AmCham EU

SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Draft Foreign Subsidies Regulation Guidelines

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €4 trillion in 2023, directly supports more than 4.6 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

The draft Guidelines to the Foreign Subsidies Regulation risk broadening the already excessive reach of the FSR and making its application even less certain for industry, adding to already disproportionate costs and complexities for businesses. The Guidelines should take the opposite approach, seeking to clarify unclear concepts related to the FSR's application, hone its scope to focus only on subsidies with a demonstrable EU nexus and align the FSR's treatment of foreign incentives with EU State aid rules.

Introduction

Since the European Commission proposed the Foreign Subsidies Regulation (FSR) in 2021, the American Chamber of Commerce to the EU (AmCham EU) has consistently raised concerns about the Regulation's extensive scope, ambiguously defined concepts and discretionary enforcement mechanisms in order to help the Commission ensure that the FSR proportionately addresses the risk of distortive foreign subsidies and contributes to a level playing-field in the EU. These concerns initially stemmed from the legal text itself, but have since been exacerbated by the scarce enforcement resources accompanying the FSR, which appear inconsistent with the Commission's aim of applying a State aid-like framework to subsidies 'currently not subject to Union State aid rules' (Recital 2, Foreign Subsidies Regulation). In addition to these concerns, AmCham EU has also raised questions about the FSR being used to collect information on subsidies with no EU nexus, outside the framework of existing international arrangements such as the WTO Agreement on Subsidies and Countervailing Measures.

Today, nearly two years after the FSR's notification obligations entered into force, our initial concerns appear to have been well-founded. The FSR has shown itself to be disproportionate in relation to its objectives and enforcement resources, with the Commission regularly requesting information far beyond what appears necessary for its assessments – including information on foreign financial contributions (FFCs) granted *after* a notification – often with unrealistic compliance deadlines. It has also been the case, in particular in public procurement procedures, that the Commission has asked companies to submit multiple FSR filings and update their FFCs repeatedly for periods extending beyond three years. And yet, despite thousands of notifications from companies and extensive information requests, the Commission has only initiated a limited number of investigations, with only one of these resulting in a formal decision.

Behind this one decision lies an enormous effort from the business community to comply with the FSR's uniquely intensive reporting requirements. These requirements have necessitated the design and implementation of entirely new tracking systems, accounting practices and audit mechanisms, which have proven to be exceptionally burdensome tasks, demanding significant investments of both human and technical resources across global teams. The length, breadth and frequency of the Commission's information requests have also contributed to the challenges that companies face. For many, FSR filings now represent the most resource-intensive filings associated with any transaction globally, requiring companies to collect and maintain data they would not otherwise gather for any business, commercial or legal justification, solely to meet the Regulation's distinctive real-time reporting obligations. This is in stark contrast with the Commission's FSR impact assessment, which predicted that the Regulation would create a 'limited administrative burden'.

The burdens created by the FSR are not only disproportionate, they also distort the competitive playing field in the EU. By requiring such detailed information on non-EU incentive schemes that are substantively similar to those authorised under EU State aid rules (eg R&D, green energy and employment credits) – and by requiring businesses to extensively track non-EU incentives that they would not be required to track in the EU – the Commission is imposing significantly higher compliance costs on businesses whose global incentive portfolios have a higher preponderance of non-EU incentives, thereby effectively disadvantaging non-EU businesses.

The FSR Guidelines are an important opportunity to provide greater legal certainty to the broad range of companies that are significantly impacted by the FSR and its new notification regime. Calibrating the regime to strike the right balance between coverage and business burden is necessary to creating the right response to distortive foreign subsidies while maintaining a level playing-field.

However, the current draft Guidelines (the 'Draft') would, in many cases, create additional complexities and introduce concepts that extend beyond what the FSR provides for. This would make compliance with the Regulation an even more resource-intensive process, further eroding an investment environment already marked by uncertainty and over-notification.

The Draft would increase uncertainty and administrative burdens

Although the Draft takes some steps towards describing how the FSR assessment process works in practice, it fails to provide the elements of clarity and/or specific examples that would help reduce the disproportionate burdens stemming from the Regulation's wide applicability.

