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To Permanent Secretaries
Directors General
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FOREIGN SUBSIDIES DISTORTING THE INTERNAL MARKET REGULATION

A Foreign Subsidy may be defined as a Financial Contribution provided directly or indirectly by a Non-EU Country, which is limited to one or more companies / industries, and which confers an advantage on a company engaging in an economic activity in the European Union Single Market¹.

Regulation (EU) 2022/2560 in relation to the 'Foreign Subsidies distorting the Internal Market' (hereinafter: the *Foreign Subsidies Regulation – FSR*) has been published on the Official Journal of the European Union on 23 December 2022 and has, in accordance with Regulation 54 of the FSR, entered into force on the twentieth day following that of its publication, ie 12 January 2023. However, it shall apply from 12 July 2023². This Regulation is binding in its entirety and directly applicable in all Member States.

The Department of Contracts encourages Contracting Authorities³ / Entities⁴, specifically officers responsible for Public Procurement to read and familiarise themselves with Regulation (EU) 2022/2560, enclosed at Annex I.

¹ https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy/foreign-subsidies-regulation_en

² Pursuant to Article 54(3) and 54(4) of Regulation (EU) 2022/2560, it shall be noted that 'By way of derogation from paragraph 2 of this Article, Articles 47 and 48 shall apply from 11 January 2023 and Article 14(5), (6) and (7) shall apply from 12 January 2024. By way of derogation from paragraph 2 of this Article, Articles 21 and 29 shall apply from 12 October 2023.

³ Contracting Authorities in S.L. 601.03 are the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

⁴ Contracting Entities in S.L. 601.05 are entities which: (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 8 to 14; (b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in regulations 7 to 13, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority.

It shall be noted that the European Commission has opened a Public Consultation on the implementation of the Foreign Subsidies Regulation. The said consultation was open until 06 March 2023.

Background

The European Union (EU) relies on an open, strong, and competitive Single Market for its success, prosperity and resilience. To this end, the EU Competition, Public Procurement and Trade Defence Instruments are crucial in ensuring fair conditions for companies.

Subsidies granted by Member States are subject to European Union (EU) State Aid Rules⁵ and scrutiny, thus, avoiding market distortions. However, subsidies⁶ given by Non-EU Governments to foreign-owned companies that are legally present in the EU fall outside the EU State Aid control and thus go largely unchecked and not scrutinised.

As a result, throughout the past years, Foreign Subsidies have negatively impacted fair competition and undermined a level playing field in the Internal Market because such subsidies facilitate the acquisition of companies active in the EU as well as distort investment decisions, market operations, pricing policies and bidding offers in Public Procurement⁷. Consequently, companies that engage in an EU-Economic Activity without subsidies are at a considerable disadvantage, when compared to companies which are beneficiaries to such Foreign Subsidies.

⁵ State Aid may be defined as an advantage intervention in any form (such as grants, guarantees, interest and tax reliefs) conferred by National Public Authorities to undertakings on a selective and discretionary basis. Such an advantage generally relates to State-Controlled Financial Resources, wherein a company receiving government support gains a distortive advantage over its competitors and affects trade between Member States. Article 107 of the Treaty on the Functioning of the European Union (TFEU) generally prohibits State Aid (because of its anti-competitive effects), unless exceptionally justified by reasons of economic development which become necessary for a well-functioning and equitable economy. Therefore, the TFEU allows policy objectives and various categories of schemes for which State Aid is considered compatible as their positive effect outweigh their negative impact. Such exemptions may be viewed in the relevant State Aid Legislation via link https://competition-policy.ec.europa.eu/state-aid/legislation_en. The State Aid Framework is the EU's internal subsidy control system.

To ascertain that (i) the prohibition is respected; and (ii) the exemptions are applied equally across the EU, the CION oversees that State Aid complies with the said EU Rules.

⁶ A subsidy may be defined as a benefit, in the form of monetary aid, financial incentives, monetary contribution or grant given to an individual, business, company, institution or an industrial undertaking, generally furnished by a government or other such authority. A subsidy may be direct (such as cash payments) or indirect (such as Targeted Tax cuts or Tax Breaks).

