

FSR and its application in Polish public procurement procedures

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I. Introduction

1. The Polish public procurement market is part of the EU market which, according to the EU treaties, is a single and common market ensuring the free movement of people, capital, goods and services. The single market is considered to be the main pillar of the European economy, making the European Union (or "EU") one of the most important trading partners in the world.
2. However, the single market faces a number of challenges. One of the most serious is the interference of third countries which use public funds to finance, directly or indirectly, operations that distort competition in the single market. Prominent examples of such practices include the takeovers of European companies hit hard by the Covid pandemic by non-EU companies receiving public funds. This issue has arisen in the public procurement market where many non-EU companies have been suspected of bidding for contracts at prices well below their realistic costs, precisely because they have been supported by public funds in their respective countries.
3. Until recently, the European Commission which oversees the internal market with a raft of specialized regulatory measures, had no tool in its arsenal to counter this type of activity. In particular, the elaborate regulations requiring strict control of state aid could not be brought to bear because they apply exclusively to aid provided by European states and could not be invoked to deal with companies benefiting from subsidies granted by non-EU third countries.
4. New legislation was therefore needed to fill this gap in EU regulations and address the negative impact of foreign subsidies on the internal market, both in terms of the overall market and in terms of the biggest threat to the EU market which is the involvement of third-country funds in mergers of companies and in competition for public contracts.

II. Applicability of the FSR

1. The tool devised is Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market,¹ commonly referred to as the FSR (short for '**Foreign Subsidies Regulation**'), the main purpose of which is to put the status of entities receiving aid from non-EU countries roughly on a par with that of entities receiving aid from European Union countries.
2. The FSR provides the European Commission with three basic instruments. The first of these, and most crucial to public procurement, is the requirement for foreign-subsidized undertakings to notify their participation in public procurement procedures, with potentially very harsh redressive measures and sanctions in store for those of their number failing to meet the requirements of the regulation, including even the rejection of tenders in the given procedure. The relevant provisions of the FSR are due to come into force on 12 October 2023.
3. Meanwhile, the European Commission may already apply the other provisions of the FSR which became effective on 12 July 2023. The Commission may:

I as part of a mandatory procedure, require information on the involvement of foreign subsidies in mergers of undertakings and impose appropriate redressive measures;

II conduct ex officio proceedings to investigate suspected cases of foreign subsidization and apply redressive measures where any such subsidization is found.

4. Formally and in principle, only the European Commission (and not the various national authorities) is vested with the special powers set out in the regulation. However, the obligations under the FSR apply to all undertakings operating in the EU market, including those based outside the European Union. In terms of public procurement procedures, as of 12 October 2023, both contracting authorities and economic operators (contractors) will be bound by the FSR, and failure to comply with its provisions, even if only in formal terms, may even result in the rejection of the tender submitted by the undertaking benefiting from foreign subsidies. Compliance with the FSR requirements will therefore be essential to compete effectively for public contracts after 12 October 2023, particularly where high-value contracts are on offer.

III. Foreign Subsidies

1. To begin with, it must be clear what kind of financial support is taken into account by the FSR and, accordingly, carries with it the risk of redressive measures being imposed by the Commission. The FSR defines foreign subsidy as a financial contribution which is provided directly or indirectly by a third (non-EU) country, which confers a benefit and which is limited to one or more undertakings or industries.
2. The concept of financial contribution that can constitute a foreign subsidy of this kind is construed very broadly. The FSR lists the following examples:

I 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;

II the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; and

III the provision of goods or services or the purchase of goods or services.

The concept thus covers all kinds of benefits to the recipient undertaking, with the list of these gains being open-ended, leaving the European Commission free to include in this category even less conventional cases than those explicitly listed in the Regulation.

