

Our position

Foreign Subsidies Regulation review

A roadmap for proportionality and effectiveness



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 €4 trillion in 2023, directly supports more than 4.6 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

After more than two years of enforcement experience, the Foreign Subsidies Regulation (FSR) has proven to be more burdensome than intended and disproportionate to what is needed to address the risk of distortive subsidisation. A thorough revision of the FSR is necessary to ensure that it targets genuinely distortive subsidies without chilling investment or overwhelming businesses and enforcers. In particular, the revision of the FSR should focus on:

1. Narrowing the scope of the Regulation to focus on actual subsidies with a clear EU nexus, rather than covering all financial contributions regardless of selectivity and impact on competition.
2. Reducing administrative burdens through ambitious simplification measures, including higher notification thresholds, an annual reporting mechanism and broader exemptions.
3. Simplifying notification procedures for public procurement, particularly by exempting certain procurement methods and bidders, allowing direct filing with the Commission and establishing consistent review timelines.
4. Improving procedural clarity and predictability, including through more consistent application of published guidance, streamlined information requests and enhanced transparency.
5. Strengthening institutional capacity through additional enforcement resources, better case management procedures and enhanced support and training for contracting authorities.

Introduction

Since the European Commission proposed the Foreign Subsidies Regulation (FSR) in 2021, the American Chamber of Commerce to the EU (AmCham EU) has consistently raised concerns about the Regulation's extensive scope, ambiguously defined concepts and discretionary enforcement mechanisms. A revision of the FSR is needed to ensure that it proportionately addresses the risk of distortive foreign subsidies and contributes to a level playing-field without discouraging investment in the EU.

Today, more than two years after the FSR's notification obligations entered into force, our initial concerns remain relevant. The FSR has shown itself to be unnecessarily broad, unpredictable and disproportionate in relation to its objectives and enforcement resources, with the Commission regularly requesting information far beyond what appears necessary for its assessments, including information on financial contributions (FCs) lacking an EU nexus or granted after a notification.

The Commission's unpredictable approach to enforcement is illustrated by the conflicting approaches adopted in the 2024 Staff Working Document (SWD) and the recent draft Guidelines. While the SWD indicated a potential limitation in the scope of the FSR, which the business community widely welcomed, the Commission changed course in the draft Guidelines, adopting a maximalist approach to enforcement. Likewise, despite publishing helpful and extensive Q&As, the Commission has, in practice, regularly deviated from its own guidance.

Overall, timelines and practices still vary significantly across cases and far-reaching information requests remain common, particularly in the public procurement domain.

And yet, despite thousands of filings from companies and extensive information requests, the Commission has only initiated a limited number of investigations, with only one of these resulting in a formal decision. Behind this one decision lies an enormous effort from the business community to comply with the FSR's uniquely intensive reporting requirements.

FSR compliance has necessitated company-wide engagement to design and implement entirely new tracking systems, accounting practices and audit mechanisms, demanding significant investments of both human and technical resources across global teams. The length, breadth and frequency of the Commission's information requests have also contributed to the challenges that companies face.

For many companies, FSR filings now represent the most resource-intensive filings associated with any transaction globally, requiring companies to collect and maintain data they would not otherwise gather for any business, commercial or legal purpose – solely to meet the Regulation's distinctive real-time reporting obligations. This is in stark contrast with the Commission's FSR impact assessment, which predicted that the Regulation would create a 'limited administrative burden'.

The burdens created by the FSR are not only disproportionate, they also distort the competitive playing field in the EU. In particular, by requiring the detailed tracking and disclosure of non-EU incentive schemes that would not need to be tracked if granted under EU State aid rules (eg R&D, green energy and employment credits), the FSR imposes a significantly higher compliance cost on businesses whose global incentive portfolios have a higher share of non-EU incentives, thereby effectively disadvantaging non-EU businesses.

These burdens also run counter to the EU's ambitions to work with trading partners to counter non-market practices as FSR compliance becomes a legitimate question for any investment in the EU.

In sum, while the FSR was originally designed to level the playing field and support fair competition, it has gone significantly beyond what is needed to correct market distortions and has created costs and uncertainties for companies that bring their own competition and strategic risks.

Streamlining the FSR is therefore critical to delivering on the Commission's simplification agenda, enhancing European competitiveness and working with partners to address non-market practices.

The current review of the FSR is a vital opportunity to recalibrate the FSR and ensure it makes a positive contribution to levelling the playing-field in Europe. Thorough reform is necessary to ensure that Europe can defend itself against distortive subsidies without undermining legal certainty and discouraging investments.

This paper lays out a roadmap for making the FSR a better tool: one that is proportionate to its objective and whose costs do not outweigh its benefits.

The FSR's disproportionate scope

The Commission's FSR impact assessment predicted that 'the additional administrative burden to prepare [an FSR] notification would appear relatively small because it would be largely limited to gathering information on the foreign financial contributions received'. This assessment severely underestimated the burdens associated with gathering FC data across complex organisations and maintaining adequate compliance systems. Compliance with the FSR has proven to be an expensive and resource-intensive process in comparison to the optimistic outlook given in the impact assessment.