⁷ Example of Foreign Subsidy in Public Procurement: A Non-EU Economic Operator plans to submit a bid in a Public Procurement Procedure published by an EU-Member State Contracting Authority in relation to an infrastructure project. The Economic Operator's company is supported by the Government of the Non-EU Country through a direct subsidy. Accordingly, the Economic Operator submits a lower-priced offer which would not have been possible without the subsidy, thereby outbidding competitors.

Scope

Accordingly, this legislative regulatory gap in the EU Competition, Public Procurement and Trade Defence Instruments necessitated a tool that would allow the relevant control over Foreign Subsidies granted by Non-EU Countries, thus, mitigating the said gap and protecting the EU's economic interests. To this end, the Foreign Subsidies Regulation is an instrument that establishes a harmonised framework, having the scope of addressing distortions (directly or indirectly) in the internal market, caused by foreign-subsidised investments. It aims to ensure that every company that operates in Europe, wherever its place of origin, adheres to EU Legislation.

Regulation (EU) 2022/2560 stipulates the rules and procedures for monitoring and investigating financial contributions granted by Non-EU Governments. In addition, if the European Commission (CION) identifies the existence of Foreign Subsidies which distort competition in the EU, FSR Regulation empowers the CION to take action (through imposed measures) to remedy and redress such distortions which may arise with respect to any economic activity, and notably in Concentrations and Public Procurement Procedures.

Applicability of the FSR Regulation in Public Procurement / Concessions

In its essence, the Foreign Subsidies Regulation shall result in an increased level of scrutiny and surveillance in Public Procurement Procedures. In fact, during the submission of offers, participating Economic Operators shall be obliged to disclose information in relation to their source funding, namely whether they are in receipt of Financial Aid from Non-EU Countries which would create distortion in the internal market. If such subsidies took place, the level playing field afforded to Economic Operators in open competitive procedures, *inter alia* would prejudice the 'Principles Underlying the Procurement Process'⁸ of the Public Procurement Regulations S.L. 601.03 (Regulations 38, 39 and 40) and of the Utilities⁹ Procurement Regulations S.L. 601.05 (Regulations 60, 61 and 62).

Article 27 of Regulation (EU) 2022/2560 states that *'Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be*

⁸ The Concession Contracts Regulations S.L. 601.09 refer to Principles and Confidentiality in Regulations 60 and 63.

⁹ Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations.

understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment pursuant to Article 4 of whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the services, supplies or works concerned shall be limited to the public procurement procedure in question. Only foreign subsidies granted during the three years¹⁰ prior to the notification shall be taken into account in the assessment’.

Brief Overview

Chapter 4 of the Foreign Subsidies Regulation specifies provisions on Public Procurement Procedures as follows:

- Article 27 – Prescribes the Conditions which distort the Internal Market.
- Article 28 – Sets the Notification Thresholds.
- Article 29 – Prescribes Prior Notification and Declaration of Foreign Financial Contribution requirements.
- Article 30 – Specifies the applicable Procedural Rules¹¹ and Time Limits of In-depth Investigation in relation to Notified Financial Contributions.
- Article 31 – Describes the Types of Decisions that the Commission may adopt.
- Article 32 – Specifies when the Suspension of a Public Contract Award to potentially Subsidised Bidders should take place.
- Article 33 – Provides that Fines and Periodic Penalty Payments applicable to Financial Contributions can be imposed¹².

¹⁰ Articles 53(1) and 53(2) of the FSR which relate to ‘Transitional Provisions’ state that ‘(1) This Regulation shall apply to foreign subsidies granted in the five years prior to 12 July 2023, where such foreign subsidies distort the internal market after 12 July 2023. (2) By way of derogation to paragraph 1, this Regulation shall apply to foreign financial contributions granted in the three years prior to 12 July 2023 where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.’

¹¹ Procedural Procedures are specified in Chapter 2: Ex officio review and general provisions for the review of foreign subsidies. Article 30(1) of the FSR states ‘Articles 10, 11 (1), (3) and (4), 13, 14, 15, 16, 18 and 23 shall apply to notified financial contributions in public procurement procedures’.

