AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Foreign Subsidies Regulation Implementation

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

On 12 October 2023, the reporting obligations of the Foreign Subsidies Regulation (FSR) will enter into application. As businesses begin to navigate these complex new obligations, it is crucial that the European Commission (Commission) increases legal certainty by publishing early guidelines and organising stakeholder workshops to clarify key concepts and share best practices. Additionally, in order to ensure a level playing field, the Commission should seek to align the notification exemptions in the FSR with the comprehensive notification exemptions in the EU's State aid regime.

Introduction

The American Chamber of Commerce to the EU (AmCham EU) represents American businesses committed to and invested in Europe, and strives to deepen the transatlantic partnership by facilitating business relations between the EU and the US. Given our members' sizeable operational footprint in Europe, we have a stake in achieving a balanced and proportionate implementation of the FSR. Therefore, we appreciate the Commission's continued willingness to engage with industry throughout the implementation process.

The Implementing Regulation (IR) published in July, which laid out key procedural rules for the application of the FSR, was an important step towards addressing stakeholder feedback and tackling some of the FSR's major complexities. As the FSR's provisions enter into application, the Commission will have additional opportunities to tailor the Regulation in accordance with its enforcement experience. The need for this practical flexibility is recognised in the FSR itself, which delegates to the Commission the ability to adopt amendments, implementation guidelines and simplified procedures.

Therefore, as businesses prepare to comply with the FSR's reporting obligations by 12 October 2023, this paper presents a few key suggestions that would help deliver the FSR's objectives of tackling distortive foreign subsidies, ensuring a level playing field, and minimising administrative burdens for businesses investing in Europe.

Our contribution focuses on two key areas where further refinement would be welcome – conceptual clarity and alignment with EU State aid exemptions – and dovetails with the Commission's Communication on long-term competitiveness, which sets the objective of reducing reporting requirements in the EU by 25%.

Suggestions for a successful implementation

Clarifying key concepts

The FSR introduces a number of novel concepts that businesses will be required to navigate for the first time. The concept of 'unduly advantageous tender', for example, is a departure from the terms typically used in EU public procurement rules, and has not been clarified in the IR. Similarly, the scope

of key concepts such as 'subsidiary companies without commercial autonomy' and 'holding companies'[1], as well as of the term 'financial services'[2] used in the IR, is yet to be confirmed.

Moreover, although the IR clarified certain aspects of the FSR's pre-notification system, it is not clear how this system applies in multi-stage procurement procedures. As outlined in article 29 of the FSR, 'in a multi-stage procedure, the notification or declaration shall be submitted twice, first with the request to participate and then as an updated notification or updated declaration with the submitted tender or final tender'. This means that a prospective bidder will need to complete pre-notification discussions before responding to a contracting authority's initial request for participation (RFP). However, given that a bidder's request to participate must typically be communicated within 30 days of the publication of the RFP by the contracting authority, it is unclear how the Commission will ensure that businesses have sufficient time to benefit from pre-notification contacts in multi-stage procurement procedures.

We also ask the Commission to provide further methodological guidance on the calculations required to assess whether a financial contribution (FC) exceeds the relevant thresholds. In particular, we would welcome guidance on:

- How to quantify the value of tax benefits which are themselves taxable. Should the gross or the net amount of the tax benefit be taken into account?
- The calculation of FCs paid in conditional instalments over extended periods. For example, businesses can receive incentives for purposes such as job development and training, which are (tentatively) approved and subsequently paid in instalments over a period of up to 5-10 years, subject to certain criteria being fulfilled for each payment. Does the EUR 1 million threshold in the IR apply to the total sum or the individual instalments? Our understanding is that FCs granted under such type of agreement should be considered on an individual basis, and each one should be subject to notification only if it is of an amount equal to or exceeding EUR 1 million.
- How to quantify the value of the granting of special or exclusive rights where there is no remuneration.

In addition to these conceptual and methodological issues, there is also a lack of guidance regarding some important enforcement mechanisms in the FSR. This applies particularly to the balancing test in article 6 of the Regulation, which allows the Commission to weigh the 'negative effects of a foreign subsidy' against its 'positive effects on the development of the relevant subsidised economic activity on the internal market'. This trade-off is reflected in the notification forms, which allow notifying parties to identify the 'possible positive effects of […] foreign subsidies'. Our understanding is that notifying parties may invoke positive effects outside the EU, as suggested by the reference to 'any other positive effects' in Annex 1 Section 7 and Annex 2 Section 5 of the IR. Since the Commission will develop guidelines to facilitate this assessment, these guidelines should also capture positive effects outside the EU. This would be in line with the FSR's commitment to avoiding 'unjustified discrimination' in the application of the balancing test (Recital 21).

[1] Our understanding is that all entities linked directly from the bidding company up to the ultimate holding company/parent would be covered, but not other subsidiaries (i.e., sister companies to the bidding company). Similarly, our understanding is that, from the bidding company down, all direct subsidiaries that lack commercial autonomy would be in scope, but second level subsidiaries would not be covered.

[2] Point 6(c) of Table 1 in Annex 1 and Annex 2 provides an exemption for the 'provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business'.

Similarly, the Commission has not offered formal guidance on how and when it intends to use the *ex officio* tool. Without guidance on the type and granularity of information that could be in scope of an *ex officio* investigation, businesses are unable to tailor their internal tracking systems accordingly. This creates an incentive to over-track data, raising the costs of data collection. In order to limit these costs, the Commission should clarify that, in the context of notifiable concentrations and public procurement procedures, the *ex officio* tool will only be used when there are strong suspicions that the notification obligations are being circumvented, or to request additional information regarding a specific suspected distortive subsidy disclosed in a notification.

