

# 9th CMS Public Procurement Forum

Update on European public procurement law

# Agenda

- 13:30 – 13:45 **Welcome**  
Virginie Dor, Jakob Steiff
- 13:45 – 14:20 **ESG criteria in public procurement processes**  
Natascha Graff, Jakob Steiff
- 14:20 – 15:00 **Dos and Don'ts of submitting a successful bid**  
Marquard Christen, Jakob Steiff, Julia Haas and Folkert Stoop
- 15:00 – 15:15 **Coffee break**
- 15:15 – 16:00 **Recent highlights from the ECJ and practical takeaways for bidders**  
Christian Scherer, Lenka Krutáková and Yves Steingrüber
- 16:00 – 16:15 **Coffee break**
- 16:15 – 16:50 **Foreign Subsidies Regulation's impact on EU bidders**  
Virginie Dor, Petra Heemskerk and Sven Brockhoff
- 16:50 – 17:00 **Wrap up**
- 17:00 – 18.30 **Cocktail reception**


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to access the agenda and  
further useful information



# Helpful Resources



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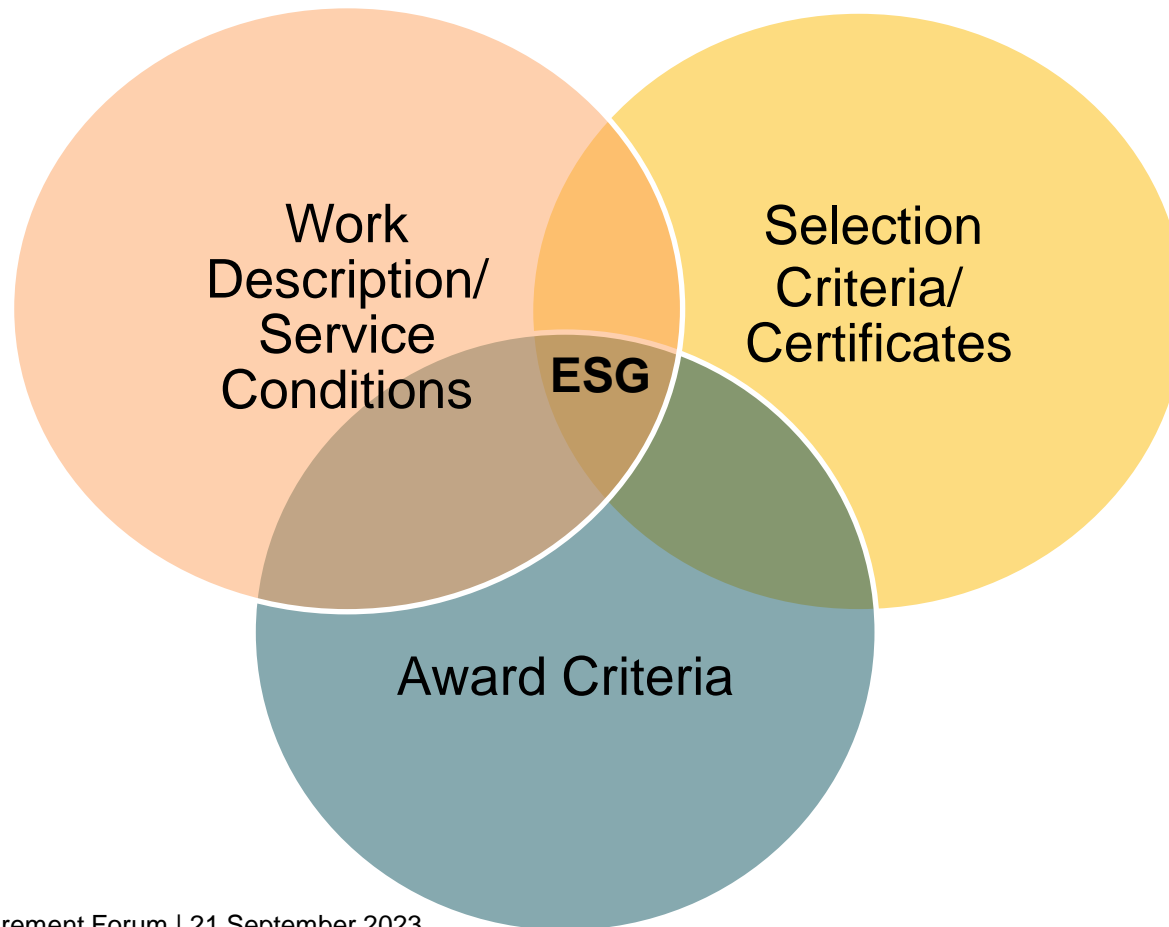
# ESG Criteria in the Public Procurement Process

Introduction by Jakob Steiff, CMS Frankfurt

# Background

- Main target for public procurement:
  - Best value for price → economic perspective
- During the 1990's ESG criteria became more important within general politics as well as procurement activities
- Acknowledged by ECJ - 17 September 2002 "*Concordia Bus Finland*" – emission reduction rates for buses as admissible award criteria
- Later ESG criteria implemented in public procurement directives as 2014/24/EU
  - Environmental eligibility certificates as EMAS (Art. 62 Sect. 2)
  - Social and environmental award criteria (Art. 67 Sect. 2)
  - Consideration of Life Cycle Costs (Art. 68)

# Different Approaches to Implement ESG Aspects



# Restrictions to Implement ESG Criteria

- Also restrictions for the application of ESG criteria have to be regarded, e.g.
  - ESG criteria may not just pursue any general political goal, but have to be interlinked with the specific procurement subject.
  - ESG criteria must be defined in an appropriate manner and may not completely override other relevant aspects as product/service quality and price.
  - ESG criteria must be in accordance with general principles of EU law, in particular:
    - The principle of transparency and
    - Non-discrimination of tender participants.