¹² Fines and Periodic Penalty Payments can be imposed by CION as set out in Article 17 of Chapter 2.

Procurement Procedures and Thresholds

The Regulation (EU) 2022/2560 applies to any type of Public Procurement Award Procedure and Concession Award Procedures covered¹³ by the following Directives¹⁴ as well as their respective locally transposed versions:

- Directive 2014/23/EU¹⁵
- Directive 2014/24/EU¹⁶
- Directive 2014/25/EU¹⁷

In line with Article 28(1) of the Foreign Subsidies Regulation, it applies to Procurement / Concession Procedures of large magnitude, specifically wherein the Estimated Total Value of Public Contracts (Public Procurement or Framework Agreement or a Specific Procurement under the Dynamic Purchasing System) Equals or Exceeds Euro 250,000,000 excluding VAT¹⁸. On the other hand, for instances where a Public Contract is divided into Lots, the Estimated Value of the Lot or the aggregate value of all the Lots to which the Economic Operator applies equals or exceeds Euro 125,000,000 excluding VAT¹⁹. In such scenarios, the aggregate Estimated Value of all lots of the public contract shall also equal or exceed Euro 250,000,000 excluding VAT.

¹³ Article 2(3) states that 'For the purposes of this Regulation, 'a public procurement procedure' means: (a) any type of award procedure covered by Directive 2014/24/EU for the conclusion of a public contract or Directive 2014/25/EU for the conclusion of a supply, works and service contract; (b) a procedure for the award of a works or a service concession covered by Directive 2014/23/EU; (c) procedures for awarding contracts falling under Directive 2009/81/EC, unless exempted by Member States on the basis of Article 346 TFEU; (d) procedures for the award of contracts referred to in Article 10(4), point (a) of Directive 2014/23/EU, Article 9(1), point (a) of Directive 2014/24/EU or Article 20(1), point (a) of Directive 2014/25/EU.

¹⁴ In line with Article 44(8), the FSR Regulation shall be 'interpreted consistently with Directives 2009/81/EC, 2014/23/EU, 2014/24/EU and 2014/25/EU, and Council Directives 89/665/EEC and 92/13/EEC'.

¹⁵ On 28 October 2016, Directive 2014/23/EU was transposed (through Legal Notice 353-2016) into National Law as the Concession Contracts Regulations S.L. 601.09.

¹⁶ On 28 October 2016, Directive 2014/24/EU was transposed (through Legal Notice 352-2016) into National Law as the Public Procurement Regulations S.L. 601.03.

¹⁷ On 28 October 2016, Directive 2014/25/EU was transposed (through Legal Notice 351-2016) into National Law as the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations: S.L. 601.05.

¹⁸ Article 28(1)(a) of the FSR states: For the purposes of this Regulation, a notifiable foreign financial contribution in a public procurement procedure shall be deemed to arise where: the estimated value of that public procurement or framework agreement 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, is equal to or greater than EUR 250 million.

¹⁹ Article 28(2) of the FSR states: 'Where the contracting authority or contracting entity decides to divide the procurement into lots, a notifiable foreign financial contribution in a public procurement procedure shall be deemed to arise where the estimated value of the procurement net of VAT exceeds the threshold laid down in paragraph 1, point (a) 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 greater than the threshold laid down in paragraph 1, point (b)'.

Further to the above, pursuant to Article 28(1)(b) of the FSR, it shall be noted that a notifiable Foreign Financial Contribution in a Public Procurement Procedure shall also be deemed to arise where *‘the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions in the three years prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4million per third country’*.

Non-Applicability of the FSR Regulation in Public Procurement / Concessions

Article 28²⁰ of Regulation (EU) 2022/2560 provides certain derogations from the applicability of the Foreign Subsidies Regulation. In addition, certain procedures for the Award of Contracts shall be covered by the provisions of Chapter 2 (*Ex Officio Review and General Provisions for the Review of Foreign Subsidies*) rather than Chapter 4 of the FSR.

Furthermore, it shall be noted that pursuant to Article 53(3) and Article 53(4) of the FSR, *‘(3) This Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023. (4) This Regulation shall not apply to public procurement contracts that have been awarded or procedures initiated before 12 July 2023’*.

