ERT Response to the consultation on the Foreign Subsidies Regulation draft Implementing Regulation

Executive summary

1.1 The European Round Table for Industry ("**ERT**") supports the goal of the Foreign Subsidies Regulation ("**FSR**") of creating a level playing field for all undertakings operating in the EU internal market by ensuring that companies do not use subsidies granted outside the EU (therefore, not subject to State aid rules) to obtain an unfair advantage in M&A activities or public procurement.

1.2 In ERT's September 2020 response to the Commission's White Paper on Foreign Subsidies, ERT called for a broad, effective and workable regime that would appropriately address distortive foreign subsidies but without making inward investments in the EU less attractive. ERT believes it is essential to preserve the EU's fundamental openness to foreign and domestic investment while keeping bureaucratic hurdles for mergers and participating in public procurement as low and streamlined as possible.

1.3 ERT recognises the challenges faced by the European Commission ("**Commission**") in the design of the draft Implementing Regulation ("**Draft IR**"). The FSR aims to address distortive subsidies granted by third countries: its wording as well as the powers it entrusts the Commission with are intentionally very broad to capture all potential forms of distortions. At the same time, the Commission must achieve this goal within the bounds of the principle of proportionality, requiring public action to be limited to the least onerous option for citizens and companies to meet this goal, including in terms of compliance. Hence, if the scope of the Draft IR is too narrow, the Commission may fail to investigate detrimental foreign subsidies, but, if it is too wide, it could lead to an excessive and unworkable administrative burden for companies and the Commission itself.

1.4 Based on the reasons set out below, our view is that the Draft IR does not yet achieve the appropriate balance. We have also identified some other improvements which should help achieve the overall objectives of the FSR in a more proportionate manner. More specifically:

(A) In our view, the information requirements on undertakings as currently envisaged in the Draft IR are **unworkable in practice** and we would strongly urge the Commission to reconsider the proposed approach. The Draft IR should further develop on the FSR references to the principle of proportionality (see Recitals 39 and 40 FSR) to **strike the right balance "*between the effective protection of the internal market and the need to limit the administrative burden on undertakings*"** (see Recital 35 FSR) as well as to make good use of public resources. In particular, the Draft IR should narrow down the scope of the reporting requirements contained in the Annexes of the Draft IR, whilst also identifying more proportionate means for undertakings to provide the required information:

- The Commission should adopt a **two-step approach**: (i) a more limited initial disclosure obligation for non-problematic financial contributions, i.e. based on general explanations, estimates and otherwise available information (e.g. IFRS reporting or country-by-country tax reporting), with

(ii) detailed information requested only for subsidies under Article 5(1) FSR and during in-depth investigation.

- The Draft IR should adopt a **significantly narrower approach to the internal documents required to be provided** in connection with a notification under the FSR.
- The Commission should clarify the criteria for when the **actions of a private entity are "*attributable*" to a third country** under Article 3(3)(c) FSR with clear and direct guidelines (for example, through a list of relevant entities similar to the sanctions list) to allow undertakings to more easily identify reportable financial contributions.
- The Commission should significantly raise the reporting obligation thresholds in the notification form. For example, in Section 5.1 of Annex 1 to the Draft IR, the thresholds (individual foreign financial contribution equal to or in excess of EUR 200k and total amount of contributions per third country and per year equal to or in excess of EUR 4 million) should be increased to a level where the contribution could potentially impact or distort a bid for a target. If the FSR captures a concentration where one of the parties has EU turnover of EUR 500 million, an individual contribution of EUR 200k would clearly not have any impact on the transaction. It would be more proportionate to have (i) thresholds that are set at a level proportionate to the purchase price for the target (e.g. 5% of the purchase price) or (ii) much higher absolute thresholds (e.g. EUR 2 million for individual contributions and EUR 40 million for total contributions per third country and per year).
- In addition, the Commission should apply the threshold for individual contributions across the board, i.e. including for public procurement filings, otherwise companies will need to collect the information anyway.