Even in cases where the Draft seeks to provide mere clarification around the FSR's text – for instance, the applicability of the Commission's call-in powers – its outcome is simply reinforcing the Regulation's excessive breadth. In other cases where the Draft attempts to provide clarity – such as in the use of public policy objectives in the balancing test – the text fails to provide enough detail to create added value for companies.

Overall, the Draft reinforces the excessive scope of the FSR by indicating that: (i) the FSR is designed and applied in a wide enough way to capture almost any subsidy, regardless of its link to the EU; (ii) any 'reasonable' link between a subsidy and a negative impact on competition is sufficient to create a concern; and (iii) if a concern is identified, there is no clear way for impacted parties to provide a rebuttal.

In other words, the Draft does not give companies sufficient guidance to actually streamline their information gathering and notification process, accurately assess whether a subsidy is more likely to present concerns and craft better arguments as to why their transaction or tender should be cleared in view of the concerns at hand.

In particular, by insisting on the potential relevance of FFCs and activities with tenuous connections to the EU, and with no evident negative impacts on competition in the EU, the Draft would exacerbate

rather than simplify the burden of the notification process. In addition, the Draft misses the opportunity to create a list of examples or a safe harbour for certain categories of FFCs that the Commission has not shown to have an impact on EU competition over its past two years of enforcement experience. This includes FFCs that are freely available to all companies or highly locked into a geography, such as local employment subsidies. Other Commission guidance documents (such as the Guidelines on Vertical Restraints) have included examples of conduct that the Commission usually considers to be unproblematic, and such examples provide valuable support for the business community.

Beyond the Draft, the Commission must also go further in using legislative amendments to address structural issues that have led to the FSR's disproportionately negative impact on businesses.

Our comments below highlight several recommendations to improve the Draft and propose several ways the Commission could amend the FSR to structurally improve its contribution to ensuring a level playing field in the EU.

Comments on the Draft

Reduced EU nexus and overly broad legal tests (Sections 2.2, 2.3 and 2.4)

Article 4(1) of the FSR provides that a distortion is found if two cumulative criteria are met: (i) a non-EU subsidy is liable to improve the competitive position of a company in the EU; and (ii) in doing so, that non-EU subsidy actually or potentially negatively affects competition in the EU.

Through the 2024 Staff Working Document and the FSR itself, the Commission has presented these two conditions, to date, as meaning that the FSR's aim is to pursue only those non-EU subsidies that have an EU nexus – in other words, those cases where there is a clear and demonstrable link between a subsidy and a company's activities in the EU (or, an 'apparent connection' as indicated in the SWD). The wording of the FSR is clearly aimed at excluding non-EU subsidies that have no link to the EU, and circumscribing the FSR to those subsidies that do.

However, the Draft seems to depart from this approach of requiring a relevant link between a foreign subsidy and the EU, instead broadening the FSR to include non-EU subsidies that have no apparent EU nexus.

Tenuous links between a subsidy and a company's competitive position in the EU

First, paragraph 18 claims that 'a foreign subsidy is only liable to improve the competitive position of an undertaking in the internal market if the foreign subsidy is likely to benefit, directly or indirectly, the economic activities in which that undertaking engages in the internal market'. This notion goes

beyond the FSR and the Staff Working Document ('SWD') published by the Commission in 2024[1]. While it is clear that the FSR covers foreign subsidies that directly facilitate a company's EU activities, the proposed language may concerningly allow the Commission to infer an 'indirect' competitive advantage, which would open the door to all sorts of speculative investigations under the FSR despite a minimal EU nexus.

Similarly, paragraphs 19-31 list three categories of subsidies which may be liable to improve a company's competitive position in the EU: (i) those used in the internal market, (ii) those directed at the internal market, and (iii) others. While the first two categories are straightforward, the 'others' category is so exceedingly broad that it hinders any potential benefits of the Guidelines in simplifying companies' compliance burdens.

In fact, paragraphs 23-24 seem to essentially imply that all foreign subsidies are liable to improve a company's competitive position in the EU. Specifically, these paragraphs claim that, even if a foreign subsidy is 'neither intended nor directed at the internal market, and there is no clear indication as to how the undertaking uses or intends to use it', it may 'free up' resources that might, directly or indirectly, be used in the EU.