On the company side, setting up and maintaining FSR compliance systems requires the regular engagement of business, legal, tax, finance and accounting teams across multiple legal entities in each country and local jurisdiction of operation, as well as the employment of external advisers and tailored IT and customer relationship management (CRM) systems.

This compliance process will typically begin with an intensive mapping exercise aimed at identifying FCs across every entity and the responsible personnel. As this information is not otherwise tracked centrally, this requires significant investments in external counsel and project managers.

Once the relevant personnel are identified, companies must design bespoke data collection, reporting and verification processes. This requires additional investments in IT contracting and, for the most robust compliance teams, involves the development of dedicated intranet pages with embedded guidance and reporting forms.

Impacted personnel must also be trained on what are, for many, novel legal and accounting concepts. Accountants and lawyers in far-away jurisdictions with distinct legal and administrative traditions must undergo training programmes to understand the FSR and what type of information may be relevant for a filing or RFI.

Once information is fed into a central repository, it must then be aggregated, catalogued and refined both for a filing and for potential RFIs. RFIs themselves present novel challenges as they often require EU-based legal teams to track down documentation that may not exist in foreign jurisdictions, usually with short deadlines. Likewise, they often require EU-based legal teams to learn and explain incentive schemes in foreign jurisdictions.

Beyond initial investments, ongoing compliance remains a significant burden as companies must continue to piece together disparate types of data from various business divisions and functions using methods that do not fit cleanly into other transaction screening, accounting or corporate reporting procedures. One AmCham EU member estimated that FSR compliance requires the regular engagement of over 100 division managers alone, not counting the engagement of other relevant employees and the cost of employing external advisers and dedicated project managers. AmCham EU members providing legal advisory for FSR filings also reflect this perspective.

The burdens created by the FSR are exacerbated by the fact that most FSR filings are subject to other overlapping transaction review mechanisms, such as merger control and FDI screening. The unique real-time data needed for FSR filings, coupled with the disparate set-up of national FDI screening regimes and the increasing jurisdictional uncertainty in the merger control space, have created significant complications for investment activity in the EU.

Divergent timelines, procedures and jurisdictional thresholds across merger control, FDI screening and the FSR can create significant additional compliance costs and undermine the feasibility of deals with fast-moving timelines. These costs can only be mitigated by further alignment between the EU's three main transaction review mechanisms.

Inconsistent guidance

As outlined in the introduction, the Commission's approach to FSR enforcement has created a significant degree of unpredictability for notifying parties. In particular, despite publishing useful guidance on the FSR filing process – including Q&As, an SWD and a competition brief – the Commission has often deviated from this guidance in its enforcement practice, particularly in the public procurement context. For example:

- The Commission's SWD took the view that, 'in the case of a foreign subsidy that has been granted to a subsidiary not active in the Union, where that subsidy has been granted and effectively used in order to develop the local activity of the subsidiary in a third country, the relationship with the internal market is not apparent'. In practice, however, the Commission's information requests have focused extensively on highly localised FCs that have no connection to a company's operations in the EU (eg employment credits).
- While the Commission's guidance requests only FC disclosures, and not a subsidy analysis, the Commission has regularly required notifying parties to provide a subsidy analysis, even for FCs that do not fall under Article 5 of the FSR. This significantly increases the burdens of the notification process.
- The Commission's guidance has confirmed that the mandatory notification obligations in Article 28 of the FSR apply to the bidding entity, its direct subsidiaries and direct or indirect parent companies, but not its sister companies. However, the Commission has regularly requested extensive information on FCs granted to sister companies. When these broad information requests are issued during active procurement procedures, businesses often struggle to respond within tight deadlines.
- When determining the grant date of an FC, the Commission appears to not follow its own guidance, particularly in relation to tax measures. For example, while question 3 of the FSR Q&A states that the grant date for tax-related measures is determined when the relevant tax returns are filed (ie when the tax liability is determined), the Commission has often requested information based on interim/draft financial reports.

In addition to undermining its published guidance, the Commission's extensive information requests have also reduced the value of the simplification measures introduced in the FSR Implementing Regulation, which were broadly welcomed by the business community. For example:

- While the Implementing Regulation provides helpful exemptions in relation to certain categories of FCs (eg contracts for the provision/purchase of goods/services at market terms in the ordinary course of business), the Commission often asks for this information during preliminary review, defeating the purpose of the exemptions.

- While the Implementing Regulation allows notifying parties to disclose FCs within range brackets (eg EUR 45-100 million), the Commission often deems such disclosures to be incomplete, and requests more detailed FC breakdowns.
- While the Implementing Regulation only requests the provision of notifying parties' 'most recent annual accounts or reports', the Commission consistently requests the disclosure of financial statements for the previous financial year, even when such documents are still unavailable.

