ICC Comments on the Draft Implementing Regulation to the EU Foreign Subsidies Regulation

A. Background

The European Commission ("**the Commission**") launched an initiative seeking feedback on the draft Implementing Regulation ("**Draft Act**") on the Foreign Subsidies Regulation (Regulation (EU) 2022/2560) ("**FSR**"), aimed at clarifying practical and procedural aspects related to the application of the new EU rules to address distortions caused by foreign subsidies in the Single Market.

The initiative sets out the rules on applying the FSR, including: procedures for notifying, and content of, notifications of concentrations and public procurement bids, rules for calculating time limits and procedural rules on preliminary reviews and in-depth investigations in cases of suspected distortive foreign subsidies.

The consultation is aimed at the text of the Draft Act, which also includes an Annex 1 applicable to concentrations ("**Annex 1**") and respective notification form and an Annex 2, applicable to notifications or declarations under public procurement procedures ("**Annex 2**"), in both cases to be filed indirectly or directly before the Commission.

B. General Comments

European competition and State aid rules, as well as public procurement rules, play a crucial role in ensuring fair competition in the EU internal market. However, until the approval of the FSR, none of these instruments applied to third-country subsidies that give beneficiaries a potential unfair advantage when (i) acquiring European companies, (ii) participating in public procurement procedures or (iii) engaging in other economic activities in the EU. While subsidies from Member States and their effects on competition in the EU are subject to strict EU State aid control and enforcement by the Commission, prior to the FSR there was no comparable control for third-country subsidies to companies operating in the internal market.

ICC understands that with the FSR, the EU aimed to introduce an effective and comparable control mechanism for third-country subsidies to undertakings operating in the EU internal market, in addition to the existing State aid and public procurement rules, putting in place a heavily bureaucratic process. The FSR goes beyond State aid rules and European and non-European companies active in the EU will need to submit a quasi-exhaustive survey of all economic interactions kept with third countries. For large companies, this represents an unmanageably large amount of information, which will quickly overwhelm the Commission's staff (in addition to companies' own staff).

Further, companies will not be able to guarantee completeness and accuracy of data production over such a large scale and the Commission will unlikely be able to make meaningful use of the vast majority of accessed information.

It is also important to consider that companies from certain third countries may not have the same level of efficiency in corporate record-keeping as the EU. Similarly, the form and format of corporate records in some countries may be significantly different from the EU standards. This may amplify an already high administrative burden and deter such companies from trading or investing in the EU.

Similarly, the bureaucratic red tape may result in an unexpectedly high workload for the EU institutions, causing them to miss out on distortive subsidies while trying to handle the impractical paperwork. For the sake of proportionality and effectiveness, it is therefore crucial that the Commission focus its own and the industry's efforts on what really matters and avoid imposing such an unprecedented information collection burden on so many companies to purse a handful of cases every year.

The Single Market has always been an attractive option for investors from third countries in the region. This provides a competitive advantage to the EU economy.

Unlike foreign companies, European companies have already been subject to subsidy regulations for years. The FSR seeks to close this regulatory gap and remedy the imbalance between European and foreign companies. That said, in its current form, the cost of compliance with subsidy restrictions will potentially be higher for foreign companies than the ones in the Single Market. This may create a competitive disadvantage for foreign companies and reverse the imbalance instead of remedying it.

In this context, there is significant room for improvement as well as the need to provide greater clarity and legal certainty for the undertakings within and outside the EU that are subject to the FSR, in the Draft Act. In its current form, the Draft Act does not answer key questions regarding various substantive points that are fundamental to understanding and applying the FSR, for instance how to interpret "financial contribution" or what constitutes a "distortive" subsidy. By way of example, public support obtained for COVID-19 or green energy initiatives may fall within this scope and make it difficult for the EU authorities to distinguish distortive subsidies from others. Further guidance will be welcome in the envisaged Guidelines or subsequent Notices, but these instruments will come too late for the many undertakings who have to figure out how to comply with the FSR (before 12 October 2023 in case of concentrations and public procurement).

It is essential to preserve the EU's fundamental openness to foreign and domestic investment while keeping the bureaucratic hurdles for mergers and participation in public procurement as low and streamlined as possible. In order to prevent unnecessary burdens on business and excessive blocking periods for undertakings, the procedures under the individual instruments must be clear, predictable and unbureaucratic.

