
EU regulation on foreign subsidies and public procurement

First in-depth investigations by European Commission into public procurement based on EU regulation on foreign subsidies distorting the internal market

Spain - Legal flash

May 27, 2023



Key aspects

- > The European Commission has formally started the first in-depth investigations based on Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, all of which relate to public tender procedures.
- > Due to these investigations, the bidding companies have withdrawn their tenders.
- > Given the relevance of this hot topic, in this legal flash we cover the main features of the control regime established under the EU regulation regarding public procurement and we tackle several matters of interest for bidding companies—although the regulation does not give clear answers or conclusions for all cases.



In February 2024, the European Commission (the “Commission”) started a formal procedure based on Regulation (EU) 2022/2560 of the European Parliament and of the Council, of 14 December 2022, on foreign subsidies distorting the internal market (the “Foreign Subsidies Regulation” or “FSR”) to investigate a tender submitted to a public procurement procedure that the Bulgarian Ministry of Transport and Communications opened for the supply of electric trains and training and maintenance services (see [here](#)). However, soon after the investigation started, the bidding company withdrew its tender.

More recently, in April 2024, the Commission announced the start of two in-depth investigations in relation to those tenders submitted to the public procurement procedure for designing, building and operating a solar farm in Romania (see [here](#)). These investigations were also stayed following the withdrawal of the tender by the two companies investigated.

Also, the Commission carried out the first inspection under the FSR, in this case, at the headquarters of a company engaging in the production and sale of security equipment (see [here](#)).

Given the recent new developments, it is worth (i) reviewing the main aspects of this control regime of tender submitted to public tenders based on the FSR, and (ii) analyzing the main issues that the bidding companies must consider based on this regulation.

Main aspects of control regime of tenders submitted to public procedures under FSR

As we explained in a [previous legal flash](#), the FSR established the Commission’s investigative powers in relation to financial subsidies by third parties to companies active in the EU that could affect competition conditions.

The purpose of the FSR in relation to public procurement procedure is, ultimately, to avoid an economic operator from being the successful tenderer in a public contract when its tender is linked to, arises from or benefits from financial subsidies granted by third countries. The FSR itself classifies such tenders as unduly advantageous.

For this reason, the FSR establishes investigative powers for the Commission, as well as a control regime which, depending on the circumstances of the tender, determine for the tenderer the obligation to notify or to make a declaration.

There is an obligation to notify (the contract cannot be awarded without the Commission having first authorized it) when the following thresholds are met (accumulative nature)¹:

¹ If the public contract is divided into lots, the obligation to notify will also require that the value of the lot—or the accumulated value of all the lots for which the tenderer submits a tender— is equal to or greater than €125,000.



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- Threshold of the estimated value of the public procurement contract or framework agreement: equal to or greater than €250 million, VAT excluded.
- Threshold of financial contributions received by the economic operator (tenderer), including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender: equal to or greater than €4 million per third country in the previous three financial years.

When both conditions are met, the economic operator must submit a standard notification form correctly completed to the contracting authority, and the contracting authority will be responsible for sending the form to the Commission “without delay.”

The Commission would then have a time limit to carry out a preliminary review and, where applicable, announce the start of an in-depth/ investigation. In that case, the Commission would have an additional time limit to carry out the investigation and adopt one of the following decisions:

- A no objection decision, if the Commission does not find that an economic operator benefits from a foreign subsidy distorting the internal market.
- A decision with commitments, if the Commission considers that an economic operator benefits from a foreign subsidy distorting the internal market but the economic operator offers commitments that completely and effectively remedy the distortion in the internal market.
- A decision prohibiting the award of the contract, if the economic operator benefits from a foreign subsidy distorting the internal market but does not offer commitments or the Commission considers them insufficient.

Generally, during the preliminary review and the in-depth investigation, the contracting authority can continue with the public procurement procedure, excluding contract awarding (without prejudice to certain situations specifically established in the FSR).

The tenderers, however, must submit a declaration “in all other cases” (according to the literal transcription of the FSR): in that declaration, the tenderers must list all foreign financial contributions received² and confirm that they are not notifiable due to not reaching the threshold mentioned earlier (€4 million). The contracting authority will forward these declarations to the Commission.

In the case of economic operators breaching the notification obligation regarding foreign contributions or circumventing (or attempting to circumvent) the notification requirements, the Commission can impose fines not exceeding 10% of the aggregate turnover of the financial year preceding the imposition. The fine could be up to 1% of the

² As we mentioned in our first legal flash about this matter ([here](#)), it is a broad concept. Currently, in addition to the examples we mentioned, we understand that tax exemptions are also included (although there are exceptions), as well as income obtained from contracts for providing services or goods to third countries. Direct financial contributions from international organizations such as the World Bank are not included.



mentioned turnover if incorrect or misleading information is supplied in the notification or declaration.

Main issues

Which financial contributions of economic operators must be considered for analyzing the corresponding notification threshold?

