BUSINESSEUROPE

POSITION PAPER

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BusinessEurope comments on the draft implementing regulation for the Foreign Subsidies Instrument

It is crucial for European companies that the terms of competition within the internal market are not undermined by economic entities benefitting from distortive foreign subsidies. Whilst the EU regulatory framework sets clear rules and limits for state aid granted by EU Member States, the EU for a long time did not have any means to tackle subsidies granted by third countries to companies operating in the Single Market. The Foreign Subsidies Regulation (FSR), which recently entered into force and will apply from 12 July 2023, has the potential to play a crucial role in filling this regulatory gap and re-establishing a level playing field within the Internal Market. Therefore, from its inception, BusinessEurope has been highly supportive of this instrument and welcomes that many of our recommendations are reflected in the final text of the regulation.

BusinessEurope has always pointed out that, in order to meet its objectives, the FSR needs to be implemented in a way that is both proportionate and effective. This means that all subsidies leading to major distortions should be tackled while minimising the administrative burden on companies and public authorities. BusinessEurope fears that, in its current form, the draft implementing regulation, which sets out the procedural rules of the Foreign Subsidies Instrument, does not meet these requirements. It ignores the operating practices of undertakings and, instead of building upon existing systems, requires the development of dedicated, new reporting tools by companies that may only face relevant transactions once every five to ten years. Whilst thus creating excessive red tape for companies, it also risks overwhelming the European Commission with information on millions of minor transactions amongst which it will be hard to spot the distortive ones. This is due to several factors, including:

(i) The scope of the term “foreign financial contribution” is still not specified in a way that is manageable for companies, which creates major uncertainties for them. The degree of granularity with which businesses need to notify foreign financial contributions is still very vague, especially for public procurement procedures.

(ii) The procedural rules regarding public procurement procedures oblige companies that claim that they did not receive a “notifiable financial contribution” to submit a declaration with a list of all foreign financial contributions they received. In this way, the workload will be higher for those companies that did not receive any notifiable foreign financial contributions than for those that did.

In order to keep the instrument manageable for companies and the European Commission, the implementing regulation needs to exclude specific types of foreign financial contributions (of a certain type or below a certain value) from both notification and declaration requirements, or at the very least be accompanied by waivers that do so. Moreover, any requirements should take into account how companies operate, how

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corporate reporting works, which data is readily available to companies and governments, and in which format.

High energy costs already put European companies at a competitive disadvantage on international markets and jeopardise the attractiveness of the EU as an investment destination. This makes it crucial that the administrative burden that any new piece of legislation creates be proportionate to its objectives. In the annex of this contribution, BusinessEurope set out some concrete recommendations on how to address our concerns and make sure that the Instrument delivers on the objectives that it was initially designed for.

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Annex
Detailed comments on the draft implementing regulation and its annexes

A) Draft implementing regulation

Article 4(3) and 5(4):

- Companies should be allowed to provide their notification or declaration in any official language of the EU, including at least in the language of the economic operator in question or its ultimate parent (if registered in the EU). The requirement to have translated all information relating to the non-EU business operations of a multinational group which does not relate to the procurement procedure itself but only to the procedure in relation to the FSR is disproportionate and not in line with fundamental rights in relation to the European languages.

Article 5(5):

- The agreement of "the contracting authority or contracting entity in charge of the public procurement procedure" should not be required for the Commission to exempt the notifying parties from the obligation to provide certain types of information in the notification. The wording should be changed into "the Commission may consult with the contracting authority". Such consultations could indeed be helpful for the Commission to understand the potential effect of individual financial contributions on the individual tender process. However, where a lack of effect is obvious as in relation to many standard day-to-day business sales and purchases-related cases, the Commission should be able to take a decision without involvement of the contracting authorities.
- The Commission must be enabled to grant general waivers for certain types of information well in advance of an individual call for tenders, ideally on the basis of general guidance regarding standard business, purchasing, sales, or services of general interest. The deadline for requesting participation in tenders is too short (e.g., 30 days) to engage in meaningful prenotification discussions, and to start preparing information on financial contributions after these discussions.

