AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Draft Implementing Regulation for the Foreign Subsidies Regulation

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American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive Summary

The Draft Implementing Regulation is a positive step towards clarifying the content, scope, and procedural aspects of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market – the Foreign Subsidies Regulation (**FSR**). As American businesses invested in Europe, we share our view on the Draft Implementing Regulation and its two Annexes (**Draft FSR IR**) to ensure that the final text provides for a balanced and proportionate application of the FSR. The main issues include:

1. **Scope of reporting obligations:** While the Draft FSR IR narrows to some extent the reporting obligations stemming from the FSR, the administrative burdens imposed on businesses are still significant. Exempting the disclosure of financial contributions which are clearly non-selective or market-based would reduce the compliance costs for businesses and ensure that the Commission can focus its resources on contributions most likely to distort the internal market, as outlined in article 5 of the FSR.
2. **Avoiding risks and unintended consequences:** The Commission should balance the effective implementation of the FSR against the need to limit risks for businesses, particularly in cases where compliance with the FSR is beyond their direct control . Therefore, the Commission should: (i) exempt the disclosure of classified information in line with existing international agreements; (ii) clarify the attributability of financial contributions to third countries; (iii) amend existing provisions requiring businesses to report information beyond their own participation in an M&A or public procurement procedure, and which is therefore not directly available to them; and (iv) establish an alternative mechanism whereby suppliers and subcontractors directly report commercially sensitive information to the Commission.
3. **Concentrations:** The Commission should limit the reporting obligation to those categories of foreign contributions that are most likely to distort the internal market, as listed in article 5.1 of the FSR. This would harmonise obligations in both Annexes and allow the Commission to focus on the most relevant financial contributions. In addition, in an acquisition, the reporting obligations relating to the financial contributions received by a target should be limited to those granted to the target because of the acquisition in question.
4. **Public procurement:** The Draft FSR **I**R fails to clearly define key concepts/mechanisms in the FSR's procurement provisions, creating legal uncertainty for businesses. The Commission should clarify that: (i) reporting requirements in public procurement procedures only apply to contracts valued at or above €250M or €125M per lot; and (ii) a single notification form will be required where financial contributions exceed the *de minimis* thresholds in some countries but not in others. We also welcome clarity regarding: (i) the concept of 'unduly advantageous offer', which lacks case-law precedents; (ii) the operationalisation of the pre-notification period in procurement procedures; and (iii) the concepts of 'economic share' and '[subsidiaries] without commercial autonomy'.
5. **Ex officio review:** The Commission should provide further details on the likely parameters of its ex officio interventions. Given the broad scope of the Commission's ex officio powers, companies are unable to plan for compliance with future requests, requiring them to pre-emptively track a disproportionate volume of information regarding financial contributions on the theoretical possibility that this information will be required.
6. **Waivers:** Businesses need additional guidance on the conditions under which the Commission will be likely to grant waivers. Without this clarity, the waiver system could paradoxically increase legal uncertainty and exacerbate administrative burdens.
7. **Procedural transparency:** Further clarifications regarding submission timelines and file access procedures are necessary to safeguard businesses' rights of defence.

Introduction

The American Chamber of Commerce to the EU (**'AmCham EU'**) strives to facilitate business relations between the US and the EU. We represent American companies committed to and invested in Europe, advocating for their fair treatment across the EU single market. We therefore have a stake in achieving a balanced and proportionate implementation of the FSR, and welcome the opportunity to provide feedback on the European Commission's ('**Commission**') Draft FSR IR.

While AmCham EU agrees with the general aim of the FSR, its adoption poses a number of challenges for EU and non-EU companies alike, in particular with regard to the broad notion of 'financial contribution' in article 3(2) of the FSR and the unnecessarily wide scope of the reporting (notification and declaration) obligations. The Draft FSR IR contains some valuable guidance on the content, scope and procedural aspects of notifications and declarations required under the FSR in respect of public procurement procedures and concentrations, as well as on the rights of defence of companies under investigation. However, it only addresses to a very limited extent the concerns AmCham EU previously raised in relation to the large administrative burdens imposed on companies trying to comply with the FSR. Further work is required to make sure that the final FSR IR provides clarity and reduces the burden related to the implementation of the FSR without diluting the EU's desired result.

