

EU FOREIGN SUBSIDIES REGULATION: PROCUREMENT NOTIFICATION REGIME FINALISED

The European Commission (**Commission**) has published the final Implementing Regulation and notification forms for the EU Foreign Subsidies Regulation (**FSR**).

Disclosure requirements have decreased in some respects but increased in others in comparison to the drafts published for consultation in February 2023, which we reviewed at the time (see [here](#)). But, overall, compliance remains burdensome – particularly for multinationals, or tenders involving complex delivery structures and supply chains, and good preparation is required.

Without the necessary information gathering systems in place, identifying and gathering the required information could take longer to complete than the time afforded to bidders during the procurement procedure.

Bidders that participate in high-value EU procurement procedures should therefore act quickly to prepare ahead of the new regime commencing on 12 October 2023 in order to avoid exclusion from future procurement processes or fines for non-compliance. To assist bidders with their preparations, we provide below an overview of the reporting obligations now that the final rules are in place.

BACKGROUND

On 10 November 2022, the European Parliament adopted the FSR which lays down the substantive legal framework on tackling distortive subsidies from third countries in the context of EU take overs and procurement procedures.

Amongst other things, the FSR establishes a requirement for bidders participating in high value EU procurement procedures to report "foreign financial contributions" (**FFCs**) granted by third countries. For these purposes, third countries include any non-EU states (including EEA countries and the UK) at all levels (e.g. central government, local authorities and other public

Key issues

- Final Implementing Regulation and procurement notification form published ahead of notification regime commencing from 12 October 2023.
- Despite Commission taking account of market feedback on draft texts published in February 2023, compliance is still expected to remain burdensome.
- Bidders for high-value EU procurement procedures are advised to put in place or finalise necessary information gathering systems in advance in order to be sufficiently prepared to comply with new formalities.

authorities) together with any public entities or any private entities whose actions can be attributed to them.

On 6 February 2023, the Commission published for consultation the draft Implementing Regulation and notification forms, which lays down the precise process and content of submissions.

On 10 July 2023, and reflecting on feedback from the market, the Commission published the final Implementing Regulation and notification forms. The procedural aspects do not differ materially from those set out in the consultation draft of the Implementing Regulation. But there have been meaningful changes to the notification forms and content requirements.

On 12 July 2023, the FSR started to apply by providing the Commission with "ex officio" powers to investigate foreign subsidies and impose redressive measures, with the notification regime commencing three months later, on 12 October 2023.

COVERED PROCUREMENTS

The notification regime covers EU procurement procedures¹ which have an estimated value (excluding VAT) 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.

Notification obligations will apply to covered procurement procedures that are initiated on or after 12 July 2023 (the date of formal application of the FSR) and which have a submission deadline for tenders that is on or after 12 October 2023 (the date the new notification regime will commence operations). Procurers should therefore, to be safe, apply notification requirements to their covered procurement procedures which are initiated on or after 12 July 2023.

REPORTING UNDER THE NEW REGIME

Form FS-PP

All bidders participating in a covered procurement will be required to submit a completed procurement notification form (**Form FS-PP**) which involves disclosing information on certain FFCs received during a rolling three-year period prior to submission of Form FS-PP (the **Reporting Period**).

The sections of Form FS-PP that bidders must complete, and the extent of information required on FFCs, varies (see box "*Form FS-PP Submission Requirements*" on page 7 below) depending on whether the aggregate FFCs granted by any third country during the Reporting Period are valued at **€4 million** or more (**Notification Threshold**). A "**Notification**" must be submitted where the Notification Threshold is met. Otherwise, a more-abbreviated "**Declaration**" must be submitted to that effect.

Notifying Parties

The notification regime applies to FFCs granted to the bidder itself as well as members of the bidder's consortium and any main subcontractors and suppliers (**Notifying Parties**). A subcontractor or supplier is considered to be

¹ Procedures covered by Directive 2014/23/EU, Directive 2014/24/EU, and Directive 2014/25/EU. Defence and security contracts covered by Directive 2009/81/EC, and contracts awarded through the negotiated procedure without prior publication on grounds of extreme urgency are exempt from the notification regime.

"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 bidder (or main contractor or concessionaire in the case of a consortium bid) submits one completed Form FS-PP on behalf of all Notifying Parties, but each Notifying Party should take responsibility for the accuracy of the information supplied in respect of its FFCs. Good coordination among the Notifying Parties will be required to ensure preparation of the Form FS-PP, including the creation of clean teams to review and assess confidential information.

General submission requirements

Regardless of the specific report, Sections 1, 2 and 8 of Form FS-PP must be completed by each bidder.

Sections 1 and 2 of Form FS-PP should be filled in with the information required in Parts I and II of Annex 2 of the European Single Procurement Document (**ESPD**) respectively. Any bidder using ESPDs to participate in the procedure are not required to complete these sections.

Each Notifying Party will need to sign Section 8 of Form FS-PP declaring "to the best of their knowledge and belief" that the information submitted is true, correct, and complete.

We provide below an overview of the form-specific Sections of Form FS-PP below.

Timing of Submission

In a single stage procurement procedure (i.e. open procedure), Form FS-PP must be submitted early in the process, as part of the bidder's tender submission. In a multi-stage procurement procedure (e.g. restricted procedure or competitive dialogue), Form FS-PP must be submitted twice – with the initial request to participate and as part of the final tender submission.

Language of Submission

The final Implementing Regulation confirms Notifications or Declarations can be submitted in any official language of the EU – not just the language of the procurement procedure as per the draft Implementing Regulation.

