Public Consultation on the Draft Implementing Regulation of the Foreign Subsidies Regulation

Comments from the Association of Inhouse Competition Lawyers (ICLA)

6 March 2023

ICLA is an informal association of inhouse competition lawyers with more than 500 members across the globe. The Association does not represent companies but is made up of individuals who are inhouse experts in competition law. This paper represents the position of ICLA and does not necessarily represent the views of all its individual members.

ICLA welcomes the European Commission's effort to provide further clarity and guidance in relation to the implementation of the Foreign Subsidies Regulation (FSR) through the publication of the Draft Implementing Regulation (IR), including the proposed notification and declaration forms. We appreciate the opportunity to comment.

We commend the EU institutions for trying to address issues that may arise from aid granted by foreign governments to businesses active in the EU. We understand that new enforcement tools may be needed to ensure a level playing field and fair competition within the EU internal market.

However, ICLA is very concerned about how the Commission intends to implement the FSR. The current proposal would place tremendous burdens on companies due to the extensive and, in our view, highly disproportionate monitoring and reporting requirements. The IR also lacks clarity and precision, leaving companies ill-prepared for complying with the extensive FSR obligations that will need to be implemented in only a few months' time.

We respectfully urge the Commission to actively engage with stakeholders to find a better solution for the implementation of the FSR. Otherwise, we fear that companies may not be able to comply and there could be significant disruptions of large procurement procedures and corporate transactions later this year, which in turn could severely harm the European economy.

Disproportionate monitoring and reporting obligations

The proposed notification and declaration forms ask for an unprecedented level of information, both in terms of detail and scope. The amount of information that would need to be collated and permanently verified would go far beyond what is required for other regulatory applications, including the merger control notifications under the EU Merger Regulation (Form CO). The reasons for that are two-fold:

- First, detailed information and documents need to be provided not only for the specific business line or jurisdiction to which the transaction or tender relates, but *for any product or service* that is being offered anywhere in the world by any entity in the applicant's group structure. In case of a large multinational group of companies, this presents a humongous

challenge, involving numerous business lines, tens or hundreds of subsidiaries, across potentially more than 150 non-EU countries. The information and documents will often come from various sources, some of which will only be available in paper form. Staff across numerous business lines, functions and geographies will need to be constantly trained on the reporting requirements. Staff departures or transfers will trigger additional ad-hoc training requirements. Verification and compliance-testing would be required as well.

- Second, relevant information and documents would need *constant updating* to be complete and accurate. This is because there is no cut-off date under the IR. In comparison, turnover aggregation under the EU Merger Regulation only needs to happen once a year. While burdensome, that exercise is manageable as it can be combined with consolidation for financial reporting purposes. The requirement to always have up-to-date data available will severely complicate the information and document collection process, as it will often require *proactive reporting* from staff across numerous business lines, functions and geographies. Also, companies cannot wait with the information and document collection until the notifiable transaction or procurement opportunity arises. There will not be enough time between the confirmation of filing requirements and the filing date to obtain the required information and documents.

Despite our large membership and their combined insights into the operations of some of the world's leading companies, we are not aware of any company that maintains a centralised database of government interactions that would meet the requirements the Commission is seeking to impose. Even if companies are able to set up such comprehensive monitoring and reporting system, which remains to be seen, the extremely broad definition of "financial contributions" will require an enormous effort in terms of information collection and review. Furthermore, according to the current thresholds proposed in the draft IR, the vast majority of entries into such system will refer to small or ordinary course contributions relating to an entirely unrelated product or service in another jurisdiction that may have virtually no nexus to the public tender procedure or M&A transaction that is being undertaken in the EU. This significant unbalance between the administrative burden imposed on the one hand, and the estimated number of relevant findings on the other hand, makes the proposed implementation highly disproportionate in our view.

Lack of clarity and precision

What significantly adds to the challenge for companies (and possibly the Commission too) is that many of the concepts in the FSR remain vague and hard to delineate in practice. As it is not clear what such monitoring and reporting systems are supposed to capture, it is very hard for companies to start setting up new systems. Companies and their advisors are still struggling to get their heads around some of the concepts on which the FSR is built, such as "*financial contribution*" or actions that "*can be attributed to the third country*".

To make things worse, we are seeing that many companies still do not yet appreciate the significant requirements that are being imposed on them. Companies have assumed that this regulation was about 'foreign subsidies' – but the FSR goes far beyond that. For example, companies that are engaged in sales to public entities will be caught by the extensive reporting requirements even if the contracts have been awarded through public tender or been negotiated on arm's length. The FSR reporting obligations kick in irrespective of whether those companies ever received a 'foreign subsidies' or expect to receive subsidies in the future. This outcome is far from intuitive and, as inhouse counsel, our members have had to work hard to create awareness of those challenges within their own companies.

