ERT

Summary Position

# The Foreign Subsidies Regulation draft Implementing Regulation

April 2023

**The European Round Table for Industry ("ERT") is concerned about the effects the proposed implementing Regulation ("Draft IR") for the Foreign Subsidies Regulation ("FSR") would have on companies, public procurement procedures and M&A activity in Europe.**

We therefore strongly support a dialogue with relevant stakeholders to develop a revised implementing Regulation which provides a sensible limitation of and clearer guidance on information to be collected and ensures a proportionate and effective implementation of the FSR.

ERT supports the goal of the 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 to obtain an unfair advantage in the EU.

Rightfully, the FSR has defined broad concepts and granted the Commission wide discretionary powers to tackle this important issue. At the same time, the Commission must achieve this goal within the bounds of the principle of proportionality and administrative efficiency, requiring public action to be limited to the least onerous option available for citizens and companies.

The Commission has repeatedly explained that it needs to ensure that the FSR does not discriminate between EU and non-EU companies. However, the Commission has failed to recognize that, due to the disproportionately burdensome nature of the Draft IR compared to the State Aid regime, EU companies operating inside and outside of the EU and subject to both FSR and State Aid regimes, may be significantly disadvantaged in M&A deals and public tender procedures when facing competing bidding companies who are only present in the EU (who are only subject to the State Aid regime).

The Draft IR as presented on February 6 unfortunately fails to meet this standard. It creates insurmountable, unnecessary, and unprecedented red tape by establishing vague, vast and all-encompassing reporting obligations for all initial case notifications.

A proportionate and efficient implementing Regulation should provide greater clarity on the information to be provided and limit first-instance information requirements to the types of subsidies that are most likely to distort the relevant public procurement or M&A activity in the EU. This would allow the Commission, as confirmed by Executive Vice-President Margrethe Vestager, to identify the high-profile cases that the FSR and the Commission are aiming at – which then could and should be investigated further.

All undertakings which may engage in large M&A projects (even as a target), JVs or large public procurement projects in the EU will face major administrative burdens and incur massive costs to design and implement from the ground up the granular reporting systems necessary to comply with the Draft IR as it currently stands.

In the first several months, if not years, after the implementation date, M&A transactions as well as public tender procedures will be disrupted and delayed significantly – and even in the mid to long-term the number of competitive bids will likely go down (as companies would face or anticipate to face negative consequences if they fail to comply with the information requirements), to the detriment of European taxpayers, businesses and consumers.

Accordingly, the responses to the Commission's public consultation on the Draft IR have been overwhelmingly negative and at the same time very consistent in identifying the main points of concern.

The detailed submission of ERT to the consultation can be found here.

We would like to draw attention, particularly to the following three major issues:

I. **The Draft IR disregards the purpose of the FSR by front-loading the information and document production requirements in initial notification processes.**

   This creates a daunting bureaucratic task for companies and Commission services even in the most benign cases. Hundreds of thousands (if not millions) of individual "financial contributions" (including i.a. wholly unproblematic social security payments, public utility payments and arms-length ordinary course of business transactions) – and accompanying documentation – will need to be monitored, collected, classified, assessed and submitted line-item by line-item, (and then reviewed by the Commission, unless companies' efforts are meant to remain entirely vain) for both the target and the acquiror in an M&A transaction, for parent companies in JVs and all tender participants and their main subcontractors in a public procurement procedure. This is unnecessary, as this collection of upfront information is not required to identify problematic cases and makes compliance with the Draft IR unfeasible for companies.

**Possible solution:** Adopt a true two-step approach as foreseen in the FSR, like the process under the EU Merger Regulation: The initial notification should include a limited disclosure obligation for non-problematic financial contributions, i.e. based on general explanations, estimates and otherwise available information (e.g. IFRS reporting or similar), with more detailed information requested only for the most-likely distortive subsidies under Article 5(1) FSR. Burdensome information requirements (such as broad document production) should be limited to in-depth, Phase II investigations.

II. **The Draft IR loses sight of the FSR's aim of addressing distortive subsidies regarding major M&A and public procurement activities.**

The FSR mandatory notification obligations apply only to cases where the target of an M&A transaction has a turnover of over EUR 500m in the EU or where the value of a public tender exceeds EUR 250m. Financial contributions need to be significant to have any effect on such projects. This fact is not reflected in the currently proposed thresholds – as even a series of financial contributions at or around the current de minimis threshold of EUR 200k would not have any appreciable effect on such large transactions.

**Possible solution:** To focus on meaningful cases, (i) thresholds need to be set at a level proportionate to the purchase price for the target (e.g. 5% of the purchase price) and/or (ii) at a much higher absolute level (e.g. EUR 2m for individual contributions and EUR 40m for total contributions per third country and per year) and (iii) the same de minimis thresholds need to be introduced for public procurement notifications otherwise most companies would need to collect all the de minimis information anyway.

III. **The Draft IR ignores that it is impossible for companies to provide the required information in the short term and to ensure completeness even in the long term.**

No current reporting system provides for the categories of information requested and certainly not at the required level of detail. For the period immediately after implementation, the Draft IR will trigger a manual collection and review of information on hundreds of thousands/millions of potentially notifiable (although entirely benign) transactions, which companies would need to examine line-by-line to determine whether the counterparty was a public entity (under the vague definition of the FSR), something companies are not currently tracking and also requiring information which may no longer be retrievable for the past. Companies will have to develop and implement additional and dedicated reporting systems to comply with the Draft IR's requirements – but this will not happen overnight. Establishing such a detailed, comprehensive and global reporting tool (based on real-time data) will realistically rather take 1-2 years; possibly even longer in international organizations composed of hundreds or thousands of legal entities, in over 140 countries, with potentially thousands of financial contributions added each day. Even after systems have been established, it will remain impossible to guarantee full accuracy due to the breadth and depth of information required. It cannot have been intended to draft a Regulation that is impossible to fully comply with and to introduce an unavoidable risk of fines for companies doing business in the EU.

**Possible solution:** The Commission should clarify that it will make broad use of the waiver provisions during a transitory period to take account of these difficulties. The Commission should further immediately engage with stakeholders to develop the criteria to be used when establishing reporting systems, e.g. by clarifying when the actions of a private entity are "attributable" to a third country under Article 3(3)(c) FSR. The Commission should also acknowledge that due to the breadth and depth of the information required undertakings will never be able to guarantee full completeness and accuracy of responses and accept "best efforts" when methodologies are disclosed.

ERT intends to actively engage with the Commission at a working level to help find efficient and workable solutions to the issues identified and thus contribute to a successful implementation of the FSR.

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen 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.

This Summary Position has been prepared by the Competition Policy Working Group.

More info and previous papers are available on: https://ert.eu/focus-areas/competition-policy/

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