General remarks

Exclude from reporting obligations certain types of financial contributions

The Commission should limit the scope of reporting obligations by exempting financial contributions that clearly do not confer a benefit or are not selective. A distinction should be made between selective contributions, on the one hand, and contributions that apply equally to all economic operators or transactions that are clearly market-based and should not be considered problematic, on the other hand (eg capital investments or sales and purchases of goods and services at market terms). This approach would follow from Table 1 of Annex 1 and Annex 2, which underlines the importance the Commission gives to the fact that a financial contribution was the result of a tender procedure. Financial contributions clearly falling into the non-selective or market-based categories should simply be removed from the reporting obligations altogether. This would significantly reduce the compliance burden while also allowing the Commission to focus on financial contributions most likely to be distortive.

Concretely, the following types of transactions should in our view be exempted from the reporting obligations (even if they may be included in determining whether the notification obligations are met):

1. Sale and purchase of goods and provision of services at market terms

Exemption from reporting obligations

Under the Draft FSR IR, any sale to or purchase from third-country governments and public entities (eg a contract for the supply of pens), even if carried out on market terms, would need to be notified when exceeding the *de minimis* thresholds (and declared in the public procurement form even when

it does not exceed it).[1] However, such sale contracts are typically awarded through competitive tenders, presupposing that the contract value covers costs and reasonable profits for performing the contract, and in many countries are already subject to public scrutiny and transparency requirements. In addition, the routine supply of basic utilities such as water and electricity by publicly-owned entities to corporate premises, even if on market terms, would in principle need to be reported under the current Draft FSR IR. Reporting financial contributions relating to the provision or purchase of goods or services carried out at market terms creates a substantial administrative burden while offering little or no value for the Commission's assessment of foreign subsidies, as transactions of this nature do not confer a benefit and therefore do not involve a foreign subsidy. The sale and purchase of goods or services awarded pursuant to competitive, transparent and non-discriminatory public tenders – or otherwise made at market terms – should be exempted from the reporting obligations under the FSR.

2. Non-selective tax measures and other measures of general application

Statutory tax measures that are generally available should also be exempted from the reporting obligations. Based on a broad interpretation of the definition of a financial contribution, a tax measure that is in no way selective may still have to be notified (eg tax exemptions issued by third countries as part of COVID-19 relief packages that were generally available to all companies). While the Commission should provide further guidance on the scope of the concept of 'financial contribution' when referring to fiscal measures, it should also clarify that non-selective tax measures – for example, statutory tax credits and provisions generally available to all companies – are excluded from the reporting obligations. This exclusion should also extend to general non-tax measures such as social security contributions or wage incentives granted under COVID-19 relief packages, which by design do not provide a selective benefit and, hence, cannot be considered foreign subsidies in any case.

3. Specific forms of public support exempted based on their objectives

Certain forms of investment should be excluded from the reporting obligations on the basis of their objectives. For example, by way of analogy, Regulation No 615/2014 (**GBER**)[2] allows Member States to grant certain categories of aid (eg environmental or RDI aid, aid having a social character, or aid to make good the damage caused by certain natural disasters) on the basis of pre-defined criteria without notifying the Commission. The GBER criteria reflect the compatibility requirements provided for in article 107 of the TFEU and codify consolidated case practice of non-distortive aid categories. The expansion of the GBER's scope and relevant aid thresholds in recent years has enabled the Commission to focus on the most distortive aid, while allowing Member States to save time, reduce administrative burdens, and promote models of aid that are 'well-designed, targeted at identified market failures and objectives of common interest, and least distortive'.[3] The same approach could be adopted in the Draft FSR IR to categories of financial contributions that are not problematic. This would be in line with the Commission's obligation to interpret the FSR in light of EU State aid legislation

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1 We note, for example, that the WTO Agreement on Government Procurement requires that contracts are awarded on market terms. See, *e.g.*, Article XV (*Treatment of Tenders and Awarding of Contracts*), paragraph 5: "…to the supplier that the [procuring] entity has determined to be capable of fulfilling the terms of the contract and that, based on solely on the evaluation criteria specified in the notices and tender documentation, has submitted: (a) the most advantageous tender; or (a) where price is the sole criterion, the lowest price".

2 See Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

3 Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines, 2014/C 198/02, first paragraph.

(Recital 9 to the FSR) and would prevent discrimination in relation to categories of financial contributions that would be exempted under the EU State Aid framework if granted by a Member State.

Limit reporting obligations for unproblematic financial contributions

If financial contributions that do not confer a benefit are not exempted from the reporting obligations in the FSR, the Commission should at least limit such obligations for unproblematic financial contributions (eg to the type of financial contribution and an estimated value), without the need to provide precise/detailed amounts. As noted above, unproblematic financial contributions would include: (i) the sale and purchase of goods and provision of services (including utilities) to/from government bodies on market terms; (ii) non-selective tax measures and other measures of general application (eg tax breaks, social security contributions, wage incentives or similar) applied to multiple sectors and industries which can therefore effectively be assumed not to amount to a targeted subsidy; and (iii) specific forms of public support exempted based on their objectives; as well as (iv) financial contributions within the meaning of non-distortive subsidies per article 4 paragraphs 2 to 4 of the FSR (ie subsidies below €4 million in a three year period; *de minimis* aid; aid for exceptional occurrences).