(B) The Draft IR should more clearly specify how to deal with **information which is confidential under foreign rules** (e.g. government contracts in the defence sector), and **competitively sensitive information** (e.g. the seller's M&A disposal strategies under Section 6.1 of Annex 1 to the Draft IR):

- The Commission should clarify how companies should handle disclosure of information considered confidential under foreign rules (e.g. government contracts in the defence sector).
- In the context of merger proceedings, the Commission should provide guidance on how the acquirer should handle third party competitive sensitive information, e.g. the seller's M&A disposal strategies under Section 6.1 of Annex 1 to the Draft IR. The acquiror does not usually have access to this information and sellers may be reluctant to disclose it.
- In the context of public procurement proceedings, companies should be allowed to submit sensitive information to the Commission themselves instead of channelling everything through public contracting authorities without corresponding confidentiality safeguards. For example, details of sales with/from public entities are highly confidential and competitively sensitive vis-à-vis public contracting authorities.

(C) The Draft IR should introduce a transitional period during which reporting obligations are limited (or at least to a certain type of subsidy) and that only acquisitions that are signed on or after 12 October 2023 will have to be notified (i.e. transactions signed before 12 October 2023 but closed afterwards will not be caught by the notification). We would recommend a transitional period of 3 years given the complexity of the monitoring and notification requirements envisaged under the regime.

(D) We also consider that the overall framework and structure of the Draft IR and associated notification forms should explicitly recognise and acknowledge the fact that it will be very challenging for undertakings to provide information which is 100% complete and accurate given (i) the breadth of the reporting requirements, (ii) the significant uncertainty in how to interpret those requirements, and (iii) the significant practical challenges in gathering the relevant information. The Draft IR and notification forms, in the language they use, have drawn inspiration from the Form CO used for merger control purposes. But the scope for material information errors in the turnover information provided with a Form CO is much lower (even with the best efforts of undertakings) – and the Draft IR and notification form should more explicitly recognise this.

(E) We have also identified a series of practical and operational improvements to further streamline the review process for both the parties and the Commission (for example, to include the possibility for the parties to choose to submit the notification in another language of the Union rather than the official language of the public procurement procedure as per para. 5 of Annex 2 to the Draft IR).

(F) Finally, we would urge the Commission to issue guidelines as soon as possible to provide additional comfort and guidance to businesses on the practical application of the FSR and the notification procedures required thereunder (similar to the Consolidated Jurisdictional Notice used in merger control proceedings).

2. The information requirements under the Draft IR are not workable in practice

2.1 While the FSR entrusts the Commission with wide powers (including the possibility to initiate ex-officio investigations), it also foresees certain limits on the assessment of foreign subsidies:

(A) The notification obligation in Articles 21 and 29 FSR is limited to larger concentrations and tenders.

(B) The Commission is then bound in its assessment to the concentration and the public procurement procedure at hand (see Recitals 37 and 46 FSR).

(C) When assessing whether the foreign subsidy is distortive, the Commission can consider factors such as the relationship between the size of the subsidy and the purchase price/the value of the contract to be awarded – only if the subsidy accounts for a substantial part of such price/value is it likely to be distortive (Recital 19 FSR).

(D) Also, Article 5 (1) FSR identifies certain forms of foreign subsidies which are most likely to distort the internal market, i.e. those which directly facilitate a concentration or enable an undertaking to submit an unduly advantageous tender.

2.2 The Draft IR fails to develop these distinctions and thereby strike the right balance "*between the effective protection of the internal market and the need to limit the administrative burden on undertakings*" (Recital 35 FSR) as well as make good use of public resources.

2.3 The combination of broadly defined FSR terms (i.e. "*foreign financial contribution*", which includes contributions from "*a private entity whose actions can be attributed to the third country"*) and extensive information requirements under the Draft IR (e.g. according to Section 5.1 of Annex 1, the parties must list all foreign financial contributions if (i) equal or in excess of EUR 200k, and (ii) total amount per third country and per year is equal to or in excess of EUR 4 million) will likely result in reporting obligations resulting in a large amount of information, which will make the process unworkable for both the parties and the Commission.

2.4 While the possibility of the Commission granting waivers is welcomed to allow for an adaptation of reporting needs in individual cases, it does not solve the basic issue for companies – they still need to prepare as though the full amount of information required under the FSR will be submitted, especially since the granting of waivers takes place in the context of pre-notification contacts (i.e. too late in the process) and is ultimately at the Commission's discretion. Moreover, the Draft IR envisages that waivers will only be granted in "*exceptional circumstances*" (Annex 1, Introduction C (5), Annex 2 Introduction D (7)). These references should be deleted if undertakings are to be given comfort that the Commission will grant waivers in a frequent and pragmatic manner.