Obligations of the FSR Regulation in Public Procurement / Concessions

Pursuant to Article 28(6) of Regulation (EU) 2022/2560, Contracting Authorities / Entities shall include a reference to the applicability of the FSR Regulation in the Contract Notice and in the Public Procurement / Concession Documents

²⁰ Article 28(3) of the FSR states: Procedures for the award of contracts falling within the scope of Directive 2009/81/EC shall not fall under this Chapter.

Article 28(4) of the FSR states: Procedures for the award of contracts provided by Article 32(2), point (c), of Directive 2014/24/EU, and Article 50, point (d), of Directive 2014/25/EU shall be covered by the provisions of Chapter 2 of this Regulation and shall be excluded from the application of Chapter 4 of this Regulation.

Article 28(5) of the FSR states: By way of derogation from Article 29(1), where the works, supplies or services can be supplied only by a particular economic operator, in accordance with Article 31(4), of Directive 2014/23/EU, Article 32(2), point (b), of Directive 2014/24/EU and Article 50, point (c), of Directive 2014/25/EU and the estimated value of the contract is equal to or greater than the value set in paragraph 1, point (a), of this Article economic operators submitting a tender or a request to participate shall inform the Commission of all foreign financial contributions if the condition set out in paragraph 1, point (b) of this Article is fulfilled. Without prejudice to the possibility to initiate a review under Chapter 2 of this Regulation, the submission of such information shall not be considered a notification and shall not be subject to investigations under this Chapter.

specifically for instances wherein the procedure is within the FSR scope and in line with the aforementioned thresholds.

Such reference shall indicate that *‘economic operators are under the notification obligation as set out in Article 29. However, the absence of such a statement is without prejudice to the application of this Regulation for contracts falling under its scope.’*

To this end, pursuant to Article 29(1) of the FSR, when the conditions for the Notification of Financial Contributions in accordance with Articles 28(1) and (28)(2) are met, Economic Operators participating in a Public Procurement / Concession Procedure, shall notify the Contracting Authority / Entity of all Foreign Financial Contributions as defined in Article 28(1)(b).

Article 29(1) of Regulation (EU) 2022/2560 continues to specify that *‘in all other cases, economic operators shall list in a declaration all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable in accordance with Article 28(1), point (b)’*.

In an Open Procedure, the notification or declaration shall be submitted only once, together with the Tender Submission. In a Procurement / Concession Procedure consisting of Multiple Stages²¹, the notification or declaration shall be submitted twice; first with the Request to Participate and then as an updated version with the Tender / Final Submission.

Contracting Authorities / Entities shall transfer the Notification / Declaration to the European Commission, for the examination of its content. Accordingly, the CION shall carry out a Preliminary Review and thereafter decide whether (or not) to initiate an In-Depth Investigation. The concerned Economic Operators and Contracting Authorities / Entities shall be informed accordingly.

²¹ For the purpose of this Regulation, a multi-stage procedure means a public procurement procedure in accordance with Articles 28 to 32 of Directive 2014/24/EU and Articles 46 to 52 of Directive 2014/25/EU, either the restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership, or a similar procedure according to Directive 2014/23/EU.

Further to the above, where a Contracting Authority / Entity²² in examining tenders suspects the presence of Foreign Subsidies, although a declaration was submitted, it shall communicate these concerns to the CION for any necessary action deemed necessary.

Establishing and Determining Obligation to Notify / Declare

The obligation to notify Foreign Financial Contributions under Article 29(5) of Regulation (EU) 2022/2560 shall apply to Economic Operators and Groups of Economic Operators²³ as well as main subcontractors and main suppliers known at the time of submission of the complete Notification / Declaration (or its updated version). Article 29(5) continues to explain that *‘For the purposes of this Regulation, a subcontractor or supplier shall be deemed 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’*.

The main Contractor / Concessionaire²⁴ is duty bound to ensure that all relevant parties submit any applicable Notification / Declaration. For the purposes of Article 33²⁵ of the FSR, the main contractor / concessionaire is responsible only for the veracity of data linked to its own Foreign Financial Contributions.

