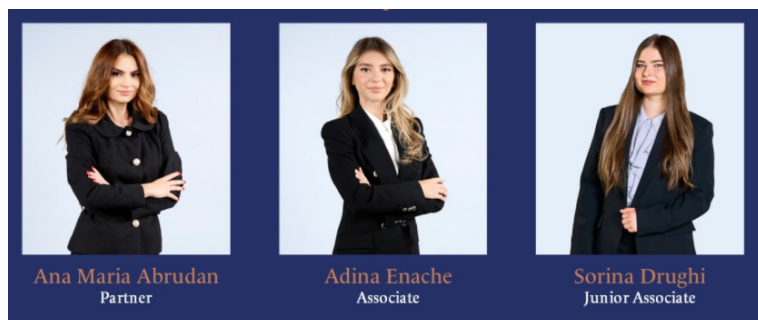


## The Impact of EU Regulation 2022/ 2560 on Foreign Subsidies (FSR) on Public Procurement Procedures in the European Union



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**Regulation (EU) 2022/2560 of the European Parliament and of the Council of December 14, 2022 on foreign subsidies distorting the internal market ("FSR" / "Regulation")**[\[1\]](#) marks a paradigm shift in how public procurement procedures are viewed in the European Union. For the first time, the European legislator is directly addressing a structural imbalance specific to the competitive advantages generated by funding from outside the Union, which until recently were outside any control mechanism comparable to the state aid regime.

In the absence of such regulation, companies subsidized by third countries could participate in European public procurement procedures while benefiting from financial support that was not subject to evaluation or censorship. This context has allowed, in certain sectors and at certain value levels, the emergence of bids that are difficult to match by enterprises operating under normal market conditions. From this perspective, the FSR is not a theoretical reaction, but responds to a visible economic reality, especially in the case of high-value public contracts financed from public funds.

Thus, distortions caused by foreign subsidies in public procurement procedures are one of the specific concerns addressed by the FSR, given *"its economic significance in the internal market and the fact that it is financed by taxpayer fund."*[\[2\]](#)

The participation of subsidized bidders in public procurement procedures may, at first glance, appear to have favorable effects. When the award criterion is the lowest price or, where applicable, the price element has a significant weighting, contracting authorities can achieve immediate savings generated by lower bids. However, these one-off benefits tend to be offset by negative effects. The constant pressure exerted by artificially low bids may discourage investment in quality and innovation, eliminate viable competitors from the market, and lead to a real reduction in competition in the medium and long term. In this regard, the FSR seeks to restore competitive balance without automatically prohibiting foreign subsidies.

The Regulation starts from a concise and deliberately flexible definition of the concept of foreign subsidy[\[3\]](#). Furthermore, the concept of financial contribution[\[4\]](#) is not limited to traditional forms of support, covering not only grants or loans, but also guarantees, tax exemptions, debt conversions, the provision of goods or services, or the waiver of revenue that would normally be due. In addition, the source of these contributions is not limited to public authorities, but may include public or private entities whose actions are attributable to a third country. From a public procurement perspective, this broad approach significantly complicates the exercise of identifying and assessing relevant financial flows.

An essential element of the FSR architecture is the clear separation between the existence of a foreign subsidy and the finding of a distortion in the internal market. Unlike state aid, foreign subsidies are not prohibited per se. They fall within the scope of intervention of the FSR only to the extent that they improve the competitive position of an undertaking and actually or potentially affect competition in a specific procedure<sup>[5]</sup>. This two-step analysis gives the European Commission a central role and considerable discretion.

Furthermore, the recent publication (on January 9) of the Commission Guidelines<sup>[6]</sup> provides additional clarity on how the Regulation will be applied, without reducing the complexity of the assessments. In interpreting Article 27 of the FSR, the Guidelines emphasize the link between the foreign subsidy and the competitive advantage reflected in the tender submitted. The analysis is anchored in the public procurement procedure concerned and starts from the question of whether the foreign subsidy actually or potentially allows the submission of an unduly advantageous tender. Price, quality, delivery times, guarantees, or contractual flexibility may become relevant in this context<sup>[7]</sup>.

The FSR also introduces a concept that is distinct from "classical" public procurement law, namely the unduly advantageous tender<sup>[8]</sup>. Although the terminology is reminiscent of the well-known concept of an abnormally low tender (defined by Directive 2014/24/EU, Art. 69), the intended purpose is different. It is not the economic sustainability of the tender that is at the forefront, but **the source of the competitive advantage**. A tender may be perfectly executable, but still problematic if its advantage derives significantly from a foreign subsidy. The Commission's guidelines suggest a methodological approach similar to that used for analyzing abnormally low tenders, but the competences remain distinct, and the European Commission has exclusive competence in this matter.