In sum, the FSR's conceptual and procedural innovations create compliance uncertainties that risk limiting the benefits of the simplified procedures introduced in the IR. These uncertainties could be mitigated with the publication of comprehensive implementation guidelines based on enforcement practice and industry feedback. Therefore, we ask the Commission to publish these guidelines as soon as possible after the initial implementation phase. In addition, the organisation of Commission-led workshops with industry and other stakeholders would also provide additional avenues for procedural clarifications, information exchange and the sharing of best practices.

Levelling the playing field

As outlined above, the IR published in July was a welcome step towards reducing the administrative burdens stemming from the FSR. Among other positive changes, the IR exempted the notification of several categories of ordinary FCs that offer no substantive value to the Commission's assessment of the distortive effects of foreign subsidies. Despite these meaningful improvements, however, the FSR still imposes high data collection costs on notifying parties. Therefore, once the Commission gains sufficient experience in implementing the FSR, it should assess how to further narrow the categories of FCs that are considered necessary for its distortion analyses. In this regard, a comprehensive framework of ex ante notification exemptions – building on existing exemptions and practice with the ad hoc waiver system – would be especially welcome.

In particular, the Commission should exempt the notification of any categories of FCs that would not be notifiable if granted by an EU Member State. The EU's General Block Exemption Regulation (GBER), for example, identifies various categories of aid granted by Member States that are presumed to be non-distortive, exempting them from the EU's *ex ante* State aid notification and authorisation regime. This includes incentives for R&D investment, workplace training, audiovisual production, energy efficiency, renewable energy production, reverse logistics and natural disaster mitigation. Similarly, tax reliefs, tax incentives and tax amortisations of general application would not be deemed selective and would therefore not require approval under the EU's State aid regime[3]. Removing these FCs from the scope of the FSR's notification obligations would not only reduce administrative burdens for businesses, but it would also ensure equal treatment of domestic and foreign incentive schemes. This dovetails with Recital 9 of the FSR, which stipulates that the FSR 'should be applied and interpreted in light of the relevant Union legislation, including that relating to State aid'. These exemptions would be without prejudice to the Commission's ability to request further information where necessary for its investigations.

[3] The IR's exemptions cover general deferrals of payment of taxes, tax amnesties and tax holidays, but is silent on other forms of tax reliefs, incentives and amortisations, even if of general application. As these terms are often used interchangeably, we ask the Commission to clarify that all forms of tax relief that are of general application will not be notifiable.

As referenced above, the Commission's decisional practice with the waiver system can help lay the groundwork for a comprehensive framework of ex ante notification exemptions. However, the ad hoc nature of the waiver system will also require time-consuming discussions between notifying parties and the Commission. In order to streamline these procedures, the Commission should provide early guidance identifying information that is deemed a priori to be suitable for waiver requests. In particular, we would welcome:

- **Guidance on scope:** The Commission should indicate whether companies can expect to be granted waivers from the requirement to provide information regarding: (i) subsidiaries or portfolio companies which have no connection with the relevant transaction; (ii) business divisions without any links to the sector/products in which the target is active; and (iii) FCs that are unlikely to be relevant to the Commission's assessment (eg ordinary course transactions).
- **Clarity on entities to be considered:** Following from the previous point, and consistent with the approach applied in State aid matters, the Commission should not apply the presumption that an FC provided to an entity which is part of the group involved in a notifiable transaction is automatically relevant. This is particularly so where an FC has no links with a notifiable transaction and is thus manifestly unlikely to have a transaction-specific distortive effect. Therefore, following the precedent set by the exemption for investment funds in the IR, the Commission should not require information where the notifying party(ies) can present high-level evidence on the functional, economic and organic autonomy of the entities concerned.
- **Extended application of initial waiver:** The Commission should consider a procedure whereby an initial waiver, granted on the basis of information provided in the context of a notifiable transaction, remains valid for a certain period of time thereafter. For subsequent notifiable transactions falling within that period of time, only limited supplementary information would be requested, covering for example FCs directly linked to the transaction or that fall into the categories of article 5(1) of the FSR.

As a further step towards ensuring a level playing field, the Commission should closely monitor the impact of the FSR's review and investigation timelines on the EU's procurement markets. If the FSR consistently causes delays in procurement procedures – in the case of in-depth investigations, these delays could be as long as 130 days – contracting authorities could have an incentive to discriminate against bidders that have a significant operational presence outside the EU. In order to mitigate this risk and preserve the competitiveness of EU procurement procedures, the Commission should consider whether it is possible to shorten the timelines for preliminary review and in-depth investigations, in accordance with the powers delegated to it under article 49 of the FSR.

Conclusion

In sum, the FSR will create new challenges for businesses, enforcers and contracting authorities alike. Given our members' sizeable operational footprint in Europe, we hope to continue playing a constructive role in the implementation process. This contribution is offered in that spirit, identifying a few key areas where the Commission could meaningfully reduce businesses' administrative burdens without undermining the FSR's objective of tackling the distortive effects of foreign subsidies. Offering early guidance on key concepts and enforcement mechanisms, creating additional avenues for stakeholder engagement, and seeking further alignment with the exemptions applied in the EU's State aid practice, would jointly help ensure an effective and proportionate application of the FSR.