In addition, the Commission should (i) limit the reporting obligations for financial contributions that lack monetary qualification (eg free land for construction projects, etc.), for example, to only briefly identifying the type of financial contribution and providing a best estimate value; and (ii) limit the requirement to report financial contributions received by affiliates, for instance to those effectively involved in the contemplated transaction. Both of these limitations would reduce the compliance burden on notifying parties without undermining the FSR's objective of tackling distortive foreign subsidies.

Make reporting obligations country- and/or sector-specific

Country-specific reporting obligations

The reporting obligations under the FSR should be limited to third countries in which companies have their main operations (eg the countries where companies have the bulk of their operations based on revenue or assets, etc.) and/or the country from which the majority of their capital originates, and/or the country where they have their headquarters. The introduction of country-specific thresholds that go beyond the €4 million aggregate threshold would be consistent with the objectives of the FSR, as it would target third countries' attempts to subsidise the economic activities of particular companies that are considered strategic for their economy. It seems reasonable to assume that third countries would not have an incentive to subsidise companies that do not have substantial operations in their countries.[4]

Sector-specific reporting obligations

Limiting the reporting of financial contributions to group companies in the same sector of the concentration or the public procurement in question would also tend to reduce the administrative

[4] As indicated in the FSR Impact Assessment, subsidies from third-countries are likely to be focused on specific firms and sectors (see Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final, p. 11, second paragraph).

burden of compliance while still maintaining the objective of the FSR. The reporting obligations should apply only to third-country financial contributions in impacted or related product markets that are relevant for assessing those countries' attempts to subsidise a given activity. This would significantly reduce the compliance burden for undertakings operating in multiple sectors.

Exclude the reporting of classified information and confidential contracts in the fields of security and defence

Article 44(9) of the FSR provides that the EU shall not take any action or conduct any investigation if it would be contrary to its obligations under international agreements. While the EU has signed agreements with third countries that include provisions on the mutual respect for, non-interference with, and non-disclosure of classified information,[5] those agreements are concluded between the EU and third countries and do not confer direct rights on natural or legal persons. As such, it is not clear that companies can rely on those agreements to avoid disclosing classified information, or whether they need to disclose information about confidential contracts with non-EU governments to the Commission as part of FSR compliance. Requiring companies to disclose classified information, including in relation to the existence of confidential contracts in the fields of security and defence, would put the Commission at risk of breaching its obligations under international agreements, and therefore is contrary to the intention of article 44(9) of the FSR.

It is also important to note that those international agreements are intended to ensure the fluid sharing of classified information, enhancing cooperation for the benefit of the citizens whose countries are party to the agreements. They are not meant to compel the sharing of information or to justify demands by one country on information that another country might deem to be classified. Each country will have good reasons to maintain the secrecy of certain terms or specifics of particular contracts, which the Commission should respect under the principle of 'mutual respect of state secrets'. The FSR should not supersede these prior agreements that have proven to be successful and critical to achieve their intended goals.

Therefore, in line with these international agreements, and in order to protect the status of classified information, companies concerned should be exempted from the obligations both to identify and report financial contributions received in the framework of public contracts in the fields of security and defence. Given that there may be severe penalties, including criminal prosecution, for the disclosure of anything related to these types of contracts, it is critical that companies with access to classified information protected by such international agreements be exempted from the reporting obligations. There may be a need to limit this exemption to strictly defined international instruments so as to prevent countries from using security and defence contracts to circumvent their obligations under the FSR.

Attributability to public or private bodies

Companies need further guidance on how to assess the attributability to a third country of financial contributions granted by public or private entities. They will need to set up new systems in order to collect the information required in the FSR's notification forms. Setting up those systems will take time and companies need detailed inputs at the beginning of the process, as it may be difficult to reprogram

[5] See Agreements on the security of classified information between the European Union and various third countries, available at https://eur-lex.europa.eu/EN/legal-content/summary/agreements-on-the-security-of-classified-information.html.

such systems once they are in place. This is why it is critical that the FSR IR clarifies this important issue.

The relevant information required to make this assessment may also not be readily available in a number of situations, and that the granting bodies may not be willing to provide more information. The absence of relevant information and possible inability to collect it should be considered for the applicable period prior to the FSR's entry into force.