General recommendations

Existence of a foreign subsidy (Article 3)

The FSR is designed to address distortions in competition caused by foreign subsidies. However, the vast majority of FCs disclosed to the Commission have no distortive potential, and most of them do not even qualify as subsidies. This is in part due to the misalignment between the definition of a 'foreign subsidy' and the definition of a 'financial contribution' in Article 3 of the FSR.

While Article 3 is clear that an FC can only constitute a subsidy if it 'confers a benefit on an undertaking [...] which is limited, in law or in fact, to one or more undertakings or industries' (ie if it is selective), the definition of an FC in Article 3(2) captures a broad range of transactions and generally available incentive schemes that are clearly non-selective. In other words, Article 3(2) covers several FCs that are not subsidies, and which the FSR is not designed to address.

In order to address this misalignment and ensure the FSR focuses on subsidies that pose a genuine risk of distortion, the Commission should narrow Article 3(2) to **exempt FCs that are freely available and not selective to certain companies**. These exemptions should cover **contracts for the provision/purchase of goods/services on market terms**, as well as any **incentives of general application** (particularly tax incentives). In addition, the Commission should **exempt any FCs that would not be notifiable under the EU's State aid framework** (eg GBER exemptions).

As outlined in the introduction, while the Implementing Regulation includes helpful exemptions for certain categories of FCs, the Commission does not always respect these exemptions. Therefore, in order to have a meaningful impact in reducing burdens for businesses, the exemptions should be written into the FSR itself.

Moreover, the exemption for tax-related FCs in the Implementing Regulation applies only to a very limited category of tax measures, and does not meaningfully reduce the administrative burden for businesses. Similarly, the exemption for arm's-length contracts does not cover financial services contracts, even though these are typically conducted on market terms (eg bond subscriptions).

If the Commission does not narrow Article 3 to exempt non-selective FCs, it should at the very least provide a comprehensive 'white list' of non-distortive FCs. Many countries offer incentive schemes that are designed to not be limited to specific companies or sectors. This is the case, for example, with most US federal, state and local R&D tax credits, green energy incentives and employment support. The Commission should consider 'white-listing' these ubiquitous incentive schemes when it

determines that they do not constitute subsidies, building on the existing exemptions in the Implementing Regulation.

These expanded exemptions would be without prejudice to the Commission's ability to request additional information on a case-by-case basis.

Other Commission guidance documents (such as the Guidelines on Vertical Restraints) already include examples of conduct that the Commission usually considers to be unproblematic. Such examples provide valuable support for the business community.

In sum, the FSR needs to have a clearer focus on selective FCs if it is to comply with the principle of proportionality. The current broad-stroke approach goes far beyond what is necessary to address harmful subsidies and creates distortionary effects and costs that offset the potential benefits the FSR may bring to the EU.

Distortions in the internal market (Article 4)

In addition to covering a broad range of non-selective FCs, the FSR currently also captures an excessive breadth of subsidies lacking a clear nexus to the internal market or evident links to specific transactions or procurement procedures. This is, in part, a result of the broad distortion criteria in Article 4 of the FSR.

Article 4(1) of the FSR provides that a distortion is found if two cumulative criteria are met: (1) a non-EU subsidy is liable to improve the competitive position of a company in the EU; and (2) in doing so, that non-EU subsidy actually or potentially negatively affects competition in the EU.

In the 2024 SWD, the Commission presented these two conditions as meaning that the FSR's aim is to pursue only those non-EU subsidies that have an EU nexus – in other words, those cases where there is a clear and demonstrable link between a subsidy and a company's activities in the EU (or, an 'apparent connection', as indicated in the SWD).

However, the recent draft Guidelines indicated that the Commission is taking a more expansive approach, broadening the FSR to cover all subsidies that could theoretically 'free up' a company's resources. This is particularly problematic in instances where companies receive subsidies that are 'ringfenced' into a specific jurisdiction (eg employment subsidies), or otherwise allowed under EU State aid rules.

Requiring the centralised tracking and disclosure of these FCs creates significant costs for businesses. Therefore, Article 4 should be amended to:

- Apply a **clear nexus** between a subsidy and the transaction or procurement procedure being reviewed
- Strengthen the required link between a subsidy and an actual distortion in the internal market

Implementing these improvements would significantly reduce legal uncertainty for companies while still allowing the Commission to access the information they need on the most distortive subsidies.

Clearer jurisdictional nexus

Article 4 currently lacks clarity around the degree to which a subsidy must be linked to a specific transaction or public procurement procedure.

The Commission should revise Article 4 to require subsidies to have an ‘**apparent connection**’ to a specific transaction or public procurement process. This is consistent with the approach adopted in the SWD, which was seemingly abandoned in the draft Guidelines.

This nexus should also take into account that, although a company may be active in multiple sectors, the subsidies under consideration should only be those in the sector(s) relevant to the transaction.

