ICC Response to the European Commission Public Consultation on the First Review of Foreign Subsidies Regulation (FSR)

A. General and cross-cutting aspects

The questions in this section are aimed at reviewing the general implementation and enforcement of the FSR, including the application of key 'technical concepts', more specifically:

- The determination of distortions in the internal market (Article 4 FSR);
- The categorisation of foreign subsidies most likely to distort the internal market (Article 5 FSR);
- The application of the balancing test to distortive foreign subsidies (Article 6 FSR); and
- The enforcement of the ex officio review mechanism (Article 9 FSR).

Please read the above-mentioned articles of the FSR in full before replying.

1. Have you or your organisation had any interaction with the FSR or its procedures? [multiple choices possible]

✓ Yes, as a competitor or affected third party (e.g. **business association**, labour union or other stakeholder indirectly affected by the application of the FSR)

If your answer is 'yes', please specify the type of sector and/or activity in the EU.

As the institutional representative of over 45 million businesses, reaching more than 170 countries, the International Chamber of Commerce (ICC) operates with a mission to make business work for everyone, every day, everywhere.

We are the primary voice of the real economy in a range of intergovernmental organisations—from the World Trade Organization to the United Nations climate process—championing the needs of local business in global decision making.

The convening power of our global network enables us to set rules and standards that facilitate over US$17 trillion dollars in trade each year—in addition to providing tailored products and digital services that directly address the real challenges faced by businesses operating internationally.

We also provide the world's premier private global dispute resolution services, leveraging ICC's unique independence, integrity and expertise.

2. How would you rate your level of knowledge and familiarity with the FSR?

✓ High: in-depth understanding and regular interaction

3. On the basis of your knowledge and experience, do you consider that the framework for assessing distortions under Article 4 FSR, including the indicators (Article 4(1) FSR), is clear and predictable?

- ✓ No

Please explain your answer. If relevant, please provide specific examples of situations where the distortion criteria were unclear and state how this could have been improved.

Article 4 establishes an overly broad framework for assessing distortions. Specifically, Article 4's two-pronged distortion test – requiring both an improvement in an undertaking's competitive position and a negative impact on competition in the internal market – has been interpreted more expansively than initially anticipated. While the Commission's 2024 Staff Working Document suggested a targeted approach focusing on subsidies with a clear EU nexus and a tangible impact on competition in the internal market, the recent draft Guidelines adopted a much broader interpretation, arguing that virtually any subsidy could create distortions by theoretically "freeing up" a company's resources and hypothetically impacting competition. This approach creates significant uncertainty for businesses.

Three key improvements would enhance the clarity and predictability of Article 4. First, Article 4 should establish a clearer jurisdictional nexus, ensuring that only subsidies with a demonstrable connection to specific activities in the internal market will be considered distortive. Second, the language in Article 4 should strengthen the causal link between a subsidy and a company's competitive position in the internal market, moving away from the current vague concept of "liable to improve", which could apply to virtually any subsidy. Third, the assessment of negative impacts on competition should align more closely with established EU competition law standards, particularly the "significant impediment to effective competition" test used in the EUMR.

Admittedly, the sentence that says that a distortion shall be determined on the basis of indicators could lead to a more practical approach, but this has not been the case for the following reasons:

- The list of indicators can be freely expanded by the Commission, raising concerns about legal certainty and the breadth of the Commission's discretion. The FSR provides indicators for assessing distortion, but their practical application remains ambiguous, with insufficient clarity on the relative weight of indicators, their hierarchy, or how they interact in practice. This lack of guidance creates uncertainty for undertakings seeking to self-assess their obligations and undermines the principle of legal certainty enshrined in EU law. Considering the five indicators mentioned in Article 4(1) could be misleading.
- Although the beginning of Article 4(1) mentions two cumulative conditions for a subsidy to be distortive (the improvement of the undertaking's competitive

condition and its negative effect on competition in the market), most indicators seem to relate to the first one.

- The amount of the subsidy should be assessed also in consideration of additional indicators, such as the size and geographical dimension of the market (supranational, not local or regional), the profitability of the industry's players, and the usual size of investments in the sector. These additional aspects should be included in the list of indicators in Article 4(1).
- The nature of the subsidy is a very open indicator. It is unclear whether the "nature" relates to the "categories most likely to distort" provided in Article 5. When read in combination, Articles 4 and 5 could provide clarification by including a list of the subsidies "least likely to distort" or by providing further examples in Article 4(4).
- The market or sector concerned should be seen as an indicator in itself, with some details about the kind of markets/sectors more prone to disruption.
- The last indicator could be more precise: whether the purpose of the subsidy is to be used in the internal market or not, whether its design ensures that the purpose would be complied with, whether, irrespective of the purpose, there are indications that the subsidy will be used in the internal market. This includes the consideration of the legal structure and conditions of a subsidy. They are highly indicative of the ultimate beneficiary and the geographical destination of a subsidy. Contractual terms, disbursement mechanics, conditionalities, governance provisions, and claw back clauses can determine how and where any advantage materializes.

Article 4(4) should be more precise: it is only when a subsidy is aimed at making good the damage suffered by the undertaking in the subsidizing country that the exception should work. A subsidy from a foreign country aimed at compensating for damage suffered in the internal market could distort competition if the other players in the same market have suffered the damage and have not been compensated for it. In addition, the exception should only work to the extent that the subsidy is proportionate to the damage.

The Commission's upcoming guidelines are an important tool to provide more guidance and clarification on these issues.

4. On the basis of your knowledge and experience, do you consider that the balancing test requirements (Article 6 FSR) are sufficiently transparent and proportional?

- ✓ Yes

Please explain your answer. If relevant, please provide examples of where the balancing test requirements in Article 6 FSR were sufficiently/insufficiently transparent and proportional.