ICC is in general concerned regarding the term *foreign financial contributions*. The definition is made in Article 3 of the FSR, in a non-exhaustive list of economic activities of different kinds. It gives the impression as if most if not all economic interaction, regardless of whether it confers a benefit or not to the undertaking in question, with a public entity in a third country are captured by this concept, as only foreign financial contributions which "confers a benefit on an undertaking" are to be treated as foreign subsidies. However, in paragraph (13) it is stated that "A financial contribution should confer a benefit on an undertaking engaging in an economic activity in the internal market. A financial contribution should be considered to confer a benefit on an undertaking if it could not have been obtained under normal market conditions." There seems to be room for clarification in the Draft Act, more precisely on the notion of foreign financial contributions and how it differs from

the term foreign subsidies, including giving examples of circumstances where a foreign subsidy should be identified or not.

Also, we suggest including the block exemption rules of certain categories of foreign subsidies/financial contribution by reference to similar mechanisms under EU State aid rules, since some of which may be granted under certain special conditions or circumstances (e.g. aid to remedy the damage caused by natural disasters or exceptional occurrences, subsidies or investment to facilitate the development of certain economic activities (impacted by economic crisis) or certain remote areas (with abnormally low standard of living) where such subsidies or investment do not adversely affect trading conditions to an extent contrary to the local public interest). These financial contributions shall be or could be exempted on categorical basis, so as to reduce the review cost and achieve more efficient regulation, allowing the Commission to prioritise its resources on complex and challenging cases.

C. Specific Comments

C.1. Draft Act text

In order to ensure an even balance between the Commission's objectives and an efficient and comprehensible implementation of the FSR by the respective addressees, attention must be paid to a number of elements. Some mechanisms of the proposal should in our view be adjusted.

- **Article 2, *Definitions***

In order to achieve a coherent and clear application of the FSR and respective Draft Act, the following definitions should be included in Article 2:

- "**Benefit**", based on recital (13) of the FSR, which states: *"A financial contribution should be considered to confer a benefit on an undertaking if it could not have been obtained under normal market conditions."*

- "**Concentration**", based on Article 20 FSR, which states: "*A concentration shall be deemed to arise where a change of control on a lasting basis results from either (a) the merger of two or more previously independent undertakings or parts of undertakings or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."*

- "**Public Procurement**", based on Article 28 FSR, which states: "*A public procurement procedure shall be deemed to arise where: (a) the estimated value of that public procurement or framework agreement net of VAT, calculated in accordance with the provisions laid down in Article 8 of Directive 2014/23/EU, Article 5 of Directive 2014/24/EU and Article 16 of Directive 2014/25/EU, or a specific procurement under the dynamic purchasing system, is equal to or greater than EUR 250 million; and (b) the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions in the three years*

prior to notification or, if applicable, the updated notification, equal to or greater than EUR 4 million per third country."

- **Article 4, *Notifications of concentrations***

The translation requirement of supporting documents into an official language of the EU, as provided in Article 4(3), may raise a disproportionate burden on foreign companies.

Article 4(4) (and also Article 5(5)) opens up for the possibility to limit the information requirements primarily during the "waiver procedure" by making it possible to get an exemption from information not being necessary for the eximination of the notification. The pre-notification period of a deal/public procurement is possibly too late for companies to seek a waiver. It will take months for companies to collect the required information and putting it in a workable format which means that companies will not be able to wait until the pre-notification to start a discussion with the Commission's case team on what information may or may not have to be submitted. As a result, the Commission should specify (at least by way of example) the type of information that would normally qualify as "not being necessary for the examination of the notification".

Article 4(5) should explicitly provide a maximum time period for the Commission to acknowledge in writing to the notifying parties or their representatives receipt of the notification, for instance **5 working days**, to avoid undue delay of the procedure.

- **Article 5, *Notifications and declarations in public procurement procedures***

Article 5(1) should limit the categories of reportable financial contribution to those most likely to be distortive.

Article 5(5). We welcome the fact that the Commission invites notifying parties to engage in pre-notification discussions. However, to ensure the usefulness and effectiveness of pre-notification discussions, there must be sufficient time to conduct in-depth discussions before a final notification can be submitted at the time of the tender (in an open procedure) or the request to participate (in a multi-stage procedure) (see Article 29(1) FSR)). The Implementing Regulation should therefore make explicit that pre-notification discussions can commence before a procurement process which triggers a notification requirement is formally initiated.

Article 5(5) also suggests that the national contracting authorities should be involved in the granting of waivers. Giving the contracting authority this joint role with the Commission in the review process appears to be contrary to the FSR and could unnecessarily complicate and delay the notification process.

- **Article 6, *Effective date of notification in concentrations***

Article 6(2) should explicitly provide a maximum time period for the Commission to deem a notification incomplete, for instance **5 working days** following notification. With the aim of impeding the undue extension of notification procedures by EU staff.

