

UPPING THE ANTE ON HIGH-VALUE EU PUBLIC PROCUREMENTS – THE INCOMING FOREIGN SUBSIDIES REPORTING RULES

This briefing provides an update on the EU Foreign Subsidies Regulation (**FSR**) and its impact on EU public procurement procedures.

The FSR enables the European Commission to identify, assess and remedy the existence of distortive foreign subsidies during certain public procurement procedures governed by EU law¹.

Bidders participating in high-value procurement procedures will be required to report on "financial contributions" that they have received from third countries (i.e. non-EU Member States), and face the risk of exclusion or fines for non-compliance when the rules take effect in late 2023. This could result in a significant additional compliance burden.

BACKGROUND

On 10 November 2022, the European Parliament adopted the FSR which enables the Commission to take measures against market-distorting subsidies from non-EU countries in the context of EU take overs and procurement procedures.² The FSR is the latest step taken by the Commission to address a purported lack of a level playing field in world procurement markets, and follows last year's introduction of the International Procurement Instrument, which provides a mechanism for restricting access to the EU procurement market for suppliers from countries that do not provide reciprocal access to their own procurement markets.³

The FSR establishes a requirement for bidders participating in high-value EU procurement procedures to report "foreign financial contributions" (**FFCs**) to the Commission, and grants the Commission wide-ranging investigative and

Key takeaways

- A new layer of scrutiny and complexity added to EU public procurement regulation
- Bidders to report on "financial contributions" including both sales to and purchases from third countries (i.e. non-EU Member States) when bidding for contracts worth \geq € 250 million, if the combined value of these contributions from any third country over a three-year rolling period is \geq €4 million
- The subsequent Commission investigation could last up to six months
- Bidders face exclusion or fines for failing to comply
- Compliance could be costly and burdensome – particularly for multinationals, or tenders involving complex delivery structures and supply chains
- Bidders interested in participating in future high-value EU procurement procedures are therefore advised to act now
- Commission can also intervene in tenders below these thresholds on its own initiative

¹ Procedures covered by Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU and Directive 2009/81/EC (unless exempt under Article 346 TFEU) (**EU Procurement Directives**).

² While this briefing focuses on procurement aspects of the FSR, we have prepared separate briefings on the FSR regime as a whole (available [here](#)) and on how it will affect M&A transactions (available [here](#)).

³ More information on the IPI is available [here](#).

corrective powers (including the ability to require the successful bidder to offer commitments, block award decisions and issue fines and penalties for non-compliance with reporting obligations).

On 6 February 2023, the Commission published for consultation a draft Implementing Regulation (**DIR**), which clarifies practical and procedural aspects related to the application of the FSR, and includes a draft template form for reporting "foreign contributions". As we reported at the time⁴, interested stakeholders had until 6 March 2023 to provide their feedback on the DIR (including template reporting form). The final implementing Regulation is expected to be adopted by the Commission during Q2 2023.

A detailed assessment of the DIR and draft reporting template can be found in Clifford Chance's response to the consultation found [here](#).

The information below on the content of the reporting forms is based on the consultation drafts published by the Commission, the final versions of which may differ.

THE FSR REPORTING REGIME

Covered Procedures

Reporting obligations will apply to EU procurement procedures which have an estimated value of **€250 million** or more. Where the procedure is divided into lots, reporting requirements will apply if the aggregate value of the lot(s) for which the bidder is bidding is **€125 million** or more. Certain EU procurement procedures are exempt from reporting requirements including:

- the award of defence and security contracts covered by Directive 2009/81/EC;
- the award of contracts through the negotiated procedure without prior publication on grounds of extreme urgency.

Entities subject to reporting obligations

Reporting obligations apply to the bidder, members of the bidder's consortium (if relevant) and any main subcontractors and suppliers (**Notifying Party(ies)**).

A subcontractor or supplier is considered to be "main" where their *"participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds 20% of the value of the submitted tender"*.