The view of ICC members is mixed regarding the clarity of Article 6, but they agree that it is short and rather abstract, and there is a lack of detailed guidance or precedential cases that illustrate how the Commission intends to apply it. The Commission should compensate for this by providing additional methodological detail. While guidance on the positive and negative effects to be considered in the balancing test is welcome, it would be useful to provide further clarity in the FSR on two points:

- First, the balancing test should, as far as possible, be based on, or at least include, quantitative tests, in order to inject some objectivity into a test that, otherwise, would provide the Commission with total discretion;
- Second, the test should be conducted on the basis of the positive and negative effects of the subsidy only, without taking into account other factors. The Commission should set proportionate standards of proof for all the parties involved in the analysis. The Commission should also provide clearer guidance on the relative weight and hierarchy of different factors in the Yet, a revised balancing test, as well as should not allow the approval of foreign subsidies where the methodology for evaluating positive EU market is already sufficient and negative effects in practice adequately supplied by (EU-based) non-subsidized suppliers
- Third, a definition of what are exactly positive, and negative effects would be welcome.

Drawing parallels with the evolution of the EU Merger Guidelines, where similar challenges and trade-offs regarding efficiency assessments were ultimately addressed through detailed guidance, there is a clear need for the Commission to develop specific standards and illustrative examples for assessing positive effects under the FSR's balancing test. Such guidance would not only provide much-needed certainty for businesses but would also enhance the balancing test's effectiveness in advancing EU policy goals.

5. On the basis of your knowledge and experience, do you consider that the criteria in Article 5 FSR for identifying categories of foreign subsidies most likely to distort the internal market are sufficiently clear and appropriate?

- ✓ Yes

Please specify how the categories listed in Article 5 FSR could be clarified or refined, including specific examples from implementation of the FSR. You may also indicate whether the list of subsidies in Article 5 is too broad, too narrow, or not clearly enough defined to enable transparency and consistent enforcement.

Overall, Article 5 is clear and has the flexibility to adapt to new developments. Its indicative list of subsidies most likely to distort the internal market allows for useful enforcement prioritization. In practice, however, the Commission has focused extensively on subsidies

that do not fall under Article 5.

The purpose of Article 5 could be expanded, e.g., by including a list of categories of subsidies unlikely to distort competition, with a provision symmetrical to Article 5(2) allowing the Commission to prove that a subsidy belonging to one of those categories has distorted competition. Additionally, several terms in Article 5 remain vague and would benefit from further clarification, particularly regarding the duration of "short or medium term" for subsidies to ailing undertakings and what constitutes "directly facilitating" versus "enabling" a concentration.

6. On the basis of your knowledge and experience, do you consider that ex officio review (Article 9 FSR) could contribute to ensuring a level playing field in the internal market?

- ✓ Yes

Please specify how ex officio review under Article 9 FSR has contributed / has failed to contribute to ensuring a level playing field in the internal market, including examples of ex officio review provisions that could be applied differently.

The *ex officio* review is a powerful and necessary instrument to achieve the FSR's objectives, particularly to address conduct that falls outside notification thresholds or exploits regulatory loopholes. Arguably, the Commission should focus more on *ex officio* investigations, which are more suitable to address identified concerns, and rely less on mandatory notifications, which impose significant burdens on all businesses.

Since there are few cases of *ex-officio* investigations (to ICC's knowledge), it is difficult to draw conclusions about their importance. However, for most companies that are complying with the FSR, it is important that the few companies that either benefit from the loopholes of the FSR (e.g., filing thresholds) or circumvent it by any means could be investigated, and the anticompetitive impact they have produced eliminated.

There are three conditions for *ex officio* review to be efficient: detection capabilities, investigations conducted within reasonable timeframes to prevent irreversible market damage, and sufficient resources dedicated to cases (which means that they should be targeted and proportionate). The Commission should provide clearer guidance on the scope, process and expected duration of *ex officio* reviews to enhance procedural transparency. *Ex officio* reviews should not be politically motivated or used as a countervailing mechanism in a trade dispute.

Furthermore, we note that in practice, certain *ex officio* investigations have been excessively prolonged. We understand that, in practice, *ex officio* investigations target only

public procurement projects with awarded contracts, yet they inevitably negatively impact the investigated companies' ongoing bidding processes and future participation in public procurement, as the investigation will raise the contracting authority's concern whether the *ex officio* investigation would adversely impact the investigated company's eligibility and ability to participate in the ongoing bidding process or the bidding process to take place.

For example, for firms possessing competitive advantages in specialized technologies, the existence of these prolonged *ex officio* investigations impedes their subsequent engagement in public procurement.

We would like to point out that such practices could fail to contribute positively to enhancing competition within the EU internal market and therefore may undermine the level playing field in the internal market. Thus, the Commission should apply a balanced and cautious approach. In doing so, the Commission should act with foresight, particularly regarding the timing of its intervention, and not exploit its wide margin for a "last-second intervention" (as indicated in the draft FSR Guidelines).

7. On the basis of your knowledge and experience, do you consider that ex officio review (Article 9 FSR) has already affected or could in any way affect non-EU companies' participation in economic activities in the internal market, including greenfield investments?

- ✓ Too early to say

Please explain your answer.

For the moment, ICC's members have only noted reluctance to invest or respond to public tenders due to the amount of information to be provided when the notification thresholds are met. Yet, it remains still too early to make a full-fletched assessment of the FSR's impact in this respect. Ex officio investigations do not seem to have affected the participation of the targeted companies in the internal market.

8. On the basis of your knowledge and experience, do you consider that the FSR contains burdensome and complex provisions?

- ✓ Yes

If your answer is 'yes', please provide specific examples with reference to provisions of the FSR and the FSR Implementing Regulation.

The most burdensome provision is the very broad definition of "financial contribution" in

Article 3, which has required companies to set up complex systems to systematically track, catalogue and report routine group activities – the vast majority of which have no distortive potential financial contributions (such as income/revenue, assets, reductions).

However, this process results in considerable expenses compared to the limited concerns identified in specific instances. For example, large companies with complex structures due to numerous subsidiaries and the use of subcontractors may need to involve one thousand of employees.