EUROPEAN CENTRAL BANK

EUROSYSTEM

# ESG and Public Procurement at the ECB



21/09/2023

**Natascha Graff**  
Lead Expert Central Procurement Division

# The ECB as Contracting Authority

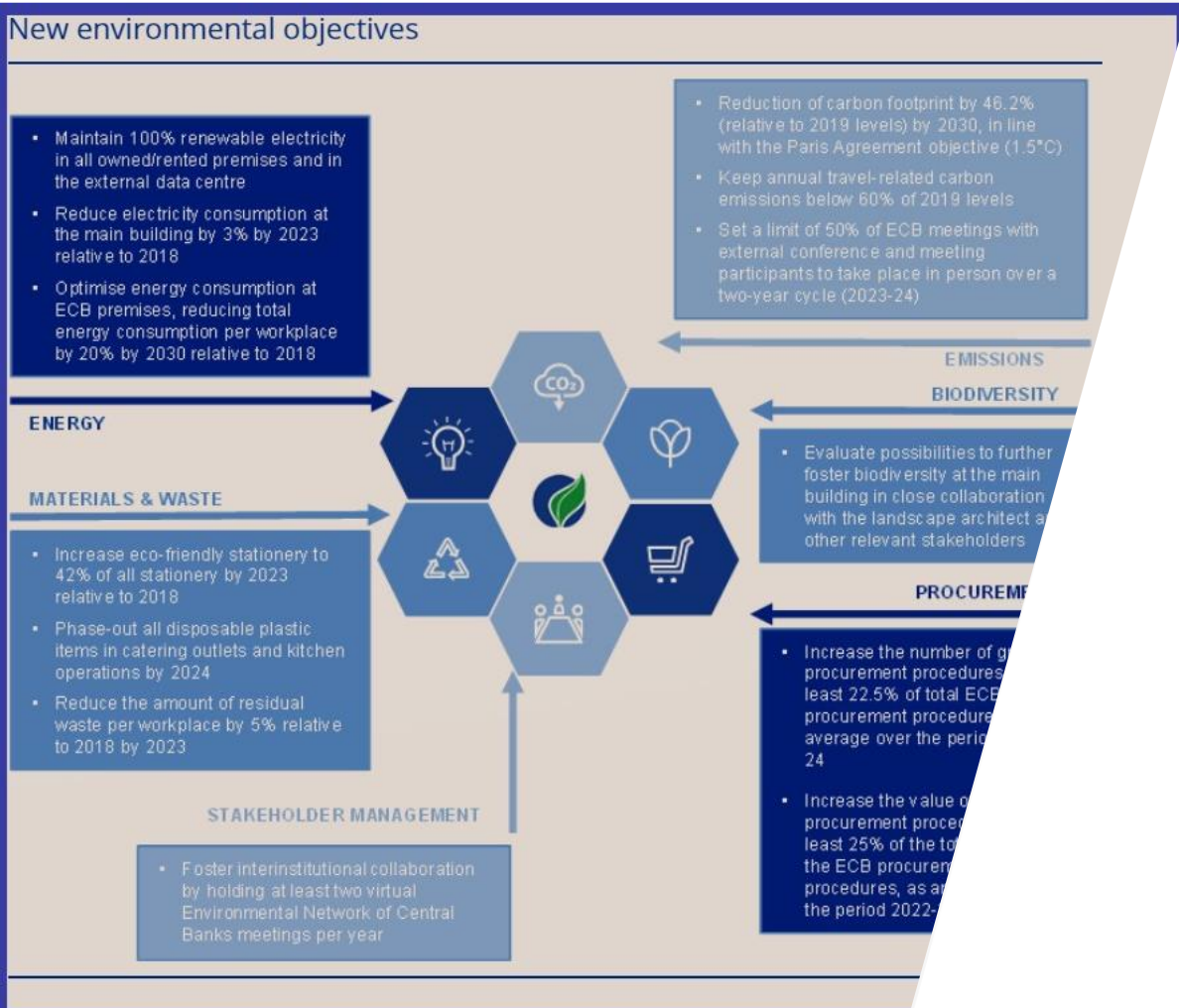


Certified since  
2010



- ECB Procurement Decision as regulatory framework – large conformity with EU Public Procurement Directives
- Environmental policy, objectives and measures following EMAS
- Around 170 competitive procedures/year
- Publication in OJ and on ECB website
- Mostly framework agreements
- Contract duration capped at 4 years
- Working language English
- Application of German contract law

# ESG Procurement: challenges



- Limitations by procurement rules:
  - Selection and award criteria must be linked to contract subject-matter
  - Specifications and award criteria cannot be changed after offer submission
  - Award to most economically advantageous tender (price always relevant)
  - Contract amendments limited
- Complicated markets
  - Confusing array of eco-labels, certifications, CO<sub>2</sub>-calculation methods...
  - Fast changing markets, innovations, price fluctuations...

# Examples of ESG in ECB procurements



- Catering: reusable packaging, seasonal, regional and fair-trade food, meat-free Thursday
- Cleaning: result-based cleaning, water recycling, microbiological cleaning agents, daytime cleaning
- Retrofit installation of filters to reduce water consumption
- Reduction of energy consumption through efficient technology
- 100% green electricity, biogas
- Sustainable cultivation of outdoor areas
- Waste separation and recycling
- Textiles and flowers from bio- and fair-trade production

# ESG Procurement:

## Examples of Criteria used by ECB



### Measures: Material efficiency

Measure	Status
Assess opportunities to develop an online collaboration platform that could support document-sharing for events and conferences with external participants	Completed The ECB has launched a document sharing platform for online collaboration with third parties
Introduce regular monitoring and yearly reporting for the share of environmentally friendly cleaning products used in catering operations with the aim of identifying possibilities to expand their use	Completed Data are collected on a yearly basis and hazardous cleaning agents used are assessed.
Request electronic learning materials in training tenders to reduce paper consumption	In progress Numbers of electronic learning materials and remote working arrangements are being tracked.
Promote possibilities to unsubscribe from unnecessary physical mail and newsletters	In progress Additional communication channels are being explored.
Launch green printing centre tender procedure for printing on site	New
Continue digital contract management beyond the pandemic	New

- Technical requirements
  - Travel by train where travel time is <4 hrs
  - Bundling of deliveries
  - Plastic-free packaging / re-use / recycle
  - Eco-labels or certifications
  - Fair-trade / ILO labour standards down supply chain
  - Female staff in the team (security guards)
  
- Selection criteria (when relevant for contract performance or for ECB's EMAS certification)
  - EMAS certification (or equivalent)
  - Experience with delivery of sustainable services/products/works
  
- Award criteria (linked to contract performance!)
  - Environmental concept
  - Staff working conditions: measures for motivation and retention

