

Thank you for joining us
The webinar will start at 4:00pm CET



▶ Webinar

Foreign Subsidies Regulation

Opportunity to shape the draft
Implementing Regulation

Legal 500 and White & Case LLP

13 February 2023

WHITE & CASE



Session overview

Agenda

- Welcome and introduction
- Panel 1: Concentrations
- Panel 2: Public procurement
- Q&A and concluding remarks

Moderator

- **James Killick:** Partner - Trade, White & Case

Speakers:

- **Martin Farley:** European Commission's Legal Service
- **Sandro Čavrak:** Legal and Policy Officer, Public Procurement Strategy Unit, DG GROW, European Commission
- **Marceline Tournier:** Global Head of Antitrust, Nestle
- **Ana Manuelito:** Public Affairs Manager, UNIFE
- **Jeremie Jourdan:** Partner - Merger Control, White & Case
- **Jean-Luc Champy:** Partner - Public Procurement, White & Case
- **Irina Trichkovska:** Counsel - State Aid, White & Case

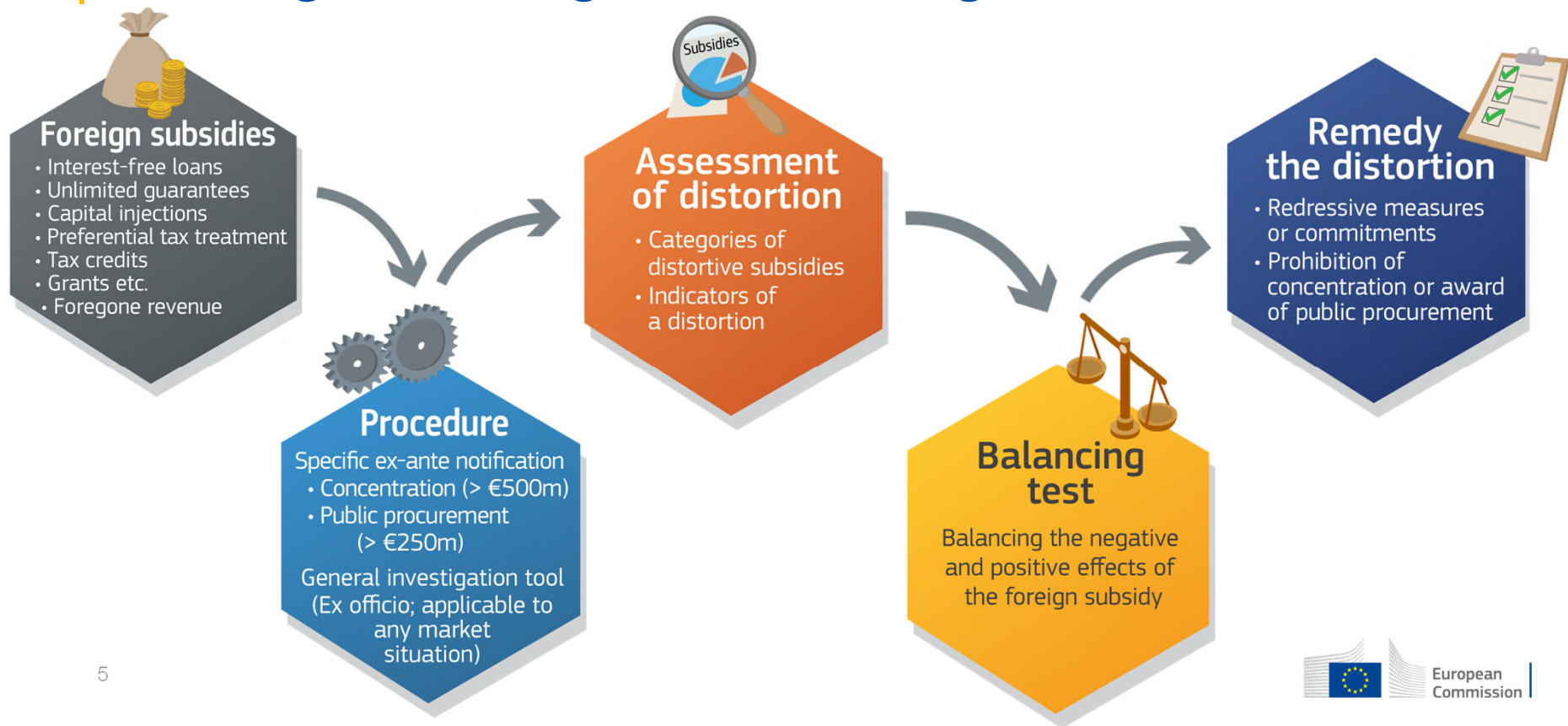


EU Foreign Subsidies Regulation (FSR) – Opportunity to shape draft implementing regulation