This proposed test of 'freed up' resources, which is based on (often) unrealistic assumptions of financial fungibility and cross-subsidisation[2], and ignores the realities of geographic lock-in and market segmentation, is so broad that it could capture subsidies with no EU nexus at all. In fact, the proposed wording may be read as creating a presumption of cross-subsidisation from non-EU subsidies provided for activities outside of the EU, solely because these could 'free up' resources for activities within the EU. This is at odds with the wording of Article 4(1) of the FSR, which is clearly intended to confine the concept of distortion to a company's EU activities.

Collectively, paragraphs 18-31 mark a significant departure from the more balanced position adopted in the Commission's 2024 SWD. In particular, the SWD took the view that, 'in the case of a foreign subsidy that has been granted to a subsidiary not active in the Union, where that subsidy has been granted and effectively used in order to develop the local activity of the subsidiary in a third country, the relationship with the internal market is not apparent', except where the Commission can establish that the subsidy was 'used by the group to cross-subsidise activities' in the EU. In other words, the SWD indicated that the burden for proving cross-subsidisation lies with the Commission, which must establish a link between a subsidy and activities carried out in the EU.

However, the Draft seems to reverse this burden of proof, stating that 'if there do not exist any credible legal or economic factors which prevent or render unlikely [cross-subsidisation], the Commission may still consider that the foreign subsidy potentially improves the undertaking's competitive position in the internal market'. By reversing the burden of proof for cross-subsidisation,

[1] In contrast, the FSR only provides that "a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market".

[2] In practice, subsidies received by a subsidiary outside the EU will normally be used where the subsidiary is active. While cross-subsidisation is theoretically possible, it is likely to be exceptional.

the Commission undermines the principle of legal certainty and significantly increases companies' compliance burdens[3].

If the Commission intends to depart from the SWD's approach to cross-subsidisation, it should provide greater clarity on what are the 'credible legal or economic factors' that may prevent cross-subsidisation. Paragraphs 25-31 only provide very limited justifications based on which businesses could rebut the possibility of cross-subsidisation[4]. In addition, the Draft unhelpfully dismisses the potential relevance of internal documents such as bylaws and policies (even if these are long-standing and consistently respected), as well as regulatory frameworks such as transfer pricing rules (even though these may discourage cross-subsidisation)[5]. The Draft also fails to provide guidance as to how companies with standard shareholder structures can rebut the presumption of cross-subsidisation.

Overall, the Commission should clarify that: (i) its distortion analyses must demonstrate a clear link between a subsidy and a company's activities in the EU; (ii) cross-subsidisation cannot be presumed, especially where there is no direct link to EU activities and the subsidy relates to projects outside the EU and/or outside the relevant market, or where the subsidy relates to non-operating costs; and (iii) internal governance, group policies, prior corporate practices and transfer pricing rules are relevant to assessing whether a subsidy has a real connection to the EU.

R&D incentives

On the issue of cross-subsidisation, the Draft seems to place a particular focus on R&D incentives. Specifically, paragraph 22 claims that subsidies for R&D conducted outside the EU may be treated as distortive if they relate to know-how or technology 'likely to be used' in the EU. This sets a very low threshold, especially for early-stage or broad-based R&D projects where the commercial use of the results is often undefined or spans across multiple regions. Without clearer boundaries, this interpretation risks capturing general R&D support schemes that are not aimed at the EU and have no direct connection to products or services offered in the EU.

Beyond legal clarity and predictability for companies, the Commission should also consider the broader policy impact of this approach. R&D is a key driver of economic growth in the EU and globally, particularly in emerging areas such as AI, green tech and life sciences – industries that are key to the EU's competitiveness. Uncertainty around how R&D support is assessed could have a chilling effect on cross-border innovation partnerships, create red tape and delay the development of technologies that ultimately benefit European consumers and industry.