Notification of M&A deals

Offer a simplified notification procedure for M&A deals

The Commission should consider introducing a simplified notification procedure for M&A transactions involving unproblematic financial contributions with little or no EU nexus, similar to the Short Form CO procedure provided for in the EU Merger Regulation. At a minimum, the Commission should ensure that M&A transactions benefitting from the Short Form CO procedure also benefit from any such simplified FSR regime. In other words, for concentrations involving financial contributions that are less likely to give rise to distortions in the internal market, a short-form notification requiring more limited disclosure should be introduced. This proposal would replace the need for extensive, case-by-case waiver requests that would otherwise be required at the pre-notification stage, which would further increase the administrative burden on notifying parties.

The Commission should introduce a simplified notification procedure well in advance of the notification obligation taking effect in October 2023, so as to give sufficient time to clarify the categories of financial contributions that will qualify for simplified notification. Establishing a simplified notification process prior to this date will serve to ease the administrative burden on notifying parties and also enable the Commission to focus its resources on M&A transactions involving financial contributions that are most likely to distort competition in the internal market.

Information on financial contributions in reportable concentrations

The scope of the information that companies will need to submit when notifying reportable concentrations is disproportionate to the objectives of the FSR and imposes a burden on notifying parties that goes beyond the requirements of article 3 of the FSR. In particular, the M&A notification form (Annex 1) appears to require significant information on (i) financial contributions that exceed the FSR *de minimis* thresholds; (ii) the financing of transactions well beyond what is required in merger filings; and (iii) the bidding process, including sensitive information to which the acquirer will not have access (eg a detailed description of other bidders, other bidder's contact details, and letters of intent/non-binding offers etc.).

Section 5 of Annex 1 provides only for a minimal reduction in the compliance burden that companies will face in their reporting obligations on financial contributions, in particular by: (i) exempting financial contributions smaller than €200,000; and (ii) waiving the reporting obligation if the aggregate amount of financial contributions received per third country is less than €4 million per year. While this reduction in the amount of information to be reported is welcome, the thresholds remain very low.

With this in mind, in addition to the recommendations we made in Section A above the Commission should limit the reporting exercise in Section 5.1 of Annex 1 to those categories of foreign contributions that are most likely to distort the internal market, as listed in article 5.1 (a) to (d) of the

FSR. This would be in line with the approach adopted in Section 3.1 of Annex 2 (Public Procurement). The present proposals are in any event without prejudice to the Commission's power to request additional information from the undertakings concerned if it considers that the notification form is incomplete or that there are risks concerning the accumulation of financial contributions.

Regarding the financial contributions received by the target in case of an acquisition, the Commission should limit the reporting obligation to those contributions that are granted to the target because of the acquisition in question. Any other financial contribution that the target may have received in the three years prior to the acquisition cannot have put the final acquirer in a competitively advantageous position vis-à-vis any other company bidding to acquire the target.

Information on deal financing and the bidding process

Sections 3 and 6 of Annex 1 also require detailed information on the financing of the transaction and the bidding process. Information on the bidding process (eg how many letters of intent and non-binding offers were received and from whom, and which bidders withdrew and at what stage, etc.) will be difficult, if not impossible, for the notifying party – the acquirer – to obtain, as such information is likely to be available only to the seller and may also require the exchange of potentially sensitive information between the acquirer, the seller and the target, or the merging parties, as the case may be. Companies would therefore benefit if the Commission reduced this mandatory information request, particularly in section 6 of the M&A notification form. Moreover, the request to provide a due diligence report, which is not based on any provision in the FSR, should be eliminated from Section 6.2 of Annex 1, or at a minimum narrowed down to information necessary to assess the financial contributions that the notifying party has received as a means to fund the specific transaction.

Alternatively, the Commission should obtain any sensitive or unavailable information relating to third parties requested in Sections 3 and 6 of Annex 1 from the relevant third parties directly, rather than requiring the notifying party to obtain/provide this information.

Suspension of time limits in concentrations

Article 24 of the Draft FSR IR states that the Commission may suspend the time limits in concentration procedures in a number of situations, including where 'other persons involved' in the transaction: (i) fail to provide the requested information at all or in full within the time limit fixed by the Commission; (ii) are responsible for the failure to provide the requested information at all or in full within the time limit fixed by the Commission; or (iii) refuse to submit to an inspection to be conducted by the Commission or to cooperate in the carrying out of such an inspection. In an acquisition, the target qualifies as an 'other person involved' (see article 2(2) of the Draft FSR IR). The suspension of time limits should not depend on a target's compliance with a request for information or an inspection, potentially leaving the acquirer (ie the notifying party) at the mercy of a target who may wish to derail the acquisition process (eg in a hostile takeover). When the target does not cooperate, the Commission could impose penalty measures upon it, but time limits should remain unaffected.