In summary, we fear that companies will not be able to collect the large amounts of information that are being requested within the current timeframes.

Our proposed solutions

We attach an outline of the various concerns we see in relation to the draft Implementing Regulation, alongside a set of proposed solutions. Our intention is to show practical ways how to make the FSR regime workable in practice – both in the short and the long run. Two main points we want to highlight here:

- *Short-term fixes*: The European Commission should proactively engage with companies to avert an administrative trainwreck towards the end of this year, with procurement potentially coming to a stand-still or suffering a significant reduction in bids and important M&A transactions (including for companies in distress!) being significantly disrupted. A short-term solution is needed that gives the European Commission key pieces of information while granting the necessary exemptions to companies who will still be in the midst of setting up an adequate monitoring and reporting system. In particular, the Commission should take a liberal approach towards waiver letters by granting waivers for information that goes beyond what is strictly necessary to further the Commission's review (e.g., likely or suspected distortive financial contributions). To enhance legal certainty and allow parties to prepare adequately, the Commission should make its approach to waivers clear upfront in further guidance. In the enclosed annex, we make detailed proposals as to what information should be subject to waivers and/or exemptions at the very least during the first three years of FSR implementation.

  We also ask that the Commission refrain at this early stage from using the full extent of its vast enforcement powers – including the imposition of fines – at a time when companies are tackling new and complex requirements while seeking to move forward with important European investment projects and continue to make their products and services available in tenders of public interest.

- *Long-term solutions*: The Commission must work with companies to build a regime that is proportionate and sustainable in the long term. The current requirement to list *all* 'financial contributions' without hardly any limitations will turn out to be simply unmanageable, even with significant investments by companies into monitoring and reporting. It also will burden the Commission with a massive workload to identify a handful of potentially distortive subsidies amongst potentially millions of competitively neutral financial contributions. We therefore propose that the Commission focuses its attention on those financial contributions that are likely to distort the internal market (see Article 5(1) FSR) and allow companies to provide general descriptions for all other types of financial contributions they may receive. This will allow the Commission to get a good understanding of the nature of the contributions a company receives from foreign governments. The Commission may then ask for targeted information on certain aspects of those contributions to the extent they are necessary to reach the goal that the Commission aims to achieve with the FSR.

- Companies and their legal advisors, as well as the Commission itself, will need to move forward in jointly addressing the significant challenges posed by the FSR; in building requisite knowledge and designing the necessary structures to comply with the FSR. Much experience will be gained in this early period with respect to the FSR, which is a novel piece of legislation. We encourage the Commission to maintain a pragmatic and collaborative approach, and to work closely with the relevant stakeholders during this learning period.

Next steps

We respectfully urge the Commission to remain flexible and open-minded in their approach to finding a workable solution for the implementation of the FSR. A successful implementation is crucial, and it is only through that success that the underlying ideas and values of the FSR can gain widespread adoption.

We are eager to continue our engagement with the European Commission to discuss our proposals in the coming weeks. In the meantime, please do not hesitate to reach out if you have any questions.