Article 6(3) provides that, the Commission may consider the notification to become effective only on the date on which it receives the relevant information communicated by the notifying parties after the notification, where such information could have a significant effect on the Commission's assessment. We understand that, as provided by Article 6(3), the time limit provided in Article 24(1) point (a) and (b) of the FSR will also be restarted due to the change of the effective date of the notification. Article 24(1) d) of the Draft Act provides that the Commission may suspend the time limit provided in Article 24(1) point (a) and (b) of the FSR, if the notifying parties failed to inform the Commission of relevant information, including changes in the facts of the kind referred to in Article 6(3) of the Draft Act. Both Article 6(3) and Article 24(1) d) of the Draft Act provide the Commission with sufficient and flexible time for its assessment, however, the concurrent application of both of these Articles may lead to confusions and extra postponement of notification procedure. The Draft Act should further clarify on the coordination between Article 6(3) and Article 24(1) d).

Equally, the Commission should clarify what would constitute any "relevant information" the parties "would have had to notify if they had know [it] at the time of notification." Does this mean a notifying party would have to report new financial contributions it receives post-notification? This uncertainty, coupled with the fact that the Draft Act allows for the Commission to restart the clock upon receiving that information, could lead to significant timing uncertainty (*"the Commission may consider the notification to become effective only on the date on which it receives the information concerned"*) – see Articles 6(3) and 7(3) of the Draft Act.

- **Article 7, *Effective date of notifications and declarations in public procurement procedures***

Article 7(4) should prescribe a maximum period of time for the contracting authority or the Commission to deem a declaration or notification incomplete. For instance, **5 working days** following receival, as applicable, of the declaration, notification, updated declaration or updated notification by the contracting authority or the Commission. With the aim of preventing the undue postponement of notification procedures by national or EU staff.

- **Article 8, *Timeline for submission of views following an opening of an in-depth investigation***

In addition to the publication of the summary notice of the decision on the OJEU, Article 8(1) should also foresee the timely publication of the **summary notice on the website of the Commission**, similar to what occurs in EU State aid cases.

Article 8(2) should enumerate in a non-exhaustively manner the circumstances that can be considered as "duly justified cases" with the aim of providing relevant undertakings with clearer guidance regarding the circumstances where they can apply for the extension of time limit, as well as avoiding arbitrary application of such extension. In addition, as regards the possible extension of the time limit for undertaking under investigation and other person to submit views, it should be further clarified with the maximum period of time for such extension of, for instance, **30 working days**.

- **Article 9, *Interviews***

Article 9(1) should explicitly include the right of the interviewed natural or legal person to be accompanied by an **external lawyer**.

Article 9(2) could opt in for **video and sound recording of the interview**, instead of minutes which can give rise to an incontrollable number of versions, augmenting the administrative burden, and may not accurately reflect the detailed content of the interview. In addition, Article 9(2) should prescribe a minimum time limit of, for instance, **10 working days**, for the person interviewed to communicate comments on the minutes of the interview, with the aim of providing the person interviewed with sufficient and reasonable time to review and comment on the minutes.

- **Article 10, *Oral statements during inspections***

Article 10(3) should prescribe a minimum time limit of, for instance, **10 working days**, for an undertaking or an association of undertakings to communicate to the Commission any change to the explanation provided by unauthorized member of staff of the said undertaking or association of undertakings.

- **Article 17, *Transparency and Reporting***

Obliging undertakings to report future financial contributions may decrease legal foreseeability. It may be beneficial to limit the Commission power of imposing such obligation with cases where such reporting is necessary to monitor the compliance with commitments.

- **Article 18, *Submission of observations***

Article 18(1) should prescribe a minimum time limit for the undertaking under investigation to submit observation on the Commission's ground on which it intends to adopt its decision. Such minimum time limit should be able to guarantee the said undertaking with sufficient and reasonable time to review the Commission's ground for the decision and prepare its observation, for instance, **30 working days**.

The undertaking under investigation should be entitled to request an oral hearing, similar to antitrust or merger control proceedings. By recognising this right in Article 18(2), restriction on the exercise of the right to be heard may be ensured as observations pursuant to Article 18(1) can be presented verbally other than a written submission.

- **Article 20, *Identification and protection of confidential information***

Article 20(6) may lead to the disclosure of the business secrets of the undertaking under investigation to the public as the term "to the extent necessary" is relatively abstract and this section provides no explicit criteria on which the information of the undertaking concerned will be disclosed. Article 20(6) should only allow the Commission to disclose, when showing the existence of a distortive foreign subsidy, the non-confidential version of the relevant information provided by the undertaking under investigation. Article 20 should clarify that Article 43(3) FSR should be limited to publications of statistics directly related to FSR and not other purposes.