# Examples of award criteria - Cleaning

Award criteria	Weighting
1. Price	45%
2. Quality of the tender	55%
of which:	
a) Organisation & Resources	7%
b) Start-up Phase	7%
c) Concept for Documentation & Reporting	2%
d) Quality and Environmental Management	8%
e) End of contract	1%
f) Internal Cleaning Concept	5%
g) Interior glass/window and façade cleaning concept	5%
h) Outside Cleaning Concept	5%
i) Winter Services Concept	5%
j) Pest Control Concept	5%
k) Acceptance of the draft contract	5%

Score	Definition
0 point	No evidence/Total failure: The proposal totally fails to address the criterion under examination or cannot be evaluated due to missing evidence.
1 point	Very Poor: The criterion under examination is addressed in an incomplete and unsatisfactory manner; serious concerns
2 points	Poor: The criterion under examination is partly addressed but with a few major gaps or issues.
3 points	Fair: The criterion under examination is generally addressed with minor issues.
4 points	Good. The criterion under examination is fully addressed.
5 points	Excellent. The criterion under examination is fully addressed and the proposal offers some added value.

# ESG Procurement: opportunities



- Market research\*
  - Functional requirements
  - Presentation of tender requirements to the bidders
  - Questions & answers phase\*
  - Negotiations\*
  - Variants\*
  - Flexible procedures:
    - Dynamic purchasing systems
    - Competitive dialogue
    - Innovation partnership
    - Multiple framework agreements with re-opening of competition
- \* Bidders can put forward their ideas

# ESG Procurement: ECB Contract clauses



- Duty to comply with environmental/social laws
- Duty re. systematic reporting and active contribution to ECB's EMAS certification
- Reciprocal commitment to innovation
  - “The CA agrees to be used as test customer [...] at no cost.”
  - “The Contractor agrees to make suggestions for improvement [...]”
- SLA: bonus for exceeding sustainability targets, penalty for failing
- Functional requirements: more flexibility for improvement/innovation during contract lifetime

# Thank you!

<https://www.ecb.europa.eu/ecb/climate/green/html/index.en.html>



# **Dos and Don'ts of submitting a successful bid**

Jakob Steiff, Marquard Christen, Julia Haas & Folkert Stoop

# Your speakers today



**Jakob Steiff**

Frankfurt



**Marquard Christen**

Zurich



**Julia Haas**

Zurich



**Folkert J.P. Stoop**

Amsterdam

# Agenda

- 1. Bidding Organisation and Management**
- 2. Formal Requirements for the Bid**
- 3. Optimizing the Contents and Winning Chances of the bid**
- 4. Communication with the Contracting Authority**
- 5. Uphold Compliance Rules**
- 6. Particularities of a non- EU jurisdiction (Switzerland)**

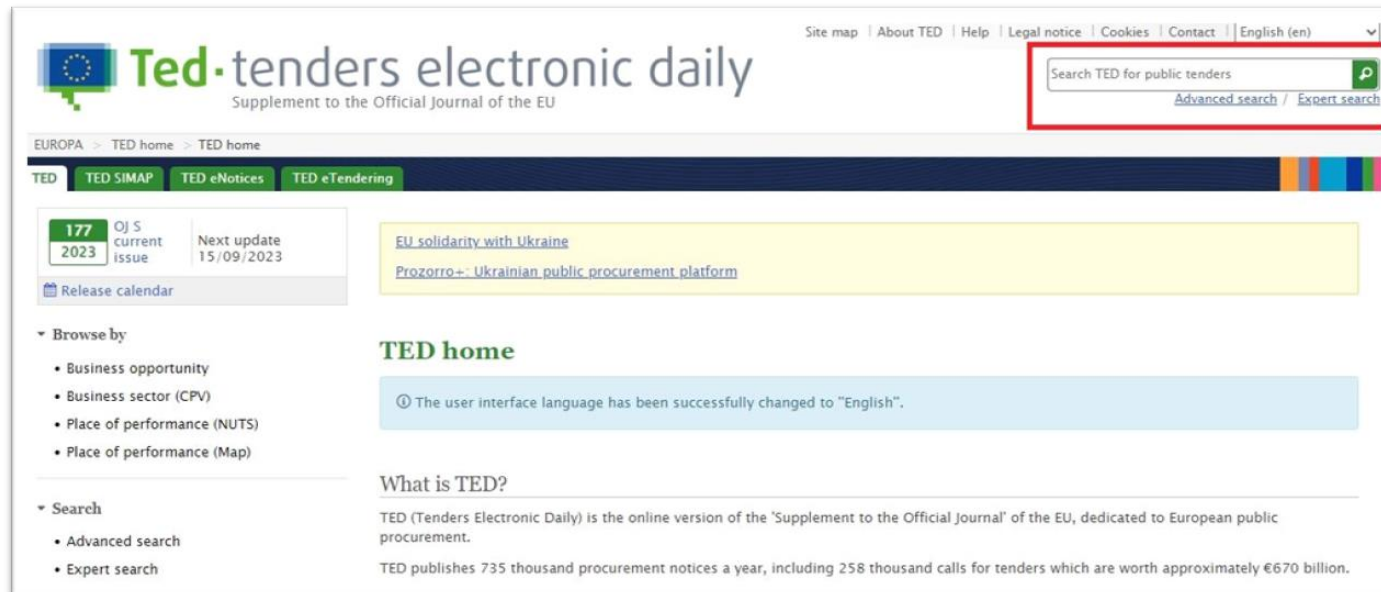
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# Bidding Organisation and Management

# Bidding Organisation and Management

## Dos

- Systematic screening of tender publications (TED, Simap, TenderNed, etc.)



The screenshot displays the TED website interface. At the top, there is a navigation bar with links for 'Site map', 'About TED', 'Help', 'Legal notice', 'Cookies', 'Contact', and 'English (en)'. A search bar is prominently featured, containing the text 'Search TED for public tenders' and a magnifying glass icon. Below the search bar, there are links for 'Advanced search' and 'Expert search'. The main content area includes a 'TED home' section with a 'Release calendar' showing '177 OJ S current issue' and 'Next update 15/09/2023'. There is also a section for 'EU solidarity with Ukraine' with a link to 'Prozorro+ Ukrainian public procurement platform'. A 'Browse by' section lists categories like 'Business opportunity', 'Business sector (CPV)', 'Place of performance (NUTS)', and 'Place of performance (Map)'. A 'Search' section lists 'Advanced search' and 'Expert search'. A 'What is TED?' section provides a brief overview of the platform.