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Reference	Problem	Our proposal
Draft Implementing Regulation (IR)		
General comment re the imputability of actions to a State	It will be very difficult, and in many cases impossible, for notifying parties to establish whether actions of private parties are attributable to a foreign State. This would require the legal and factual assessment of ownership and governance information of those entities. This information will in many cases not be available to companies, including due to confidentiality restrictions.	The Commission should provide a clear and detailed list of categories of parties that qualify as governments, public authorities or public or private entities whose actions can be attributed to a third country (per Art. 3(2) FSR) for the purposes of identifying financial contributions, either in the Implementing Regulation or separate guidance.
Art 4 and Art 5 IR re notification requirements more generally	In order to meet the current notification requirements under the FSR, companies are required to collect a massive amount of information. Because the time this is expected to take is longer than M&A deal timelines or public procurement processes, this information will need to be collected and "oven-ready" well in advance of any possible notification or declaration under the FSR. The FSR defines the concepts of "financial contribution" and "third country" very broadly, without providing much needed guidance. The concepts are largely new and untested. Crucially, there are limits to what can be learned from the EU State aid regime when what is notified (or declared) under the FSR are "financial contributions" which, unlike State aid, do not necessarily confer a benefit (recital (11) FSR). There will be significant uncertainty among businesses and their advisors as to how to apply the concepts to real-life situations. And with the current deadlines, ICLA members expect that companies will not be "deal ready" and prepared to make full and detailed notifications by 12 October 2023. This could expose companies to liability vis-à-vis third parties if a transaction / procurement procedure fails due to the unavailability of information required for the FSR reviews, and significant disrupt procedures as well.	In order to cater for the large amounts of information that companies will not have readily available, and that will require the design and setting up of dedicated monitoring systems, the European Commission should clarify that, *in the short run* and during a certain period (e.g., three years from the date the FSR becomes applicable) it will not impose sanctions against companies who have unintentionally failed to make a fully accurate notification or declaration (e.g., by reference to a negligence standard). The European Commission should also clarify that, during that period, it will typically seek to grant waivers such that notifying parties can provide information on the following basis: • Limiting disclosure to information already categorized as government grants/subsidies in the operators' existing financials based on applicable accounting standards (e.g., IFRS, etc.); • Looking back in the first year at financial contributions from the last year, in the second year, at financial contributions from the last two years, and only in the third year, looking back three years; • Notifying only financial contributions which have a direct link to the concentration/public procurement; and/or • Notifying only financial contributions granted in the same geographic and product market of the concentration/public procurement.
Art 4(4) IR	Art 4(4) IR seems to propose that notifying parties can request waivers, i.e. dispensations from the obligation to provide certain information or documents,	The European Commission should specify (at least by way of example) in Art 4(4) IR the type of information that would likely qualify as "*not being necessary for*

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	only at the pre-notification stage and only in the context of specific notifiable transactions. We believe that **the pre-notification stage is far *too late* for waiver discussions**. Setting up a system (technology, processes and policies) that continuously collects the required information across hundreds of entities and numerous, sometimes separately managed, business lines will require significant lead time given the size and geographical spread of the companies affected by the FSR. To avoid rendering the waiver procedure ineffective in managing information requirements, companies need guidance on possible dispensations ***well in advance*** of the FSR notification and declaration obligations taking effect.	*the examination of the notification*", so that companies can rely on that guidance and start building their internal monitoring and reporting solutions accordingly. See below for specific suggestions what information and documents should typically be dispensed with. However, we strongly encourage the Commission to make these clarifications, to the extent possible, in the Implementing Regulation itself. The waiver procedure should only be used for ***additional*** relaxations in specific constellations. • Information and documents relating to financial contributions falling outside of the scope Art 5 FSR; here, a description of the financial contributions companies receive, rather than specific itemizations, should be sufficient; • Information and documents on financial contributions that have already been used for a different purpose than the notified transaction / tender; • Financial contributions provided in the context of different product lines or geographies with no evident nexus to the notified transaction / tender; • Information and documents on financial contributions that have been made prior to the FSR taking effect and for which reliable information is not available; and • Information and documents that cannot be disclosed without breaching contractual obligations, or violating applicable laws and regulations (see also below).
Art 4(3) IR / Art 5(4) IR	Art 4(3) and 5(4) IR as currently drafted propose that notifications and declarations shall be submitted in the language of the procurement procedure to which it relates and the language of the notification shall also be the language of the proceedings, unless the Commission and the notifying parties agree otherwise.	We propose that the default rule is that the proceedings are in English, unless the Commission and the notifying parties agree on conducting the proceedings in another EU language. To implement this change, we propose the following changes to Art 4(3) and 5(4) IR:

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	This would be impractical. Neither the European Commission nor the companies or their advisors would have enough qualified staff to support procedures in all EU languages.	"*Notifications [and declarations]**, including any supporting information and documents,** shall be submitted in **English, unless the Commission and the notifying parties agree otherwise**. Unless the Commission and the notifying parties agree otherwise, **English** shall also be the language of the proceedings […]*"
Art 5(5) IR	See our comments above in regards to Art 4(4) IR and the requesting of waivers at the pre-notification stage. These comments apply here equally. Also, while it is welcomed that the Commission invites the parties to engage in pre-notification discussions, in order to ensure that sufficient time is available to conduct such discussions it should be possible to initiate them *before* a procurement project is officially launched.	See comments in Art 4(4) IR above about clarifying the type of information that would qualify as not being necessary for the examination of the notification. It should be clarified that it is possible to engage in pre-notification discussions *before* a procurement project is officially launched.
Art 17 (1) (a) IR	The **transparency and reporting obligations** proposed in Art 17 (1) (a) appear disproportionate and seem to unduly interfere with a company's interest in confidentiality of its financial and other potentially sensitive information. We see no policy justification for imposing such far-reaching transparency and reporting obligations.	The European Commission's power to impose transparency and reporting obligations on an undertaking relating to future foreign financial contributions should be *limited to situations* where such reporting obligation is necessary to monitor the compliance with either (i) commitments accepted by the Commission in a final Decision; or (ii) with redressive measures adopted by the Commission in a final decision. To implement this proposal, Art. 17 (1) (a) should be removed and be subsumed within Art 17 (1) (c).
Art 20 (6) IR	Art 20 (6) IR is an exception to the **principle of protection of confidential information** that Art 20 enshrines. We are of the view that the principle of proportionality requires the European Commission to make Art 20 (6) subject to stricter safeguards. Art 20(6) as currently drafted does not require the Commission to consider the interests of the information provider in confidentiality of its information.	Art 20 (6) should require the Commission to also consider the interests of the information provider in confidentiality of its information. To implement this proposal, we propose that Art 20(6) is revised along the following lines: "Nothing in this Article shall prevent the Commission from using and disclosing to the extent necessary information showing the existence of a distortive foreign subsidy ***provided such use or disclosure would be proportionate in light of the foreseeable harm to the information provider resulting from such use or disclosure***".

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Art 21 IR	Art 21 IR as currently proposed overtly interferes with the undertaking under investigation's right of defence without any apparent policy justification, because it requires *the specified external individuals* to identify potentially relevant documents, a task that the undertaking's inhouse representatives are best placed to fulfil.	The undertaking under investigation should have access to a *non-confidential* version of the *entire* file. ICLA therefore proposes to update in particular Art 21 (3) by deleting "*mentioned in the grounds on which the Commission intends to adopt a decision, as well as a list of all documents*".
Art 21 (4) IR	While we appreciate the burdens related to the preparation of an access to file, we believe that the proposed 'confidentiality rings' proposal in Art 21 (4) would bring the principle of protection of confidential information in danger. It should not be the case that (third) parties' confidential information will be made available to potential competitors or any third party for that matter, even if the provision of information is being limited to 'specified legal and economic counsel' and subject to terms of disclosure. The FSR will require the exchange of often highly sensitive data, and the Commission should be prepared to guarantee that confidential data will be treated as such. Doing otherwise may result in (third) parties being reluctant or simply not being able to bring information to the Commission's attention.	In order to facilitate the access to file process, the approach to propose the use of confidentiality rings is generally helpful, but should be made subject to the parties' consent. Eventually, it will be in the parties' best interests to use the approach, unless if they have specific concerns that their confidential information may be misused. We therefore propose that Art 21 (4) is being revised as follows: "Subject to paragraph 5 ***and subject to the parties' explicit consent***, the Commission ***may*** additionally provide access to all documents on its file submitted by information providers, without any redactions for confidentiality, under terms of disclosure that will appropriately safeguard the protection of business secrets and other confidential information". In case parties would not consent to use the proposed 'confidentiality rings' solution, and the availability of a non-confidential version of the file would not be sufficient to guarantee the parties' right of defence, the Commission could still make confidential information available in a data room under existing Best Practices procedures (Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation).
Art 24 IR	Art 24 as currently drafted seems to make **suspension of time limits** in concentration proceedings dependent on the target and seller's compliance with a request for information or an inspection (i.e., the "*other person involved*" in an acquisition). We believe this is counterproductive as it would allow other parties to use delays to the FSR review process tactically, e.g., to prevent consummation of the transaction. A target company could be hostile towards the acquisition (e.g., in a hostile takeover situation) or a seller may have fallen out of love with the	Only the notifying party's behaviour should affect time limits. In cases where another person involved does not cooperate, the European Commission could consider imposing penalties upon that person; however time limits should remain unaffected. To implement this proposal, each reference to "*or other persons involved*" should be deleted from both paragraphs 1 and 2 of Art 24.