- **Article 21, *Access to the file and use of documents***

Right to access to the Commission's file by companies under investigation is limited by Article 21. This article does not extend to internal documents of the Commission, internal documents of the authorities of Member States or third countries, correspondence among the Commission, Member State authorities, third countries, and contracting authorities. Such restrictive approach may be damaging to the right of defense as the company under investigation would not have access to records that are important for determining the amount of foreign subsidies. Accordingly, the investigated parties should have access to a non-confidential version of the entire file.

- **Article 24, *Suspension of time limits in concentrations***

It will be beneficial to set forth a reasonable and tangible time frame for the Commission to process data. The current form of Article 24(4) contains the phrase "*within a reasonable time limit*", which lacks clarity and foreseeability.

- **Article 26, *Transmission and signature of documents in concentrations***

Article 26(3) should include the exact format (e.g., by email mentioning the email address) or referring to a website where the format is clarified.

The content of Article 26(5), *in fine*, regarding communication "without undue delay" by the Commission confirming the completeness of received documents, should be densified in a specific time period not exceeding **5 working days** in benefit of legal safety.

- **Further areas for clarification**

  - The Commission should confirm that for tax measures in countries that have adopted a compliant global minimum effective tax regime ("Pillar 2") reporting waivers will be available.

C.2. Draft Act Annex 1 - Concentrations

Since the **FSR is not applicable to trade in goods and to imports of subsidised goods due to the primacy of the WTO Agreement on Subsidies and Countervailing Measures**, such subsidies will not fall within the FSR.

This observation should be explicitly reflected by a necessary adaption in Annex 1, with a new recital stating that the form is not applicable, conditions met, to trade in goods and to imports of subsidised goods due to the primacy of the WTO Agreement on Subsidies and Countervailing Measures, including a specific reference to **Article 32(1) of the WTO SCM Agreement**: *"No specific action against a subsidy of another Member State can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."*

Additional clarification and guidance should be provided in the form on this topic by the Commission to allow companies to understand the practical scope of this exemption.

In addition, Annex 1 requires the notifying parties to list all types of foreign contributions and their amounts, but still gives no further instruction on how to define each category of foreign contribution in Article 3 of the FSR, nor how to determine whether a financial contribution is a foreign subsidy ("**determination approach**") and how to calculate the subsidy amount ("**calculation method**"), which brings a lot of uncertainty to the filing. Without clear guidance, the reporting obligations could become very extensive for every undertaking within and outside EU. Therefore, it is necessary that more clear and detailed determination approach and the calculation method for each type of foreign subsidy are included in Annex 1.

The most pressing issue for most businesses caught by the new filing regime is the putative requirement to gather information on each and every foreign financial contribution over a three-year rolling period, no matter how small and even in respect of transactions that are on market terms, such as purchases of train tickets from a State-owned rail operator. For many multinational businesses this would require filtering hundreds of thousands of transactions to identify those with counterparties that have sufficient links to a third country. That would be extremely costly and burdensome. Moreover, given that the vast majority of such financial contributions will not amount to subsidies and/or will be too small to have any relevance to the Commission's analysis, such a burden would be unnecessary and disproportionate to the aims of the FSR. Consequently, a key consideration for the Commission should be to design the filing regime in a way that allows companies to avoid that burden. Two ways in which this could be achieved are:

(i) making it clear (in the Section 9 attestation) that businesses can opt to accept or assume that the foreign financial contribution filing thresholds are met, even if they have not gathered data on each and every FFC in every non-EU jurisdiction; and

(ii) clarifying that only individual foreign financial contribution of over EUR 200,000 need to be included for the purpose of calculating whether the threshold of EUR 4 million of aggregate foreign financial contribution per country per year in Section 5.1(ii) of the draft form is met.

- **Recital (9)**

Explicit explanations on "adequate reasons", "best estimate" and the information which "is not necessary for the examination of the case" shall be provided. ("*In the course of pre-notification contacts, the notifying party(ies) may request waivers to submit certain information required by this form. The Commission will consider waiver requests, provided that one of the following conditions is fulfilled: (a) the notifying party(ies) gives adequate reasons why the relevant information is not reasonably available and provides best estimates for the missing data, identifying the sources for these estimates. […] (b) the notifying party(ies) give adequate reasons why the relevant information is not necessary for the examination of the case*")

The lack of more guidance about the scope of "adequate reasons" and the standards for "best estimate" and the information which "is not necessary for the examination of the case" will lead to the Commission's excessive discretion. As a result, it will become difficult for the notifying parties to apply for such waivers. Additional guidance must be provided by the Commission on this topic in Annex 1.