Outline of the Foreign Subsidy Review and Assessment

Further to a Preliminary Review (Article 10 of the FSR), if there is sufficient evidence of a distortive Foreign Subsidy, the European Commission shall adopt a decision to initiate an In-Depth Investigation (Article 11 of the FSR).

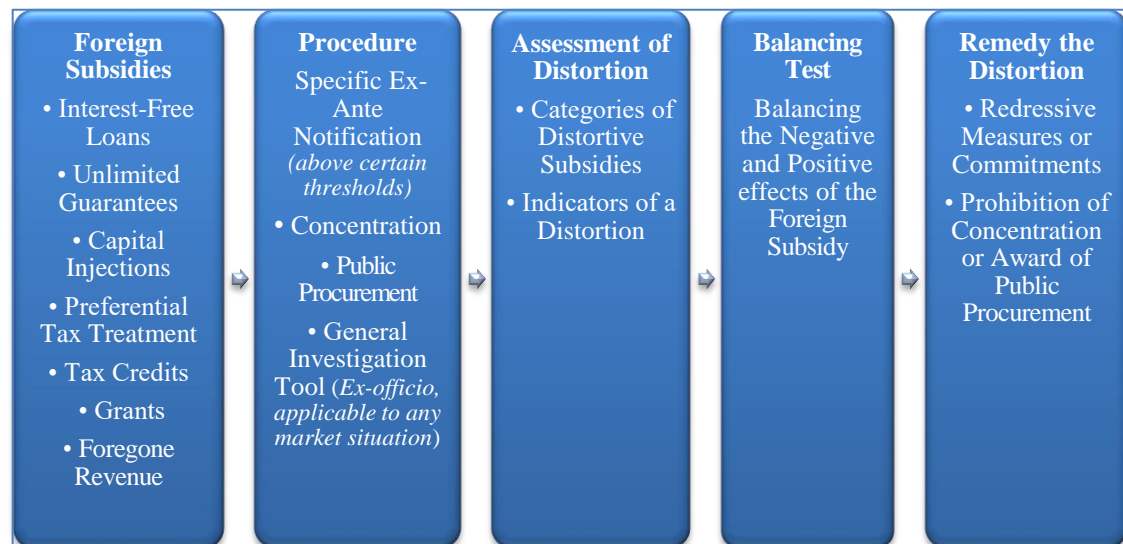
²² Article 29(7) of the FSR states: *Where the contracting authority or contracting entity examining tenders suspects the presence of foreign subsidies, although a declaration was submitted, it shall communicate such suspicions to the Commission without delay. Without prejudice to the powers of contracting authorities or contracting entities, laid down in Directives 2014/24/EU and 2014/25/EU, to examine whether a tender is abnormally low, the contracting authority or contracting entity shall not perform an assessment of whether a tender is abnormally low where such an assessment would be initiated on the suspicions indicating a possible presence of foreign subsidies alone. Where the Commission concludes that there is no unduly advantageous tender within the meaning of this Regulation, it shall inform the relevant contracting authority or contracting entity thereof. Other legal or natural persons may report to the Commission any information relating to foreign subsidies distorting the internal market and may communicate any suspicions that a false declaration has possibly been made.*

²³ A Group of Economic Operators shall be understood as those referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU.

²⁴ Article 29(6) of the FSR states that *‘On behalf of groups of economic operators, main subcontractors and main suppliers, the main contractor within the meaning of Directives 2014/24/EU and 2014/25/EU or main concessionaire within the meaning of Directive 2014/23/EU shall ensure the submission of the notification or declaration.*

²⁵ Article 33 of the FSR relates to *‘Fines and periodic penalty payments applicable to financial contributions in the context of public procurement procedures’*.

If the Financial Contribution by a Non-EU Government is within the meaning of Regulation (EU) 2022/2560, the European Commission will balance the negative effects in terms of the distortion with the positive effects of the foreign subsidy in relation to the subsidised economic activity. If the negative effects outweigh the positive effects, to remedy the distortion, CION may impose Redressive Measures or accept Commitments from the companies.



Contact

Contracting Authorities may submit any queries to the Department of Contracts' Customer Care service on info.contracts@gov.mt or by calling on +356 2378 1000.

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