DETERMINING THE €4 MILLION NOTIFICATION THRESHOLD

Bidders should first determine the Notification Threshold.

The final Implementing Regulations and Form FS-PP make important clarifications in this regard:

- the Notification Threshold is to be determined based on the aggregated amount of FFCs granted by a third country to an *individual* Notifying Party (not the aggregated amount granted by a third country across all Notifying Parties). In other words, a Notification must be submitted where one or more Notifying Party meets the Notification Threshold. Whereas a Declaration must be submitted if no Notifying Party meets the Notification Threshold.

- all FFCs (regardless of type or amount) granted to the Notifying Parties by a third country during the Reporting Period must be considered for the purposes of the determining whether the Notification Threshold is met. In this regard, FFC 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

granted by a third country, regardless of whether the "financial contribution" involves any element of subsidy and whether or not the transaction is on arm's-length terms.

Bidders will submit a Notification when it is clear to them that that the Notification Threshold is met. If it is not clear whether the Notification Threshold may be met, bidders could choose to focus on gathering information on FFCs with a value of €1 million or more (following the procedure outlined below) in the first instance, as these are the only FFCs that are required to be identified in Form FS-PP and may, when added together, exceed the Notification Threshold.

NOTIFICATIONS

Bidders which meet the Notification Threshold will need to report on FFCs in accordance with the rules set out in Section 3 and Table 1 of Form FS-PP. The final Implementing Regulations and Form FS-PP contain important changes to the reporting rules.

FFCs which the Commission considers "most likely to distort the internal market" (Section 3 of Form FS-PP)

Under the draft rules, bidders were required to provide detailed information on each FFC that fall into the categories which the Commission considers "most likely to distort the internal market" (see box on right), regardless of value, which required bidders to answer a list of detailed questions set out in Section 3 of Form FS-PP in respect of each FFC.

The Commission has reduced the burden by introducing a new minimum financial threshold. Bidders are now only required to provide detailed information on FFCs which have an individual value equal to or exceeding **€1 million** during the Reporting Period. The pre-set questions at Section 3 of Form FS-PP remain, but have been streamlined.

Other types of FFC (Table 1 of Form FS-PP)

On the other hand, the Commission has also increased the breadth of reporting obligations by introducing a requirement to include information on other types of FFCs (i.e. those that do not fall into the categories which the Commission considers "most likely to distort the internal market") that:

- have an individual value equal to or exceeding €1 million; and
- do not fall within an exempt category which includes the provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business, as well as the deferrals of payment of taxes and/or of social security contributions, tax amnesties and tax holidays.

Category of FFCs which the Commission considers "most likely to distort the internal market"

- 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 enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.

The extent of disclosure for such FFCs is limited in comparison to that required for FFCs most likely to distort. Rather than providing detailed information on each FFC, bidders are only required to provide the aggregate amount of all FFCs granted per third country during the Reporting Period in the form set out in Table 1 of Form FS-PP (grouped by grantor country and by type (e.g. loan, grant)). Furthermore, bidders do not need to report aggregate FFCs from a third country that has given less than €4 million of FFCs during the Reporting Period (even if the aggregated amount includes FFCs which meet the individual €1 million threshold).

When providing the aggregate amount of all FFCs per third country during the Reporting Period, bidders will have to indicate the purpose of each type of FFC and the granting entity or entities. This will allow the Commission to request further information in relation to any that pique its interest, so Notifying Parties will need to consider carefully the overall legal narrative within which they present these FFCs.

Supporting information and documentation (Sections 4, 5 and 6 of Form FS-PP)

Adding to the disclosure burden in respect of FFCs most likely to distort, Notifying Parties will have the opportunity to evidence (with supporting documents) the following potential justifications:

- 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); 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.

DECLARATIONS

If none of the Notifying Parties meets the Notification Threshold, a bidder will be required to submit a Declaration that the Notification Threshold is not met, and to prove this by disclosing information on FFCs received in accordance with the reporting requirements set out in Section 7 and Table 2 of Form FS-PP.

In the draft notification Form FS-PP, bidders were required to list each FFC granted during the Reporting Period (regardless of type or value). However, as with Notifications, the Commission has reduced the burden by setting minimum financial thresholds. Bidders are now only required to specifically identify FFCs with a value equal to or exceeding €1 million during the Reporting Period at Section 7 of Form FS-PP.

FFCs with an individual value of less than €1 million can be declared in aggregate using Table 2 of Form FS-PP without setting out the individual value of each, although the Commission reserves a right to request for any such FFCs to be reported individually. Any FFCs of which the total amount per third country during the Reporting Period is below €200,000 do not need to be reported at all.

**POST-SUBMISSION CONSIDERATIONS (INCLUDING THE
CONSEQUENCES OF LATE, INCOMPLETE OR
MISLEADING REPORTING)**

Please see our original briefing on the impact of FSR on EU procurement procedures (see [here](#)) for further information on post-submission considerations including Commission investigations and the consequences of late, incomplete or misleading reporting.

FORM FS-PP SUBMISSION REQUIREMENTS

Section	Notification	Declaration
1. Description of procurement	✓	✓
2. Information about Notifying Parties	✓	✓
3. Foreign financial contributions	✓	x
4. Justification for absence of unduly advantageous tender	Optional	x
5. Possible positive effects	Optional	x
6. Supporting documentation	As required	x
7. Declaration	x	✓
8. Attestation	✓	✓
Table 1	As required	x
Table 2	x	As required

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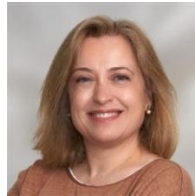
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