- **Recital (24)**

In Recital 24(a) the **definition of "notifying party" and "party(ies) to the concentration"** also includes jointly controlled entities.

Including jointly controlled (and not only majority owned) entities in the definition of "notifying party" and "party(ies) to the concentration" makes the reporting obligations foreseen very difficult to comply with. Often, such joint ventures are not integrated into a company's ERP system, are treated differently in a company's accounting system and sometimes purposefully include Chinese walls to the parent entities. **The definition in Recital 24 (a) should make reference to Article 22 (4) FSR**.

- **Recital (25)**

The benchmark for the exchange rate shall be clarified. ("*The financial data requested in Section 4 must be provided in euro at the average exchange rates prevailing for the years or other periods in question.*")

Notifying parties should be explicitly informed which official exchange rate benchmark (from which authority) to use in avoidance of obscurity.

- **Section 3.7**

This section should be deleted or at least limited to those acquisitions in the same markets related to the concentration. ("*List of acquisitions of control made during the last three years by the notifying party(ies) of undertakings active in the Union.*")

It will be extremely extensive for the undertakings to list every acquisition of control made during the last three years of undertakings active in the EU. There is no explicit provision in the FSR that requires the information of the notifying parties' acquisitions of control in the last three years. Without clear

legal basis, this section, which creates excessive burden on the notifying parties, should be deleted, or at least limited to the same markets related to the concentration for the purpose of assessment.

As a general comment, there should be a reflection as to why the long-list of information requested is relevant to the FSR. Alternatively, the information could be requested in Phase II.

- **Section 4.1**

The calculation method of the joint venture's turnover shall be explicitly provided. ("*In accordance with Article 20(3), point (a) of Regulation (EU) 2022/2560, the relevant turnover in the Union in case of the creation of or the acquisition of a joint venture, is the turnover in the Union of the joint venture itself.*")

Pursuant to Article 20(3), point (a) of the FSR provides a threshold for a notifiable concentration without any guidance on how to calculate the turnover of a joint venture. The Draft Act also fails to provide any further guidance on that. Therefore, the calculation method of the joint venture's turnover shall be clarified, and more guidance shall be provided in section 4.1. For instance, it should be clarified that when a joint venture is newly created/established and its parents are not contributing any revenue-generating assets to it, its turnover will be zero and always below the threshold, therefore, it shall be made clear whether the turnover shall be tracked back to the joint venture's parent entities.

As a a general point (and while we recognise that the Draft Act may not be the appropriate place to do so), the Commission should clarify that it will follow the rules established by the EUMR Consolidated Jurisdictional Notice when calculating turnover and identifying undertakings concerned. However, we note that the second sentence of paragraph 139 of the Consolidated Jurisdictional Notice should be disapplied in the context of the FSR because (unlike the EUMR) Article 20(3)(a) FSR requires that, for joint ventures, only the turnover of the JV is to be taken into account.

- **Section 5.1**

Section 5.1 of Annex 1 (Concentration notification form) and Section 3.1 of Annex 2 (Public procurement notification form) are not consistent for what concerns the categories of "foreign financial contributions" for which the notifying parties have to provide the detailed list.

The coherence of these two Annexes should be granted by requesting the same set of data and information. More in details, the Annex 1, Section 5.1 should use the same wording of the Annex 2, Section 3.1 limiting the detailed list of financial contribution to be provided exclusively to those most likely to distort the internal market pursuant to Article 5(1) paragraphs a) to d) of the FSR. Below the proposed wording (in bold and underlined the needed additions):

"5.1. Provide a detailed list of all the foreign financial contributions ***as defined in Article 3(2) of Regulation (EU) 2022/2560*** *that have been granted to the undertakings identified in Article 20(3), point (b) of Regulation (EU) 2022/2560 in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest* ***and that fall into any of the categories in Article 5(1), points (a) to (d) of Regulation (EU) 2022/2560***."

We welcome the **threshold** foreseen in Annex 1, section 5.1 (i), for financial contributions to be notifiable. Such threshold should also be introduced in Annex 2 (see below). However, given the size of the transactions caught by the FSR (*i.e.*, targets with a turnover of more than EUR 500 million), the threshold in inappropriately low. **It should be set to the higher of 0.5% of the purchase price of the target or EUR 2 million. The threshold in Annex 1, section 5.1 (ii) should be set at the higher of 5% of the purchase price of the target or EUR 40 million.**

In addition, as collecting and preparing data for threshold calculation is disproportionate for minor amounts (e.g., the monthly water bill payable by a foreign state owned company or the procurement of stamps by a third country), **there should be a *de minimis* amount up to which an individual financial contribution is exempt from the companies' reporting and internal monitoring obligation and up to which financial contributions do not even have to be considered for threshold calculation** . We propose this *de minimis* amount to be EUR 2 million.

