



Foreign Subsidies Regulation and EU International Procurement - Necessity, Changes and Challenges -

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FSR in the context of international procurement

EU Public Procurement Market

- Open access within the limits of Art. 25 Dir 2014/24/EU / GPA
- Among the most open markets in the world, but increasing challenges for EU companies
- **Unfair competition (mainly based on price) from foreign-subsidised bidders, SOEs – “Underbidding”**

International Procurement Markets

- Barriers to entry for EU companies (lack of transparency, local content/ownership requirements, preferential treatment of domestic suppliers)
- Discriminatory conditions (outside GPA)



Uneven playing field

Purpose / Problem Definition

Objective: Ensure level playing field for EU companies

- EU State aid control, but no equivalent regime for FS
- Impact Assessment - instances of FS impacting the Internal Market:
 - Subsidised acquisitions
 - **Subsidised bids in public procurement tenders**
 - Other market situations such as subsidised investments, 'operating aid' etc.

Regulatory gap:

- None of the existing tools adequately tackle distortions caused by foreign subsidies on the internal market

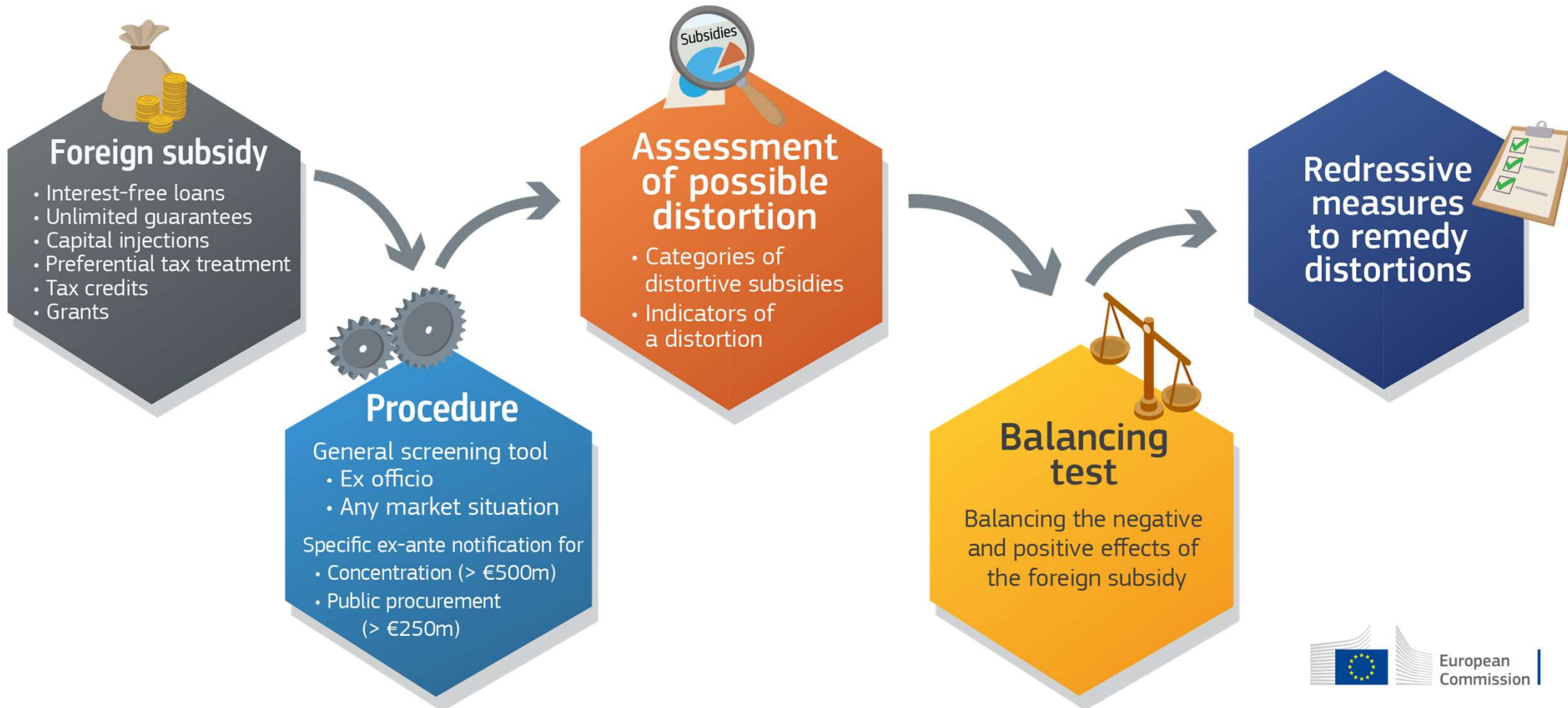
Regulatory Gap – Public Procurement

- PP Directives do not address FS distorting the Single Market
 - Rules on “abnormally low” bids (Art 69 Dir 2014/24/EU) not sufficient
 - Public buyers not obliged to take into account FS when assessing the viability of a bid
 - Incentive to accept lowest (subsidised) bid
- > **FSR proposal to close the gap**

Some guiding principles

- **Maintain trade and investment flows**
 - Target most distortive foreign subsidies
 - Minimise administrative burden
 - e.g. high thresholds, alignment with EUMR concepts and timelines
- **Respect international obligations, in particular WTO compatibility**
 - Comply with non-discrimination, national treatment principles
 - Avoid conflict with existing rules (e.g. ASCM, IPI, FDI screening)

The Commission proposal at a glance



The Instrument – Procurement in short

Targeted

- Ex-ante notifications: most harmful cases 250 Mio plus
- Ex-officio for **all** others, also ad hoc request for notification before award of contract
- All economic operators/groups + main subcontractors/suppliers (key tech or 30% value)

Effective

- Investigation on basis of general assessment criteria (e.g. indicators) and undue advantage of tender
- Deadlines: 60 days preliminary, 200 days total
- Commitments or prohibition of award during procedure
- Toolbox of measures for ex-post