Notifications in public procurement procedures

Clarify the scope of article 29(1) of the FSR

The FSR IR needs to clarify that 'notification' and 'declaration' requirements in the context of public procurement procedures only apply to procurement contracts valued at or above €250M (or €125M

per lot). The first sentence in article 29(1) of the FSR and the reference to 'all other cases' in the second sentence may suggest that a declaration of all financial contributions is required in case either of the two thresholds is not met (ie €250M deal value OR the €4M in financial contributions per third country). We do not believe this is the legislators' intent, and would otherwise imply a heavy workload for bidders to compile/list foreign financial contributions in small-value public contracts. Our recommendation seems to be supported by the second sentence of article 29(1) of the FSR, which requires that a declaration must always state that the financial contributions received are below the aggregate €4 million threshold per third country. This indicates that, in a scenario where the €4 million per country threshold is met but the contract value threshold is not, the Commission will not require any declaration (nor indeed any notification). However, this point is not clarified by the Draft FSR IR. Notification/declaration obligations should be expressly limited to tenders equal or greater in value to €250M/€125M per lot to ensure legal certainty and avoid a disproportionate compliance burden for companies.

It should also be confirmed that, for public procurement contracts equal to or greater in value than €250M/€125M per lot, a bidder receiving aggregate financial contributions above the €4M threshold in some third countries, and below the €4M threshold in others, is required to submit a single notification in respect of the public procurement in question, rather than both a notification in respect of third countries from which financial contributions of €4M or more were received AND a declaration in respect of third countries from which financial contributions of less than €4M were received. In fact, we interpret paragraph 17(c) Annex 2 (Section G – 'The requirement for a correct and complete notification or declaration') to mean that, for a given public procurement procedure, the submission of a notification and a declaration are mutually exclusive (hence: 'the declaration may be submitted only where all of the notifying parties are declaring that no notifiable foreign financial contributions in the last three years have been granted to them. Where at least one of the notifying party(ies) has been granted notifiable foreign financial contributions, the submission shall be considered a notification for the purposes of this Form').

Clarify the concept of 'subsidiaries without commercial autonomy'

The Draft FSR IR and the public procurement notification form also do not provide clarity on the concept of subsidiaries 'without commercial autonomy' referred to in article 28 of the FSR, which will be key in determining the financial contributions to be reported by undertakings participating in a notifiable public bid. The concept is not defined in the FSR or in any other legal instrument or case law, and its scope appears to be somewhat more limited than the concept of control in merger control.

The term 'subsidiaries without commercial autonomy' clearly indicates that only fully-owned subsidiaries of the notifying party can be considered as falling under the scope of the FSR. For instance, the *Akzo* case-law on parental liability for antitrust infringements may be applied by analogy, whereby only 100% ownership of a subsidiary gives rise to a presumption that a parent company exercises decisive influence over the company.[6] Therefore, in order to ensure the operability and proportionality of the public procurement tool, the concept of 'subsidiaries without commercial autonomy' should be explicitly limited to fully controlled subsidiaries.

Exclude the requirement to provide information available only to third parties

[6] See Judgment of the Court of Justice of 10 September 2009, *Akzo v Commission*, EU:C:2009:536, para. 61.

In addition, the information required from companies remains overly broad. For example, Section 6(3) of the public procurement notification form requests information that is only available to third parties, such as stocks, employment, investments, purchases and orders from suppliers or subcontractors. We suggest that the documentation requested be limited to the company engaged in the public procurement procedure and that undertakings not be required to submit similar information for affiliated companies.

Clarify the scope of the reporting obligation under Section 3.3 of the public procurement notification form

We would welcome the Commission's clarification as to whether the three categories of foreign subsidies covering operational or other expenditures to be reported under Section 3.3 of the public procurement notification form (that is, foreign subsidies covering: (i) operational expenditures in day-to-day management or activities related to the specific tender; (ii) direct financing of participation in the tender; and (iii) new investments that allow for an increase in capacity or improve the technical performance of the products, works or services offered in the specific tender) constitute an exhaustive list of the categories of expenditures falling under article 5.1 (e) of the FSR, and are therefore the most likely to distort the internal market in public procurement settings. If so, we would welcome a clearer definition of these three categories.