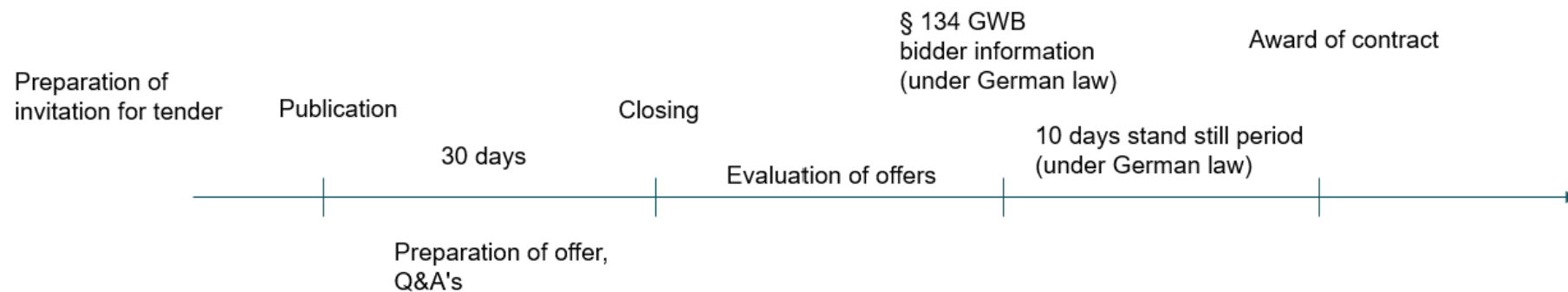


# Bidding Organisation and Management



## Dos

- Screening timelines in the course of the procedure
  - Open procedure:



# Bidding Organisation and Management



## Dos

- Screening timelines in the course of the procedure
  - Competitive procedure with negotiation:



# Bidding Organisation and Management



## Dos

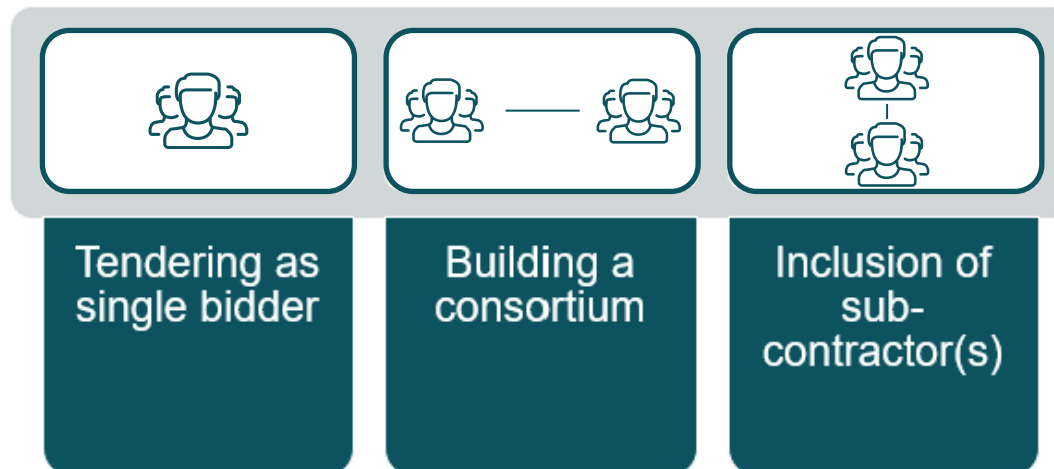
- Building an effective bidding team
  - Define responsible team members
    - For formal and practical handling of the bid
    - For contents of the bid – technically, economically and legally
  - Successful bidding is a multi-professional task
  - For a multi-professional team

# Bidding Organisation and Management



## Dos

- Forming an eligible entity – according to EU public procurement law, different forms are acknowledged:



# Bidding Organisation and Management



## Dos

- Early approach of partners is recommendable
  - To ascertain availability of partners
  - For suitable and clear affiliation of tasks
  - Partners should also
    - Often proof eligibility criteria for themselves (as defined in the tender documents)
    - Prepare their part of the offer

# Bidding Organisation and Management



## Don'ts

- Start too late with preparation of the offer
- Disobey to formal requirements (as for instance signing requirements)
- Ignore unclear or unbearable work descriptions

**2**

# Formal Requirements for the Bid

# Formal Requirements for the Bid



## Dos

- Keep in mind the deadlines
- Note the formal requirements
  - Normally electronic bidding
  - Qualified signing requirements?
  - Completeness of bid documents? (checklist)
- Create a bidding time schedule
  - For bidding timelines
  - For internal and partner feedbacks

**3**

# Optimizing the Contents and Winning Chances of the bid

# Optimizing the Contents and Winning Chances of the bid

## Dos and Don'ts

There are 3 key issues to “win the game”:

- Work description
  - Precise analysis and full match
  - Avoid gaps and deviations – ground for exclusion of the offer
- Selection criteria
  - Precise analysis and full match
  - Avoid deficits, especially concerning minimum standards
- Award criteria
  - Precise analysis if tender is promising at all (relation quality / ESG criteria / price)
  - Take time to address quality / ESG criteria and to elaborate conceptual issues
  - Avoid only generic statements and documents – try to address concrete and tender specific conditions and challenges

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# Communication with the Contracting Authority

