financial contribution' is a deliberately wide term including e.g. capital injections, grants, loans, guarantees, tax exemptions and even the provision or purchase of goods or services.

A foreign financial contribution constitutes a 'foreign subsidy' if it confers a benefit on an undertaking engaged in an economic activity in the EU (e.g. participating in a public procurement procedure) and if it is limited to one or more undertakings or industries. It is the Commission alone, under the control of the EU Courts, who determines whether a foreign financial contribution constitutes a foreign subsidy or not, and who will assess whether a foreign subsidy distorts the EU internal market.

## Notification obligation and declaration

Notification of a foreign financial contribution in a public procurement procedure is triggered when:

- the estimated value of the public procurement or framework agreement net of VAT, or a specific procurement under the dynamic purchasing system, is equal to or greater than **EUR 250 million**; and
- the economic operator, including subsidiaries without commercial autonomy, its holding companies, and its main subcontractors and suppliers involved in the same tender was granted aggregate financial contributions in the three years prior to notification, equal to or greater than **EUR 4 million per third country**.

If the procurement is divided into lots, notification will be triggered if the first threshold is met, and the value of the lot or the aggregate value of all the lots to which the tenderer applies is equal to or greater than **EUR 125 million** and the foreign financial contribution is equal to or higher than EUR 4 million.

The estimated value of the contract is calculated in accordance with the provisions laid down in the EU procurement directives (i.e. Article 8 of Directive 2014/23, Article 5 of Directive 2014/24 and Article 16 of Directive 2014/25).

If both thresholds are met, the economic operator concerned must notify the contracting authority or contracting entity when submitting its tender. Where the estimated contract value exceeds EUR 250 million but the threshold concerning aggregate financial contributions (the second threshold above) is not met, the participating economic operators shall in a declaration list all foreign financial contributions received and confirm that these are not notifiable (i.e. do not meet the threshold). The contracting authority or contracting entity forwards the notifications and declarations to the Commission for review.

In an open procedure, the notification or declaration are submitted once, together with the tender. In multi-stage procedures, the notification or declaration shall be submitted twice: first with the request to participate and then (after updates) together with the final tender.

The FSR's notification procedure is not applicable to procurement procedures under Directive 2009/81 (defence and security procurement).

## Calculation of aggregate foreign financial contributions

Notifiable foreign financial contributions are calculated as an aggregate of contributions received by the participating economic operator or group of economic operators (as referred to the EU procurement directives), including their holding companies and subsidiaries without commercial autonomy, as well as the main subcontractors and main suppliers known at the time of submission of the complete notification or declaration.

Main subcontractor and main suppliers means subcontractors and suppliers whose 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.

For a group of economic operators, the main contractor or main concessionaire is responsible for submission of the notification but is only held responsible for the veracity of data linked to its own foreign financial contributions.

According to the Commission's draft notification form for foreign financial contributions relevant in public procurement procedures, only foreign financial contributions relating to operational costs and foreign financial contributions falling within certain high-risk categories, deemed most likely to distort the internal market, shall be included in the notification or declaration. Those high-risk categories are:

- (a) foreign subsidies granted to ailing undertakings;
- (b) unlimited guarantees for the debts or liabilities
- (c) export financing measure that is not in line with the OECD Arrangement on officially supported export credits; or
- (d) a foreign subsidy enabling unduly advantageous tenders.

The draft implementing regulation does not set out a limit in terms of amount. All foreign financial contributions falling under any of the above categories or relating to operational costs, shall be listed in the notification or declaration.

## Consequences of a notification

If a tender is accompanied by a notification of a foreign financial contribution, then the contracting authority or contracting entity may not award the contract to the notifying economic operator until the Commission after its preliminary review has decided not to initiate an in-depth investigation. The relevant time limits for the Commission are 20 working days for the preliminary review and 110 working days for in-depth investigations, both counted

from the receipt of complete notification. In case of an in-depth investigation, the contract may not be awarded to the notifying economic operator until the Commission has adopted an approving decision.

Should the Commission adopt a decision prohibiting the award of the contract, the contracting authority or contracting entity shall reject the concerned tender.

While the Commission is examining a foreign financial contribution notified by an economic operator, the contracting authority or entity may award the contract to an economic operator who have submitted a declaration, should it have submitted the most economically advantageous tender.

## Relevant dates

The FSR is applicable as of 12 July 2023, but the notification or declaration obligation with regard to public procurement procedures applies from 12 October 2023. This means that tenders submitted in procurement procedures with an estimated contract value of or exceeding EUR 250 million and initiated on the 12 October or later, shall include either a notification or declaration, as relevant.

Nevertheless, the Commission may decide to open an *ex officio* investigation already as of 12 July 2023, in which case it can investigate foreign subsidies granted as far back as 12 July 2018. In terms of public procurement, *ex officio* investigations are limited to awarded contracts. It should be noted that there are indications that a number of EU companies are in the starting blocks to submit FSR complaints to the Commission. Such complaints could allow the Commission to open an *ex officio* investigation.

The FSR does not apply to contracts awarded or procedures initiated *before* 12 July 2023.

## What do we know so far in terms of information to be included in a notification and a declaration?

The Commission has published a draft implementing regulation setting out procedural provisions and a draft notification form. The draft was out for consultation until 6 March 2023 and the final version is expected to be adopted before 12 July 2023.