2.5 The Commission should instead focus the notification requirements on capturing those cases which are most likely to distort the internal market, for example by only requiring information in connection with mergers or public procurement where there is a potential link between the foreign payment and the M&A deal or public procurement contracts.

a. Two-Step Approach

2.6 One solution to the above issues would be for the Commission to further refine the two-step approach envisaged in the Draft IR. Initial reporting requirements should be much more limited than currently foreseen, and ideally based on general explanations and reasonable estimates, or information which is otherwise available, e.g. IFRS reporting (IAS 20) or country-by-country-tax reporting.

2.7 More onerous reporting requirements should only exist where (i) the relevant financial contributions are likely to fall into any of the categories of Article 5 (1), points (a) to (e) FSR or (ii) in cases of an in-depth Phase II assessment (Article 24 (1) lit. b) and 30 (3) FSR). Even for those cases where lighter information requirements exist, the Commission would in any event still have the right to enquire further in case of specific doubts.

Another option would be for Section 5.1 of Annex 1 to take the same approach as Section 3.1 of Annex 2, and only require the notification of financial contributions above the thresholds if those contributions fall into any of the categories in Article 5(1), points (a) to (c) and (e) of the FSR.

b. "Third Country"

2.8 The Commission should clarify in specific guidance or in the Draft IR itself the criteria for when the actions of a private entity are "*attributable*" to a third country. This needs to be based on easily accessible and automatically reviewable facts to allow undertakings to review their business partners, such as in a list of relevant entities published by the Commission (similar to sanction lists).

2.9 While taking the very broad concept of entities attributable to a country from the EU state aid regime as a basis for the FSR may make sense theoretically, it ignores the very different context of the ex-ante control of concentrations and public tenders. The State aid regime deals with concrete and limited cases where the potential connection to a state can and should be assessed in detail.

2.10 In contrast, without sensible guidance/constraint by the Commission, all undertakings which anticipate larger M&A transactions or bidding/subcontracting for public tenders will have to immediately and continuously collect, monitor, and assess data of hundreds of thousands of third party relationships. The required effort to determine with certainty which of those many business partners can be attributable to a third country places a disproportionate burden on undertakings. Whether a business partner is (partially) state-owned or not is not information undertakings generally collect and store for all business partners. Other legal requirements such as anti-money laundering laws also do not require the complete review of all business relations but allow for a risk-based approach.

2.11 Even if a company establishes that a business partner is ultimately majority-state-owned, assessing the criterion of imputability under the state aid jurisprudence requires examining "*whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures*" (ECJ, 16 May 2002, C-482/99, para. 52). In each case, this would require an individual assessment of information which is regularly unavailable to companies.

2.12 In conclusion, nearly all the (millions of) ordinary course transactions will take place at arm's length and identifying those which could potentially amount to a distortive subsidy through the approach foreseen by the Commission would amount to the proverbial search for a needle in a haystack.

2.13 This all ignores the key assessment under the FSR, i.e. determining whether a foreign financial contribution actually may amount to a problematic distortive subsidy.

c. Reportable Financial Contributions

2.14 To avoid further disproportionate reporting obligations, the Draft IR should foresee limitations on the scope of financial contributions to be reported in Phase I.

2.15 Ideally, IFRS reporting rules (IAS 20 – government grants) should serve as an initial basis for reporting obligations of companies applying such standards. This is a category that many undertakings would likely be able to provide with limited additional effort. At the same time, this would likely include the most relevant subsidies for the Commission's assessment. Also, as these figures are audited, comparability and reliability of data is ensured.

2.16 A further option could be to limit the geographic scope of reporting obligations to exclude financial contributions for which a negative effect appears unlikely. A third country is unlikely to grant distortive financial contributions to a company in the performance of which it has no special interest. Therefore, as a matter of proportionality, the reporting obligations should be limited to those countries which likely would be interested in subsidising a company such as:

(A) The country/countries where a company and/or its ultimate controlling shareholder have their seat(s).