# Communication with the Contracting Authority

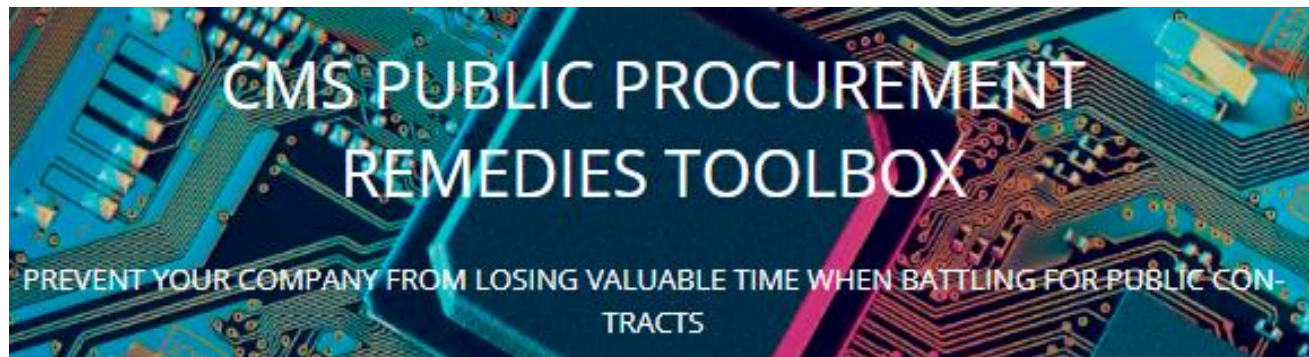
## Dos and Don'ts

- Using Q&A Tool in an early stage of the tender is crucial to sort out unclear points
- But keep in mind - answers are presented also to competitors
- In case there are severe challenges or infringements of fair competition, as:
  - Ongoingly unclear work description
  - Work description or procurement procedure is biased in favor of competitors
  - Unclear or unfair selection criteria or award criteria
  - Too short time limits
  - Award decision is going to be wrong due to flawed evaluation method
- ... it should be taken into account to launch
  - a formal complaint to the contracting authority
  - and subsequently a review procedure (according to the relevant national procedural laws)

# Communication with the Contracting Authority

## Tools for Review Procedures:

- EC Document 'National Review Systems in the Area of Public Procurement (14/02/2019)
- Interactive online tool: CMS Public Procurement Remedies Toolbox



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# Uphold Compliance Rules

# Uphold Compliance Rules

- Avoid exclusion for infringements of compliance rules as
  - Infringements of relevant laws and legal orders
  - Collusive bidding and pricing
- If so, use self-cleaning measures
- Avoid conflicts of interest
  - As acting on both sides of the procedure
  - Obey rules in case bidder is involved in preparation of the tender (as established by EuGH, 3.3.2005 – C-21/03; C 34/03 – "Fabricom")

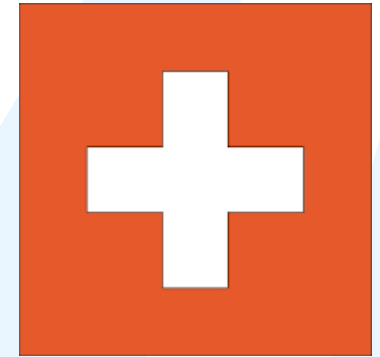
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# Particularities from a non-EU Country

# Particularities of a non-EU jurisdiction

## Preliminary remarks

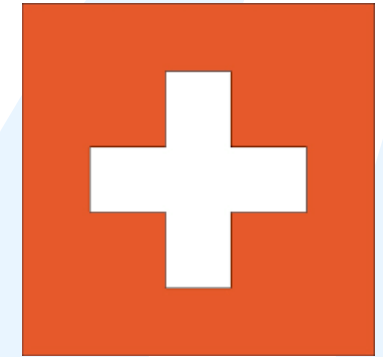
- Harmonization of requirements in Switzerland by recent revision of public procurement law
- But: New public procurement regime has not yet entered into force in all cantons (tenders on sub-federal level by cantons/municipalities) – for current status see <https://www.bpuk.ch/bpuk/konkordate/ivoeb/ivoeb-2019>)
- Swiss particularities especially in appeal proceedings/legal protection



# Particularities of a non-EU jurisdiction

## Dos and don'ts

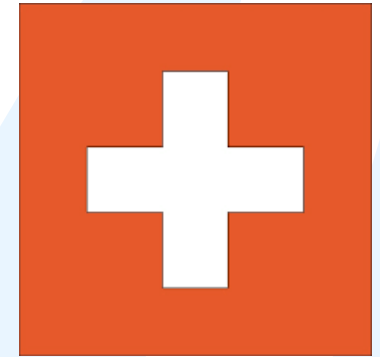
- Systematic screening of tender publications
  - SIMAP ((<https://www.simap.ch>))
  - Tender publications within scope of international treaties (GPA, EU-CH Agreement) also published on TED
  
- **Participation of foreign companies in tenders in Switzerland**
  - Right to participate within scope of international treaties / if reciprocal rights granted in country of origin
  - Outside scope of international treaties / without reciprocity: participation if permitted by contracting authority
  - Challenge: Country specific permits / certificates (usually as proof of fulfillment of eligibility criteria)



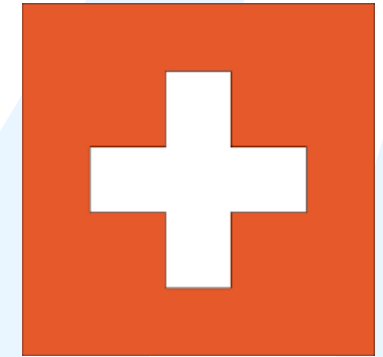
# Particularities of a non-EU jurisdiction

## Dos and don'ts

- Recommendation: **Carefully review** call for tender / tender documentation (e.g. possibility in Switzerland to prohibit consortia and/or involvement of subcontractors)!
- Observe **Swiss specific regulations** on, e.g., working conditions (incl. health, safety and equal pay and environmental aspects) for services to be provided in Switzerland
- Observe **specific time limits**
  - Partially different time limits for submitting the offer
  - Standard still **non-electronic bidding** and offers must arrive at the procuring entity within the deadline
  - Appeal period now 20 days both on federal and cantonal/municipal level, but: in certain cantons still old 10-days deadline
  - Shortcomings in the invitation to tender must be challenged (in court) within 20 (10) days after publication of tender



# Particularities of a non-EU jurisdiction



## Dos and don'ts

- **Conclusion of contract** / suspensive effect of appeals
  - Once concluded, contract can in principle not be annulled ("pacta sunt servanda")
  - **No automatic suspensive effect** of appeals
    - Only granted
      - Upon request by appellant and
      - Following summary (prima vista) assessment by court
    - In practice: withdrawal of appeal if no suspensive effect granted/contract already concluded
- **Damage claims**
  - Limited to necessary expenses for preparing and submitting the offer
  - When establishing violation of public procurement law, appeal court also decides on claim for damages, therefore: include alternative motion in the appeal