We also recommend to clarify that only financial contributions received by the target that are directly or indirectly related to the acquisition must be notified. Any other financial contribution that the target may receive would increase the target's value and on balance would make an acquisition more expensive for the acquirer.

Section 5.1 also contains a footnote stating that a financial contribution "should be considered granted from the moment the beneficiary obtains a legal entitlement to receive" the financial contribution. This should be further clarified to **ensure that companies can build on existing financial reporting data**.

Even with the reporting requirements under section 5.1 appropriately limited in the way described above, **it will be impossible for companies to report on financial contributions received in a past where no relevant reporting instruments were in place**. Gathering relevant data would be a completely manual exercise. It would be impossible to conduct such an exercise in any meaningful or comprehensive manner (as relevant data is to a large extent no longer retrievable, e.g., due to organizational and portfolio changes, etc.). New reporting instruments for FSR will need to be set-up which is not possible in a short time frame. Therefore, **for a transition period (e.g., 3 years from the notification obligations coming into force) it should be possible to report on financial contributions in an aggregated and descriptive way**, e.g., with the help of existing annual reports or existing IAS 20 reporting.

- **Section 5.2**

In the current draft of this section, it is difficult to assess whether a foreign financial contribution has a "possible link with the concentration". It may be helpful to include additional criteria and provide clarity on the circumstances that affect this assessment. There is little guidance to be found in the EU State aid regime to help businesses to understand how the Commission intends to assess subsidies in the context of concentrations and the relevant theories of harm – in particular with respect to subsidies granted to the target – are unclear.

- **Section 5.3.6**

This **section should be duly pondered by the Commission.** (*"Does or will the contribution confer a benefit within the meaning of Article 3 of Regulation (EU) 2022/2560 to the undertaking to which the foreign financial contribution has been granted? 12 If the contribution does not confer such a benefit, please explain why;"*)

Certain information should be subject to a waiver from the outset. For example, by analogy with the principle of the market economy operator test in State Aid law, the Commission could waive any information requirement in a notification in respect of standard commercial transactions carried out at arm's length, with no "benefit", provided that the company submits a general explanation.

- **Section 6.1**

The information required in this section shall be reasonably limited. ("*Does the concentration occur in the context of a structured bidding process? If so: 6.1.1. Provide a detailed description of the bidding process; 6.1.2. Indicate how many other candidates were contacted; 6.1.3. Indicate how many other candidates expressed an interest; 6.1.4. Provide a detailed description of the profile of each of the other candidates mentioned above (e.g. whether these were private equity companies or industrial undertakings; 6.1.5. Indicate how many letters of intent and non-binding offers were received and from whom; 6.1.6. Indicate how many and which bidders withdrew and at what stage of the process.*")

Even in a structured bidding process, the information of other candidates that were contacted or expressed an interest may involve business secrets and may not be disclosed to the notifying parties. It is difficult for the notifying parties to know all the candidates who were contacted or expressed an interest, not to mention providing detailed description or even the status of the letters of intent or non-binding offers. It will impose undue burden on the notifying parties and may also break confidentiality obligations of the seller to provide such information. Therefore, this section should be reasonably limited to the general description of the bidding process and the information practically available to the notifying parties themselves.

- **Section 6.2**

Does the Commission really need to receive all due diligence reports and all documents discussing valuation as part of the initial notification? Shouldn't this be limited to Phase 2 investigations or complex Phase 1 cases as under the EUMR? The Commission will quickly be overwhelmed by the amount of information it will receive. This obligation may also negatively disrupt the due diligence process.

- **Section 6.3**

This section should be deleted. ("*Provide contact details of all other undertakings who expressed an interest in the acquisition or the merger.*")

It is difficult for the notifying parties to know all undertakings who expressed an interest, not to mention providing their contact details. Such disclosure may also give hints about the future business plans of companies that are not a party to the transaction. To avoid imposing undue burden on the notifying parties, this section should be deleted. If necessary, the Commission may request such contact details in a subsequent stage of the procedure.

- **Section 6.4**

The information required in this section shall be limited to those products or services that have overlapping, vertical or neighbouring relationship. ("*Please explain what are the different business lines or activities of each of the parties to the concentration in the internal market, explaining categories of products and/or services offered in each of them and to what customers.*")

It will be very extensive and burdensome to list all the business lines or activities of each party to the concentration. Some business lines or activities may be completely irrelevant to the concentration, especially for joint venture transactions and acquisitions. Referring to the merger control filing regime, the information required in this section shall be limited to those relevant products or services markets that have overlapping, vertical or neighbouring relationship with the markets related to the concentrations.