Clarify the scope of the Declaration in Section 7 Annex 2

Based on the current Draft FSR IR, a declaration appears to require more details about financial contributions received than a notification form. This outcome seems contrary to the distinction between a notification and a declaration, as well as the aim to focus on transactions that are most relevant and likely to distort the internal market. In particular, the requirement in Annex 2 Section 7 (*Declaration*) of the Draft FSR IR that 'the notifying party(ies) must list all foreign financial contributions received' when submitting a declaration is difficult to square with: (i) the more limited requirement in a notification to provide information relating only to financial contributions that are most likely to be distortive; (ii) the statement in Article 4(2) of the FSR that 'Where the total amount of a foreign subsidy to an undertaking does not exceed €4 million over any consecutive period of three years, that foreign subsidy shall be considered unlikely to distort the internal market' (when a declaration is submitted, no notifying party will have received €4M or more in financial contributions per third country); and (iii) the requirement in the FSR and its recitals to observe the principle of proportionality in applying the FSR (see, eg article 32(7) and Recital 35 of the FSR). For these reasons, the Commission should remove (or waive) the requirement in Annex 2 Section 7 ('Declaration') of the Draft FSR IR that notifying parties 'must list all foreign financial contributions received' where a declaration is made.

In addition, as currently drafted, Section 7 in Annex 2 ('Declaration') of the Draft FSR IR does not align with the scope of Section 3 of the public procurement notification form. To be in line with Section 3, Section 7 should refer to a declaration that, in addition to not meeting the €4 million per third country threshold, the notifying party either (i) declares not to have received foreign financial contributions that fall within the categories in article 5(1), points (a) to (c) and (e) of the FSR; or (ii) lists the foreign financial contributions that fall within the categories in article 5(1), points (a) to (c) and (e) of the FSR. As stated above, there should be no declaration if the contract value threshold is not met, and, where a declaration does apply, the Commission should remove (or waive) the requirement that notifying parties 'must list all foreign financial contributions received'.

Justification for the absence of undue advantage in public tenders

The Draft FSR IR uses the term 'unduly advantageous offer' rather than the term 'abnormally low' used in existing public procurement rules. The notion of 'undue advantage' is not clarified in legislative texts or case law, and the Draft FSR IR provides no guidance on how notifying parties should interpret the term. Moreover, unlike existing public procurement procedures, the burden of proof is reversed, with companies having to justify that a tender is not 'unduly advantageous' as a result of financial contributions received. Companies should only be required to complete Section 4 if the contracting authority has evidence of an 'undue advantage'.[7] The concept of undue advantage should also be further defined in the FSR IR, as it is in public procurement rules.

Identification of the main subcontractors/suppliers

We would welcome clarity as to what 'key elements of the contract performance' or 'economic share of their contribution' mean under article 29(5) of the FSR, and whether this is measured in purely monetary terms (ie subcontractor received 20% of fees payable) or otherwise.

Outside of construction/utility build, this may be difficult to know at the tender stage, in particular in e-commerce and IT, where the value that a 'supplier' receives may not be known until the contracting authority starts to consume.

'Key elements of the contract performance' is a very subjective concept that can put bidders and subcontractors/suppliers in a position of legal uncertainty when submitting bids within the EU. If no agreement can be found on the appropriate definition in the FSR IR, the IR could for example provide that this shall be defined by the contracting authorities under each tender.

Safeguards in relation to required sharing of confidential information

Main suppliers and subcontractors should be able to submit commercially sensitive information directly to the Commission, rather than through the main bidder.

In notifiable public procurement procedures, undertakings may be participating in bids alongside partners with whom they also compete (or will in the future compete) in other tenders. Under the public procurement notification process currently envisaged in Annex 2 of the Draft FSR IR, such undertakings would potentially be receiving (and disclosing) confidential information about financial contributions that their partners have received. This exchange of sensitive (including competitively sensitive) information between undertakings that are also competitors raises serious concerns and an unacceptable level of risk from an antitrust perspective, and may also raise questions from a conflict-of-interest perspective under procurement rules. Therefore, the Commission should structure the reporting obligations for public procurement notifications to avoid the exchange of sensitive information between notifying parties, including through procedural safeguards such as the direct provision of information required in the notification form by each notifying party to the Commission separately, rather than this information being gathered and submitted by the main contractor.

[7] In the case of public procurement, it is the contracting authorities that determine whether a tender is abnormally low and request explanations from the economic operators (see Article 84(1) of Directive 2014/25/EC and Article 69(1) of Directive 2015/25/EC).

Inclusion of remediation or mitigation mechanisms in relation to information to be provided by suppliers or subcontractors

We would also welcome clarity as to whether bidders will have recourse to any remediation or mitigation mechanisms if their main suppliers or subcontractors do not provide sufficient or adequate information.

