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Belgian Council of State Suspends EUR 750 Million Casino Concession Award on Foreign Subsidies Regulation Grounds: A First for Belgian Public Tendering Litigation

On 31 August 2026, the Belgian Council of State suspended the decision by the city of Brussels of 17 July 2026 to award the concession to operate the Brussels casino to E.C.K. SA (***ECK***), a member of the Napoleon Games group. The judgment, given in extreme urgency proceedings, turns in significant part on the EU's Foreign Subsidies Regulation (***FSR***). This is the first judgment in Belgium in which non-compliance with FSR procedures has led to the successful challenge of a public procurement or concession award.

Background

On 19 January 2026, the city of Brussels adopted the terms of a services concession for the operation of the Brussels casino for a 15-year term, with an estimated value of EUR 750 million. The city of Brussels did not publish the estimated value of the award, and did not mention the notification obligation under Article 29 of the FSR in the Official Journal or national notices. Only Casinos Austria filed a declaration under Article 29(1) of the FSR; the other tenderers, including ECK, did not. On 17 July 2026, the city of Brussels awarded the concession to ECK, ranking it ahead of the incumbent concessionaire, Casinos Austria International Belgium (***Casinos Austria***), which then sought a suspension of the award decision before the Council of State.

FSR Plea

Casinos Austria argued that the city of Brussels had awarded the concession without verifying whether the successful tenderer had complied with its notification or declaration obligations under the FSR, and that its tender was therefore irregular.

The Council of State agreed. Reading Articles 28(1) and 29(1) of the FSR together, it held that once the estimated value of a public contract or concession reaches EUR 250 million, every participating operator must either notify its foreign financial contributions to the contracting authority or submit a declaration listing all contributions received and confirming that they are not notifiable. That obligation arises by operation of law and does not depend on demonstrating the existence, amount, or distortive effect of any foreign financial contribution. According to the Council of State it was therefore irrelevant that Casinos Austria had not shown that ECK had received any such contribution.

The Council of State rejected the argument of the city of Brussels that the FSR imposes obligations only on economic operators, and not on the contracting authority. Article 29(2) of the FSR requires the contracting authority to transmit notifications and declarations to the European Commission (the ***Commission***) without delay, and Article 29(3) of the FSR obliges it, after giving the operator ten working days to produce the missing document, to declare the tender unaccompanied by a notification or declaration as irregular, and therefore reject it and inform the Commission.

Article 29(3) of the FSR leaves the contracting authority no discretion: once the ten-working-day cure period has expired without the missing document being produced, the tender must be declared irregular and rejected. A concession or public contract may therefore not be awarded to an operator whose tender lacks the required notification or declaration, irrespective of how that tender scores on the substantive award criteria.

The consequence is stark: an economic operator failing to submit a notification or declaration under the FSR is not merely non-compliant with a formality, its tender is irregular by operation of law.

The Council of State also rejected the argument that compliance could be deferred until conclusion of the concession. Reading Articles 29(3), 29(4) and 32(1) of the FSR together, the Council of State held that a contracting authority must ensure FSR compliance before adopting the award decision. This is because Article 32(1) of the FSR allows every other step of the tendering procedure to continue during the Commission's review, but not the award itself. Notably, the city of Brussels had not even availed itself of the discretion existing under Article 29(3) of the FSR to grant the tenderers a ten-working-day cure period to produce the missing documents. Instead, it had proceeded directly to the award without engaging with the FSR at all. That wholesale omission, and in particular the non-compliance with Articles 28 and 29 of the FSR, affected the regularity of both the tendering procedure and the award decision. The plea was held to be well founded, and the Council of State ordered immediate suspension.

National Courts, Not the Commission, Police FSR Compliance of the Tendering Procedure

The judgment is a useful reminder of how the FSR's enforcement architecture interacts with national public procurement remedies. The FSR gives the Commission exclusive competence to assess, once notifications or declarations are transmitted, whether foreign financial contributions made it possible to submit an unduly advantageous tender or distorted the tendering procedure. The Commission is then in a position to exercise its powers of preliminary review, investigation and decision.

By contrast, the Commission has no power under the FSR to compel a national contracting authority to rescind or reopen an award made in breach of Articles 28 and 29 of the FSR. It is national law, and national courts, that provide the remedy: an unsuccessful tenderer can challenge the regularity of the award before the competent national court, as Casinos Austria did here. The Council of State confirmed this division of competences: it examined whether the city of Brussels had complied with Articles 28 and 29 of the FSR as a matter of the regularity of the award decision, noting that it was not for it to rule on the regularity of individual tenders. Practically, a competitor's ability to invoke an FSR breach depends on timely recourse to national judicial review, since failing to challenge an irregular award within the applicable time limits may leave no further remedy.

Why This Matters for Private Entities Participating in Tender Procedures

The judgment carries a clear practical lesson. The obligation to notify or declare foreign financial contributions under Articles 28 and 29 of the FSR arises automatically once the EUR 250 million threshold is met, regardless of whether the contracting authority raises the issue in the tender documents.

For private businesses, this has a double implication. First, tenderers cannot assume that silence from the contracting authority means that the FSR does not apply: a failure to file a notification or declaration risks having their tender declared irregular and rejected, even at a late stage. Second, competitors have a direct interest in monitoring whether other tenderers and the contracting authority have complied with their FSR obligations. A missing notification or declaration, if they become aware of it, provides them a ground on which to challenge an award.

Businesses should therefore build FSR compliance into their tender strategy and exercise due diligence on public contracts and concessions above the EUR 250 million threshold, rather than relying on the contracting authority to raise the issue.

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