3. When determining whether or not a foreign subsidy was granted, it is irrelevant whether it was granted directly through a public entity of a third country or through a private entity. The term will include both contributions provided by central government and public authorities at all levels and by public and private entities whose actions can be attributed to a third country, taking into account all relevant elements (such as the characteristics of the entity and the legal and economic environment prevailing in the state in which the entity operates).
4. The key question is whether or not the undertaking at issue received a benefit that it could not have obtained under normal market conditions. The Commission will have to determine the existence of a benefit on the basis of comparative benchmarks, such as the investment practice of private investors, financing rates obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service. Thus, a financial contribution will not be considered a benefit, and therefore not a foreign subsidy within the meaning of the FSR, if, most importantly, it has been obtained under normal market conditions, such as following a competitive, transparent and non-discriminatory tender procedure.
5. Importantly, the FSR does not limit the scope of the term 'third country' to specific categories of countries, nor does

it provide for exceptions to the scope of countries covered by the term. Consequently, the FSR applies not only to countries that in the past were often seen as adversely interfering in the EU market, but to any non-EU countries including, for example the UK, the USA or Israel.

IV. Assessment of foreign subsidies

1. The assessment procedure the European Commission is required to conduct does not end with the mere finding that a foreign subsidy was granted. This is because only subsidies that are deemed to distort the EU internal market will be sanctioned. 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 negatively impacts competition in the internal market. Importantly, this impact does not have to be actual, but can also be potential, seen as likely to materialize in the future.
2. The FSR explicitly lists the categories of subsidies most likely to distort the internal market. The most common and characteristic of these include foreign subsidies granted to ailing undertakings and foreign subsidies in the form of guarantees for the debts or liabilities of an undertaking, without any limitation as to the amount or the duration of such guarantees. In the context of public procurement procedures, detrimental foreign subsidies will most often be in the nature of a financial contribution (in the broad sense of the term, as already indicated) enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract.
3. The FSR also includes specific 'minimum thresholds' for assessing the impact of foreign subsidies. If the total amount of a foreign subsidy granted to an undertaking does not exceed EUR 4 million over any consecutive period of three years, it is considered unlikely to distort the internal market. On the other hand, if the subsidy does not exceed the allowable de minimis amount of state aid (as set out in the applicable state aid regulations, with the figure for most industries being EUR 200.000 over any consecutive period of three years), the law does not consider it to distort the internal market at all.
4. If market distortions nevertheless do occur, they may still be justified on certain positive grounds. To this end, the Commission must carry out a so-called balancing test which involves weighing the negative effects of the distortions in the internal market against the positive effects on the development of the relevant subsidized economic activity concerned or other policy objectives pursued by the Union. If the negative effects are found to outweigh the positive ones, the Commission must impose redressive measures to mitigate the negative effects of the subsidy.

V. Notification in public procurement procedures

1. Notification is of paramount importance in public procurement. It is mandatory in all competitive procedures for contracts with a value of EUR 250 million or more. The European Commission may, however, extend this obligation to other procedures if it decides that an ex ante review of the tenders submitted is called for because of suspicions that the economic operators involved may have benefited from foreign subsidies in the three years preceding the submission of the tenders. The severity of the sanctions for failure to comply with the FSR requirements during the tendering process cannot be overemphasized, as non-compliance may often result in the rejection of the tender.
2. An economic operator whose tender involves a financial contribution (or multiple financial contributions taken together) of at least EUR 4 million received from a non-EU country in the last three years must notify it before submitting its tender.²
3. Economic operators who have received financial contributions falling below the EUR 4 million threshold are required to submit a declaration instead of the notification, but this declaration must still list the financial contributions received from third countries, marked as not subject to notification. The forms for these documents and the scope of the information required are set out in the FSR Implementing Regulation³ (the '**Implementing**

Regulation').