Reducing the mandatory reporting requirements for concentrations and public procurement procedures would make the FSR more targeted and efficient. This could be done by limiting the reporting requirements to particular types of subsidies and cases with a high probability of causing market distortions. In particular, the FSR should exempt the reporting of non-selective financial contributions (e.g., contracts for the provision/purchase of goods/services on market terms, and generally available tax incentives), building on the exemptions already included in the Implementing Regulation. In addition, if the notification thresholds were based on objective figures, already available in the undertakings' accounts, the burden would be much lighter. Further, more practical guidance on the application of exemptions would be welcomed. The current *de minimis* thresholds are manifestly disproportionate when assessed against deal values - for example, requiring disclosure of EUR 1 million contributions in transactions involving targets with EUR 500 million EU turnover creates substantial compliance costs without meaningful regulatory benefit. The Commission should consider raising thresholds or introducing dynamic thresholds linked to transaction scale. More generally, several members of ICC have found it difficult in practice to obtain waivers from case teams for those financial contributions whose amount was difficult to calculate in practice and whose information collection was burdensome. More flexibility in granting waivers concerning those financial contributions that are obviously unlikely to generate anticompetitive issues but are burdensome to collect and value would be much appreciated.

In addition to the broad definition of "financial contribution" in Article 3, the public procurement provisions in Articles 28-30 are also particularly complex and burdensome. Companies are often required to submit multiple FSR filings for a single tender, and the filing procedures for consortia and main contractors are highly complex, with the bidder having to submit FSR filings on behalf of consortia partners or contractors. The process is further complicated by the unclear timelines for preliminary review, with contracting authorities not having a clear deadline for transferring filings to the Commission. The Commission should reconsider the requirement to file through contracting authorities rather than directly with the Commission.

The low evidentiary standards for issuing RFIs under Article 13 have also created additional

challenges. Companies frequently face extensive information requests with short response timelines, often requiring complex data gathering exercises. These information requests often override the exemptions provided in the FSR and FSR Implementing Regulation. For example, while the Implementing Regulation exempts the disclosure of government contracts concluded on market terms, the Commission often requests information about these contracts. In addition, while Article 28 limits the number of entities in a corporate group covered by the FSR's notification requirements, the Commission regularly requests information regarding other entities in the corporate group. In order to reduce these burdens, the language in Article 13 should be tightened to ensure the Commission's RFIs are proportionate and predictable.

9. On the basis of your knowledge and experience, how successful do you think the FSR has been in addressing possible distortions in the internal market caused by foreign subsidies?

- ✓ Neutral

Please explain your answer.

The FSR appears to function effectively, though perhaps not in the manner initially contemplated. Despite limited in-depth investigations (5) and even fewer decisions with commitments to date, the regulation has proven effective primarily through its deterrent function. Certain heavily subsidized players seem to avoid participating in EU public tenders fearing the information production requirements of the FSR.

However, the enforcement statistics suggest limited substantive impact – with approximately 200 M&A notifications resulting in only two in-depth investigations, and over 3,500 public procurement declarations resulting in only three in-depth investigations, the intervention rate is approximately 0.1% of all cases. Despite their limited number, the Commission's negative decisions (or the cases where a company has decided not to proceed with an operation) have reinforced this impact. However, a more important question is whether this positive impact has justified the procedural burdens that the FSR imposes on companies involved in M&A transactions and public tenders. ICC would welcome a study conducted by an independent consultant about this balance, and a general assessment of the Commission on the necessity of the current procedural burden. Despite almost 4,000 FSR filings in two years, which have created significant administrative burdens, the Commission has opened only a very limited number of in-depth investigations. The Commission should also publish its decisions more quickly. The fact that only the *e&/PPF* decision is accessible in a new field is problematic and does not help the private sector to interpret and assess the situation under the applicable rules.

10. On the basis of your knowledge and experience, how effective do you think the FSR has been in addressing possible distortions in priority sectors identified by other European Commission initiatives (i.e. clean industrial deal, EU automotive action plan, defence readiness omnibus, etc.)

- ✓ *Neutral*

Please explain your answer.

The implementation of the FSR has had a largely neutral impact on distortions in priority sectors highlighted by initiatives like the Clean Industrial Deal, EU Automotive Action Plan, and Defense Readiness Omnibus. While FSR enforcement has involved areas such as telecommunications, clean energy, infrastructure, and border security, overall intervention, even in key strategic sectors, has remained limited.

11. On the basis of your knowledge, please describe any developments that you are aware of with regard to the introduction or application of subsidy-control legislation in non-EU jurisdictions (for example, similar to the EU's State aid rules).

China: Article 82 of the Guidelines on Review of Horizontal Concentrations issued by China's State Administration for Market Regulation on 20 December 2024 provides that:

"*Where evidence indicates that domestic and foreign government subsidies obtained by parties to the concentration may have adverse effects on competition in the relevant market, the antitrust enforcement authority may require the parties to the concentration to provide details regarding such subsidies and shall take into account the adverse effects of these subsidies on the competition in the relevant market during its review.*"
However, this statement is included in a soft law document, so that it cannot be considered as a "subsidy-control legislation".

UK: The UK established a domestic subsidy control regime under the Subsidy Control Act 2022.

US: In November 2024, the U.S. made significant changes to its Hart-Scott-Rodino merger notification filings, requiring filing parties to disclose whether they have received any subsidy from a "foreign entity or government of concern" within the two years prior to the filing. Filing parties must also provide a brief description of any such subsidy. The US have also introduced a question on subsidies received from certain countries (Russia, China, North Korea, Iran) in their new HSR form applicable since 10 February 2025. This requires companies active in M&A in the US to internally gather subsidy information regarding these four jurisdictions.

More recently, in its 'Report to the President on the America First Trade Policy', issued in April 2025, the Office of the U.S. Trade Representative highlighted the following:

"Foreign subsidies can disadvantage domestic products in a country's government procurement market. The EU has recognized this problem and introduced the FSR to address distortions caused by foreign subsidies for public procurement. OMB assessed the value of the FSR and other policies to tilt the playing field in favor U.S. producers by strengthening domestic procurement preferences and closing loopholes".