Reporting Threshold

Bidders for covered procedures that have combined FFCs of **€4 million** or more per third country in the rolling three-year period before submission (**Reporting Threshold**) must submit a full notification (**Notification**).

Bidders under the Reporting Threshold must make a declaration to that effect (**Declaration**).

Calculating the value of FFCs for the purposes of the Reporting Threshold

When determining whether they exceed the reporting threshold, bidders must aggregate the amount of FFCs received by all Notifying Parties **and** certain

⁴ See Clifford Chance's February 2023 briefing on the DIR (available [here](#)).

group companies (subsidiary companies without commercial autonomy and holding companies).

The FSR's definition of an FFC is broad and includes:

- the transfer of funds or liabilities (e.g. capital injections, grants, loans);
- the forgoing of revenue that is otherwise due (e.g. tax exemptions); or
- the provision or purchase of goods or services

in each case, regardless of whether the "financial contribution" involves any element of subsidy and whether or not the transaction is on arm's-length terms – even the purchase of a train ticket from a state-owned railway operator would constitute an FFC.

The FFC must be provided by a third country – including central government and public authorities at all other levels – as well as any foreign public entity or any private entity whose actions can be attributed to the third country.

Consequently, in order for a bidder to determine whether it meets the Reporting Threshold, it would have to gather information on each and every sale, purchase or financing transaction in a third country in the past three years, no matter how small, and identify those for which the counterparty is a third country entity (e.g. purchases of train tickets from a State-owned rail operator). It would also be necessary to identify and put a value on every tax exemption received from a third country. That exercise is likely to be expensive and time consuming particularly for multinational businesses which may have to filter hundreds of thousands, or even millions, of transactions.

In an attempt to lessen this burden, bidders may choose to concede that the Reporting Threshold is met and to submit a Notification on that basis. This approach seems pragmatic because, as explained below, bidders that do not meet the Reporting Threshold may be subject to more onerous information disclosure requirements than bidders that do meet the Reporting Threshold.

Such an approach, should it be accepted by the Commission, could be a cost-effective solution to what would otherwise be a costly and burdensome exercise. However, as it is possible that the Commission may not accept this approach and might more-explicitly require bidders to account for each and every FFC in order to demonstrate that the Reporting Threshold is met before issuing a Notification, Bidders are advised to monitor the position closely.

Submitting Reports

Bidders must submit a single report on behalf of all Notifying Party(ies).

If the procurement procedure subject to the reporting obligations is a single stage procedure (i.e. open procedure), the report must be submitted as part of the bidder's tender submission. In a multi-stage procurement procedure (e.g. restricted procedure or competitive dialogue), the report must be submitted twice – with the request to participate (**Initial Notification**) and as part of the final tender submission (**Updated Notification**).

Bidders that fail to submit a report face exclusion (though a contracting authority must first request that a report is submitted within 10 working days before doing so).

For Framework Agreements, reporting obligations will only apply during the original procurement procedure leading to the establishment of Framework Agreements and not subsequent call-off procedures.

Completing Reports

Reports must be completed in the manner prescribed in a standard form, a draft of which was included with the DIR.

As we summarise in the table below, disclosure requirements in the draft standard form will vary depending on whether the bidder is submitting a Notification (i.e. bidder is above the Reporting Threshold) or Declaration (i.e. bidder is below the Reporting Threshold).

Counterintuitively, this could result in a more onerous reporting burden for bidders that do not meet the Reporting Threshold.

In particular, a bidder above the Reporting Threshold would have to disclose only certain categories of FFCs which the Commission considers most likely to cause a distortion in a procurement procedure (**Reportable FFCs**):

- subsidies granted to ailing undertakings;
- subsidies in the form of an unlimited guarantee for the debts or liabilities of the undertaking;
- export financing measures that are not in line with the OECD Arrangement on officially supported export credits; or
- subsidies granted for operating costs or facilitating participation in the procurement procedure.

While a bidder below the Report Threshold would have to list each and every FFC received by a third country.