4. Importantly, the above obligations also extend to financial contributions provided to any subsidiary company of the economic operator without commercial autonomy, its holding companies, main subcontractors and suppliers (i.e., entities involved in key elements of the performance of the contract or to an extent of more than 20 percent of the value of the tender submitted) participating in the same tender, with the latter two categories of entities being required to submit a notification or declaration concerning their own financial contributions (each notifying party being responsible only for the accuracy of the information relating to the foreign contributions provided to that party).
5. In multi-stage procedures, the obligation to notify arises twice, first when economic operators submit the documents specified in the Implementing Regulation together with the request to participate in the tender procedure, and then again at the tender stage. The notification obligation may also arise in the case of certain negotiated contracts (e.g., a contract for a unique work of art, or an artistic performance, or if there is a lack of competition for technical reasons or where exclusive rights need to be protected).
6. The contracting authority will forward the notifications or declarations directly to the European Commission which will then use them in its preliminary review. Tenders (or requests to participate) submitted with incomplete notifications or declarations must be supplemented in a timely manner at the request of the contracting authority or the Commission, failing which the tender will be rejected. If the Commission has sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it will open an in-depth investigation procedure in order to gather further information to assess the nature of the financial contribution in question.
7. The Commission's powers to obtain the information it needs are defined very broadly. Firstly, on pain of a fine or financial penalty, it can request information from any undertaking or information relating to an undertaking and conduct the necessary interviews. The Commission can also conduct inspections on the premises of the investigated undertaking in the Union and, in some cases, even on its premises in a third country.
8. The relevant procedure is detailed in the Implementing Regulation. Throughout the procedure, the party under investigation will enjoy adequate procedural rights, including the right of defense, and will have the opportunity to comment on the grounds on which the Commission intends to base its decision. It should also be recalled that the Implementing Regulation sets out detailed rules for the protection of confidential information (including professional or business secrets) submitted to the Commission, requiring, where appropriate, that such information be identified as confidential or that the identification be justified (and to some extent giving the Commission discretion as to whether this is necessary at all).
9. It is worth remembering that the Implementing Regulation allows, and indeed encourages, pre-notification discussions with the Commission. Such discussions are voluntary, and are primarily intended as an opportunity to determine the precise amount of information required by the Commission. In the course of these pre-notification contacts, the notifying party(ies) may request waivers to submit certain information required by the relevant form, provided that there are adequate grounds for doing so, as where the information in question is not available for legitimate reasons, or if the information in question is not necessary for the review of the matter in question.
10. In a model scenario, the Commission will need up to 20 working days to complete its preliminary review (with the possibility of extending this period to 30 working days) and to decide whether or not to open an in-depth investigation into the matter, which will take a maximum of 110 working days (with the possibility of extending this period to 130 working days after consultation with the contracting authority, in duly justified exceptional cases). The possible award of the contract to the tenderer under investigation is suspended pending the completion of these procedures, and the ineffective expiry of any of the above time limits (i.e., the failure of the Commission to take a decision within the prescribed time limits) brings the suspension period to an end.
11. The Commission may also reopen the investigation if it obtains new information of relevance to the case and may review the already awarded contracts on its own initiative.
12. It follows from recital 72 of the FSR that disputes over issues regulated by the FSR will not be subject to the jurisdiction of the National Appeals Chamber (Krajowa Izba Odwoławcza). The acts of the Commission under the

VI. Powers of the Commission outside the notification procedure

1. As mentioned above, the notification procedure is only one of several instruments available to the Commission under the FSR. In the context of the public procurement market, it is also important to bear in mind the Commission's broad powers under the so-called 'general fact-finding measures,' which allow the Commission to investigate on its own initiative any business sector and any market situation where there is a suspicion of foreign subsidization. The potential applicability of the FSR under this procedure covers essentially all sectors of the EU economy, with the exception of certain strictly defined categories.
2. The procedure according to which the Commission carries out these activities is divided, as in the case of reviews under the notification procedure, into two stages: the preliminary review and the in-depth investigation, with no strict time limits for the completion of these procedures (which, in the case of public procurement procedures, mark the period during which contracts cannot be awarded to the tenderer under investigation while these procedures are ongoing). The Commission's powers to obtain the necessary information, to conduct interviews and to carry out inspections are as extensive in these procedures as in the reviews of notifications submitted in the course of public procurement procedures. In addition, in order to prevent irreparable damage to competition in the internal market, the Commission may adopt the necessary interim measures for the time necessary to issue its final decision.
3. It is noteworthy that the FSR places great emphasis on the possibility for any natural or legal person (or their associations) to provide information on foreign subsidies that distort the internal market. The Commission welcomes information from any entity on the potential existence of foreign subsidies, particularly in situations where, for example, the beneficiaries of the subsidies are direct market competitors of the informants.