Coherent

- Exclusive EU competence (Commission)
- Low admin burden for Member States
- Balancing of negative and positive of the foreign subsidies

Public Procurement - Chapter 4 - Investigation

Which foreign financial contributions?

- Only those given in the three years prior to the notification
- Subsidies below 5 million in the previous three years unlikely to be distortive

Distortion?

- General assessment criteria, e.g. indicators (not exhaustive: amount and nature of subsidy; its purpose and conditions; situation and activity of undertaking...)
- Tender is unduly advantageous

Unduly advantageous?

- Tender made possible due to the foreign subsidy, but
- Advantage may be explained by other factors such as technology

Public Procurement - Chapter 4 - Decisions

Outcome of the investigation

- In case of distortion:
 - Undertaking may propose effective commitments
 - Otherwise prohibition of award
- In the absence of distortion: award as normally.

The procurement procedure during the investigation

- Award to investigated undertaking not possible before decision or before 200 days elapse.
- Award to another undertaking with the best tender always possible.

Public Procurement – Chapter 4 - Competences

The Commission's exclusive competence

- Reception of the notification
- Preliminary investigation
- In-depth investigation
- Assessment of any proposed commitments
- Balancing test
- Redressive measures

The Contracting authority's role?

- Forward the notification to the Commission
- Award in line with any Commission decision
- Inform Commission of any decision relating to the outcome of the PP procedure

A careful balance in Public Procurement

Interests of participants

- Public buyers
- Tenderers
- Commission
- Citizens



Avoid circumvention

- Groups of operators
- Main suppliers and subcontractors
- Over 30 %



Effectiveness / Admin burden

- Targeted notification – high threshold
- Protection of SMEs

A specific distortion test

- Limited to the specific procurement procedure
- Unduly advantageous tender



Direct public interest and public money

- Financed with public (and often European) funds
- Time sensitive

Specific challenges for PP

- **Efficient and effective procedures:**
 - Ensure that ex-ante review procedure does not delay ongoing PP procedure
 - Distortion test: notion of unduly advantageous tender
 - Ex-officio review : effective redressive measures
- **Specific procurement situations**
 - How to deal with lots, urgency procurements, multi-stage procedures, single bidders

Thank you



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