(B) Countries where a company makes at least 25% of its revenues.

2.17 The Commission should further exclude reporting obligations on financial contributions received in third countries with a free trade agreement covering subsidy issues by providing a whitelist (Article 44 (9) FSR).

2.18 The Commission should also consider limiting reporting obligations to the business units and/or markets which are relevant for the transaction/tender in question as financial contributions received for other business units and/or markets are unlikely to have a distortive effect for the case under assessment by the Commission, similar to the approach for “affected markets” under the EUMR.

2.19 Finally, the Commission should provide guidance on how to report financial contributions paid in instalments. Assuming as an example a fiscal incentive in the form of a 20-year period reduction on property tax, the value of the reportable financial contribution could be either the amount for the entire period or the annual amount. At present, the Draft IR does not specify which one should be reported.

2.20 Similarly, the Draft IR does not provide any indication on how to deal with financial contributions whose amount may vary over time: in the example of the 20-year period fiscal incentive mentioned above, the tax may be linked to the value of the underlying property, floating according to market dynamics. These layers of complexity should be clarified by the Commission to avoid a situation of uncertainty.

d. Scope of reporting requirements

2.21 Para. 24(a) of Annex 1 specifies that the concept of “*notifying party(ies)*” extends to all entities that are jointly controlled by the relevant undertaking making the notification. This raises some significant practical issues. In particular, it can often be the case that entities which are jointly controlled (but not majority owned) are not integrated into a company’s ERP systems, are treated differently in a company’s accounting system and sometimes purposefully are subject to information barriers preventing information flowing to the parent entities. The definition in para. 24 (a) should make reference to Article 22 (4) FSR in the definition of the scope of the notifying undertaking and/or explicitly carve out such entities from the scope of the “*notifying party(ies)*”.

2.22 Furthermore, given the aim of the FSR, it is unclear why financial contributions received by the target should be notified to the Commission. It is hard to understand how such financial contributions could distort the competitive process regarding the transaction which is what the FSR intends to address (Recitals 4 and 37 FSR). At least if the threshold of EUR 50 million is met by the acquirer alone or by the acquirer and the “government grants” are received by the target according to IAS 20, no further information should be required for the target entity.

e. General explanations

2.23 A further measure to ensure the proportionality of the burden caused by the (initial) notification would be to require general descriptions and explanations on standard business transactions, potentially based on reasonable assumptions, rather than having to report details of hundreds of thousands of ordinary course business transactions. This would also allow the Commission to come to a first assessment quickly and with limited effort, rather than having to assess thousands of individual transactions already at an initial stage.

f. "*De minimis*" threshold for reporting obligation under the concentration tool

2.24 Section 5 Annex 1 to the Draft IR limits the reporting obligation to foreign financial contributions whose (i) individual amount is equal to or in excess of EUR 200k, and (ii) the total amount per third country and per year is equal to or in excess of EUR 4 million.

2.25 This notification form's "*de minimis*" threshold for reporting obligations is a small step in the right direction to make the information requirement less burdensome. However, it should be further improved for it to reach the intended effect.

2.26 Firstly, the "*de minimis*" threshold introduced is de-valued by the need to confirm the EUR 50 million threshold in Section 4.2 of Annex 1. If an undertaking does not reach the EUR 50 million threshold on the basis of the reportable financial contributions in Section 5 of Annex 1, it needs to review a potentially large number of smaller financial contributions to assess whether it meets the threshold. The Commission should consider the following measures:

(A) Introducing a presumption that unless the undertakings concerned reach a threshold of EUR 40 million with the sum of all financial contributions over EUR 200k, they shall be deemed to be below the EUR 50 million threshold.

(B) Introducing a true "*de minimis"* threshold under which financial contributions do not need to be considered at all (for example EUR 500k, given subsidies below this size are highly unlikely to affect the competitive position of the undertakings concerned).

2.27 Secondly, the same issue arises in the relationship between Section 5.1(i) and Section 5.1(ii) of Annex 1. As it currently stands, undertakings need to review many more financial contributions to determine whether they reach the threshold in Section 5.1(ii). Section 5.1 (ii) needs to make reference to Section 5.1 (i), i.e. the total sum per country should be calculated on the basis of the financial contributions above the threshold as referenced by Section 5.1 (i).