Legal 500 in association with White & Case
13 February 2023

Martin Farley
European Commission, Legal service
[speaking in a personal capacity]

The agreed Regulation at a glance



The draft Implementing Regulation (1)

- **Procedural rules for three procedures set out in FSR**
 - Ex officio
 - ***Concentrations***
 - Public procurement bids
- **Inspired by procedural rules for mergers, antitrust and State aid**

The draft Implementing Regulation (2)

- **9 chapters**

- Scope and definitions (chapter I),
- Notifications and transmission of documents (chapters II and IX)
- Investigation by the Commission (chapter III)
- Commitments and redressive measures (chapter IV)
- Submission of observations (chapter V)
- Use of information, confidential information and access to file (chapter VI and VII)
- Time limits (chapter VIII)

The draft Implementing Regulation (3)

- Notification and transmission of documents (Chapters II and IX)
 - How and by whom
 - Digital transmission of documents as rule
- Investigation by the Commission (Chapter III)
 - Submission of views following opening of the in-depth investigation
 - Interviews
 - Oral statements during inspections

The draft Implementing Regulation (4)

- Commitments and redressive measures (Chapter IV)
 - Time limits for submission of commitments
 - Procedure
 - Monitoring trustee
 - Transparency and reporting obligations

The draft Implementing Regulation (5)

- Submission of observations on grounds on which the Commission intends to adopt its decision (Chapter V)
 - Submission of observations in writing
 - No oral hearings
- Safeguards to guarantee rights of defence
 - Observations on grounds
 - Access to file
 - Possibility to submit written observations: (i) after opening of in-depth investigation; and (ii) after receipt of “grounds”

The draft Implementing Regulation (6)

- Use of information (Chapter VI)
 - possibility for information to be used for other purposes, subject to authorisation
- Treatment of confidential information (Chapter VI)
 - power to take decisions where it is not possible to reach an agreement on confidentiality
- Access to file (Chapter VII)
 - non-confidential versions of the documents included in the grounds
 - flexibility for setting A2F for other documents (e.g. confidentiality rings, data rooms, classical A2F etc.)

The draft Implementing Regulation (6)

- Calculation of time limits (Chapter VIII)
- Possibility to suspend time limits
 - Notifying parties fail to provide (complete) information
 - Third parties fail to provide (complete) information owing to circumstances for which the parties are responsible
 - Refused to submit to an inspection
 - Failed to inform Commission of relevant information – including change of facts

Draft notification form for large concentrations (1)

1. 'Administrative sections' are similar to Form CO as used in EU merger control

- Sections 1-3 and 8
- Description of concentration, info about parties to the concentration, supporting documentation

2. Notification thresholds (Section 4)

- Target (or JV / merging party)
 - is established in the Union; **AND**
 - generates an aggregate turnover in the Union of at least **EUR 500 million**; **AND**
- The acquirer and the target were granted combined aggregate **financial contributions** of more than **EUR 50 million** in the **preceding three years**

Draft notification form for large concentrations (2)

3. Foreign financial contributions (Section 5):

- List of financial contributions granted over the past three years meeting two cumulative conditions:
 - (i) an individual amount \geq 200,000 EUR; **and**
 - (ii) an aggregate amount per 3rd country per year \geq EUR 4 million;
- More detailed information in notification form *only for subset of financial contributions*, namely financial contributions likely to fall in one of the **categories** (i.e. most likely to be distortive)
- If needed, Commission services can gather additional information through information requests

Draft notification form for large concentrations (3)

4. Impacts (section 6)

- Concentration in the context of a structured bidding process?
- Economic and business rationale of the concentration?
- Improved economic activity of notifying parties after concentration?
- Merger control or other filings in the EU?
- Benefits to operation of new entity on the IM?