As indicated previously, to analyze the threshold for financial contributions, the set of financial contributions received by the following players must be considered:

- ▶ The economic operator, i.e., the company or bidding entity formally submitting a tender for award of a public contract. In line with the EU regulations on public procurement, e.g., article 2(10) EU Directive 2014/24, a broad definition of economic operator must be considered for these purposes.
- ▶ The economic operator's subsidiaries without commercial autonomy. The FSR does not include a definition or establish criteria for determining when it is possible to consider that a direct or indirect subsidiary of the economic operator does not have commercial autonomy; it also does not state the reason for which the contributions to subsidiaries with commercial autonomy are excluded for the purpose of the threshold.

Under the Spanish public procurement regulations, the concept of belonging to the same group is considered, in the terms of article 42.1 Commercial Code, but with the exclusive purpose, in case two related companies submit tenders to the same public procurement procedure (which, excluding works concession contracts, is permitted), of the calculation for identifying the tenders in the case of alleged irregularity. However, the courts have pointed out that concurrence in the same public procurement procedure is not admissible when the related companies constitute a business unit, as it would be contrary to the principle of the single proposal.

To calculate the threshold for financial contributions, it is obvious that it is not enough to belong to the same group, but given the lack of clear criteria under the FSR, economic operators wanting to bid must carry out a self-assessment regarding the commercial autonomy of their subsidiaries; to do this, they can use, as a first approximation, the criteria used by the courts to consider that related companies are not acting as independent economic operators.

- ▶ The economic operators' holding companies. The FSR does not include nuances or additional considerations in relation to the holding companies of the bidding economic operator. Therefore, it is logical that, the reference to holding companies includes those companies that have control (exclusive or joint; direct or indirect) of the economic operator submitting the tender offer to the public procurement procedure, assuming—the notion of “control” mentioned before.



- Subcontractors and main suppliers participating in the same public procurement procedure. The FSR does establish a criterion for considering subcontractors or suppliers “main”: where their participation ensures key elements of the contract performance—which leaves certain margin for interpretation—and, in any case, where the economic share of their contribution exceeds 20% of the value of the submitted tender—which constitutes a more objective and verifiable criterion.

In which cases, where the requirements for notification obligation do not concur, must tenderers supply declarations?

The wording of the FSR literally states “in all other cases,” which, at a first reading, leads us to understand that, in any case, and in any public procurement procedure in which the requirements leading to notification obligations are not met, the tenderer must supply a declaration. However, there could be arguments to uphold that the obligation to submit a declaration can only be required in those cases in which, where the requirement of the economic threshold of the contract or framework agreement concurs (estimated value equal to or greater than €125 million), the tenderer had received financial contributions within the threshold established for them.

Is there the possibility to remedy a tender if the corresponding notification or declaration has not been included? What is the time limit?

It can be remedied, and the FSR obliges the contracting authority to grant a process for doing this. Under the FSR, 10 business days (substantially higher than the three days established in the Spanish public procurement regulations for remedying the tenders containing rectifiable defects) are granted to remedy the tender.

If the tendering specifications do not establish it, will the obligation to notify or declare the financial contributions still apply in line with the FSR?

Yes, it will still apply. Under the FSR, the contracting authorities must, where applicable, indicate in the contract notice or in the tendering specifications that the tenderers are subject to the notification obligation. However, it expressly adds the following: “However, the absence of such a statement is without prejudice to the application of this Regulation for contracts falling under its scope.”

When must tenderers submit the notification or declaration?

In an open procedure, the notification or declaration must be submitted together with the tender (it is logical to assume that it is submitted in the envelope or file commonly referred to as “administrative documents”). In a multi-stage procedure, the notification or declaration must be submitted twice, first with the request to participate and then as an updated notification or updated declaration with the submitted tender or final tender (therefore, in the restricted procedure, it will be submitted with the tender, while in the other procedures, it will be submitted with the final tender). A doubt arises about this double submission in



relation to the negotiated procedure without prior publication, in which the request for participation is not submitted but an initial tender is and, once the negotiation has ended, a final tender is submitted.

Conclusions and recommendations for bidding companies

Based on the control regime and the investigative powers the FSR confers on the Commission in relation to tenders to public procurement procedures, as well as the activity that the Commission has already carried out in this area, we recommend that the bidding companies consider the following actions:

- Carry out a study or analysis, similar to an audit, to determine (i) whether the group's subsidiaries have commercial autonomy, and (ii) the financial contributions received and calculable as such for the purpose of the FSR.
- Design a system for keeping that information updated or for activating its collection in a short time frame.
- If, whether regularly or occasionally, important subcontractors or suppliers are used, request the usual subcontractors or suppliers in the same year.
- Regarding all the public procurement procedures in which an economic operator intends to participate, we recommend checking the estimated value of the contract or framework agreement, establishing a warning in case the threshold under the FSR is reached.

For additional information, please contact our [*Knowledge and Innovation Group*](#) lawyers or your regular contact person at Cuatrecasas.

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