B. Concentrations (merger and acquisitions (M&A) transactions)

The questions in this section are aimed at reviewing the implementation and enforcement of Chapter 3 FSR on concentrations, and the relevant provisions of the FSR Implementing Regulation.

12. Do you consider that the current notification thresholds for concentrations, as set out in Article 20 FSR, are appropriate proxies for identifying the most relevant cases of potentially distortive foreign subsidies?

- ✓ No, too low

Please explain your answer.

In practice, the Commission's original estimate of around 30 M&A notifications per year has been significantly exceeded, with nearly 200 notifications in two years, suggesting the thresholds may be overly broad and capturing transactions with limited distortive potential.

In general, thresholds should be calibrated to balance **enforcement effectiveness** with **administrative efficiency**. Thresholds that are too low risk generating a high-volume addition, narrowing the scope of notifications in Article 3 to exempt non-problematic cases, while thresholds that are too high may unduly weaken the regime's protective function. Accordingly, we encourage the Commission to review thresholds **periodically**, taking into account **case experience**, **sector-specific risk**, and **administrative capacity**, to focus resources on high-risk matters.

The €1 million de minimis for FSR reporting is-selective financial contributions, as suggested **in our view not proportionate** and does not reflect an amount that response to question 8 above, would be potentially distortive or advantageous in commercial reality, in light of the minimum thresholds for public procurement tenders (€125m / €250m value)

and concentrations (€500m turnover) that would trigger a FSR notification requirement.

A sensible step would be **to raise the *de minimis* threshold** for reporting an individual financial contribution to the higher of: (i) €50 million in aggregate per annum from a given country, or (ii) 10% of the total public procurement tender value / 10% of the consideration value for a concentration.
If the thresholds for reporting are not exceeded, neither a notification nor a declaration should be necessary or else the thresholds do not ease the administrative burden imposed by FSR.

The requirement for economic operators which do not exceed the help, ensure that only relevant public procurement thresholds, to declare all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable (Article 29) should therefore be removed.

ICC members envisaged different ways to tackle those issues. One possibility for change could be as follows:

Adjust revenue threshold for notification of concentrations
The fact that the Commission received approximately 200 notifications of concentration in the first two years of application of the FSR with only two leading to in-depth investigations (both concerning targets with EU revenues substantially exceeding EUR 500 million) suggests that the current thresholds capture too many unproblematic transactions. Raising the revenue threshold would allow the Commission to focus its limited resources on cases with genuine potential for market distortion while freeing businesses from costly and time-consuming notifications that yield no regulatory benefit.

Exclude target's FFCs from notification threshold calculation
Article 20(3) should be amended to exclude the target's FFCs from the threshold calculation regarding the notification of concentrations. FFCs received by the target prior to a concentration have no bearing on a potential distortion of competition in the concentration process nor should they play a role for the assessment of a potential distortion of competition post-transaction.

13. On the basis of your knowledge and experience, how do notification obligations affect the timelines and costs of M&A transactions? [multiple choices possible]

- ✓ Moderate delay

Please explain your answer.
There is no box for ICC's truthful answer: moderate delay but significant uncertainty.

Most filings are pure paperwork, without any real issue to address, which means that the delays are mainly due to the necessity of gathering information that is not easily available; for this reason, they mainly affect the preparation period. The extensive data-gathering requirements are particularly challenging as companies must collect information on foreign financial contributions from business units often unrelated to the transaction, and this information must be regularly updated throughout the process. The FSR has become one of the most resource-intensive regulatory filings encountered globally. Filing procedures are time-consuming (burdensome internal gathering of data und lengthy procedure - sometimes taking longer than merger control) and costly (complicated form FS-CO requires external advice).

The FSR adds several layers of uncertainty, notably for investors that are not large companies with a strong track record of M&A (those have now put in place an efficient information system): whether a FSR filing will be necessary takes time to be decided upon.

14. On the basis of your knowledge and experience, do you consider that the timelines for preliminary review and in-depth investigation of concentrations (Article 25 FSR) are adequate for merger planning and proportionate in terms of costs (e.g. legal or advisory costs)? [multiple choices possible]

- ✓ I do not know / No opinion

Please explain your answer.

There is no general answer. Costs and the time necessary to prepare the filings vary depending on whether the undertaking is a fully prepared repeat investor or not. Undertakings that are not used to the process will incur high costs and delays. Further, it depends on the complexity of the case. In-depth investigations are clearly too long when merger clearance has been obtained in Phase I. In some cases, the Commission should consider authorizing investors to close the transaction and later impose remedies rather than obliging the parties to stand still.

15. On the basis of your knowledge and experience, do you consider that the reporting of financial contributions for concentrations (Section 5 of Form FS-CO) is clear and proportionate?

- ✓ No, too broad

Please explain your answer. If applicable, please provide specific examples of situations where Section 5 of Form FS-CO was unclear and explain why.

This is clearly burdensome, especially for companies who regularly supply public bodies. See our response to questions 8 and 13.

16. On the basis of your knowledge and experience, do you consider that the structure and information requirements of Form FS-CO and the Implementing Regulation are proportionate and reasonable for notifying concentrations?

- ✓ No

Please explain your answer.

It would be more efficient to just request the general description of subsidies not covered by the exemptions of the reporting obligations and limit the reporting obligations in general.

The Commission could also consider introducing a simplified procedure as foreseen in Article 47(1)(a). This could limit administrative burden for notifying parties in the vast majority of cases that do not raise competitive concerns.

17. On the basis of your experience, do you consider that the outcome of the Commission's review of notified concentrations is transparent and accessible?

- ✓ Partially

Please explain your answer.

The outcome is rather transparent for the notifying party, but the Commission takes too long to publish its decisions (only one published decision (*e&/PPF*) to date), leading to a lack of transparency, which makes it difficult to use precedents and learn from previous cases.

18. Have you experienced situations where the same concentration was subject to notification requirements under the FSR and another regulatory regime (e.g. EU Merger Regulation, national foreign direct investment (FDI) screening mechanisms, etc.)?