5. Balancing test (Section 7)

- Identify possible positive effects

Thank you



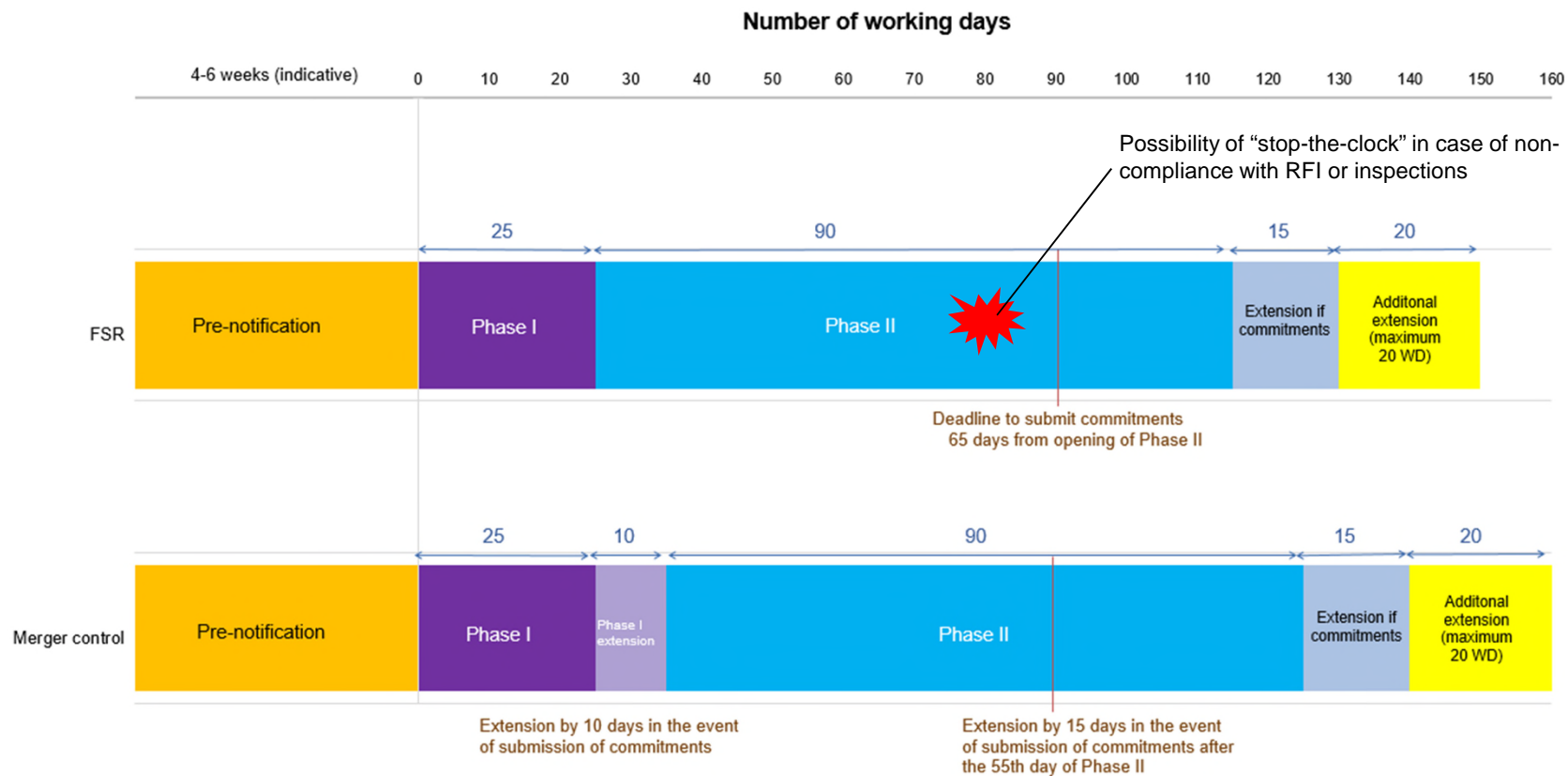
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FSR – Implementing package Concentrations

Jérémie Jourdan, White & Case LLP

FSR procedure for concentrations - Timeline



▶ FSR procedure for concentrations – Right to be heard

- Right to **submit observations** within **a month from opening of in-depth investigation** (similar to comments on Art 6(1)(c) decision in merger control)
- Prior to adopting a decision, company can **submit observations**
 - EC to set a time limit within which the company may submit its observations in writing (typically 2 weeks in merger control).
 - EC not obliged to take account of written submissions received after the expiry of the time limit.
 - Possible of extensions if justified.
- **No oral hearings** (contrary to merger control proceedings)

▶ FSR procedure for concentrations – 2-tier Access To File

- **Notifying party** gets access only to redacted documents on which the grounds are based (“incriminating” documents)
- Legal, economic and technical **advisers** have access to the whole unredacted file under terms of disclosure (electronic access / data room)
- Exceptions:
 - Internal EC / MS documents
 - EC may refuse access to certain documents above or disclose documents that are partly redacted under the terms of disclosure, if it deems that the harm that the information provider will likely suffer outweighs the importance of the disclosure for the exercise of rights of defence.
- Rules on confidentiality (similar to merger control)

► Concentration - Notification Form - Section 5 (FFC)

All FFCs

Table 1
[See Section 5.2]

Receiving entity	Granting entity	Third-country to which the financial contribution is attributable	Type of financial contribution	Was the financial contribution the result of a tender procedure?	Amount of the financial contribution	Date of granting
		Country A				
		Country A				
		Country A				
Total financial contributions Country A						
		Country B				
		Country B				
Total financial contributions Country B						
		Country C				
		...				
		...				
		...				
		...				
		...				