Applying a clearer jurisdictional nexus would allow companies to design their FSR compliance frameworks around specific deals and tenders instead of a vague and all-inclusive concept of distortion at large.

Stronger link to actual distortions in competition

The language in Article 4 has created significant uncertainty around the degree to which a subsidy must be linked to a company’s competitive position in the EU, or to a negative impact on competition in the internal market, in order to be deemed distortive. This is particularly true in three cases.

First, the broad concept of ‘liability’ in Article 4(1) has allowed the Commission to consider a broad set of subsidies with tenuous connections to the internal market as distortive. For example, the Commission’s draft Guidelines implied that all foreign subsidies may be liable to improve a company’s competitive position in the EU, claiming that, even if a foreign subsidy is ‘neither intended nor directed at the internal market, and there is no clear indication as to how the undertaking uses or intends to use it’, it may ‘free up’ resources that might, directly or indirectly, be used in the EU.

This proposed test of ‘freed up’ resources and the notion of an ‘indirect’ competitive advantage are so vaguely defined that they could apply to virtually any subsidy.

The Commission could provide greater clarity on its distortion analyses by aligning with the language used in Article 5, so that a subsidy must be liable to ‘directly facilitate an undertaking’s activities in the internal market’.

Second, by not setting a clear standard for causality in Article 4(1), the FSR has allowed the draft Guidelines to propose an interpretation which downgrades the link between a subsidy and a negative impact on competition from a **direct to a contributory relationship**. This implies that the Commission does not need to demonstrate that a subsidy is primarily responsible for a negative impact on competition, but **merely contributes to one**.

This creates problematic overlaps with merger control. In principle, if a transaction’s negative impact on competition stems primarily from a non-subsidy-related issue, it should be addressed through merger control. Duplicative assessments generate unnecessary costs and uncertainties for businesses and create the risk of unnecessary remedies.

Setting a higher evidentiary standard would help reduce this uncertainty. Specifically, the Commission could limit its distortion analyses to cases where the relationship between a foreign subsidy and a company’s competitive position in the internal market is ‘clearly established’.

Finally, the ability for the Commission to assess ‘potential’ negative effects on competition has also created an uncertain assessment environment for companies. Specifically, this wording allows the Commission to apply the FSR to essentially any subsidy based on a speculative analysis of its theoretical effects, regardless of its actual impact on the internal market. It also allows the Commission to develop hypothetical market situations which are nearly impossible to rebut upon appeal.

In addition, the focus on ‘potential’ effects departs from legal standards used in other transaction review mechanisms. The EU Merger Regulation, for example, requires the Commission to show that a transaction will create a ‘significant impediment to effective competition’ (SIEC) in the EU. The Commission should remove the FSR’s references to ‘potential’ distortions and align with the EU Merger Regulation’s SIEC test.

Categories of foreign subsidies most likely to distort the internal market (Article 5)

A revised FSR should provide more certainty into the definition of ‘facilitating’ and ‘enabling’ in Article 5(1)(d) and 5(1)(e).

Balancing test (Article 6)

The FSR’s balancing test allows the Commission to weigh the negative impacts of a subsidy against its potential positive effects, especially when the subsidy fosters economic development within the EU or supports broader EU policy goals. These goals may encompass addressing market failures, such as underinvestment in R&D, or promoting environmental objectives like climate action and biodiversity protection.

While considering the positive effects of subsidies is generally beneficial, the application of the balancing test continues to lack transparency, given the absence of relevant case law or guidance. This lack of clarity limits the effectiveness of the balancing test in supporting different policy objectives.

This situation mirrors the challenges previously identified in the EU Merger Guidelines on efficiencies, where providing clear guidance around how positive effects are measured proved necessary to allow parties to understand what types of arguments would be accepted.

A clear test or standard for the assessment of positive effects under the FSR, accompanied by indicative examples, would create more certainty for businesses and increase the effectiveness of the balancing test in supporting EU priorities.

In-depth investigation (Article 11)

Uncertainty around the length of in-depth investigations may arise as a major risk for FSR compliance as the FSR matures over the years.

Setting clear limits for the length of in-depth investigations would at least provide companies with a clear date to expect the conclusion of an investigation. Therefore, Article 11(5) should be amended to set a hard limit of 18 months.

Interim measures (Article 12)

Interim measures should only be adopted during an in-depth investigation to ensure consistent procedures under the FSR.

Likewise, before adopting interim measures under Article 12, the Commission should inform the undertaking concerned and invite interested parties, Member States and the third country concerned to express their views in writing within a prescribed period of time.

Requests for information (Article 13)

As outlined in the introduction, the use of RFIs under the FSR has caused significant uncertainty for notifying parties, creating additional costs and complexities for businesses that are already strained in complying with the FSR's notification obligations. For time-sensitive public procurement procedures, RFIs can be particularly destabilising.

Given the frequency and breadth of the Commission's RFIs, and short timelines typically given for providing responses, companies are increasingly having to carry out extensive due diligence on all their FCs as a precaution. This adds to the already significant costs associated with FSR compliance.