- ✓ Yes, frequently

If your answer is 'yes' or 'occasionally', please describe any overlap, including whether, in your view, the notification requirements under the FSR created or contributed to an additional administrative burden, confusion or timing issues. If possible, indicate how such issues could be addressed or better coordinated.

Notifying to DG COMP both on the basis of merger control and on the basis of FSR is very frequent in practice. When both an FSR notification and a merger control notification to the Commission are mandatory, the notifying party could only be asked to complete a single notification form (with a dedicated FSR section). The case team should be able to deal with both aspects under the authority of the same case team manager (while relying

on dedicated FSR experts). This would ease the added layer of complexity and uncertainty due to two parallel filings with separate forms. Moreover, it could speed up the process. are also technical differences between Form FS-CO and Form CO that create unnecessary duplication of effort, such as different approaches to market analysis and variations in supporting document requirements, which increase administrative burden without clear regulatory benefit.

19. On the basis of your knowledge and experience, do you consider that the FSR has in any way affected participation by non-EU countries in mergers and acquisitions involving the EU?

- ✓ Too early to say

Please explain your answer.

Despite the added new layer of complexity and uncertainty of the FSR to the already complex filing requirements in multi-jurisdictional cases, it is too early to make a clear-cut assessment.

20. If relevant, please provide any other examples of situations where the implementation, enforcement or procedural aspects of the FSR module for concentrations (i.e. the combination of the Regulation, Implementing Regulation and associated forms and procedures for concentrations) was too burdensome, procedurally unclear and/or lacking predictability. Explain the reasons for your answer.

The FSR has not created by itself the heavy procedural burden for multi-jurisdictional transactions, which is essentially due to the high number of independent merger control and FDI control regimes in the world, but it has added a new layer of complexity and uncertainty. The EU could have compensated this addition by alleviating the other causes of the burden (e.g., referral requests automatically granted to avoid multiple merger control filings at Member State level, a one stop shop at EU level for FDI control with clear jurisdictional thresholds aligned with merger control…) but did not do it.

The main issue with FSR filings remains the very burdensome amount of data to collect and the lack of flexibility of the case teams to grant waivers for obviously non-problematic financial contributions when they prove burdensome to identify and value.

C. Public Procurement

The questions in this section are aimed at reviewing the implementation and enforcement of Chapter 4 FSR on public procurement procedures, and the relevant provisions of the FSR Implementing Regulation.

21. On the basis of your knowledge and experience, do you consider that the current thresholds for public procurement procedures, as set out in Article 28 FSR, are appropriate proxies for identifying the most relevant cases of potentially distortive foreign subsidies?

- ✓ No, too low

Please explain your answer.

The Commission initially estimated around 36 notifications per year, but has received at least 3,422 filings relating around 598- nearly 95 times higher than projected - resulting in only three in-depth investigations. considers This extremely high number has led to an overwhelming workload for the Commission. According to the Commission's latest data, while the number of notifications for concentrations is approximately 200, the number for public procurement is above 3,400. Such a situation creates the risk that the Commission's (human) resources are essentially dedicated to procedural work while, at the same time, the notification burden on the private sector is largely ineffective. For example, by

As noted in our response to Question 12, a sensible step would be **to raise the *de minimis threshold*** for reporting an individual financial contribution to the higher of: (i) **€50 million** in aggregate per annum from a given country, or (ii) **10%** of the total public procurement tender value / **10%** of the consideration value for a concentration.

If the reporting thresholds are not exceeded, neither a **notification** nor a **declaration** should be required; otherwise, the thresholds fail to ease the administrative burden imposed by the **FSR**.

The requirement for economic operators, which do not exceed the relevant public procurement thresholds, to declare all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable (Article 29) should therefore be removed.

By increasing the thresholds and amending the declaration requirements as outlined above, FSR, or broadening the reporting obligations, the Commission the administrative

burden on the private sector would be reduced, while allowing itself to focus its resources on the substantial issues raised by a limited number of meaningful cases. For example, the EUR 4M financial contribution threshold for public procurement should at least be aligned with the higher threshold of EUR 50M used for concentrations. In addition, in line with our response to question 8 above, the calculation of whether these thresholds are met should not consider non-selective financial contributions.

In fact, what notifying parties see in practice for non-problematic notifications is no reaction whatsoever from the case team. They do not know when the waiting period starts. They do not know when they are cleared. This phenomenon, probably related to the overwhelming and non-anticipated number of notifications, creates of lot of uncertainty for the bidders to a public tender.

The Commission should also revise the application of the FSR's notification thresholds to framework agreements and dynamic purchasing systems. The EUR 250M threshold is particularly low when the contract value is distributed across multiple suppliers over several years – as is often the case with framework agreements and dynamic purchasing systems. The FSR's notification thresholds should consider the amount actually awarded to each contractor per year, instead of looking at the aggregate value of the entire agreement spanning multiple years. For dynamic purchasing systems, which typically involve commercially-off-the-shelf goods/services that are generally available on the market, the Commission should consider whether it is necessary to apply the FSR's mandatory notification obligations.

The Commission could also raise the FFC threshold but keeping the tender value threshold (avoiding to have important 250 mio tenders go by unchecked by the Commission).

Finally, the Commission should also consider an annual notification mechanism for undertakings that participate in multiple large tenders every year, as well as streamlined notification requirements for tenderers originating from countries covered by the WTO Government Procurement Agreement.

22. On the basis of your knowledge and experience, how do notification obligations under the FSR affect timelines and costs with regard to public procurements? [multiple choices possible]

- ✓ Significant delay or uncertainty; Significant additional costs

Please explain your answer.

ICC only considers here the delays and costs for the bidding undertakings, but the impact on the contracting party should also be taken into account. While it is usual for companies

that envisage an M&A transaction to anticipate a significant cost for financial and legal advice, it is less the case when they respond to a public tender. Cost control in the latter case is essential, first because a substantial proportion of bids fail, and second because offering a low price is the main way to success. The delays in preparing the bidding offers are generally rather short, which makes any additional preparatory work painful. ICC does not highlight those problems to criticize the very existence of the public procurement section of the FSR, but as an additional argument for setting the thresholds at a level that optimizes the cost/benefits ratio of the regime.