Clarification of pre-notification timelines in public procurement procedures

Recital 11 of the public procurement notification form in Annex 2 includes the possibility to engage in pre-notification discussions after a public tender has been published. However, guidance is needed on how pre-notification procedures are to be applied in practice in public procurement procedures, given that such contacts would need to be completed before the deadline for submitting a request to participate, which in most cases is 30 days. In practice, this deadline means that in multi-stage procedures (which constitute the majority of complex and larger public procurement procedures), parties would not reasonably have sufficient time to benefit from a pre-notification phase, and probably not even to gather all the information requested.

In order to allow prospective bidders to engage with the Commission in a timely manner, the pre-notification period in public procurement procedures should be available before the publication of a procurement project, for instance through the 'preliminary market consultations' foreseen in the EU's public procurement directives, which allow for contracting authorities to exchange information with market operators prior to the publication of a tender. This mechanism would facilitate the operationalisation of the pre-notification phase while also respecting the principles of fair competition, transparency, equality and non-discrimination that govern public procurement procedures.

Ex Officio Investigations

The Draft IR offers no guidance on the information, including on financial contributions, that companies under investigation pursuant to the Commission's *ex officio* powers will be required to provide. Without guidance on the type and granularity of information that will be reportable under the Commission's *ex officio* tool, companies are unable to plan in advance for compliance with a possible future investigation. Given the uncertainty regarding their compliance burden, companies are in the invidious position of having to 'assume the worst' and create comprehensive records of every financial contribution on the theoretical possibility that this information will be required as from 13 July 2023.

For this reason, the Commission should issue guidance on the scope of information that will be reportable in an *ex officio* investigation. This guidance would avoid placing a disproportionate administrative burden on companies while also ensuring that the objective of the FSR to identify and remove distortive foreign subsidies is met.

Waivers and requests for clarification

Clarification of scope for waivers

AmCham EU welcomes the introduction of waivers in the Draft FSR IR that allow companies to narrow the scope of reportable information. However, further guidance on what information may be subject to a waiver is needed, similarly to what is provided for merger control. For instance, the term 'not necessary' is not defined in the Draft FSR IR or the FSR.[8] The same applies to the term 'not reasonably available'. This means that the Commission has wide discretion in determining what information can and cannot be waived by notifying parties, which creates legal uncertainty for companies and risks lengthening pre-notification contacts.

Furthermore, the possibility to obtain waivers during pre-notification procedures will not be helpful for companies that will need to develop an information collection system well in advance of an actual notification. The Commission should therefore at the very least seek to identify areas in which waivers are most likely to be granted, so that companies can rely on those indications and exclude the irrelevant financial contributions from the information system they will be required to put in place. This could be the case, for example, for unproblematic contributions described in Section A.2, in the event that the Commission does not agree to an exemption or limitation of information. These are: (i) the sale and purchase of goods and provision of services (including utilities) to/from government bodies on market terms; (ii) non-selective tax measures and other measures of general application (eg tax breaks, social security contributions, wage incentives or similar) applied to multiple sectors and industries which can therefore effectively be assumed not to amount to a targeted subsidy; and (iii) specific forms of public support exempted based on their objectives; as well as (iv) financial contributions within the meaning of non-distortive subsidies per article 4 paragraphs 2 to 4 of the FSR.

In this regard, AmCham EU would also welcome the possibility for 'waivers in principle' or clarification requests to be submitted to the Commission outside the framework of a notification procedure/an *ex officio* investigation, and for the appropriate publication of the related guidance provided by the Commission. Alternatively, the Commission could provide detailed written guidance on the circumstances in which a waiver is likely to be forthcoming. This would enable companies to refine their monitoring system and clarify their reporting obligations in advance of any notification.

Waivers of contracts with third countries including classified information

Even though contracts including classified information in line with existing international agreements should be exempted from reporting obligations under the FSR, the Commission should alternatively limit the amount of information required from companies on these contracts. For instance, it could require companies to provide a general description of foreign financial contributions, naming the country involved and providing information such as the type of aid and aggregate amounts, rather than providing detailed information on specific contributions. This would limit any potential confidentiality conflicts that will arise when companies are not authorised to share information regarding certain contracts or arrangements with certain government entities or organisations. This could be accompanied by further clarity from the Commission as to whether such contracts fall within the definition of the existing provision for information 'not reasonably available'. Companies would then be able to request a waiver on this basis and engage further with the Commission as it sees fit.

[8] For instance, in merger control, the Commission provides guidance of what information can be waived by notifying parties. See Article 1(4)(g) of Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**EUMR Implementing Regulation**").