A review of the FSR should set stronger evidentiary standards for the issuance of RFIs to create certainty for industry. For example, the issuance of RFIs should be limited to instances where the Commission has sufficiently strong indications that an FC constitutes a subsidy. In addition, it should also be clarified that an RFI must be duly justified, limited to the information necessary for the Commission to carry out its duties, proportionate to the purpose of the request and not unduly burdensome for notifying parties.

Notification thresholds for concentrations and public procurement procedures (Articles 20 and 28)

The FSR's notification thresholds are excessively low, and have produced a significant and unexpected volume of filings – particularly for public procurement. These thresholds should be revised and significantly increased to reduce the number of mandatory filings and allow the Commission to focus its resources on cases where there is clear evidence of distortive subsidisation.

In addition, for public procurement procedures, companies should not be required to undergo multiple FSR filings per year if the bidding entity remains unchanged.

Tender value threshold

The €250 million tender value threshold for public procurement in Article 28(1)(a) should be significantly increased **to reduce the number of mandatory filings by at least 50%**. In addition, there should be greater clarity on the application of the threshold to framework agreements and dynamic purchasing systems. A more proportionate and targeted approach would be to base the threshold on the actual value assigned to a contractor per year, rather than the total value of the framework agreement or dynamic purchasing system over several years.

Requiring all contractors who bid under a framework agreement to submit a notification – regardless of the value involved – can lead to unnecessary administrative burdens and inefficient processes and is not aligned with the objectives of the FSR. Adjusting the threshold to consider actual annual contract values would help avoid superfluous filings and better reflect the practical realities of contract implementation, relieving contractors that receive only small portions of larger procurements.

For dynamic purchasing systems, the Commission should consider exempting the application of the FSR. Dynamic purchasing systems involve products or services that are generally available on the market. They typically include strong guardrails against distortions, such as strict pricing requirements and standard contractual clauses. As summarised in recital 63 of the Public Procurement Directives, dynamic purchasing systems allow contracting authorities to ‘have a particularly broad range of tenders and hence to ensure optimum use of public funds through broad competition in respect of commonly used or off-the-shelf products, works or services which are generally available on the market’.

Similarly, the Commission should also consider introducing a targeted exemption or simplified procedures for bidders originating from countries that are signatories to the WTO Government Procurement Agreement (GPA). This would be consistent with the tiered approach adopted in the Net Zero Industry Act (NZIA).

FC thresholds

The static FC thresholds in Articles 20(3)(b) and 28(1)(b) capture an excessive number of transactions. These thresholds should be significantly increased, and/or replaced with a dynamic threshold tied to the value of the concentration or public procurement procedure (eg 10% of the estimated value of the concentration or public procurement procedure).

Moreover, the thresholds could also be adjusted to **the relevant company’s turnover or EBIT**, with FCs below that threshold being presumed non-distortive.

In addition, the focus on FCs received in the three years preceding the notifiable event creates burdensome accounting requirements for companies. Amending the FC thresholds to apply only to **FCs received in the prior calendar year** would provide a more proportionate and less burdensome timeframe, while still allowing the Commission to receive more detailed information if needed.

For public procurement in particular, the €4 million FC threshold is exceedingly low compared to the tender value threshold, as well as for companies that routinely engage in public procurement procedures. Pharmaceutical or medical equipment companies, for instance, routinely sell basic medicines and equipment to hospitals, on market terms, with the value easily exceeding €4 million per contract. This can mean that the provision of basic medicines or equipment to a single major hospital in any jurisdiction could trigger FSR filings for all large public procurement procedures in the EU.

In line with our comments on Article 3, this can be addressed by removing contracts for the provision of goods/service on market terms from the calculation of whether the FC thresholds are met.

Call-in powers (Articles 21 and 29)

While the FSR allows the Commission to call in M&A transactions and tenders falling below the notification thresholds, the discretionary application of these powers could create significant uncertainty, given FSR compliance strategies are typically tied to the likelihood of a company's participation in a notifiable event. Even if not applied, the mere presence of these powers could require a wider set of businesses to establish costly FSR compliance regimes as a precaution.

The Commission itself has already recognised the importance of clear notification thresholds, noting in its FSR impact assessment that, 'because of the high proposed notification thresholds, SMEs will not be impacted by additional administrative burdens as a result of having to submit notifications'.

In the context of an increasingly uncertain investment environment, where many member states are introducing call-in powers under merger control, the application of call-in powers under the FSR would add significant uncertainty, which must be factored into any potential deals or bids.

The commitments offered in the *Emirates Telecommunications Group / PPF Telecom Group* decision ('e& decision') already offer a template for a **proportionate call-in mechanism**. Applying a mandatory sub-threshold notification requirement as an exceptional commitment, in cases where no other remedy would alleviate risks, allows the Commission to call in transactions involving companies which demonstrate a high risk – without creating additional costs and uncertainty for all companies.