Procedurally, the FSR establishes **obligations to notify** or, where applicable, **declare foreign financial contributions** for public procurement procedures exceeding certain value thresholds. The notification obligation is triggered when two thresholds are cumulatively met: (i) the estimated value of the public procurement procedure reaches or exceeds EUR 250 million, and (ii) the economic operator, together with the entities within its structure, including subsidiaries, holding companies, main subcontractors or suppliers, has received, in the last three years, financial contributions from the same third country amounting to at least EUR 4 million per third country.

Even in situations where the notification thresholds are not reached, economic operators remain obliged to submit a complete declaration of foreign financial contributions received, confirming that they are not notifiable.

Furthermore, an aspect with significant practical impact is that the incidence of the notification obligation does not depend on the existence of a foreign subsidy, an assessment that falls within the competence of the European Commission, but on the mere existence of foreign financial contributions. Even funding granted under market conditions or on the basis of measures of general application must be taken into account by economic operators in their internal analysis in order to determine the obligation to submit a notification or, where applicable, a declaration in the public procurement procedure in question. The substantive assessment is the sole responsibility of the European Commission, with the contracting authority playing a strictly intermediary role<sup>[9]</sup>.

The consequences of this assessment are direct on the public procurement procedure, given that failure to notify, as well as incomplete or non-compliant submission of information, may lead, in a relatively short time, to **the rejection of the tender as irregular**.

Last but not least, the intervention of the European Commission may lead to the suspension or extension of public procurement procedures, affecting award timetables and procurement strategies. From this perspective, the FSR introduces an external variable that may unpredictably influence the conduct of public procurement procedures.

Overall, and by way of conclusion, we consider that the FSR cannot be understood or applied in isolation. On the

contrary, this Regulation lies at the intersection of public procurement law, competition law, and the economic dynamics of global markets. The real challenge lies not in the existence of the Regulation, but in how it is and will be interpreted and applied in practice. In this context, economic operators are called upon to go beyond a simple formal obligation of diligence and to carry out a rigorous, comprehensive, and honest analysis of the potential impact of foreign subsidies. This obligation is coupled with a requirement for utmost sincerity, especially since the Regulation establishes a severe penalty regime: from fines for incomplete, inaccurate, or misleading notifications/declarations to penalties of **up to 10% of total worldwide turnover**, as well as corrective measures that can block the award of the contract. In this context, compliance with the FSR is not only a procedural requirement, but an essential condition for managing the legal and commercial risks associated with significant public contracts.

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[1] Available here: <https://eur-lex.europa.eu/eli/reg/2022/2560/oj>

[2] Recital 40 of the FSR.

[3] According to Article 3(1) of the FSR: *"For the purposes of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries."*

[4] The concept of financial contribution is defined by a non-exhaustive list: *"For the purposes of this Regulation, a financial contribution shall include, **inter alia**:*

*(a) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting*

*off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;*

*(b) the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights*

*without adequate remuneration; or*

*(c) the provision of goods or services or the purchase of goods or services."*

[5] According to Article 4(1) of the FSR: *"A distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market."*

[6] [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_26\\_43](https://ec.europa.eu/commission/presscorner/detail/en/ip_26_43)

[7] See point 84 of the Guidelines: *"The advantage may consist, for example, in reducing the price, in increasing the quality or in offering better terms related to delivery and lead times, warranties and after sales support, payment terms, service level agreements, contractual flexibility, compliance with technical specifications, risk management, innovation, social and sustainability values in relation to the procurement concerned."*

[8] Article 27 of the FSR clarifies that this mechanism aims to counteract foreign subsidies *"that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned."*

[9] Thus, according to Article 3(2) of Implementing Regulation (EU) 2023/1441: *"Notifications and declarations in public procurement procedures shall be submitted to the contracting authority or contracting entity by the economic operator, or, in the case of groups of economic operators, main subcontractors and main suppliers, the main contractor or main concessionaire, referred to in Article 29(6) of Regulation (EU) 2022/2560 on its behalf and on behalf of any and all notifying parties as referred to in Article 2, point (3). Each notifying party shall only be responsible for the correctness of information linked to the foreign financial contributions that have been granted to it."*