VII. Sanctions

1. If the Commission finds a foreign subsidy causing distortions in the internal market that does not 'pass' the balancing test, it will have to impose redressive measures that are both suitable and proportionate to remedy the distortions caused in the internal market by the foreign subsidy. The initiative in this regard may also lie with the undertaking under investigation which may itself propose commitments to remedy the distortions caused by the subsidies. The FSR does not set out any finite set of commitments or redressive measures and only gives some examples, such as the requirements to offer access, under fair, reasonable and non-discriminatory conditions, to infrastructure or production capability, to reduce capacity or market presence, to refrain from certain investments, to divest or license, on fair, reasonable and non-discriminatory terms, assets acquired or developed with the help of the subsidies, to publish the results of research and development and, finally, to repay the foreign subsidy.
2. In any public procurement, the most severe sanction that can be imposed in the notification procedure is undoubtedly the rejection of the tender submitted. This may be the case if a decision is taken to prohibit the award of the contract in question (in a bid to remedy the negative effects of a subsidy) as well as in cases of breach or attempted circumvention of the formal requirements under the FSR, in particular if the undertaking concerned does not submit a proper notification or does not adequately cooperate with the Commission in the course of the procedure.
3. Failure to comply with the formal requirements of the FSR and failure to implement the Commission's decisions can also result in very severe financial sanctions. The Commission may impose fines of up to 10 percent of annual turnover and periodic penalty payments of up to 5 percent of the average aggregate turnover in the preceding financial year for each day of breach.

VIII. Practical conclusions

1. Given the wide range of requirements under the FSR and the fact that this Regulation can be applied to any public procurement procedure, any economic operator wishing to participate in the public procurement market after 12 October 2023 will need to take preparatory action. As the FSR is now in force, each major undertaking should conduct an internal audit of the foreign contributions it receives to see how they may be classified under the FSR and implement procedures to ensure that the contributions are properly monitored in the future. This will allow them to be properly notified or allow the undertaking to argue that the particular type of contribution does not qualify as a foreign subsidy distorting the internal market or that its positive effects outweigh its negative impact, thereby avoiding the imposition of unwarranted redressive measures.
2. It should be emphasized that even if the economic operator in question is not a beneficiary of foreign subsidies, it must still meet the formal requirements of the FSR, bearing in mind that its failure to comply with the notification requirement or to cooperate properly with the Commission may expose it to the most severe penalty for such negligence — the rejection of its tender
3. At the same time, undertakings operating in the EU market should consider whether they are being harmed by third-country subsidies granted to their competitors or other market players, both in and outside the public procurement market. If the competitive advantage enjoyed by the latter is the result of foreign subsidies, the FSR provides legal instruments to neutralize this advantage, and undertakings may be well advised to contact the Commission directly in this regard.

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1. OJ EU L 330 of 2022, p.1.
 2. It is important to note that all financial contributions must be notified, not just the foreign subsidies as defined in the FSR. According to the Commission's guidelines, the EUR 4 million amount to be notified also includes benefits obtained through supplies or purchases of goods or services from third countries, although the current form for this notification explicitly excludes the need to list such benefits obtained at market terms in the ordinary course of business.
 3. Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (OJ EU L 177 of 8.4.2023, p. 1).

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