[Note: the financial contributions must be listed in alphabetical order of the granting third-country. Within each third country, they must be ordered chronologically.]



For all likely distortive FFCs

Subsidy to ailing undertaking, unlimited guarantee, export finance, subsidy facilitating the concentration

- ✓ Form of contribution?
- ✓ Granting entity?
- ✓ Purpose and economic rationale?
- ✓ Conditions attached to grant and use?
- ✓ FFC confers benefit?
- ✓ Limited to certain undertakings or industry?



Specific questions for each type of likely distortive FFCs

Concentration - Notification Form - Section 6

- 6.1. Does the concentration occur in the context of a structured bidding process? If so:
 - 6.1.1. Provide a detailed description of the bidding process.
 - 6.1.2. Indicate how many other candidates were contacted.
 - 6.1.3. Indicate how many other candidates expressed an interest.
 - 6.1.4. Provide a detailed description of the profile of each of the other candidates mentioned above (e.g. whether these were private equity companies or industrial undertakings).
 - 6.1.5. Indicate how many letters of intent and non-binding offers were received and from whom.
 - 6.1.6. Indicate how many and which bidders withdrew and at what stage of the process.
- 6.2. Indicate whether a bank, a consultancy company or equivalent assisted the notifying party and, if so, if there was any due diligence carried out examining the economic and business rationale of the concentration?
 - 6.2.1. Provide a detailed description of the due diligence carried out.
 - 6.2.2. Provide a copy of all the corresponding due diligence report(s) or any equivalent documents prepared by external parties assessing the transaction from a strategic, legal, economic, or tax point of view, including documents discussing the value of the transaction.
- 6.3. Provide contact details of all other undertakings who expressed an interest in the acquisition or the merger.

FSR – Implementing package Public Procurement

Jean-Luc Champy, White & Case LLP

► Scope of FSR

□ Stakeholders

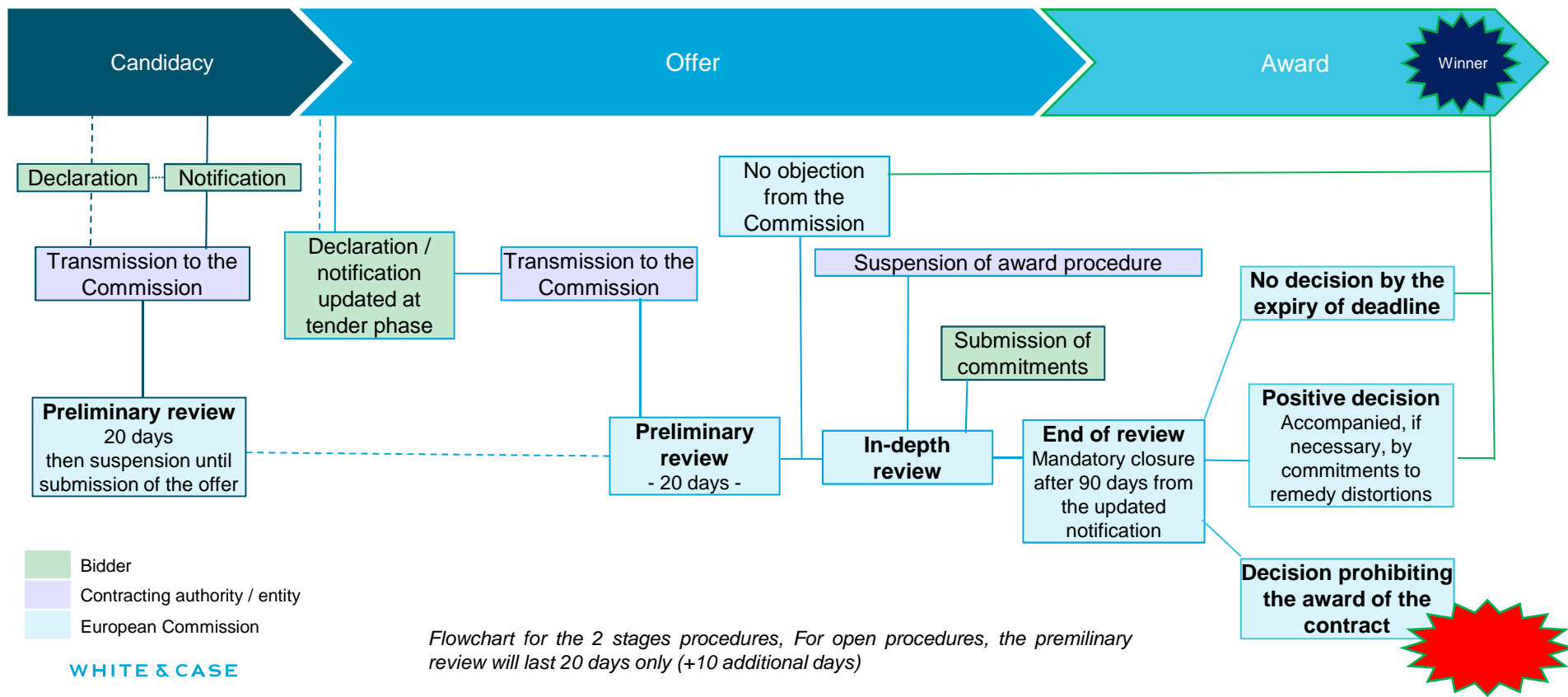
- ✓ Economic operators
- ✓ Consortia
- ✓ Main subcontractors and suppliers