DIR standard form submission categories		
Section	Reporting Threshold	
	Above (a 'Notification')	Below (a 'Declaration')
1. Description of the procurement procedure	✓	✓
2. Information about the Notifying Party(ies)	✓	✓
3. Detailed information on Reportable FFCs	✓	x
4. Explanation of how the tender is not unduly advantageous	Optional	x
5. Possible positive effects of the subsidy	Optional	x
6. Supporting documentation	✓	x
7. Declaration that FFCs are below the thresholds, and list of all FFCs received	x	✓
8. Attestation	✓	✓

For many bidders that submit a Notification the most relevant category of Reportable FFCs will be "subsidies granted for operating costs or facilitating participation in the procurement procedure". In this respect, Notifying Parties will be required to disclose the following FFCs and related documents, but only insofar as they relate to the products, works or services that are the subject of the procurement procedure:

- FFCs covering operating expenses which the company would incur in its day-to-day management or activities;

- any other FFCs that directly finance participation in the procurement procedure (e.g. because used as a source of financing or a guarantee for such financing); and
- subsidies for new investments that enable increases in the capacity or technical performance of the relevant products, works or services.

To the extent that Notifying Parties have received any Reportable FFCs that amount to subsidies, they will also have the option to explain:

- why the subsidy has not given the bidder an undue advantage (e.g. because it would have won the tender even without the subsidy, given the nature of the tendered goods or services and/or its technical capabilities). If there is no undue advantage, the Commission will not be able to block the award of the contract or insist on commitments as a condition of clearance; and/or
- why any subsidies received were justified by their positive economic effects. If such effects are established, the Commission will take them into account when deciding whether to block the award of the contract or accept commitments, and in relation to the nature and level of any required commitments.

Review of Notifications by the Commission

Upon receipt of bidders' reports, contracting authorities must transfer Notifications to the Commission without delay.

In turn, the Commission will conduct a review process of up to two stages. There will be a preliminary review, consisting of requests for information and inspections. If the Commission concludes at the end of the preliminary review that there are sufficient indications that a bidder has been granted a distortive foreign subsidy, it will open an in-depth investigation. During the in-depth investigation, the Commission will further assess the foreign subsidy by requesting additional information and may seek commitments from the entity under review (e.g. divestment of certain assets, repayment of the foreign subsidy to the third country, reducing the capacity or market presence, and the publication of R&D results).

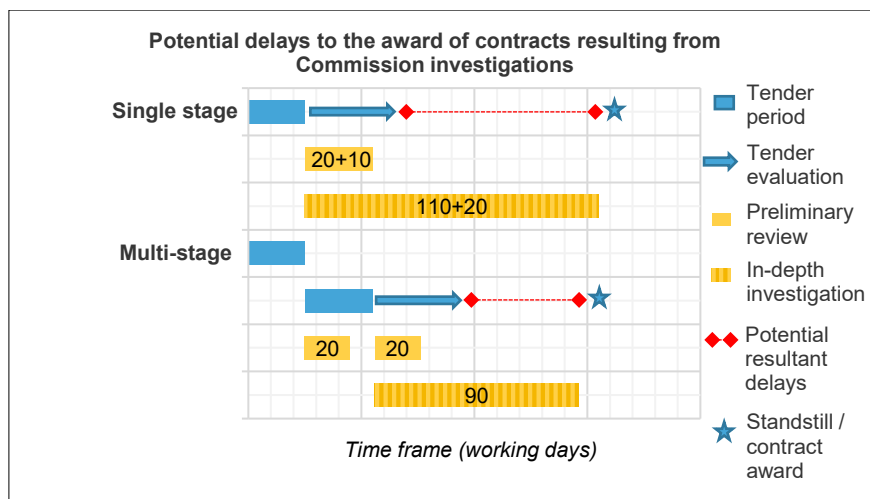
An in-depth investigation will close with the adoption by the Commission of one of the following decisions in respect of the notified FFCs:

- "*No objection decision*" – the Commission finds that the preliminary assessment leading to the opening of the in-depth investigation is not confirmed or distortions (if any) are outweighed by positive effects and permits the award of the contract to the bidder;
- "Decision with commitments" – the Commission finds a distortion but allows the award of the contract based on commitments offered by the bidder that fully and effectively remedy the distortion in the internal market;
- "Decision prohibiting the award of the contract" – the Commission finds a distortion and the bidder either fails to offer commitments or provides commitments which the Commission deems inappropriate or insufficient. In this situation, the contracting authority must exclude the bidder from the relevant procurement process and (if it has already completed the process and determined to award the contract to the

bidder) may award the contract to the next most economically advantageous tender.