2.28 Thirdly, the level of the thresholds should be raised to limit the number of reportable financial contributions. Given the application scenarios (transactions where the target has EU turnover of at least EUR 500 million), it appears unlikely that general, non-targeted financial contributions of an individual third country in the range of EUR 12 million over three years (or EUR 200k for an individual contribution) could be distortive. Similarly, it seems improbable for a company to receive distortive subsidies targeted at the same transaction by several third countries.

2.29 Given the threshold of EUR 50 million over three years in the FSR for all undertakings concerned, EUR 4 million per year and per country appears much too low. Indeed, Recital 19 of the FSR clarifies that foreign subsidies (not "*financial contributions*") under the threshold of EUR 4 million over three years are unlikely to distort competition in the EU. Establishing the information requirement threshold for a Phase I case at this level for "*financial contributions*" is disproportionate given that at the same time, Recital 19 states that "*a foreign subsidy [which] covers a substantial part of the purchase price of the target, is likely to be distortive*". A target which has a turnover of at least EUR 500 million in the EU will very likely have a purchase price in the hundreds of millions (or billions) – a "*substantial part of the purchase price*" would be much higher than EUR 12 million. Also, by setting fixed limits which ignore the purchase price of the individual case, the Draft IR ignores the clear connection between the purchase price and the likelihood of a distortion established by the FSR.

2.30 Accordingly, both the EUR 200k threshold as well as the EUR 4 million p.a. threshold should be raised significantly, at least to EUR 2 million and EUR 40 million. Alternatively, rather than raising the thresholds in a uniform manner, they should be dependent on the size/turnover of the notifying party and/or the purchase price (e.g. 5% of the purchase price). Also, the Commission should differentiate between the various forms of the financial contributions and foresee a significantly higher threshold for the ordinary course transactions under Article 3 (2) 1 lit (c) FSR, as these will be particularly burdensome to collect. In cases of doubt, the Commission can always request a greater depth of information.

g. "*De minimis*" threshold for reporting information under the public procurement tool

2.31 Section 3.1 of Annex 2 must be supplemented by a similar threshold as included in Section 5.1 of Annex 1. The above proposals also apply for any threshold that is included in Annex 2. Importantly, it is critical that the thresholds in Section 3.1 of Annex 2 and Section 5.1 of Annex 1 are aligned as companies active within public procurement will put in place monitoring systems to continuously monitor financial contributions without foreseeing whether the information will ultimately be required for a concentration or public procurement notification procedure.

2.32 Regarding Annex 2, the requirement under Section 3.1 to include all financial contributions that "*relate to operating costs*" is extremely broad and could result in various irrelevant notifications, such as electricity payments or the stamps bought from the public post office. It is also exceedingly complex to determine whether and to what extent a financial contribution covers operating costs versus investment costs. The foreign financial contribution notifiable under Section 3 of Annex 2 need to be effectively limited to keep notifications manageable. The reference to "*operating costs*" should be completely deleted from Section 3 of Annex 2.

2.33 Section 7 requires that, in circumstances where the notifying parties have been granted any financial contributions in the last three years, the notifying parties must make a declaration to this effect. Given the challenges with identifying all potential financial contributions described above, requiring a declaration in the terms currently provided for in Section 7 is disproportionate. This section should either be deleted or the form of declaration amended (for example, to include meaningful *de minimis* reporting thresholds and conditions, as well as qualifiers regarding reasonable efforts and the best of the notifying party's knowledge).

h. Section 5.2 of Annex 1: criteria to assess whether a financial contribution has a possible link with the concentration

2.34 Some criteria should be provided to enable companies to assess whether a financial contribution has a possible link with the concentration.

3. Time Scope of notification obligations

3.1 Reporting obligations should refer to the three financial years before the conclusion of the agreement or submission of the tender, not the last three years (unclear whether calendar years or periods of 12 months) before the conclusion of the agreement or submission of the tender (Section 5.1 of Annex 1 and Section 3 of Annex 2). There could be limited exceptions to this general rule, e.g. in cases of direct facilitation pursuant to Article 5 (1) point (d) FSR or other significant cases. This will ensure better data quality (audited accounts, see EUMR Jurisdictional Notice, para. 169) and allow the parties to prepare the notification forms with an adequate degree of diligence.