Article 4 and 5:

- We welcome the possibility for the Commission to dispense a notifying party with the obligation to submit certain types of information within the framework of a notification. It should still be clarified under which circumstances the Commission could consider that this information "is not necessary for the examination of the notification".
- The notification requirements regarding foreign financial contributions need to be limited in a meaningful and pragmatic manner to allow the Commission to focus on the relevant contributions and avoid a disproportionate burden on undertakings. For example, based on an analogy to the market economy operator/investor principle in state aid, the Commission should generally exclude from notification requirements (including with regards to Section 7 of Annex 2) any standard business transactions (sales, purchasing, finance etc.) at arm's length basis when the economic operator/parties provide a general explanation of their standard business transactions without having to provide any further information from the outset. This

general exemption should include standard business transactions, such as ordinary sales of products, solutions and services in competitive (not necessarily bidding) processes, procurement of services and products of general interest (e.g. social security contributions, transportation, airline tickets, utility fees for water, gas, electricity, postal deliveries, etc.), procurement of input products, services and solutions in the ordinary course (purchase of raw materials and other input) at arm's length, unless any special advantages may have been granted that go beyond market standard rebates or discounts, e.g. based on volume. Having to process hundreds of thousands of ordinary-course-of-business transactions is neither desirable for companies nor for the Commission.

- Collecting and preparing information on financial contributions is disproportionate for minor amounts, such as a company's monthly water bill payable to a foreign state-owned enterprise or the procurement of stamps from a foreign post office. A possible solution could be exempting individual transactions below a certain threshold from a companies' reporting and internal monitoring obligations through a general waiver. Financial contributions below this specified amount should in particular not be considered for the calculations on whether notification thresholds are breached.
- The European Commission should alleviate the burden on companies resulting from the notification requirements, e.g. by:
  (i) Fostering information exchange mechanisms with the governments that hold information on financial contributions, e.g. using the OECD Tax Information Exchange Agreements as a basis;
  (ii) Favouring extraction of companies' existing management systems, thereby avoiding any manual addition of information to the line items to be notified;
  (iii) Using existing reporting structures and formats (e.g. GAAP, IFRS or other accounting standards).

Article 6:

- Article 6 (2) should set a deadline, e.g. 5 working days, for the Commission to inform the notifying parties that information, including documents, contained in the notification is incomplete, if applicable.

Article 11:

- One would assume that the sentence "as well as all the submitted tenders where the company submits information under Article 12 of this Regulation" refers exclusively to the tender procedure at stake, and not to other tender procedures managed by the same contracting authority in which the company has participated. If this is the case, the wording should be clarified.

Article 17(1)(a)

- The Commission should have the power to impose upon an undertaking the obligation to report future financial contributions only where such reporting is necessary to monitor the compliance with commitments accepted or redressive measures adopted in a final decision. Otherwise, the Commission would have the power to embark in a "fishing expedition", contrary to the principle of respecting the private sphere of an undertaking.

Article 21:

- The limitation stipulated in Article 21(2), which excludes access to all internal documents of the Commission, authorities of Member States and third countries, is particularly restrictive. At the very least, access should be given to internal documents or correspondence of public authorities that contain exculpatory information.
- Regarding Article 21(3), the undertaking under investigation should have access to a non-confidential version of the entire file (without prejudice to the Commission providing access to the confidential version of the entire file to a limited number of specified external legal and economic counsel engaged by the undertaking under investigation). The employees of the undertaking under investigation may be in a better position than its external advisers to identify documents in the file that support its case.
- Regarding Article 21(4)(c), BusinessEurope doubts that the requirement that specified legal and economic counsel and technical experts cannot become employees of the undertaking under investigation during the three years after the end of the investigation is necessary and wonders how compliance with it could be supervised in practice. We deem this limitation excessive, taking into consideration that professionals, such as legal advisors, are already bound by confidentiality obligations. If included at all, any restrictions should be kept to a bare minimum duration (three years is excessive), and exclude lawyers therefrom.
- A materiality threshold should be inserted in Article 21 to ensure that the clock is not stopped if, for example, a wrong e-mail address is submitted.
- A new subsection should be added to ensure that when the Commission disagrees with confidentiality claims, it should indicate a period at the end of which it will disclose the information. Within that time period, the information provider should be able to seize the Hearing Officer of DG COMP or make use of any judicial protection available to it, including any interim measures, to object to the intended disclosure.
- A new subsection should be added to establish a dispute resolution mechanism and/or involve the Hearing Officer of DG COMP for instances where the Commission refuses granting access to the file or ensuring the protection of confidential information and/or business secrets.