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	transaction after signing. In both cases, the opposing party could delay the information provision intentionally to push the FSR review beyond a commercial or contractual deadline (e.g., a long-stop date), thereby forcing a termination of the transaction.	
Art 27, 29 IR	The numbering of articles in the IR seems to jump from Art 26 to Art 29. This is likely a clerical error.	We propose to update the numbering of the IR.
Annex 1 (Notification for concentrations)		
Introduction (9) of Annex 1	Agreements between businesses and non-EU governments or government-linked entities may occasionally contain **classified or otherwise sensitive and non-disclosable information**. Companies with activities in the defence, infrastructure, high-tech or other national security related sectors frequently face such confidentiality obligations, which may be statutory, regulatory, or contractual in nature. Pursuant to such confidentiality obligations, companies may not be authorized to share certain information with the European Commission or other third parties. It is of utmost importance that the notifying party(ies) can request and the European Commission grants waivers in these situations. Not doing so would have serious ramifications for business, including EU businesses seeking market access abroad. Insisting on disclosures and hence requiring companies to violate foreign legislation, regulation, or contractual obligations, would create significant financial and commercial exposure to those companies.	Introduction (9) (a) of Annex 1 should include an explicit reference to the scenario that classified or otherwise non-disclosable information cannot be provided without breaching contractual obligations, or violating non-EU laws and regulations. We therefore propose to update paragraph (9)(a) of the Introduction as follows: "*the notifying party(ies) gives adequate reasons why the relevant information is not reasonably available* ***or cannot be disclosed without breaching contractual obligations, or violating applicable laws and regulations****, and provides best estimates for the missing data.*" It would provide further clarity and predictability if the Commission can confirm in the IR that it will likely grant waiver requests relate to genuinely classified or otherwise non-disclosable information.
Introduction (24) of Annex 1	The aggregation rules for turnover and "financial concentrations" are clearly set out in Art 22(4), 23 FSR. The IR and its annexes need to be consistent with the FSR.	To avoid confusion, paragraph (24) should make reference to Art 22(4), 23 FSR as regards turnover and aggregation of financial contributions.
Section 3.7 of Annex 1	The requirement to provide a list of all acquisitions made (presumably worldwide) during the last three years is not supported by any power given to the Commission in the FSR, is burdensome to a disproportionate extent relative to any insight it would give the Commission, and is clearly not relevant in	We recommend this requirement be removed from the notification form. If the Commission justifiably requires such information in specific cases, it could be requested in an RFI.

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	circumstances where the Commission's assessment is required to be "*limited to the concentration concerned*" in the notification (per Art 19 FSR).	
Section 5.1 of Annex 1	We welcome the European Commission's proposal to introduce a ***de minimis* threshold** below which financial contributions do not need to be included in the notification form. However, as set out in ICLA's letter to the European Commission of 23 January 2023, significant uncertainty and concerns remain over whether and how companies can set up a monitoring system that collects the unprecedented breadth and detail of information on "financial contributions" as currently foreseen by the Draft IR. A company first needs to be able to *monitor* financial contributions across numerous business lines, group entities and geographies, before it can *assess* which of those financial contributions are reportable under the FSR. In the context of the *de minimis* threshold this means that a company needs to first identify each of the financial contributions obtained, before it can determine which of those are below (a) EUR 200,000 individually; and (ii) EUR 4 million per country in aggregate; and thus can be excluded from the notification obligation. Such monitoring itself will be a herculean task, and is going to demand a full reworking of a company's reporting systems. While we appreciate the overall goal that the Commission is trying to achieve with the proposed Implementing Regulation, the principle of proportionality requires the Commission to only request information and documents necessary to achieve the desired objective, and not impose burdens that are excessively intrusive on companies and arguably go beyond what is necessary and proportionate to achieve its goals. For these reasons, it is important that the Commission focuses its information requirements in Section 5.1 on what is truly necessary to achieve its goals, and provides further clarifications in this regard.	To alleviate some of the administrative burden on companies actively contributing to the EU economy, we propose that the European Commission provides the following **clarifications in relation to the information requirements** in Section 5.1: • Section 5.1 of Annex 1 should mirror Section 3.1 in the Notification form for procurement processes (Annex 2), such that notifying parties should only need to notify financial contributions that fall into any of the categories in Art. 5(1), (a) to (d) FSR. • Where appropriate, notifying parties should be permitted to provide a description of the financial contributions they receive, rather than be required to itemize them in each case. This would seem appropriate in particular for financial contributions that do not fall within the scope of Art. 5(1) FSR or that are relatively small in value considering the size of the notifying party's group (we note that the *de minimis* threshold proposed in Section 5.1 of Annex 1 is an absolute one and may be still very low for groups of a certain size). This would allow companies to be transparent about the type of financial contributions they receive, while offering a potentially more manageable process to both the Commission and the companies involved. • The Commission should include further *qualitative carve-outs* regardless of their amount. The Commission should at the very least specify that the following type of information would likely qualify as "*not being necessary for the examination of the notification*" in the context of waiver requests, so that companies can rely on that guidance and start building their internal monitoring and reporting solutions accordingly: ○ "*ordinary course activities such as paying for or receiving public utilities, providing goods or services to public sector customers in the ordinary course of an undertaking's business,*