3.2 The need to update the notification under Articles 6 (3) and 7 (3) of the Draft IR should be limited to cases where there are significant and meaningful deviations from the original notification.

4. Reporting obligations under Section 3 and 6 of Annex 1

4.1 It is unclear for which purpose the Commission would require all the information requested under Sections 3.4, 3.5, 3.6, 3.7, and 6 of Annex 1 in all cases. With the exception of the contact details under Sections 6.10 and 6.11, disclosure of this data should be limited to (i) contributions linked to the concentration under Section 5.2 of Annex 1, (ii) contributions likely to fall into any of the categories of Article 5 (1) FSR, or (iii) Phase II cases.

4.2 Especially regarding Sections 6.1 and 6.3, the information requested is highly sensitive, generally not known to the purchaser and protected by strict confidentiality obligations.

4.3 Section 6.6 refers to the financial contributions listed in Section 5.2 of Annex 1. As Section 5.2 does not limit the number of financial contributions, it must be assumed that the reference is wrong. Collecting the required explanations appears very burdensome and unwarranted for many transactions, as identified by Section 5.2 of Annex 1.

4.4 The reference to the target in Section 6.6.2 appears questionable, as any subsidy granted to the target could hardly distort the competitive process regarding the concentration.

5. Document requirements under Section 8 of Annex 1

5.1 The document disclosure requirements as currently envisaged in Section 8 of Annex 1 are incredibly broad and will place a disproportionate burden on notifying parties. We see three critical changes that are required, without which these requirements will be unworkable in practice:

(A) Section 8.2 of Annex 1 does not specify for which financial contributions the required documents should be provided. As document gathering and production is an especially burdensome and costly process, any such requirement should be limited and targeted to the real needs of the Commission's assessment. The provision of a potentially large number of documents for all types of financial contributions should be limited only to those financial contributions that may fall into any of the categories of Article 5(1) (a) to (d) FSR (in the same way that applies for Section 8.1 documents).

(B) Only documents which have been prepared for or by senior management of the notifying party should be in scope of the disclosure obligations under Sections 8.1 and 8.2. Otherwise, undertakings will be required to do an extensive trawl of a potentially vast number employees who might have copies of relevant documents which discuss the purpose of the financial contribution (especially in circumstances where Section 8.2 is not limited in the way recommended above).

(C) Finally, it is disproportionate, unworkable in practice and may put an undertaking in breach of confidentiality requirements to extend the disclosure requirements under Section 8.2 to documents "*from the grantor*". Consistent with other notification regimes (such as the EUMR), the disclosure requirements should be limited to those documents from the undertaking itself, and not from third parties.

6. Table 1 (Annex 1 and Annex 2)

6.1 The question of whether a financial contribution was a result of a tender procedure is not something undertakings usually keep track of in a centralized system. Providing this information will require manual effort and there appears disproportionate in Phase I cases.

6.2 Regarding the "*type of financial contribution*" column it should be clarified which relevant categories should be used.

7. Reporting obligations under Section 6 of Annex 2

7.1 The information requirements under Section 6 of Annex 2 are extremely burdensome, especially in the scenario where companies need to list all foreign financial contributions without any de minimis thresholds or requirements limiting contributions to those that fall under Article 5 (1) FSR. Companies will simply not be able to comply with this request. We suggest clarifying that Section 6 of Annex 2 only applies to financial contributions that fall within the scope of Article 5 (1) FSR.

8. Confidentiality issues

a. Confidentiality obligations under foreign laws

8.1 In certain instances, companies may be bound by foreign laws not to disclose the information required under the form. Many government contracts, for example in the defence sector, require strict confidentiality not only on the specificities of the contract but also on the mere existence of the contract as such. Companies may find themselves facing two conflicting legal obligations and the possibility of severe sanctions, including imprisonment. They may try to negotiate a lifting of the specific confidentiality obligation with the third country but cannot reach this result autonomously. Currently, the Draft IR does not consider this issue at all. A direct interaction between the Commission and the third country could help resolve this issue. In any event, it should be clarified that businesses need not risk prosecution or litigation by a third country for a breach of foreign confidentiality restrictions. Reference to this issue should at least be made in the section on waivers to allow the Commission to adapt its reporting requirements in individual cases.