The time frames for concluding preliminary reviews and adopting a decision closing the in-depth investigation depends on the award procedure (see box to the right), but could last as long as 130 working days (c. six calendar months) from the Commission's receipt of a Notification submitted as part of the bidder's tender.

Although a contracting authority can progress the procurement procedure during the Commission's investigations (including evaluating requests to participate and tenders), it cannot enter into contracts with successful bidders that remain under investigation. This means that the new FSR review process could lead to significant additional delays to the conclusion of public procurement procedures.



Fines and Penalties

The Commission may impose:

- fines up to 10% of the entity's worldwide aggregate turnover in cases where the entity intentionally or negligently fails to make a required Notification or arranges **financial** operations or contracts to circumvent the notification obligation;
- fines up to 1% of the entity's worldwide aggregate turnover in cases where the entity intentionally or negligently **supplies** incorrect information;
- periodic penalty payments not exceeding 5% of the entity's average daily aggregate worldwide turnover until it submits **complete** and correct information.

IMPLICATIONS

Cost and burden of compliance

The most pressing issue for bidders for sizeable public contracts in the EU is the requirement to gather information on each Reportable FFC for each Notifying Party (and their group companies) over a three-year rolling period.

Searches will need to be robust and thorough, as bidders face fines and penalties for incomplete or misleading reports.

Commission investigation time frames

Single stage (i.e. open procedure)

- the Commission must conclude the preliminary review within 20 working days after receipt of the Notification (extendable by 10 working days) and any in-depth investigation within 110 working days after receipt of the Notification (extendable by 20 working days)

Multi-stage (e.g. restricted procedure and competitive dialogue)

- the Commission must examine the Initial Notification within 20 working days of receipt but without closing the preliminary review or reaching a decision on opening an in-depth investigation
- the Commission resumes the preliminary review following submission of final bids, and has 20 working days to finalise it (considering any additional information)
- the Commission must adopt a decision closing any ensuing in-depth investigation within 90 working days from the submission of the Updated Notification

Consortia and Supply Chains

The choice of partner also becomes more pertinent for bidders given the risk of adverse Commission decisions arising from Reportable FFC granted to any one of the Notifying Parties or their group companies. As result, bidders may become more selective with whom they form consortia or supply chains and require additional due diligence ahead of selection.

Failing to prepare is preparing to fail

Linked to the above points, gathering information is potentially burdensome and may take longer than the time afforded to bidders during the procurement procedure itself (e.g. 15-35 calendar days during an open procedure).

Bidders should therefore consider starting the process of gathering the information (as well as establishing processes and procedures to streamline the exercise going forward) now to ensure that they are able to submit accurate and timely information, and without diverting precious resources from other important aspects of the tender submission.

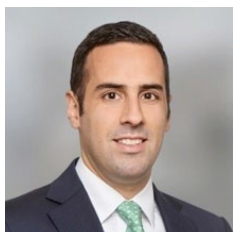
EX OFFICIO REVIEW

It should also be noted that the FSR gives the Commission the power to review, on its own initiative, EU procurement procedures that are not subject to reporting obligations – whether because their value is less than €250 million or because they relate to an exempt activity such as the award of defence and security contracts. However, such reviews will not result in the cancellation of the decision awarding a contract or in a termination of a contract.

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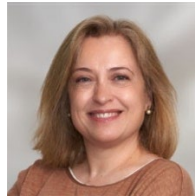
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