[3] See Judgment of the Court of Justice of 26 June 2025, *Commission v Spain*, Joined Cases C-776/23 P to C-780/23 P, EU:C:2025:487, §§92-93, 95. See also Judgments of the Court of Justice of 8 December 2005, *ECB v Germany*, C-220/03, EU:C:2005:748, §31, and of 16 January 2025, *DYKA Plastics*, C-424/23, EU:C:2025:15, §37.

[4] The Draft largely confines the means available to demonstrate that a foreign subsidy is unlikely to benefit activities in the EU to formal legal constraints or structural safeguards, such as shareholder arrangements that legally prohibit the transfer of funds, corporate structures that isolate financial flows, or fiduciary duties in limited partnership agreements that restrict the use of capital across entities.

[5] It is surprising that the Commission considers the OECD transfer pricing rules as not sufficient to rule out cross-subsidisation. In State aid cases, the Commission has relied on OECD transfer pricing rules to apply the at arm's length principle under Article 107(1) TFEU, particularly in the tax field. While recognising that OECD rules are non-binding and not specific to State aid, the Commission has described them as "useful guidance to tax administrations and multinational enterprises on how to ensure that transfer pricing and profit allocation arrangements produce outcomes in line with market conditions".

The Commission should revise the Guidelines to draw a clearer distinction between targeted non-EU subsidies and general R&D incentive measures, as well as limit enforcement to cases where there is demonstrable evidence of EU effects, for example: (i) a defined plan to commercialise the results in the EU; (ii) sales or licensing of the R&D output to EU customers; or (iii) specific integration of the technology or know-how into EU operations.

Reduced role of a subsidy's negative impact on competition in the EU

As outlined above, Article 4(1) of the FSR establishes that the existence of a distortion requires a non-EU subsidy to actually or potentially negatively affect competition in the EU. The purpose of this article is to limit the FSR to non-EU subsidies that affect the EU.

However, the Draft establishes an overly broad distortion test. Specifically, paragraph 41 proposes that the legal standard for distortion should be a 'reasonable link' between a foreign subsidy, the improved competitive position of a subsidised company and the negative impact on competition in the EU. This departs from legal standards used in other transaction screening mechanisms and creates a legal test that is tremendously difficult to rebut upon appeal. The EU Merger Regulation, for example, requires the Commission to show that a transaction will create a 'significant impediment to effective competition' (SIEC) in the EU.

Moreover, according to paragraph 50, even where a subsidy 'may not have a specific purpose or conditions attached to them, or these may be too general to draw any conclusion as to the potential impact on the undertaking's specific behaviour in the internal market', the Commission will 'rely on other indicators to assess the link between the foreign subsidy and the undertaking's behaviour'. This suggests that, even in the absence of an evident reasonable link between a subsidy and the negative impact on competition in the EU, the Commission will still be allowed to construe one.

In addition, the final two sentences of paragraph 41 downgrade the link between a subsidy and the negative impact on competition in the EU from a **causal to a contributory relationship**. This means that the Commission does not need to demonstrate that a subsidy is mainly responsible for a negative impact on competition, but merely contributes to this. In principle, if a transaction's negative impact on competition in the EU stems primarily from a non-subsidy-related issue, it should be addressed through merger control. Duplicating assessments between transaction screening mechanisms creates unnecessary costs and uncertainties for businesses and screening authorities and creates the risk of unnecessary remedies.

Overall, the 'reasonable link' principle creates a low legal standard that could be applied to almost any transaction, particularly in view of the broad role that the Draft gives to prospective analysis (see below). As long as a subsidy could 'reasonably' contribute – even in a minor contributory way – to a negative impact on competition in a hypothetical future market, the Commission could deem a subsidy as distortive. This implies, in theory, that the Commission may consider all non-EU subsidies liable to distort competition in the EU, which is an enormously consequential assumption that can be applied to essentially any transaction.

Along these lines, the FSR's lower legal standard would, in principle, allow the Commission to use the FSR as a proxy for merger control as long as it can identify a potential competitive concern and a

contributory FFC, should they be concerned that they might fail to meet the higher burden of the SIEC test.