The draft implementing regulation unfortunately leaves most notions open to interpretation and provides very few practical limitations in terms of information and documentation to be submitted. The Commission uses very broad terms. Below, we provide just a few indications of the requirements set out in the draft notification form.

The draft notification form requires a notifying party to provide a detailed list of all non-EU financial contributions most likely to distort the internal market (as defined in the FSR) or relating to operational costs, which have been granted to them in the three years prior to submission of the tender.

The information required is very detailed. First, regarding non-EU financial contributions most likely to distort the internal market (the high-risk categories), the main elements and characteristics of each financial contribution, as well as possible links with the public procurement procedure, shall be elaborated. In addition, supportive evidence is required concerning, inter alia: form of the contribution; granting entity; purpose and economic rationale; attached conditions; which high-risk category (see above under Calculation of aggregate foreign financial contributions) the financial contribution falls under; the conferral of a benefit; selectivity of that benefit.

As to foreign financial contributions covering operational costs and/or facilitating the participation in the public procurement procedure, notifying parties should identify if and explain how the contribution impacts products/services/works offered and quantify the impact and identify financial contributions granted to cover new investments allowing to increase the capacity or improve the technical performance of the products/services/works offered in the tender.

While foreign financial contributions not falling under the high-risk categories or relating to operational costs are not relevant for the notification obligation, it is important to be aware that such foreign financial contributions could be caught in case of an *ex officio* investigation and it is therefore recommended to monitor also such contributions, even if it risks adding to the already significant administrative burden.

Parties may include, as relevant, elements to justify that the tender is not unduly advantageous. Such elements may include the economics of the products/services/works provided, originality of the works, supplies or services proposed, compliance with ESG obligations etc. Parties can also include a list of and substantiate any possible positive effects on the development of the relevant subsidised activity as well as broader positive effects relating to policy objectives, in particular those of the EU.

With regard to the information required, it is clear that undertakings are facing a challenging administrative exercise, monitoring and gathering information and documentation potentially relevant to future FSR proceedings.

Nevertheless, the draft notification form does provide for the possibility for a notifying party to request a waiver from the obligation to

provide information in case the information is not reasonably available, in part or in whole, to the notifying party or where there are adequate reasons for why the information is not necessary for the examination of the relevant case. According to the draft notification form, such a request must be made in the notification form (under relevant section) during the pre-notification discussions with the Commission.

## Risks with not respecting the FSR

If a non-EU financial contribution shall be notified under the FSR, the Commission's approval is required before the contracting authority or contracting entity may award the contract to the notifying economic operator. The FSR provides for fines of up to 1 % of aggregate turnover in the preceding year for incorrect or misleading information in the notification, and up to 10 % of aggregate turnover for failure to notify or circumvention of the requirements.

Tenders not accompanied by a notification or a declaration, as relevant, shall be declared irregular and be rejected by the contracting authority or contracting entity.

Should you have any questions or wish to discuss, please feel free to contact Martin Johansson, Hedvig Josefson or Sam Fakhraie Ardekani.



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# Annex

## CHECKLIST



### 1. Identify whether your company or corporate group is likely to be subject to the FSR

Does your company or any entity of your corporate group interact with non-EU public authorities or public or private entities whose actions can be attributed to a non-EU country and is your company or corporate group likely to be involved in public procurement procedures above the EUR 250 million threshold, or are your competitors likely to submit complaints to the Commission about you having (allegedly) received foreign subsidies? If the answer is yes, we advise you to set up a tracking system for continuous monitoring of non-EU financial contributions throughout your organisation.

### 2. Set up a database for keeping track of foreign financial contributions granted per country per year received as of 12 July 2018

For the purpose of potential notifications, the database should list all foreign financial contributions received after the **12 October**

**2020** and indicate which of these fall within the high-risk categories mentioned above and/or relate to operational costs.

Note that also other non-EU financial contributions may be relevant in terms of the Commission's *ex officio* investigations. Such investigations may be initiated in relation to foreign subsidies granted as of **12 July 2018**. It may thus be of interest to track any non-EU financial contributions received as of that date, if it is likely that the Commission would initiate an investigation based on claims that you have been granted foreign subsidies. With regard to such investigations, note that a foreign subsidy is not to be considered to distort competition if its total amount to an undertaking is below EUR 200,000 per non-EU country during a *consecutive period of three years*.

The database should be continuously updated, by all entities of your corporate group.

### 3. Gather information supporting any possible positive effects

The database should include descriptions of possible positive effects on the development

of the relevant subsidised economic activity on the EU internal market, as well as broader positive effects on relevant policy objectives, in particular those of the EU. Specify when and where the positive effects have taken/are to take place.

#### **4. Gather documentation and evidence**

In the context of notifications, there is a requirement to provide supporting documents relating to non-EU financial contributions most likely to distort the EU internal market (i.e. falling under any of the high-risk categories). This includes information on the form, purpose, economic rationale, granting authority, conditions attached, benefit conferred and selectivity of the contribution.

Foreign financial contributions covering operational costs shall be substantiated with official documents of the grantor, to prove the reason for which the contribution was granted and describe the intended impact.

The database should, as relevant, include the above information and preferably include links or references to supportive evidence.

Template provided in the Commission's draft notification form.

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]*