b. Competitively sensitive information

8.2 In some instances, the Draft IR requires the notifying parties to provide information which in many cases is competitively sensitive. This is true especially for the information on a bidding process under Section 6 of the concentration form, for the information on subcontractors in the tender form, and for competitively sensitive information vis-à-vis public contracting authorities (e.g., procurement/supply contracts with other public entities). Here, it would be helpful if the Implementing Regulation (for example in Section C in the Introduction to Annex 1) were to foresee a direct interaction between the Commission and the relevant third parties (e.g. the seller of a business or a subcontractor to a tender) to gather the relevant information. Given the high sensitivity of this information, even providing the information only to external advisors or submitting the information directly to the contracting authority would in some cases not provide sufficient comfort to the undertakings involved.

9. Transitional approach needed

9.1 In any event, given the short remaining time period until the notification obligation becomes relevant, the Commission should at least limit the reporting requirements for a transitional period, so as to allow undertakings to adapt or build up reporting systems which can deal with the information requirements for the future. Alternatively, the Commission should issue a clear public statement that it will not seek to bring enforcement action for “technical” breaches of the reporting requirements under the FSR until the regime is more fully developed.

9.2 Companies currently do not record the types of information requested in a way which would allow a complete answer to the Commission. The adaptation of existing or the development of new reporting tools will require significant time, likely going beyond the year 2023. Therefore, the Commission should not require the production of information regarding the period before the notification obligation comes into force and for a certain period thereafter, e.g. three years, unless this information is reported under IFRS or other applicable reporting standards and therefore readily available to companies. If at all, only financial contributions falling into the categories of Article 5 (1), points (a) to (e) FSR should need to be reported in more detail initially.

9.3 Also, the Commission should clarify Article 54 (4) FSR (and how it interacts with Article 53 (3) FSR) by stating that only transactions which are signed on or after 12 October 2023 require notification. Applying the notification obligation to transactions signed before 12 October 2023 would place an undue burden on undertakings which would, for lack of an Implementing Regulation and dedicated Commission personnel, not be able to start the pre-notification process.

10. A more explicit recognition of the challenges in providing complete and accurate information

10.1 We consider that the overall framework and structure of the Draft IR and associated notification forms should explicitly recognise and acknowledge the fact that it will be very challenging for undertakings subject to the FSR to provide information which is 100% complete and accurate.

10.2 This issue arises in particular in light of (i) the breadth of the reporting requirements, (ii) the significant uncertainty in how to interpret those requirements, and (iii) the significant practical challenges in gathering the relevant information.

10.3 The Draft IR and notification forms, in the language they use, have drawn inspiration from the Form CO used for merger control purposes. But the scope for material information errors in the turnover information provided with a Form CO is much lower (even with the best efforts of undertakings) – and the Draft IR and notification form should more explicitly recognise this. For example:

(A) The reference to the scenario where undertakings provide "*incorrect or misleading information*" (Article 6(4) of the Draft IR) should be qualified with language which recognises the challenges described above.

(B) Similarly, the "Attestation" section in the notification forms should be qualified with a statement that the information is accurate "*based on reasonable enquiries proportionate to the nature of the information required to be disclosed in this notification*" (or wording to that effect).

10.4 Similarly, the Commission should specify the circumstances where an undertaking "*ought to have known*" that information provided with a notification was incomplete (Article 7(3) of the Draft IR).

11. Additional practical suggestions

11.1 We would also recommend the following improvements which would improve the Draft IR and the overall efficiency of the notification process envisaged thereunder:

(A) In Article 6 (2) of the Draft IR, we suggest that the Commission adds "without delay" after "… in writing". Similarly, we suggest the Commission includes an express reference to its commitment to deal with matters expeditiously (for example a target of responding to draft notification forms within five working days, or a target of attending a meeting with the notifying parties within the first 1-2 weeks of notification being submitted)

(B) If possible, it may be clarified in Article 4 (3) Draft IR that translation does not have to be provided by a verified translator (to allow the use of in-house resources), unless specifically requested by the case team.

(C) Annex 1, Section 3, footnote 7 contains a typographical error ("equivalTents") and a blank para. (Section 6.9).

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The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairs of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

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