Prior notification or declaration of foreign financial contributions in the context of public procurement procedures (Article 29)

The current set up of Article 29 creates significant difficulties for companies participating in public procurement procedures. For example, parties have no visibility on when the contracting authority transfers a file to the Commission, which makes it difficult to understand if the preliminary review period has started. In multi-stage procedures, the short deadline for submitting a request to participate makes it challenging to prepare the initial FSR filing. The requirement for main contractors to submit FSR filings on behalf of subcontractors and suppliers also creates significant confidentiality and antitrust risks.

These concerns can be alleviated by:

- Allowing parties to submit notifications directly to the Commission;
- Not requiring notifications upon submitting a request to participate.

Data confidentiality and antitrust concerns in public procurement notifications

The filing system set up under the FSR for procurement creates largely irreconcilable confidentiality issues for notifying parties filing alone or in consortia. Specifically, Article 29(1) requires economic operators to first submit their notifications to the contracting authority or entity (a party that is not the intended reviewer of this data), these notifications are then transferred to the Commission.

While the password is provided exclusively to the Commission, encrypted documents are not entirely secure, as they remain susceptible to decryption such as brute force attacks. This poses a significant risk because the internal systems of the contracting authority may not be fully secure against cyberattacks.

Confidentiality concerns are even more acute when multiple notifying parties are involved, such as in a consortium or where there are main subcontractors or suppliers, because the FCs of all participants must be transmitted to the main contractor. Notifying parties should not be put in a position where they must share commercially sensitive and confidential information with other members of a consortium.

Instead, notifying parties should each be able to communicate their FCs directly and separately to the Commission. The contracting authority should be empowered to, as a control feature, ask for bidders to submit the case number provided by the Commission.

This would significantly simplify compliance for both notifying parties and contracting authorities, the latter of which typically suffer from limited knowledge and resourcing related to FSR compliance.

IT modernisation for consortium filing

In parallel, the Commission should also consider developing a modern IT system for effectively submitting public procurement filings – particularly those involving complex consortia.

This would minimise complexity, help abate antitrust concerns and bolster the security of highly sensitive data.

Uncertainty around transferral of filings

The Commission only begins its preliminary review once the contracting authority transfers a filing. While the FSR provides that this transfer should occur ‘without delay’, in practice, contracting authorities often have significant discretion in determining when to transfer the filing, which could result in delays of several months. These inefficiencies would also be addressed by allowing the economic operator to submit the FSR filing directly to the Commission.

If the Commission maintains the same system, where contracting authorities are responsible for transferring filings to the Commission, there should at least be a binding deadline for contracting authorities.

Notifications with requests to participate

For multi-stage procedures, Article 29(1) requires economic operators to submit their initial notification when they request to participate in a tender.

However, economic operators typically have only 30 days to respond to a request for participation. Requiring parties to gather data and undertake pre-notification discussions within 30 days creates significant complexities for potential bidders, without clear benefit for enforcement.

The Commission should amend Article 29(1) to require FSR filings to be submitted only with the submitted or final tender. Having multiple FSR filings for one tender is inefficient and creates burdens for both notifying parties and the Commission. The Commission should also require one FSR filing per year for companies that participate in multiple tenders every year.

If the Commission maintains the current requirement for two notifications per tender, it should avoid making broad information requests after the second notification, as these have often amounted, in practice, to a third filing for a single tender. In other words, any significant information requests should be made between the first and second notification.

Responsibilities of main contractors

‘Main contractors’ currently have to submit one co-notification per bidding economic operator and per internal legal entity. This means one single deal might require a main contractor to prepare and sign dozens of documents. This workload is often multiplied by the number of deals a single economic operator may be involved in across the EU.

Procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures (Article 30)

Although Article 30 lays out timelines for Phase 1 and Phase 2 investigations in public procurement procedures, the **administration of the FSR has led to significant uncertainty around when Phase 1 begins**. In particular, the broad discretion afforded to the Commission in determining whether a filing is complete creates significant variation between cases.

The Commission must develop clear and binding guidance around what constitutes a notification, without prejudice to its ability to request more information during an investigation. In addition, the FSR should automatically deem filings complete after a certain number of days, unless the Commission determines that they are incomplete.

Additional recommendations

Annual reporting mechanism

The provision of real-time data continues to be a significant burden for companies. Administering these processes is time- and resource-intensive, requiring significant investments and engagement across teams from different divisions and entities. As this real-time data is not required for any other regulatory compliance purpose, resources dedicated to these systems provide no other value than supporting FSR compliance.

Given that the vast majority of FSR notifications do not result in in-depth investigations, a simple way to reduce this burden would be adopting an annual reporting mechanism, like the one used in merger control. In practice, an annual reporting mechanism would ideally allow companies to file based on the jurisdictional triggers from the EUMR (ie from the last audited year) as well as the standards for substantive information. If, upon review, the Commission identifies a need for real-time data, they could then issue an RFI that would require the notifying party to start collecting and sharing real-time data.