Notifications, requests and other submissions

Determination of notifying parties

The notion of 'notifying party' differs between the M&A notification form and the public procurement form. In the former, only the acquirer, the merging parties or the parent companies of the joint venture are considered as notifying parties, as in merger control. By contrast, in public procurement procedures, all economic operators, groups of economic operators, main subcontractors or main suppliers are classified as notifying parties. This leads to inconsistent and complicated situations, for example, where companies have to sign the commitments submitted by any of the notifying parties, even if the obligations are unrelated to their business activities. Similarly, the notion that all economic operators involved in a public procurement procedure are defined as notifying parties underestimates the significant burden that tender participants would have to bear to coordinate and collect the relevant information. This broad notion of notifying parties also has important implications for the liability of companies if incorrect or incomplete information is provided.

Effective date of notifications and submissions of information

While the Commission has the power to declare information submitted as incomplete, there is no equivalent provision requiring the Commission to declare a submission as complete (see article 6(1) and 7(1) of the Draft FSR IR). This creates severe legal uncertainty for notifying parties, as the clock will only start running once the Commission considers the notification form as complete.

Moreover, article 7(3) of the Draft FSR IR requires that 'the notifying parties shall communicate to the Commission without delay any relevant new information, including changes in the facts, which the notifying parties would have had to notify if they had known or ought to have known that information at the time of the submission of a completed notification or declaration or updated notification or updated declaration'. It should be made clear to the notifying parties when this reporting obligation ends, and that article 7(3) of the Draft FSR IR does not create an ongoing and perpetual notification obligation. There is also (i) uncertainty as to what constitutes 'ought to know', (ii) uncertainty regarding the legal standard to be applied in assessing what information a notifying company ought to know, and (iii) no clear definition of 'relevant new information'.

Additional clarifications and guidance on jurisdictional and procedural matters

The Commission should incorporate the following additional clarifications and guidance in the final IR so as to provide legal certainty and protect the rights of defence of companies under investigation:

- Provide a clear and detailed list of categories of parties that qualify as 'a state' or whose actions can be attributable to a third country for the purposes of identifying financial contributions. Even with this clarification, it will be very burdensome for operators to conduct thorough ownership/governance diligence on third-party contractors, with ownership/governance information being mostly unavailable or strictly confidential.

- Ensure that notifying parties will not be held liable for failure to comply with the FSR and/or for submitting information that turns out to be false, incomplete or misleading if the Commission considers information may be missing but that notifying parties have taken reasonable steps to report financial contributions, or reasonable best estimates of those contributions. This should take account also of potential restrictions to gathering and

disclosing information under applicable non-EU legislation, as well as the time and cost involved in doing so.

- Extend the right to review and submit comments and observations on interviews conducted during M&A/public procurement investigations and related minutes to the notifying parties. The Draft FSR IR currently grants this right only to the interviewees, which may limit rights of defence.

- Amend the access to file mechanism in article 21 of the Draft FSR IR, which currently limits the rights of defence of undertakings under investigation. Specifically, the proposed confidentiality ring mechanism would not allow the in-house counsel and expert employees of undertakings under investigation to be privy to relevant materials in a file supporting the undertakings' cases. Therefore, undertakings under investigation would have to rely entirely on external legal and economic counsel, who would be in a much worse position to identify exculpatory information. For this reason, undertakings under investigation should have access to a non-confidential version of the entire file, unless there is consent amongst all parties concerned to the use of a confidentiality ring mechanism of the type contemplated in the Draft FSR IR.

Efficient and confidential information sharing

We also call on the Commission to alleviate the burden resulting from notification requirements by:

- Fostering information cooperation and exchange mechanisms with third countries on financial contributions (eg building on existing frameworks such as the OECD Tax Information Exchange Agreements).

- Using existing reporting structures and formats (eg GAAP, IFRS or other accounting standards).

Preliminary guidelines on distortion

Article 46 of the FSR requires the Commission to publish guidelines on the criteria for determining the existence of a distortion no later than January 12, 2026. However, these first three years are critical for companies seeking to build compliance systems and scour millions of transactions for potential financial contributions. Therefore, the Commission should publish preliminary guidance on the types of transactions it considers to be distortive in order to provide companies with certainty as they enter into business transactions both abroad and in the EU.

Conclusion

In sum, while AmCham EU supports the Commission's efforts to tackle distortive foreign subsidies, we believe that the recommendations outlined in this text will help better calibrate and clarify the implementation of the FSR, thereby minimising administrative burdens and avoiding unintended consequences for businesses investing in the EU, while also supporting the Commission's overarching objective of creating a level playing field in which companies from around the globe can compete on a fair basis within the European single market.