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		or making employer contributions to health and social security where those services and payments are made in accordance with generally applicable domestic laws and regulations"; ○ "*financial contributions which have evidently already been used for purposes other than the relevant concentration or public procurement, for example for business activities outside the internal market*"; and ○ *"financial contributions that otherwise show no relevant connection to the notified combination, in particular those relating specifically to products in entirely different markets, for example financial contributions to those companies within the notifying's party group that are not involved in the contemplated transaction, e.g. through financing, planning or execution*." To render the ***de minimis* threshold** more effective, we propose that the Commission considers the following proposals in relation to Section 5.1: • Introduce a more meaningful *de minimis* threshold under which financial contributions do not have to be reported (e.g., EUR 2 million instead of EUR 200,000). For transactions of the size that the Commission is considering, potential subsidies below EUR 2 million are unlikely to have any meaningful impact; • Clarify the reference to "individual amount". For example, in case of employer's contributions to health and social security for its employees, i.e. "individual amount" should mean each contribution paid per employee/monthly (as opposed to a contribution paid per employee/annually, a contribution per all employees together/monthly or annually, or other possible readings). Another example relates to clarifications regarding a company's payments for public utilities (e.g. gas, electricity); • Notifying only financial contributions which come from countries where: (i) the company has its seat; and/or (ii) the ultimate controlling

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		shareholder of the company has its seat; and/or (iii) the company makes more than a certain percentage of its annual revenues; • Significantly increase the aggregate amount per country (e.g. EUR 40 million), and/or turn the aggregate threshold into a relative threshold (e.g. "20% or more of the undertaking's annual turnover in that country" or "5% of the purchase price agreed for the target entity" (cf. Recital 19 FSR – "*a foreign subsidy [which] covers a substantial part of the purchase price of the target, is likely to be distortive*")); • Clarify that the EUR 4 million threshold is calculated by reference to an individual financial contribution, e.g. a specific consecutive annual tax relief, that must not reach or exceed EUR 4 million over a three-year period. In other words, if the company receives tax reliefs under different programs, then those would not need to be aggregated for purposes of the EUR 4 million test; and/or • Provide for an additional/separate *de minimis* threshold for revenues generated through the provision of goods or services or the purchase of goods or services, such that companies that are engaged in sales towards, or procurement from, public entities and/or SOEs through public tender procedures or based on arms-length negotiations are not disadvantaged by the large amount of business they may have with those public entities.
Section 6.1 and 6.3 of Annex 1	Section 6.1 and 6.3 of the template draft notification form asks the notifying party to disclose extensive **information on the bidding process** in concentrations (e.g. how many NBO's were submitted, by whom, etc.). Such information is generally not available to the buyer in a competitive bidding process as the seller would not disclose it for strategic reasons. It will thus be difficult (if not impossible) for an acquirer to provide a response to this Section 6.1. and 6.3.	We propose to remove Sections 6.1. and 6.3 in their entirety. The Commission could seek to collect such information where necessary, outside of the notification form, by relying on information requests to third parties using its general investigative powers under the FSR in case of any specific concerns (for example, during Phase 2 proceedings).
Section 6.2.2 of Annex 1	Section 6.2.2. requires the notifying party to provide copies of certain "*documents prepared by external parties assessing the transaction from a*	The Commission should delete "legal" from the wording and clarify that it will respect legal professional privilege (i.e. legal advice is not in scope). The FSR may also be an opportunity for the Commission to provide more detailed guidance on how it will – in practice – manage legal advice obtained from non-EEA