An annual reporting mechanism aligned with the jurisdictional and substantive requirements from the EUMR would minimise the need to collect real-time data for filings of no interest to the Commission while aligning with data collection done for merger filings.

Empty form notifications

In certain cases, parties must send notification forms even when there is no data to report. This occurs when (1) the sum of all financial contributions in the three years prior to the triggering event meets the threshold for notification, but (2) no financial contribution must be reported as a result of the exemptions in the Implementing Regulation. The Commission should consider waiving the notification requirement in such cases.

Waiver extensions

Waivers are essential for simplifying compliance, particularly for companies that frequently submit FSR notifications.

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 categories listed in Article 5(1) of the FSR.

Guidance around required documents

The Commission should provide a non-exhaustive list of documents or supporting information that may be requested during an FSR review to help companies sufficiently prepare.

FSR data confidentiality

The data submitted to the Commission in FSR filings is uniquely comprehensive. It is not submitted for any other regulatory purpose globally and gives the Commission privileged access into businesses' sensitive commercial activities at the national, regional and local level.

This unprecedented access to granular information about a company's operations at any given moment raises concerns about the potential usage of such data.

Although businesses do not assume nefarious intent, given the breadth and sensitivity of the data collected by the Commission, the Commission should align its own obligations for FSR data handling with those imposed on companies under regulations like the General Data Protection Regulation (GDPR) and those the European Commission itself has, for example under Regulation 2018/1725 regarding the processing of personal data by and between EU institutions and bodies. By extension, the best practices out of Regulation 2022/868 on European data governance regarding data handling and management could also be helpful to ensure a robust FSR framework and reassure market participants on the preservation of the integrity of the data they share to comply with EU law.

First, the Commission should clarify the protection and use of the data guaranteed in the FSR. This could include clarification and guardrails around who has access to FSR data, how it is stored and processed, and when and how it is deleted. The principle of data minimisation also serves as a guide. That is, the Commission should only collect, store and use data to the extent it is needed for FSR purposes.

The Commission should also provide information on the transfer of FSR data outside of the relevant FSR teams – particularly, whether and how it is used for non-FSR-related activities. Similarly, the Commission should be focused on ensuring there are safeguards on the transfer of such data by the Commission outside of the EU (for example when working with non-EU regulators and non-EU public authorities), given that other countries and jurisdictions might not always apply the same level of diligence as the European Commission.

Ideally, the Commission should refrain from using data gathered from the FSR for other activities within or beyond the competition space, due to the cross-cutting nature of this data. This is in line with Article 43 of the FSR.

Additionally, the Commission should include rights for companies to request and request the deletion or amendment of FSR data. In line with data protection regulations, companies should be able to ask the Commission for a summary of what FSR data the Commission has retained. Likewise, they should be able to, within measure, rectify the data and formally object to its use on issues unrelated to FSR. The Commission should provide a right for companies to request that the Commission delete sensitive data upon the completion of a merger or public procurement proceeding not subject to further investigation.

Procurement-specific recommendations

Administration by DG GROW

Adequate resourcing

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) has received over 3,400 FSR filings.

Although the Commission has done its utmost to set up case teams within a DG that typically does not handle company-specific enforcement procedures, significant investments in staff, resources and

procedures are necessary to ensure DG GROW is able to efficiently process the large number of filings it receives, conduct investigations and undertake the capacity-building exercises necessary to ensure effective application of the FSR by contracting authorities.

Although DG GROW has recently restructured to provide the FSR team with a Unit, it must be noted that DG COMP has an entire directorate dedicated to the FSR. Providing further resources must be a top-line priority for the Commission and co-legislators.

Predictability

As outlined in the previous sections, FSR compliance has been particularly challenging in the public procurement context. This is partly due to DG GROW's enforcement approach, which has been prone to a degree of unpredictability. Preliminary review procedures, for example, have often involved multiple extensive information requests and significant periods of silence from DG GROW.

These procedural challenges and delays should be addressed to avoid creating significant legal uncertainty for notifying parties. For example, when a notifying party has responded to an information request, and the Commission has not requested additional information after several months, the notifying party should be entitled to assume that its answers have been accepted by the Commission.

Uncertainty around incomplete filings

As highlighted above, the Commission's discretion in deeming a filing complete creates uncertainty regarding the expected timelines for preliminary review. This has been a particular concern in the context of public procurement procedures.

Further guidance on the circumstances under which DG GROW would consider a filing incomplete would help limit uncertainties for companies and ensure that they are able to file complete cases.

Likewise, when DG GROW considers a filing incomplete, it should adopt an incompleteness decision within 20 working days from when the file is transferred by the contracting authority to ensure clarity for the economic operator.