Concerned by participation in procedures for the award of **public procurements and concessions**

□ Application thresholds

- ✓ Public procurements, framework agreements (including PPP contracts), as well as concessions whose estimated value excluding VAT is greater than **or equal to EUR 250 000 000**
- ✓ Economic operators – subsidiaries without commercial autonomy – parent companies – main subcontractors and suppliers participating in the same call for tenders which received total financial contributions – in the three years preceding the notification – of **EUR 4 000 000 or more per third country**
- ✓ Specific allotment scheme (cumulative value of lots > EUR 125 000 000)

Public procurement procedure



► FSR's impact on the award of the contract

- **Control prior to the award of the contract:** all procedural steps in the public procurement procedure may continue, except for the award of the contract - pending a decision by the Commission or the expiry of the deadline for the completion of the in-depth investigation
- **Review of awarded contracts:** *ex officio* review on the Commission's own initiative - following which the decision may contain redressive measures but shall not result in the cancellation of the decision awarding a contract or in a termination of a contract.
- **Litigation risks before EU courts against EC decisions (+ interim measures)**
- **Litigation risks before national courts:**
 - Non compliance with notification / declaration obligation (assuming it is a tender obligation)
 - Non compliance with the FSR (but national courts cannot review EC decisions)

Main recommendations

- **Need to anticipate risk**
 - Upstream due diligence of potential partners before the conclusion of a consortium agreement or exclusivity commitment ;
 - Provide for the possibility of changing the composition of the consortium in case of difficulties and facilitate the conditions for exit of a partner subject to an in-depth investigation.

- **Limited possibilities to modify the composition of a consortium during the tender process**
 - Be very attentive to the possibilities of changing the composition of the consortium before the submission of the BAFO
 - Such possibilities are often restricted, especially in public procurements procedures, in addition to previous thresholds



Foreign Subsidies Regulation

Implementing Regulation and Notification form –
PP specificities

Sandro Čavrak
European Commission, DG GROW C2
[speaking in a personal capacity]

13 February 2023

The Implementing Regulation

- Provisions specific to public procurement:
 - Submission of notification or declaration (of no notifiable foreign fin. contrib. – same form)
 - Notification in the language of the public procurement procedure
 - Right of CA/CEs to clarify notification/declaration and reject if not clarified as prelim. step
 - Obligation for CA/CEs to send documents it considers crucial for the investigation
 - Suspension of time limits only in multi-stage procedures, until submission of the (final) tender

Notification form for public procurement

Similar when possible to the Concentrations form (CF), with notable differences.

- Sections 1 and 2 correspond with first 2 sections of the ESPD (interoperability being explored); description of the public procurement, info about the notifying parties
- Section 3 on financial contributions more detailed than in CF as more information needed up front (no stopping the clock)
- Section 4 provides for the possibility (not obligation) to justify the absence of undue advantage of the tender
- Section 5 on balancing corresponds to Section 7 in the concentrations form
- Section 6 provides for supporting documents, more detailed than in CF as more information needed, some parts optional
- Section 7 is the declaration that there are no notifiable foreign financial contributions; in that case sections 3-6 are left empty. A list of received non-notifiable contributions needs to be provided.

Thank you



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▶ Q&A

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