# We thank you for your attention!



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# **Recent highlights from the ECJ and practical takeaways for bidders**

# Your speakers today



**Lenka Krutakova**

Prague



**Christian Scherer**

Cologne






**Yves Steingrüber**

Cologne

# Agenda

## Update on ECJ case law

-  Structure of the procedure
-  Exclusion grounds
-  Award decision

# Structure of the procedure

# Introduction and background

## Identification of the procurement needs

- Definition of the needs
- What do we need /What kind of a public contract

## Application of EU public procurement law

- Contract value and thresholds
- Exclusions

## Choice of procedure

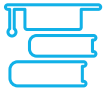
- Open and restricted procedure or competitive procedure with negotiation

## Preparation procurement documents

Preparation stage

Case

**European Court of Justice (Eighth Chamber),  
judgement of 16 July 2022, C-274/21  
EPIC**



## Facts

- The Republic of Austria concluded 21 framework agreements with one company each for the supply of COVID-19 antigen tests
- No publication of a contract notice or a notice of awarded contracts
- Framework agreement provided for a maximum purchase value of EUR 3 million
- In the case of two framework agreements, the individual call-offs exceeded the maximum purchase value



# Judgement



## Issue: standstill period

- Directive 89/665 (Directive regarding review procedure) is applicable to framework agreements
- a contract may not be concluded before the expiry of a standstill period of at least 10 or 15 calendar days



## Issue: limit

- commitments only up to a maximum quantity and/or a maximum value of the works, supplies or services concerned
- once limit has been reached, that framework agreement will no longer have any effect



# Implications for the practice

- Judgment takes up and continues the previous case law on compliance with maximum quantities or values (ECJ, C-23/20, Simonsen & Weel)
- Key points framework agreement:
  - specification of estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value (in the contract notice or the tender specifications)
  - standstill period applicable
  - if limit has been reached, that framework agreement will no longer have any effect

Case

**European Court of Justice (Eighth Chamber),  
judgement of 16 June 2022, C-376/21  
Obshtina Razlog**



# Facts

- Tendering (open procedure) of several lots by a small Bulgarian town (estimated contract value of the relevant lot EUR 17.400)
- Only one bid was submitted for the lot. Bid price was twice the estimated price. Procedure was discontinued
- Subsequently, contract (contract value EUR 17.365) was awarded in a negotiated procedure without a prior publication to the bidder of the open procedure (sole participant)
- Reason for choosing that form of award: lack of a suitable tender for that lot in the prior open procedure



# Judgement



Issue: EU-law below threshold?!

- Bulgarian law faithfully transposed Directive 2014/24
- Aim: uniform interpretation of EU-procurement law



Issue: negotiated procedure

- tender must be considered not to be suitable where it is 'unacceptable'
- tenderers whose price exceeds the contracting authority's budget = unacceptable



# Implications for the practice

- Directive 2014/24 EU could be also relevant below the threshold
- Key points negotiated procedure:
  - high prices could lead to an unsuitable tender
  - if an award procedure is discontinued, direct negotiations can still be held with individual bidders
  - special characteristics of the contract are not required
  - prior open procedure and subsequent negotiated procedure without prior publication could form an indivisible whole

# Exclusion grounds

# Introduction and background

## **Art. 56 PPD: Tenderer**

- Not excluded and
- Selection criteria

## **Exclusion grounds**

- Art. 57(1),(2): Mandatory
- Art. 57(4): Discretionary

## **Art. 57(6): Self-cleaning**

## **Art. 57(7): Maximum period of exclusion**

## **Discretionary exclusion**

- (a) Non-compliance
- (c) Grave professional misconduct
- (d) Agreements distorting competition
- (g) deficiencies in performance of prior public contract
- Insolvency, conflict of interest, etc.

## **Art. 57(7): Maximum period of exclusion**

- Mandatory exclusion: 5 years from date of conviction by final judgment
- Discretionary exclusion: 3 years from date of 'relevant event'

**European Court of Justice (Fourth Chamber),  
judgement of 15 September 2022, C-416/21**

Landkreis Aichach-Friedberg vs.  
J. Sch. Omnibusunternehmen, K. Reisen GmbH  
Intervener: E. GmbH & Co. KG



# Facts

- Open procedure: public contract for public transport bus services
- J is trader operating under his company name
- K. Reisen is a bus transport company of which J is MD and sole shareholder
- J and K. Reisen submitted separate tenders each
- Tenders excluded for breach of competition rules
- Authority: tenderers are in a position to concert their respective tenders
- J and K. Reisen
  - Two tenders do not fall under Art. 101 TFEU because they are an economic unit
  - List of exclusion grounds is exhaustive



# Judgement

- Exclusion ground
  - Agreements with other economic operators
  - aimed at distorting competition
- ≠ Art. 101 TFEU
  - Not: agreements concluded ‘between undertakings’
  - Not: effect to trade in EU
- Objective: broad interpretation of exclusion ground
- Not limited to Art. 101 TFEU contracts
- List of exclusion grounds is exhaustive
- MS may adopt rules to ensure equal treatment
- If related tenderers, equal treatment requires autonomous and independent bids
- Sufficient if there are links between tenderers indicating influence on content of tenders
- A fortiori, if economic unit



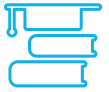
# Implications for the practice

- Broad interpretation of exclusion ground re agreements aimed at distorting competition
- German court accepted exclusion for non-compliance with principle of equal treatment
- Authority must assess whether bids of related tenderers were prepared autonomously and independently
- List of exclusion grounds is exhaustive
- No other exclusion grounds can be invented by MS
- Other exclusion grounds may only be applied if the criteria of one of the listed grounds are met

# Case

**European Court of Justice (Fourth Chamber),  
judgement of 24 October 2018, C-124/17  
Vossloh Laeis vs. Stadtwerke München**

**OLG Düsseldorf Vergabesenat,  
Decision of 22 June 2022, VII-Verg 36/21  
C.G. Haenel vs. Federal Republic of Germany  
Intervener: Heckler & Koch**



# Facts

## ECJ case

- Vossloh Laeis was imposed a fine for participating in a cartel up to 2011
- Decision of Federal Cartel Office in 2016
- Stadtwerke München black-listed Vossloh Laeis
- Vossloh Laeis argues
  - Max. exclusion period exceeded
  - 'relevant event' is end of participation in cartel