- **Sections 8.2 and 8.3**

We recommend to clarify that the submission of supporting documentation under Sections 8.2 and 8.3 only applies to financial contributions that fall under Article 5(1) of Regulation 2022/2560, as indicated under Section 8.1.

- **Table 1**

Table 1 to the Annex 1 contains a column asking the "**Date of granting**" of a financial contribution, which will often not be clearly identifiable. Given that the wide definition of financial contributions will result in a requirement to report an extensive number of individual transactions, the respective reporting needs to be automated and system-based. It should be clarified that the last column of Table 1 (Date of granting) **can be filled with the date on which the financial contribution was posted in the internal reporting system of a company following commonly accepted reporting standards**.

C.1. Draft Act Annex 2 – Public Procurement

This instrument is a declaration or notification-based form for the scrutiny of bids for public contracts by undertakings that receive a financial contribution from a third country. The aim is to detect foreign subsidies that enable a bidding undertaking to submit a bid that is unduly advantageous (Article 28 FSR). The notification obligation applies not only to an individual bidder, but also to groups of economic operators, main subcontractors and main suppliers.

Since the **FSR is not applicable to trade in goods and to imports of subsidised goods due to the primacy of the WTO Agreement on Subsidies and Countervailing Measures**, public procurement contracts referring to goods and goods and services in a combined contract (in which the goods are preponderant *vis-à-vis* the services) will not fall within the FSR.

This observation should be explicitly reflected by a necessary adaption in Annex 2, with a new point stating that the form is not applicable, conditions met, to trade in goods and to imports of subsidised goods due to the primacy of the WTO Agreement on Subsidies and Countervailing Measures, including a specific reference to Article 32(1) of the WTO SCM Agreement: *"No specific action against a subsidy of another Member State can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."*

Additional clarification and guidance should be provided in the form on this topic by the Commission to allow companies to understand the practical scope of this exemption.

Similar to Annex 1, it is necessary that more clear and detailed determination approach and the calculation method for each type of foreign subsidy are included. In addition, Annex 2 is unclear in a lot of instances and should be reviewed – e.g., what is the relationship between Section 3 notifications and Section 7 declarations?

- **Recital (25)**

We recommend to allow parties to communicate business secrets directly to the Commission or at least impose on public contracting authorities the same confidentiality obligations as imposed on the Commission.

- **Section 3.1**

We recommend excluding from Section 3.1 of Annex 2 the obligation to notify financial contributions which relate to operating costs. It is extremely difficult for companies to determine whether a financial contribution was granted to cover operating or investment costs, let alone to quantify the impact caused by contributions to cover operating expenses, which requires high expertise in economics and statistics. Further, the FSR does not list financial contributions to support operational expenses as one of the most likely to distort the internal market under Article 5(1).

We further recommend to align public procurement notification with a concentration notification by requiring foreign financial contributions to be included on the Notification Form list if:

- The individual amount of the contribution is equal to or in excess of EUR 200,000; and

- The total amount of contributions per third country and per year is equal to or in excess of EUR 4 million.

Annexes 1 and 2 should be coherent and request the same set of data and information. Annex 2, **Section 3.1, must be supplemented by a threshold** comparable to the one in Annex 1, section 5.1 (cf. above). Financial contributions should only need to be listed in a notification if their individual amount is higher than 0.5% of the estimated value of the public procurement agreement or EUR 2 million, whichever is higher.

In addition, as collecting and preparing data for threshold calculation is disproportionate for minor amounts (see above for Annex 1, Section 5.1), **there should be a *de minimis* amount up to which an individual financial contribution is exempt from the companies' reporting and internal monitoring obligation and up to which financial contributions do not even have to be considered for threshold calculation** . We propose this *de minimis* amount to be EUR 2 million.

Annex 2, Section 3.1, contains a footnote stating that a financial contribution "should be considered granted from the moment the beneficiary obtains a legal entitlement to receive" the financial contribution. This should be further clarified to **ensure that companies can build on existing financial reporting data**.

Even with the reporting requirements under Section 3.1 appropriately limited in the way described above, **it will be impossible for companies to report on financial contributions received in a past where no relevant reporting instruments were in place**. Gathering relevant data would be a completely manual exercise. It would be impossible to conduct such an exercise in any meaningful or comprehensive manner (as relevant data is to a large extent no longer retrievable, e.g., due to organisational and portfolio changes, etc.). New reporting instruments for FSR will need to be set-up which is not possible in a short time frame. Therefore, **for a transition period (e.g., 3 years from the notification obligations coming into force) it should be possible to report on financial contributions in an aggregated and descriptive way**, e.g., with the help of existing annual reports or existing IAS 20 reporting.