23. On the basis of your knowledge and experience, do you consider that the timelines for preliminary review and in-depth investigation of notified foreign financial contributions in public procurement procedures (Article 30 FSR) are adequate for the overall public procurement procedure and proportionate in terms of costs (e.g. legal or advisory costs)?

- ✓ No, timelines too long

Please explain your answer and specify whether your assessment differs for the timelines applicable to open procedures and those applicable to multi-stage procedures. If so, please clarify how you would distinguish between them.

If the preliminary review's timeline and costs are acceptable (e.g., due to FSR adaptations that aim to exclude tenders without any problems or risks), it is not the case for in-depth investigations. More than five months (or more than that if there is an additional delay) after the complete notification (with completeness date being uncertain) is far too long, and the costs could be out of proportion with the related tender. The use of pre-notification directly by the undertaking is a way to save time and to make the completion date more certain. But the main way is to reduce the duration of the in-depth review period, even if it means that the undertaking will have less time to respond to RFIs.

In addition, as outlined in our response to question 8 above, contracting authorities have significant discretion in determining when to transfer filings to the Commission. In our experience, contracting authorities have in many cases waited several months between the receipt of a notification and the transferal of the notification to the Commission. The Commission also has broad discretion to determine whether a filing is complete. Therefore, while the preliminary review window is reasonable, it is often the case that notifying parties have no visibility or clarity on when the preliminary review period has started. This can create significant delays in the notification process, which would be addressed by allowing companies to file directly with the Commission. To increase legal certainty, filings should also be deemed automatically complete after a specific number of days, unless the Commission deems them incomplete.

24. On the basis of your experience, do you consider that the outcome of the Commission's review of notified foreign financial contributions in public procurement procedures is transparent and accessible?

- ✓ Partially

Please explain your answer.

The Commission's review of notified foreign financial contributions in public procurement procedures has lacked transparency and predictability. In particular, DG GROW's approach has been characterized by frequent demands for extensive information – including information far exceeding the mandatory reporting requirements – followed by long periods without communication. This pattern is especially concerning when companies respond to information requests but receive no feedback for months, leaving them uncertain about whether their submissions are satisfactory. undertaking (although the notifying parties tend to experience a very high number of tacit clearances)

Such unpredictable procedures and timing delays create an untenable situation for businesses participating in public procurement, who require clear timelines and predictable processes to effectively engage in tenders. Reform is needed to establish more transparent and reliable procedures that provide companies with the legal certainty necessary for effective participation in EU public procurement.

25. On the basis of your knowledge and experience, do you consider that the framework for assessing distortions in public procurement procedures (Articles 4 and 27 FSR), including the indicators (Article 4(1) FSR), is clear and predictable?

- ✓ No

Please explain your answer.

See our response to question 3.4 (*i.e.*, response to Question 3)

26. Do you consider that the texts of the FSR and its Implementing Regulation are clear and precise enough for contracting authorities/entities to understand their obligations under the FSR?

- ✓ Partially

Please explain your answer and, if applicable, provide specific examples of unclear provisions in the FSR or its Implementing Regulation that result in lack of awareness/understanding by the contracting authorities/entities.

Currently, there is still a lot of uncertainty in public procurement procedures, as some authorities may request information that does not comply with the Implementing

Regulation, require bidders to use forms that differ from the Form FS-PP, ask for FSR notifications or declarations even when the relevant thresholds are not met (e.g. as part of the commercial tender requirements or just to be "safe"), or on the contrary forget to ask for the notifications or declarations. This increases the burden and risk for companies, as they remain individually liable for their filings with the Commission.

In addition, as highlighted above, the concept of "without delay" in Article 29 has provided contracting authorities with significant discretion to determine when to transfer filings to the Commission, and the lack of clarity on the application of the FSR thresholds to framework agreements and dynamic purchasing systems has led to inconsistent implementation across contracting authorities.

27. On the basis of your knowledge and experience, do you consider that the scope of the notification obligation in public procurement procedures, as set out in Article 28 FSR, is clear and predictable? For example: which entities fall under the obligation to notify foreign financial contributions, definition of 'main' subcontractor, etc.

- ✓ No

Please explain your answer. If your answer is 'no', please provide specific examples of how the scope of the notification obligation is unclear and unpredictable and explain why.

First, there is uncertainty as regards who the main subcontractors or suppliers are, and to what extent their figures must be integrated when calculating the thresholds. In addition, some bidders are themselves subject to have to choose their suppliers through bidding processes, which means that they are not always aware of their identity at the time of the notification.

Second, the notion of "subsidiary without commercial autonomy" is unclear, notably whether this notion corresponds to existing notions under EU competition law.

Further, contracting authorities may also request information from additional subcontractors purely as a precaution, which increases uncertainty and administrative burden for economic operators under Article 28 (see our response to question 26). This illustrates the issues and existing uncertainties in connection with Article 28 FSR. Thus, clear rules should delineate the mandatory scope of information requests and discourage disproportionate over-collection.

In addition, as outlined in our response to Question 8, while Article 28 is clear that the mandatory notification obligations for public procurement only apply to the bidding entity, its direct subsidiaries, and its direct or indirect parent companies – and specifically exclude sister companies – the Commission has often diverged from this approach. In practice, the

Commission normally demands comprehensive information about financial contributions received by sister companies, despite these entities falling outside the scope of Article 28. This divergence between the legal text and enforcement practice is particularly problematic during ongoing procurement procedures, where companies face substantial challenges gathering and submitting this additional information within the constrained timeframes typically provided. In order to ensure legal certainty for notifying parties in public procurement procedures, the Commission should focus on entities covered by Article 28, unless there is strong evidence to suggest that other entities in the group have benefitted from distortive subsidies.