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	strategic, legal, economic, or tax point of view", which could be interpreted as including documents attracting **legal professional privilege**.	counsel and not be seen to act in a discriminatory manner, since the FSR will likely target a sizeable number of non-European companies whose principal legal advisors may not be EEA-qualified (but, e.g., US or UK) lawyers.
Section 6.9 of Annex 1	Section is empty.	This appears to be a clerical error. Section to be deleted.
Section 7 of Annex 1	Government subsidies are almost always provided to companies to achieve positive effects nationally or locally. This is true for EU subsidies as well as non-EU subsidies. Confining the assessment to **positive effects *within the Internal Market*** would render Section on 7 of Annex 1 incomplete and in many cases meaningless.	It should be clarified in Section 7.1 that notifying party(ies) can also list positive effects in relation to non-EU markets, if such information is available. To implement this proposal, the second sentence in Section 7.1 could be revised as follows: *"Please also list and substantiate any other positive effects of the foreign subsidy, **including positive effects on markets outside the European Union,** such as broader positive effects in relation to the relevant policy objectives, in particular those of the Union, and specify when and where those effects have or are expected to take place."*
Section 8 of Annex 1	Section 8 is very broadly drafted and lacks clarity as to what **types of documents** need to be enclosed to the notification. Broad document production requirements would add significantly to the administrative burden being brought upon companies and the European Commission, without necessarily furthering the Commission's review. The European Commission must adhere to the principle of proportionality when requesting documents. In the EUMR, similar document production requests are very targeted in Phase I and only are broadened in Phase II in-depth investigations. Similar limitations should be introduced in Section 8.	Section 8.1 should be clarified as to which documents are in scope. Since Section 8.1 is limited to financial contributions that may fall into any of the categories of Art 5(1), points (a) to (d) FSR, Section 8.1 should logically be limited to documents supporting the specific information provided in response to Section 5.3.1 to 5.3.7 of Annex 1. To implement this proposal, we suggest the following changes to Section 8.1: "*… copies of all ~~the supporting~~ documents – prepared by or for or received by any member(s) of the board of management, the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting – relating to the financial contributions that may fall into any of the categories of Article 5(1), points (a) to (d) of Regulation (EU) 2022/2560 pursuant to Section 5.2 **that support the information provided in Section 5.3.1 to 5.3.7**.*"

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		Furthermore, the wording in Section 8.2 requires clarification that it only extends to the financial contributions referred to in Section 8.1, i.e. "*financial contributions that may fall into any of the categories of Article 5(1), points (a) to (d) of Regulation (EU) 2022/2560*". To implement this proposal, we suggest the following changes to Section 8.2: "*analyses, reports, studies, surveys, presentations and any comparable documents either from the grantor or from the undertaking receiving the foreign financial contribution* ***referred to in Section 8.1*** *discussing the purpose and economic rationale of the foreign financial contribution as well as possible positive effects within the meaning of section 7 above – prepared by or for or received by any member(s) of the board of management, the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting*." In addition, please see our comments in relation to Art 4 and Art 5 IR above as regards waivers, which also extend to the documents listed in Section 8.
Annex 2 (Notification for procurement)		
Introduction to Annex 2	Art 28(1) FSR creates confusion as to whether declarations are also required for procurement processes involving agreements valued **below EUR 250 million**, but where the threshold of EUR 4 million per country in terms of aggregate annual financial contributions during the three-year period is reached. This is because the second sentence starts with the reference to '*in all other cases*', and the prior sentences refer to Art 27(2) that discusses both the EUR 250 million and the 4 million threshold. We highly doubt that the Commission would expect declarations to be submitted for ***every*** public procurement process (and certainly hope this is not the case) but believe this needs to be clarified.	Clarifications are needed in the Implementing Regulation as well as the Introduction to Annex 2 that a declaration only needs to be prepared in case the estimated value of the public procurement is equal to or greater than EUR 250 million.
Section 3.1 of Annex 2	We welcome that Section 3.1 does not require the notification of all financial contributions above the threshold of EUR 4 million in aggregate, but only those that fall into any of the **categories in Art 5(1)**, points (a) to (c) and (e) FSR.	As mentioned, we welcome the helpful clarifications set forth in this section – in particular the limitation of the notification requirement to financial contributions falling into any of the **categories in Art 5(1)**, points (a) to (c) and