Section 3.1 states that "A foreign financial contribution granted to any notifying Party as defined in points (25) and (26) of the Introduction of this Notification Form must be included in this list if its aggregate amount equals or exceeds EUR 4 million per third country in the three years prior to notification.". The reference to points (25) and (26) seems to be incorrect and should be clarified.

- **Section 3.1.6**

Section 3.1.6 should be duly pondered by the Commission. ("*Does or will the contribution confer a benefit to a notifying party? If the notifying party considers that the contribution does not confer such a benefit, please explain why;*")

Certain information should be subject to a waiver from the outset. For example, by analogy with the principle of the market economy operator test in EU State Aid law, the Commission could waive any information requirement in a notification in respect of standard commercial transactions carried out at arm's length, provided that the company submits a general explanation.

- **Section 3.3**

As mentioned above, we recommend to remove the reference to operational expenses given how unworkable this is in practice. It is disproportionate to put contributions covering operational expenses to any extent on the same foot as Article 5(1), (e) subsidies. In the alternative, the Commission should at least clarify that Section 3.3. information requests only apply to foreign subsidies listed in Table 1 (i.e., after applying the aggregate EUR 4 million *de minimis* threshold).

- **Section 3.3.1**

The quantification requirements of impact in Section 3.3.1 should be deleted. ("*identify all such contributions granted to cover operating expenses which the company would incur in its day-to-day management or activities (for instance in the manufacturing process) for the products, works or services offered in the tender which has triggered this notification. Please explain how the contribution impacts the products, services and works offered, including their manufacturing process and quantify the impact.*")

As explained, it is extremely difficult and extensive for the notifying parties to quantify the impact caused by contributions to cover operating expenses, which requires high expertise in economics and statistics. It is more reasonable that the notifying parties provide the amount of the financial contribution and description of the impact, deleting the quantification requirements.

- **Section 3.3.3**

More guidance and clear standards should be provided to identify such foreign subsidies ("*identify any foreign subsidies granted to cover for new investments that allow to increase the capacity or improve the technical performance of the products, works or services offered in the tender for which this notification is submitted. Please quantify their impact.*")

Without more guidance and clear standards, the concept of "increase the capacity or improve the technical performance of the products, works or services" may be too broad to identify such foreign subsidies.

In addition, similar to the Section 3.3.1, the quantification requirements of impact shall also be deleted.

- **Section 6.1**

We would like to emphasize that the requirement to produce supporting documents for all financial contributions listed is extremely burdensome and highly disproportionate under the current level of *de minimis* thresholds. In accordance with Article 13(4)(a) of FSR, information requests ought to be accompanied by the legal basis and purpose of the request.

- **Sections 6.2 and 6.3**

Same comment as for Section 6.1. In addition, we recommend to clarify that the submission of supporting documentation under Section 6.2 and 6.3 only applies to financial contributions listed in Section 3.2-3.6.

- **Section 7**

This section requires companies to declare all financial contributions received when the public procurement tender in which they participate do not meet the notification thresholds, which effectively means that companies participating in any small tender in the EU would be required to declare all financial contributions received in any third-country (something that companies participating in large EU public procurement processes do not even have to do). We recognise that, in order to verify that the EUR 4 million threshold is not met, parties to qualifying public procurements will often have to gather information on each and every foreign financial contribution received from a third country, in which case we accept that the disclosure of such contribution would not impose an unacceptable burden. However, it will often also be possible for parties to verify that the threshold is met in other ways, without having to undertake the arduous exercise of gathering information on all foreign financial contributions, e.g., by confirming that the value of their sales in a given country in the past three years is less than EUR 4 million and they have no operations or facilities there that would have made purchases, received financing or benefitted from foregone revenue that could push it over the EUR 4 million threshold. It seems to us that a more proportionate approach would be to simply require parties to declare that no notifiable foreign financial contributions have been received. The possibility of significant financial penalties under Article 33(2) FSR for an incorrect declaration will suffice to ensure that such declarations are truthful and, if the Commission has a reasonable suspicion that an incorrect declaration has been made it can rely on its powers under Article 13 and 14 FSR to ascertain whether that is the case.

At minimum, Section 7 should make it clear that it is only foreign financial contributions received in the three years prior to the public procurement procedure that must be listed and (in line with the disclosure requirements of the concentration form) that individual foreign financial contributions with a value of less than EUR 200,000 need not be listed.

- **Table 1**

Table 1 of Annex 2, which is identical to Table 1 of Annex 1, should be streamlined the same way as proposed for Table 1 of Annex 1 (see above).