Article 24:

- Regarding Article 24(1), in an acquisition the suspension of time limits cannot depend on the Target's compliance with a request for information or an inspection. If so, the Target may consciously derail the whole process (e.g. in a hostile takeover). When the Target does not cooperate, the Commission should impose penalties upon it, but time limits should remain unaffected.
- Regarding Article 24(4), the Commission should be under a more stringent obligation to process data than currently expressed in "within a reasonable time limit".

Article 26 and 29:

- The differences between the processes regarding tenders and concentrations / dealings with DG GROW and DG COMP are not always self-explanatory. For example, there are diverging means of communication with DG COMP (for concentrations) and DG GROW (for tenders) with respect to the qualified electronic signatures that must be used. This increases the burden on companies and forces them to work with external advisers to be able to handle the process. This is particularly true for companies active in both concentrations and public procurement.

B) Annex 1

Recital 13 (e):

- A company providing incorrect information can be liable to fines of up to 1 % of its aggregate turnover. However, if the incorrect information is the result of an honest mistake, there should be some kind of appreciation of whether the incorrect information is of such character that it could affect the assessment of the Commission. Otherwise the submission of incorrect information should be considered trivial and not warrant a fine.

Section 3:

- The requirement under 3.7. to provide a list of all acquisitions of control made during the last three years is disproportionately burdensome, considering in particular that, under Article 19 FSR, the Commission's assessment of the foreign subsidy must be "*limited to the concentration concerned*".

Section 4:

- Regarding 4.2., this question seems to be redundant. If the company in question has not received foreign financial contributions of 50 million Euro over three years, the concentration is not notifiable, and section four does not need to be filled in.

Section 5:

- The notification requirements regarding foreign financial contributions need to be limited in a meaningful and pragmatic manner to allow the Commission to focus on the relevant contributions and prevent a disproportionate burden on undertakings. The requested information is not readily available to undertakings, and they will need to set up dedicated reporting systems to collect it. Clear guidance is required to allow undertakings to set up these new reporting systems in a way which complies with the Commission's requirements. Regarding Section 5.1., the *de minimis* thresholds are welcome. However, this does not go far enough as financial contributions below EUR 200,000 still need to be tracked to monitor the thresholds in Section 4.2. and Section 5.1.(ii). Section 5.1. should mirror Section 3.1. in Annex 2 and thus be limited to financial contributions that fall into any of the categories listed at Article 5(1)(a) to (d) of the FSR. This would alleviate the reporting burden on businesses and would focus the Commission's investigative efforts on the more likely distortive contributions.
- Regarding 5.2., it is not sufficiently clear under what circumstances foreign financial contributions "have or they have not a possible link with the concentration". Without clearer criteria, it will be difficult for a company to assess this.
- Regarding 5.7.1., it needs to be defined more clearly when a financial contribution is considered "provided to finance exports of services into the EU".

Section 6:

- The information requirements set out from 6.2. to 6.6. are far-reaching and would require a significant amount of work. Especially 6.2., which requires disclosures on the due diligence process along with copies of the due diligence reports, is disproportionate to the purpose of this legislation. It may also require parties to disclose trade secrets or legally privileged documents (see "*assessing the*

transaction from a […] legal […] point of view") which were reviewed as part of the due diligence process but are actually irrelevant to the Commission's review under this legislation. This requirement may disrupt the due diligence process and parties may refrain from disclosing certain information and documents which may be essential to the deal (but which are not relevant to the Commission's review), fearing that such information could be included in the due diligence reports to be submitted to the Commission. 6.3 also requests irrelevant information as it may require the disclosure of undertakings that have shown initial interest in the target but then decided not to proceed, which may give an indication in their future business plans. In this way, 6.3 would require the disclosure of the business plan of undertakings that are not even a party to the transaction at the end. The Commission should consider whether all this information is necessary for assessing financial contributions and, in any event, clarify that documents prepared by outside legal counsels are not covered. For example, the provision of this information could be limited to cases where there are financial contributions falling under Art. 5(1)(d) of the FSR.