28. On the basis of your knowledge and experience, do you consider that the structure and information requirements of Form FS-PP and the Implementing Regulation are proportionate and understandable for notifications and declarations in public procurement procedures? [multiple choices possible]

- ✓ No, not proportionate; No, not understandable

Please explain your answer. If applicable, please provide specific examples of requirements that are unclear and/or disproportionate and explain why.

Even if completing the form may be painful in a number of circumstances, ICC considers that it is better to provide information in the form than to have the Commission asking questions, which would lead to increased delays.

However, considering extensive administrative burden, the Commission should provide more practical guidance, e.g., by quickly publishing decisions.

Additionally, the exemptions in Form FS-PP should be broadened not for non-problematic financial contributions. For example, the tax-related exemptions in Form FS-PP are too restrictive, covering only a small subset of tax measures and thus failing to deliver meaningful relief to businesses. This problem extends to the treatment of arms-length transactions, where the exemptions exclude financial services contracts, despite these typically being conducted on market terms (e.g., bond subscriptions). Certainty in this area would help avoid unnecessary disclosures and allow businesses to focus on financial contributions.

It should be born in mind that the tight deadlines of public procurement procedures exacerbate compliance challenges, as companies must prepare FSR documentation in parallel with bid preparation. Given resource constraints, smaller economic operators often lack the infrastructure that large corporations can deploy for compliance, making the fixed costs of FSR compliance a disproportionate burden that are relevant for the

Commission's assessment.

There is also a significant inconsistency regarding the requirement to declare when notification thresholds are not reached. Under the current requirements of Form FS-PP and the Implementing Regulation, declarations to public procurement authorities necessitate more comprehensive data collection compared to the notification obligations applicable when thresholds are met, resulting in additional administrative burdens for companies. Furthermore, many public authorities have limited experience with the FSR and understanding of the FSR. Thus, there have been cases where tender notices omit references to the obligation to submit an FSR notification or declaration. The Commission should ensure that national authorities enforce these rules appropriately, without imposing undue burdens on companies seeking to comply with the FSR.

Further, the process through which notifications have to be sent to the public authority organizing the tender together with the offer of the bidder raises confidentiality issues. Not all bidders want those public authorities organizing the tender to be aware of those financial contributions they received in the world. This process also makes it difficult for the notifying parties to have direct contact with the case team and are often left without information on the timetable of the notification. A mechanism in which the notifying parties (bidders) would notify themselves and keep the public authority organizing the tender informed of the outcome would be much preferable. If that is not possible, the case teams at DG GROW should at least reach out to the notifying parties to address their potential questions and keep them informed of the process and timetable of the notification.

29. On the basis of your knowledge and experience, do you consider that the FSR has affected participation by non-EU countries in EU public procurement procedures?

- ✓ Too early to say

Please explain your answer.

As there have been only a few cases in this context, it is too early to evaluate the actual impact of the FSR on public procurement procedure. However, examples show that companies reconsider participation in public procurement procedures due to the FSR and, in some cases, withdraw bids when the Commission opens investigations.

30. If relevant, please provide any other examples of situations where the implementation, enforcement or procedural aspects of the FSR module for public procurement (i.e. the combination of the Regulation, Implementing Regulation and associated forms and procedures for public procurement procedures) was too burdensome, procedurally unclear and/or lacking predictability. Explain the reasons for

your answer.

One of the main problems is that the undertaking concerned is not the notifying party since this role lies with the public contracting authority. The consequence is a lack of information about the delays. Either the Commission should better inform the bidding undertakings (for example by giving them a direct line of contact with the case team), or the FSR should be changed in order to allow undertakings to notify them. We also refer to our responses to questions 26 and 27, *i.e.,* the sometimes-chaotic situation, when some authorities may request information that does not comply require Implementing Regulation, require bidders to use forms that differ from the Form FS-PP, or ask for FSR notifications or declarations even when the relevant thresholds are not met.

Please find below some suggestions for alleviating the procedures:

Reduce redundant filings in public Procurement procedures

Article 29(1) should be clarified to ensure that in multi-stage procedures, filings are only required with awardable tenders. In addition, updates of a filing should only be required when the period between respective filings exceeds 90 calendar days. This would reduce redundant administrative work for both economic operators and contracting authorities.

Simplify filings for groups of economic operators and main subcontractors

It is not uncommon for economic operators participating in a public tender as part of a consortium to be in actual or potential competition with one another, or with one or more of their main subcontractors. In some cases, they may even be in competition with the contracting authority itself.

Under the current framework, the requirement for one main bidder to collect all FFC information from the bidding group and submit the FSR notification on behalf of the group raises significant concerns. Specifically, this process may infringe upon antitrust rules and compromise the confidentiality of sensitive business information.

To mitigate these risks, Article 29(6) should be amended to allow each member of a consortium and the main subcontractors to submit their FSR filings directly and independently to the Commission. In such cases, the parties could provide the contracting authority with the relevant case number as a reference and control mechanism.

This amendment would address the antitrust and confidentiality concerns associated with the current centralized submission process, while maintaining transparency and regulatory oversight.

31. In your view, how important is the FSR public procurement module for safeguarding EU sovereignty in key economic sectors, enhancing competitiveness and promoting strategic public procurement by addressing unfair competition in public procurement procedures that undermines the integrity and proper functioning of the internal market?

ICC's view is that FSR can play a significant role on those issues but that the burden it creates is impacting can reduce the quality of public procurement procedures that may be essential for EU sovereignty and competitiveness. At the same time, the high number of notifications seems to make it unlikely that the Commission can really dedicate time to strategic questions. Therefore, the FSR should be more focused. This aim could be achieved, e.g., with higher notification thresholds and/or by being more flexible about the provision of information on clearly non-problematic, a narrower range of covered financial contributions, and/or limiting the notification obligations to certain kinds of procurements or broadening the exemptions of the reporting obligations and bidders.

Final comments and supporting material

32. Do you have any additional comments, concerns or suggestions to contribute to the review of the FSR and FSR Implementing Regulation?