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	(Please see the subsequent section where we discuss our concerns around extending this notification obligation to financial contributions relating to "operating costs"). **However, any positive effect of such approach would be severely diminished if the notifying parties were still required (in accordance with Section 7 of Annex 2) to itemize *all* financial contributions in case of declarations that are to be submitted.** Furthermore, the references to "points (25) and (26) of the Introduction of this Notification Form" in Section 3.1 are unclear and require clarification.	(e) FSR – which we believe are critical in making the notification a manageable process. Without these clarifications, the information collection would incur disproportionate time and costs and further clarifications would be required to make the process manageable (see our comments to Section 5.1 of Annex 1 above). To render the ***de minimis* threshold** more effective, we suggest implementing our proposals listed in relation to Section 5.1 of Annex 1 here accordingly. See our further comments as regards Section 7 of Annex 2.
Section 3.1 of Annex 2 (cont'd)	Financial contributions which relate to *operating costs* are not in the list of those foreign subsidies that most likely distort the internal market (see Art 5(1) FSR). Accordingly, they should not be treated as on par with Art 5(1) FSR subsidies in Section 3.1 of Annex 2.	We propose removing *"or relate to operating costs as indicated in its Recital 19"* from Section 3.1 of Annex 2.
Section 5 of Annex 2	See Section 7 of Annex 1 above.	See Section 7 of Annex 1 above.
Section 6 of Annex 2	Section 6 is very broadly drafted and lacks clarity as to what types of documents need to be enclosed in the notification. Broad document production requirements would add significantly to the administrative burden being brought upon companies and the European Commission, without necessarily furthering the European Commission's review. The European Commission must adhere to the principle of proportionality when requesting documents.	Section 6.1 should be clarified as to which documents are in scope. Since Section 6.1 is limited to financial contributions that may fall into any of the categories of Art 5(1), points (a) to (c) and (e) FSR pursuant to Section 3.1, Section 6.1 should logically be limited to documents supporting the specific information provided in response to Section 3.1.1 to 3.1.7 of this annex. To implement this proposal, we suggest the following changes to Section 6.1: "*…copies of all ~~the supporting~~ official documents relating to the financial contributions granted in the three years preceding the notification listed in Section 3.2-3.6 (e.g. loans, guarantees, etc.)* ***that support the information provided in sections 3.1.1. to 3.1.7.***" Furthermore, the wording in Section 6.2 requires clarification that it only extends to the financial contributions referred to in Section 6.1, i.e. "*financial contributions that may fall into any of the categories of Article 5(1), points (a) to*

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		(d) of Regulation (EU) 2022/2560". To implement this proposal, we suggest the following changes to Section 8.2: "*analyses, reports, studies surveys, presentations and any comparable documents from the grantor and the recipient of the foreign financial contribution* ***referred to in Section 6.1 above*** *discussing the purpose and economic rationale of the foreign financial contribution as well as possible positive effects within the meaning of section 5 above*". In addition, please see our comments to Section 4(4) Draft IR as regards waivers, which also extend to the documents listed in Section 6 of Annex 2.
Section 7 of Annex 2	Section 7 stipulates that in case of a declaration, the notifying party(ies) must list *all* foreign financial contributions received. It will be extremely challenging if not impossible for most companies to establish a reporting system that will identify, and continuously monitor, all financial contributions received. Please refer to our comments on Section 5.1 of Annex 1 in this respect. It is also hard to conceive why as currently drafted, a 'declaration' form requires substantially more detail and information than a 'notification' form, which in line with Section 3.1 is only required to include foreign financial contributions "*that fall into any of the categories in Article 5(1), points (a) to (c) and (e) of Regulation (EU) 2022/2560*. This seems contrary to the overall idea and structure of the FSR.	For the sake of clarity, the first paragraph of Section 7 should be updated to read as follows: "Where no ***notifiable*** foreign financial contributions in the last three years have been granted…". The second paragraph of Section 7 needs to be caveated as it is practically impossible for companies to identify and analyse each and every financial contribution received. To that effect, we propose the following changes to the statement in Section 7: "*None of the participating notifying party(ies),* ***based on their respective reasonable enquiries and diligence****, have* ***identified*** ~~*received*~~ *any other foreign financial contributions notifiable under Chapter 4 of Regulation (EU) 2022/2560.'"* To bring the 'declaration' form in line with the 'notification' form, the third paragraph of Section 7 should clarify that it is permissible to provide a generic description of the (non-notifiable) financial contributions received, without having to list each of those financial contributions individually. To that effect, we propose adding the following wording to Section 7: *"In accordance with the obligation in Article 29(1) of Regulation (EU) 2022/2560, the notifying party(ies) must list all foreign financial contributions received.* ***Where only foreign financial contributions falling outside the scope of Section 3.1 in the last three years have been granted to the notifying party(ies),***

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		Sections 1, 2 and 8 of this Form must be filled out, along with a description of the categories of all financial contributions obtained". In line with the proposals related to the concentration notification, the European Commission should provide the following additional **clarifications in relation to the information requirements** in Section 7, and include further *qualitative carve-outs* regardless of their amount: • "*ordinary course activities such as paying for or receiving public utilities or making employer contributions to health and social security where those services and payments are made in accordance with generally applicable domestic laws and regulations*"; • "*financial contributions which have evidently already been used for purposes other than the relevant concentration or public procurement, for example for business activities outside the internal market*"; and • *"financial contributions that otherwise show no relevant connection to the notified combination, in particular those relating specifically to products in entirely different markets, for example financial contributions to those companies within the notifying's party group that are not involved in the contemplated transaction, e.g., through financing, planning or execution*."