## OLG Düsseldorf case

- Procurement of assault rifle for Bundeswehr
- Bidder excluded because of violation of patent of other tenderer
- Exclusion based on legal opinion by patent lawyers
- Excluded bidder argues other tenderer to be excluded because of unlawful exports to Mexico in 2006/2009



# Judgement

## ECJ railway case

- Period of exclusion to be calculated from date of decision of authority
- Consistency with rules on time limit for mandatory grounds for exclusion
- Foreseeability and legal certainty
- Existence of relevant conduct may be regarded as proved only after decision

## OLG Düsseldorf rifle case

- Violation of patent is grave professional misconduct
- Excluded bidder had acted negligently so that exclusion was lawful
- Other tenderer not to be excluded re Mexico export
- Max. period for exclusion exceeded
- 'relevant event' is the (end of) misconduct



# Implications for the practice

- Patent or other IP infringements may cause exclusion
- Courts must assess in procurement proceedings
- Still unclear how max. period for exclusion re optional exclusion grounds to be calculated
  - Administrative decision or
  - (Mis-) Conduct
- High relevance in practice
- ECJ ruling
  - Consequence if there is no administrative decision?
  - Arguments not convincing
- OLG Düsseldorf
  - Often administrative decision after years
  - Exclusion period in most cases exceeded
- Compromise
  - 'can demonstrate' or
  - 'has sufficiently plausible indications'

# Award decision

# Introduction and background

## **Award decision**

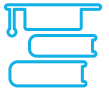
- Art. 56(1) PPD: Contracts shall be awarded on basis of criteria laid down in accordance with Art. 67 to 69
- Art. 56(1)(a): Compliance with requirements, conditions and criteria set out in contract notice or invitation to confirm interest and in procurement documents
- Art. 67: Contract award criteria
- Art. 68: Life-cycle costing
- Art. 69: Abnormally low tenders: CA shall require explanation on price or costs proposed in tender where tenders appear to be abnormally low

# Case

**European Court of Justice (Fourth Chamber),  
judgement of 12 September 2022, C-669/20**

Veridos vs.

Ministar na vatreshnite raboti na Republika Bulgaria,  
Mühlbauer ID Services – S&T



# Facts

- Restricted procedure for services relating to the supply and management of ID cards in Bulgaria
- Two bids were received
- The unsuccessful bidder – Veridos GmbH:
  - challenged the contract award
  - claimed that
    - the successful tender appeared abnormally low
    - the contracting authority had failed to verify whether or not that was in fact the case
- Rejected by national authority – non-applicability of a provision in national law



# Judgement

- The Contracting Authorities must assess whether any tenders appear to be abnormally low (also in cases when the CA does not intend to reject any tenders)
  - Comparison with other tenders cannot be the sole criterion – even when the criterion is stipulated in national law
- If that is not the case, there are no further obligations to verify that assessment or state reasons
- The assessment is subject to judicial review





# Implications for the practice – Contracting Authorities and Utilities

- To investigate all tenders that have the appearance of being abnormally low
- Irrespective of whether or not they are considering rejecting the tender
- Make a clear record of the reasons for rejecting or accepting the relevant tender
- EU institutions are obliged to state reasons for acceptance of a tender that did not appear to be abnormally low upon request – failure to do so may lead to annulment of the award decision





## Implications for the practice – Tenderers

- The judgement may encourage more challenges by disappointed tenderers
- During the preparation of the offer, tenderers should already ensure that the offer calculation is prepared on a secure and verifiable basis
- The aspects considered for the calculation of the tender price should be documented to be able to submit the declarations and verifications within the deadline



# We thank you for your attention!



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# EU Foreign Subsidies Regulation (“FSR”)

Specific rules applicable to public procurement procedures



# Your speakers today



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# Agenda

## 1. Overview

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## 2. Thresholds and exceptions

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## 3. Implications

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## 4. EU Commission's actions

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## 5. Content of the notification

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## 6. Open questions

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# Overview



## New

- Third country (outside EU) subsidies could be deemed to be **distorting competition** in public procurement law.
- Significant additional work for companies who want to obtain a public contract.



## Timing

- Procurement procedures initiated **after 12 July 2023** will be affected.
- Reporting obligations for companies **from 12 October 2023** onwards.

# Definitions of financial contribution and foreign subsidy from the FSR

## Foreign subsidy

- Financial contribution directly or indirectly provided by a third country (outside EU, Switzerland, Norway, United-Kingdom...); and
- 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.

## Financial contribution

Large interpretation including:

- 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;
- foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration; or
- provision of goods or services or purchase of goods or services.

# A financial contribution provided by who?

## Financial contribution provided by:

- the central government and public authorities at all other levels;
- a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy; or
- a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.



# Exceptions?

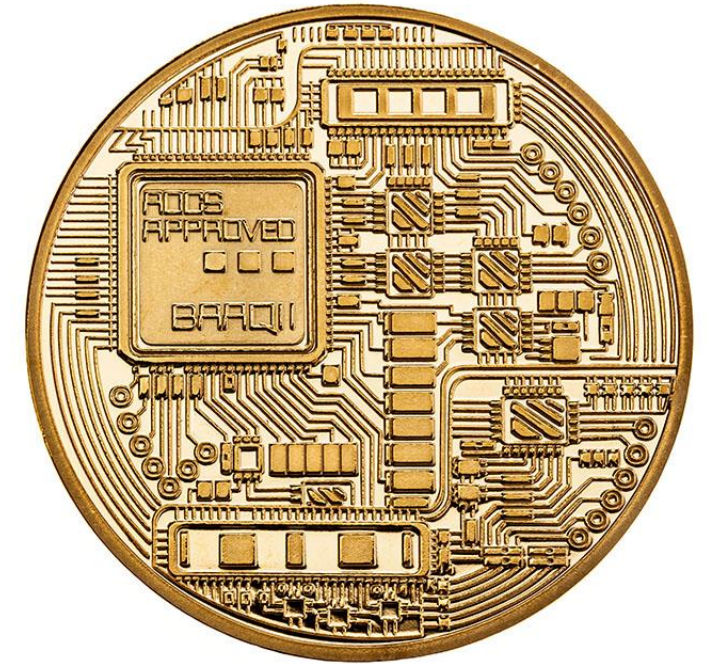
## Exclusion of:

- **contribution with the aim of making good the damage caused by natural disasters or exceptional occurrences**
- **procurement in the defence and security sector**
- **negotiated procedures without prior publication due to urgency**
- **if in a stand-alone position, the reporting obligation is directly to the EU Commission**

# Specific thresholds



- Public procurement value of > **EUR 250 million**
- Financial contributions of > **4 million per third country (aggregate amount)**
- Subsidies granted during the **three years** prior to the notification
- In the event of a lot formation a lot-related threshold of at least EUR 125 million net applies



# Specific thresholds – subcontractors/suppliers

- Economic operators and main suppliers and main subcontractors known at the time of the notification/declaration are taken into consideration together
- Main = > 20%
- Prime contractor is responsible to make the notification/declaration BUT is only responsible for the veracity of its own notification/declaration



# Implications for bidders (art. 29 FSR)

## Notification

“Where the conditions for the notification of financial contributions (cfr thresholds) are met, economic operators, shall notify the contracting authority or contracting entity of all foreign financial contributions > 4 Mio per third country received in the last three years”

## Declaration

- “***In all other cases***, economic operators shall list in a declaration all foreign financial contributions and confirm that they are not notifiable in accordance with Article 28(1), point (b)”.
- “*in all other cases*” → no threshold at all?
- See art. 5 of the implementation regulation:
  - Declaration only applies in procurement procedures above 250 Mio (and 125 Mio for the concerned lots if divided into lots)
  - If financial contribution < 4 Mio → declaration

# When shall the notification/declaration be made? (art. 29 FSR)

## Open procedure

Once

→ With the tender

## Two-phases procedure

2 times:

- Request to participate
- Updated version with tender

# Implications for contracting authorities

## Contracting authorities:

- shall ask for the notification/declaration
- **shall transfer the notification/declaration to the Commission** without delay
- if they suspect foreign subsidies, but no notification was made (only a declaration) → they shall inform the EU Commission
- shall continue the evaluation during the investigation of the EU Commission
- shall:
  - **not award the contract before** the Commission terminates its preliminary review (max. 30 working days) or
  - **not award the contract to the undertaking that made a notification** before the Commission terminates its in-depth investigation (max. 130 working days)

# What if the notification/declaration is missing?



The contracting authority shall request to the tenderer to submit the document within 10 working days



If still missing → tender is irregular → rejection

# EU Commission's investigation

## The Commission can:

- Ask for additional info within 10 working days if the **notification** is incomplete → rejection of tender if information non provided
- Ask for a notification even if the thresholds are not met if it has suspicion of foreign subsidies
- Start a preliminary review
- As the case may be, initiate an in-depth review



# Decision of the EU Commission

## (After an in-depth investigation) the Commission can:

- Where the Commission finds that an economic operator benefits from a foreign subsidy distorting the internal market →
  - Ask for commitments that fully and effectively remove the distortion (which shall not result in the modification of the initial tender) → if ok, contract can be awarded to that tenderer
- Where the undertaking does not offer sufficient/ appropriate commitments →
  - Adopt a decision prohibiting the award of the contract to that undertaking → the contracting authority shall reject the tender and award to the next best tenderer
- Adopt a “no objection decision”:
  - when the distortion is outweighed by positive effects (on the development of the economic activity)
  - when the preliminary assessment is not confirmed
- Let the time limits it is submitted to elapse...

# Decision of the EU Commission

## Possibility to impose fines to the economic operator:

- Max 1 % of aggregate turnover in the preceding financial year, where the economic operator intentionally or negligently supplied incorrect or misleading information in a notification or declaration
- Max 10 % of the aggregate turnover in the preceding financial year where those economic operator, intentionally or negligently:
  - failed to notify foreign financial contributions in accordance with Article 29 during the public procurement procedure;
  - Arranged financial operations or contracts in order to circumvent or attempt to circumvent the notification requirements



# Content of the notification according to Annex II of the draft implementing regulation (I)

## Section 1

- Summary description of the procurement procedure
- Link to the EU notice or other platforms
- Use of the European Single Procurement Document (ESPD) allowed.

## Section 2

- Information to the reporting parties.

## Section 3

- Information on third-country financial contributions, including:
  - Form, issuer of contribution, purpose and economic reasons for granting,
  - Are there any conditions attached to the contribution or its use?
  - Category within the meaning of Art. 5 a) to c) and e) FSR
  - Does or will the contribution give the applicant an advantage? If not, please explain why not
  - Is pursuant to Art. 3 FSR the contribution restricted to certain companies or sectors?
  - Non-economic activities?
  - Contributions to cover operating costs?

## Section 4

- Justify why the advantage is not illegal.

# Content of the notification according to Annex II of the draft implementing regulation (II)

## Section 5

- Possible positive effects.

## Section 6

- Evidence documentation.

## Section 7

- Explanation in the absence of subsidies distorting competition (if applicable).

## Section 8

- Certificate.

N.B. for declarations: the same form shall be used but the tenderer shall only fill sections 1, 2, 7, 8.

# Open questions

## What are the rights of other tenderers?

- Other legal or natural persons may report to the Commission any information relating to foreign subsidies distorting the internal market and may communicate any suspicions that a false declaration has possibly been made.

## Is there any legal protection?

- Possibility to submit observations to the Commission and get access to the Commission's file
- Against the decision of a contracting authority → complaint before the competent national Court
- The national Court must refer questions of interpretation concerning the FSR to the CJEU for a preliminary ruling (Art. 267 TFEU)
- Action for annulment has priority under EU law:
  - N.B.: if an action for annulment against a decision of the Commission is admissible and the undertaking in question has not brought an action for annulment within the applicable 2-months' time period pursuant to Art. 263(6) TFEU, the national Court may then not refer a question relating to the validity of the Commission's decision to the CJEU upon the request of the undertaking in question (Recital 56 FSR).

# Open questions: consequences?

## What consequences do these obligations have for companies?

- Large-scale reporting and monitoring required in advance of participating in a procurement procedure that is above the threshold.
- Notification & declaration (!)

## What consequences do these obligations have for contracting authorities?

- Obligation to ask for these information
- Obligation to report to the EU Commission
- Obligation to wait for the decision of the Commission before award
- Possibly: reject a tender as irregular due to foreign subsidies

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