DG GROW has also seemingly adopted an untenable treatment of financial statements which frequently leads it to deem filings as incomplete. Specifically, DG GROW currently insists that economic operators disclose financial statements from previous years, even when they are not yet available. Requiring companies to provide financial statements that are not yet available is impossible and goes beyond the requirement found in section 6.3 of Form FS-PP, which only requests the provision of '*the most recent annual accounts or reports*'. The Commission should not consider this as a basis for declaring a filing incomplete.

Waivers

The FSR team at DG GROW has reportedly not offered any waivers despite two years of enforcement and thousands of cases.

Waivers are vital to simplify the cost and process of FSR compliance, particularly for large companies that frequently engage in notifiable public procurement procedures. DG GROW should revisit its approach to waivers to increase their availability.

Accessibility

The business community has historically had significant difficulty accessing the case team at DG GROW to understand the status of an investigation and ask questions.

For example, although each case has a designated case team (comprised of a case manager and case handlers), DG GROW does not provide the phone numbers of its case team, thereby restricting communication to email only. This practice raises transparency issues and is not aligned with other FSR services of the Commission.

In addition, DG GROW requires notifying parties to submit a substantial amount of sensitive information via email, which raises concerns about the number of people outside the designated case team who may have access to this information.

Accessibility is vital to good administration of the FSR. DG GROW must ensure that future staff development and organisation efforts reflect the need to have a case team that is accessible and responsive to notifying parties and their representatives.

Case register

DG GROW does not maintain a register of FSR cases, making it difficult for economic operators to track the progression of a filing from the contracting authority to the Commission, and understand whether a filing is complete.

DG GROW should align its case register practices with DG COMP and disclose the following information for each FSR filing:

- Name of the economic operator
- Name of the main subcontractor/supplier
- Case number
- Name of the public tender
- Date of receipt of complete notification
- Deadline for the investigation
- Sector of public tender

Transparency

While the Commission has published statistics related to the competition module of the FSR, it has not provided stakeholders with information relevant to the public procurement module.

Statistics around the number of case handlers available, number and nature of notifications, trends in length of screening and opening of Phase 2 investigations are vital for stakeholders to understand what to expect from an FSR procedure.

In addition, unlike DG COMP, DG GROW is not regularly updating its Q&As, leaving the business community without ongoing guidance on how the Commission's approach to public procurement is evolving.

The Commission should increase transparency around the application of the FSR by DG GROW.

Good administration by contracting authorities

After two years of FSR enforcement, contracting authorities still demonstrate little understanding of the FSR. As outlined above, they often take several months to transfer filings to the Commission, with no explanations provided to notifying parties and no notification of the date when the file is eventually transferred. In addition, contracting authorities often rely on bidders to guide them through FSR compliance.

AmCham EU members have even reported that contracting authorities have withdrawn tenders and reopened them in a way that would fall below the FSR's thresholds to avoid complexities related to the FSR.

The effectiveness of the FSR relies heavily on contracting authorities understanding the legislation and being able to communicate effectively with bidders and DG GROW to indicate whether a bid meets the notification thresholds, and to provide updates on the status of an FSR investigation.

Uncertainty and inexperience on the part of contracting authorities adds significant complexities to participation in public procurement. Greater training for contracting authorities and predictability in the Commission's administration of the FSR would help minimise this uncertainty. For multi-stage procedures, when the Commission receives an initial FSR filing and becomes aware of a notifiable tender, it should engage proactively with the contracting authority to avoid delays in the transfer of the second filing.

Under the current Public Procurement Directives, contracting authorities must indicate to a tenderer whether a contract is covered by the GPA. The Commission should introduce a similar requirement for contracting authorities to indicate whether specific contracts are covered by the FSR. While this requirement is already foreseen in Article 28 of the FSR, inclusion in the Public Procurement Directives would strengthen its application.

Moreover, as the Commission seeks to improve the FSR and the Public Procurement Directives, it must empower DG GROW to educate and build the capacity of contracting authorities across Europe to comply with the FSR.

Conclusion

Combatting distortive subsidies is only one piece in the equation of improving Europe's resilience and competitiveness. Europe also needs to attract capital, technologies and partnerships to grow and succeed.

The FSR has an important role to play in countering distortive subsidies and levelling the playing field. However, its current design and application create a suite of issues that undermine its ability to effectively pursue that goal.

Adopting the reforms outlined in this paper would sharpen the FSR into a proportionate and effective instrument that focuses on remedying the effects of genuinely distortive foreign subsidies while minimising unnecessary compliance costs. Specifically, narrowing the scope of notifiable FCs, introducing ambitious simplification measures, improving procedural clarity and adopting capacity-building measures would significantly reduce the unjustified administrative costs associated with the FSR, while allowing the Commission to focus scarce resources on the small subset of cases that may create market distortions.

Increasing the predictability, targeting and functioning of the public procurement module, which represents the vast majority of FSR filings, is particularly vital to decrease complexities for contracting authorities and economic operators, while contributing to the Commission's goal of decreasing the complexity of participating in public procurement across Europe.