Section 8:

- The gathering and production of documents is an extremely burdensome and costly task. This is why in the merger control process in Phase 1 cases only a limited number of documents defined by a small target audience needs to be provided, and a more comprehensive production of documents is only required in Phase 2 cases. Section 8 does not differentiate accordingly, which creates a disproportionate burden on undertakings and risks overwhelming the Commission with large amounts of irrelevant material.
- Section 8.1. requires the production of "all the supporting documents". Providing "all documents" with certainty is a task impossible to comply with. A limitation should be introduced, e.g. "major documents" or based on the target audience a document is created for.
- Regarding 8.2., the scope of the analyses, reports, studies, surveys, presentations, and comparable documents to be provided is not limited in any meaningful way and especially not limited according to types of financial contribution. Providing the documents for all the contributions reported under Section 5.1 as it currently stands is impossible, given the wide range and potentially large number of foreign financial contributions. This could require the production of millions of documents related to ordinary-course-of-business transactions with governments or state-owned entities. Accordingly, for notifications, Section 8.2. should focus on the most harmful financial contributions as defined in Art. 5 (1)(a) to (d) of the FSR and/or the contributions identified in Section 5.2. Additionally, the documents to be provided should be limited according to the group of individuals which they have been presented to.

C) Annex 2

Section 2 :

- The fact that main contractors must channel the notifications and declarations of their subcontractors and consortium partners is problematic as main contractors should not have access to their competitors' confidential financial information.

Section 3:

Contrary to concentrations, the foreign financial contributions that need to be reported for public procurement procures are very vaguely defined. Particularly the concept "subsidies relating to operating costs" as mentioned in Recital 19 of the Foreign Subsidies Regulation is unclear and leaves a lot of scope for interpretation. This is particularly problematic for the construction sector, where almost any costs could be considered as relating to operating costs. Moreover, Section 3 focuses on those financial contributions that constitute subsidies in accordance with Article 5 FSR that the FSR considers "most likely to distort the internal market". Financial contributions related to operating costs are not listed in Article 5.1 of the FSR and thus should not be treated at a par with those that the FSR considers most likely to distort the internal market. For these reasons, the concept "operating costs" should be removed from this section, but may be factored in by the Commission in its substantive assessment.

Section 4 :

- It should be clarified that Section 4 only applies in relation to foreign subsidies, not in relation to any/all foreign financial contributions. If applied to foreign financial contributions, Section 4 is counterintuitive as it requires the economic operator to provide explanations which contradict the narrative of an advantageous tender offer vis-à-vis the customer.
- Any information provided under Section 4 must not be disclosed to the contracting authority as it would provide an unfair disadvantage in negotiations and distort the bidding process to the detriment of the economic operator vis-à-vis the contracting authority. In addition, any information provided under Section 4 by suppliers or subcontractors must not be disclosed to the main bidder/economic operator.

Section 6:

- The information requirements set out in 6.3., such as for example in 6.3.c., are excessive and should not be part of a normal notification. It should only be requested by the Commission if there is any indication of foreign subsidies leading to an unduly advantageous tender, but not in the context of an ordinary notification. Moreover, some elements are not sufficiently clear: For example, regarding 6.3.b., do all tax declarations of foreign (and EU-based?) group companies from the past three years need to be submitted? Does 6.3.a. refer to the audited annual accounts of all group companies?
- Concerning 6.3.c. and 6.3.d., the information to be provided is very sensitive and would contain business secrets. The Commission should specify how it intends to treat this information.

Section 7:

- The last sentence of section 7 is problematic. It requires DG GROW to make use of waivers since the requirement to "list all foreign financial contributions" is not practicable. In fact, due to this far-reaching requirement, the workload risks to be higher for those companies that did not receive any notifiable foreign financial contributions in the past three years than for those that did. The Commission should issue general guidance accompanying the implementing regulation and notification forms and clarify in which cases it will generally issue a waiver and what general information it will request instead. In the area of public procurement, the Commission should issue general waivers well in advance for particular types

of business or tenders. The time frame available for the submission of bids (e.g. 30 days) usually is too short given the disproportionate efforts required.

D) Guidance

- According to Article 46 (1) FSR the Commission shall publish, at latest by 12 January 2026, guidelines with detailed criteria regarding the existence of a market distortion and the assessment of distortions in public procurement as well as the balancing test. The Commission should expedite the issuance of the aforementioned guidelines as they will be paramount to ensure legal certainty for both EU and non-EU companies active on the internal market. The absence of such guidelines creates uncertainty in the context of mandatory notification requirements for concentration and public procurement. The Commission may follow the good example it set by issuing both the updated Vertical Block Exemption Rules and the respective guidelines at the same time. Affected companies cannot wait until January 2026 for a better understanding of their legal duties.

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