Given that the economy is a perpetually changing reality, the FSR should be more adaptive. Regular economic enquiries could shed light on the sectors, kind of subsidies, or situations that are the most important for the strategic purpose of the FSR. Based on those enquiries, some aspects of the FSR (such as thresholds or sector focus) could be regularly adapted by implementing regulations. In addition, the Commission could rely more on the flexibility afforded by ex officio investigations, and less on the rigid notification obligations. The very fact that Article 52 of the FSR requests a review of the FSR two years after its entry into force shows that a rigid, non-adaptable regulation is not the right instrument to address strategic questions.

<u>Proposals concerning taxation aspects</u>
Given ICC's extensive experience in tax matters, we would like to highlight three key areas intertwined with taxation aspects where clarification and guidance would be beneficial, namely:

<u>1. Clarify the interpretation of FSR with respect to taxation</u>

Tax measures that are part of national tax legislation and therefore generally applicable to all taxpayers, including outside of the list provided under Article 5 of Regulation (EU)

2022/2560, should not need to be reported under FSR.

The issue of interpretation faced by businesses can be attributed to including "the foregoing of revenue that is otherwise due" in the definition of a "financial contribution," in combination with additional guidance in questions and answers (Q&A) prepared by the Commission services that confirm Annex I, Table 1, point B(6)(a) of Implementing Regulation (EU) 2023/1441 provides an exhaustive enumeration of "tax benefits" that have to be reported.

A common-sensical interpretation would be:

- Statutory deductions and credits made in calculating the tax liability for corporate income tax purposes, do not amount to a "tax benefit" and should not be reportable (e.g. loss relief between group companies in the same jurisdiction);

- Statutory exemptions from the corporate income tax base, and other tax features aimed at mitigating double taxation do not amount to a "tax benefit" and should not be reportable (e.g. a participation exemption for a distribution or capital disposal);

- Timing differences, arising from the application of national tax legislation that applies to any taxpayer, do not amount to a "tax benefit" and should not be reportable (e.g. accelerated depreciation / amortization);

- There is no "tax benefit" if different rates of corporate income tax, state, cantonal, city or municipal tax apply to a taxpayer, as proscribed in tax legislation that applies to any taxpayer;

- There is no "tax benefit" if different rates of indirect tax apply to a supply of goods or services and importations that fall into a specific category, including zero rates, as proscribed in national tax legislation that applies to any taxpayer. This includes cases where such differentiation serves to simplify tax administration or to safeguard the neutrality of the tax system;

- Patent box regimes, innovation box regimes, and research and development tax credits or similar regimes, which conform to OECD requirements and apply to any taxpayer who meets the relevant criteria, should not be reportable. As ICC, we would like to note that such regimes are also available in EU Member States and exempted under EU State aid rules;

- VAT refund schemes implemented by third countries should be recognized under the FSR as general tax measures consistent with both EU law and WTO rules. They do not confer a selective advantage and should be excluded from notification and assessment requirements under Regulation (EU) 2022/2560;

- Tax incentives for decarbonization are already exempt from State aid challenges, thus tax incentives designed to tackle the shared challenge of climate change should not be considered to be reported, provided their design is comparable to what State aid rules exempts.

Further guidance from the Commission would be welcome to clarify other practical points of interpretation, including:

- How the grant date of a tax-related financial contribution should be determined in practice (where our suggestion would be to take account of the tax year in which the benefit is effectively claimed by means of e.g. tax return or other filings, definitely in cases where the tax-related financial contribution cannot be quantified at the time of grant); and

- How the value of a tax-related financial contribution should be calculated.

2. Observe the principle of proportionality for FSR reporting

As noted in our response to the questions 12 and 14, the €1 million *de minimis* for FSR reporting is not proportionate and does not reflect an amount that would be potentially distortive or advantageous in commercial reality, in light of the minimum thresholds for public procurement tenders (€125m / €250m value) and concentrations (€500m turnover) that would trigger a FSR notification requirement.

de minimis for reporting an individual financial contribution should be increased to the higher of (i) €50m, aggregate amount per annum from a given country, or (ii) 10% of the total public procurement tender value / 10% of the consideration value for a concentration.

If the thresholds for reporting are not exceeded, neither a notification nor a declaration should be necessary or else the thresholds do not ease the administrative burden imposed by FSR.

The requirement for economic operators which do not exceed the relevant public procurement thresholds, to declare all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable (Article 29) should therefore be removed.

3. Focus on the scope of FSR with respect to taxation

Any entity in scope of FSR reporting requirements that belongs to a multinational group with an ultimate parent company located in a territory that has adopted the OECD's Pillar II framework should not have to report any tax-related financial contributions included in Pillar II calculations.

The Pillar II framework should ensure that, globally, the multinational group is subject to a minimum effective tax rate of 15% in each jurisdiction in which they operate.

This effectively erodes the benefit of any tax-related financial contributions the multinational group may have received.

Following the same logic, a similar exception for reporting tax-related financial contributions should exist for any financial contributions businesses included in tax calculations required under other minimum tax regimes, e.g. the Global Intangible Low-Taxed Income (GILTI) and Corporate Alternative Minimum Tax (CAMT) regimes in the US. Specifically for the US, every legal entity within a US federal consolidated filing group should qualify for this exemption as long as the group is required to calculate GILTI and/or CAMT as part of its total tax liability.

The Commission should also take into account the fact that tax-related financial contributions from territories are not included in the list of heaven tax systems since they align with international tax good governance standards for tax transparency, fair taxation and measures against base erosion and profit shifting.

The EU list is already used in the application of administrative and legislative defensive measures to jurisdictions included in the list, and existing EU legislation explicitly refers to the list (e.g., mandatory automatic exchange of information and reporting requirements for tax schemes involving listed countries).

Lastly, the Commission could consider making clear standards for the completeness of the foreign financial contributions and specifying clear granularity requirements, to enhance the predictability for enterprises in preparing materials and improve the efficiency and standardization of material preparation.

33. Please indicate whether the Commission may contact you, if necessary, for further details about the information submitted.

- ✓ Yes