The Commission should amend this language to require a clearer and more demonstrable link between a subsidy and the negative impact on competition in the EU. In particular, paragraph 41 should be amended to require the Commission to demonstrate that a subsidy materially contributes to the negative impact on competition in the EU. Likewise, the legal standard in paragraphs 41, 48 and 55 should be amended to require that the existence of a subsidy is 'very likely to be directly linked' with a negative impact on competition.

In general, further work could be done to align the review frameworks under the EUMR and FSR. This is particularly relevant in view of the Commission's parallel attempts to increase the use of efficiencies in merger control and positive benefit defences in foreign subsidies screening. Alignment between the time horizons for assessments, evidence accepted and standards of proof would help ensure that both instruments are aligned and that innovations in efficiencies and positive tests are consistent.

Insufficient guidance on prospective analysis (Sections 2.3 and 2.4)

The Draft gives a major role to the prospective analysis of the evolution of markets and subsidies, as anticipated in the FSR. This is seen both in paragraph 34, which discusses the long-term developments of a market, and in paragraph 42, which discusses subsidies that do not actually impact competition but are deemed distortive.

While prospective analysis may be necessary to understand the impact of a subsidy and is provided for in the FSR itself, it also introduces a level of subjectivity which could create significant uncertainty. This is particularly true in markets that are fast-moving and hard to predict, like those in the digital economy.

To balance the need for prospective analysis with the importance of not introducing excessive uncertainty into the FSR assessment process, which may discourage investment into the EU, the Guidelines should provide certainty to investors about how and when the Commission will employ a prospective analysis. For instance, they should clarify how the Commission will balance the potential long-term impact of a specific subsidy with the development of a market. These clarifications would help ensure that FSR assessments are generally based on the economic and legal conditions at the moment when an undertaking benefits from a subsidy, as indicated in paragraph 43.

Expanded scope for public procurement (Section 2.5)

Article 28 of the FSR clearly defines the scope of notifiable FFCs in the context of public procurement procedures. Specifically, the scope of these mandatory disclosures is limited to the so-called 'linear ownership structure' of the relevant economic operator, which includes the bidding entity, its direct subsidiaries and direct or indirect parent companies, but excludes its sister companies unless they act as main suppliers (or subcontractors) to the bidding entity. In line with this requirement, many companies that participate in notifiable public tenders have set up their data collection systems to focus on those entities within their linear ownership structure.

However, paragraph 81 of the Draft states that there are ‘specific circumstances’ in which the Commission could request and examine FFCs from any group entity, including those outside of the linear ownership structure, without clarifying what these ‘specific circumstances’ would be. Paragraphs 82 and 83 go even further, indicating that information could be requested from any part of the broader corporate group based on a vague test that the corporate group has the ‘ability and incentive’ to transfer funds – an ambiguous concept whose application is difficult to predict.

The Draft thus appears to add an additional compliance burden for notifying parties. Given that Article 28 of the FSR clearly sets out the scope of the mandatory FFC disclosure obligations in public tenders, deviating from these limits runs counter to the principle of legal certainty. Additionally, requiring such disclosures without a clear justification and within a short deadline raises issues of proportionality, or lack thereof, which EU law must respect.

In practice, regular deviation from the linear ownership structure and requests for broader FFC disclosures without proper reasoning for these requests would hinder the ability of businesses to participate in public tenders. Public tenders are usually subject to tight deadlines, and companies typically have limited time to respond to the Commission’s queries. Any expansion in the scope of FFC disclosures during an active public tender could lead to an inability to meet the request – particularly in cases where the relevant FFC data is spread across several departments and subsidiaries around the world.

The Guidelines should clarify that any information requests falling outside the linear ownership structure will only be made in exceptional and justifiable cases, with the burden for such justification falling on the Commission. In particular, the Commission should be able to demonstrate that there are concrete indications that a subsidy outside the linear ownership structure has directly facilitated the submission of an unduly advantageous tender, and that such indications could be challenged by the bidding entity. Any such requests should be made as early as possible in Phase 1 and framed as precisely as possible to provide bidders a chance to obtain the required information within adequate time limits.

Limited clarity on the balancing test (Section 3)

The balancing test under the FSR allows the Commission to weigh the negative impacts of a subsidy against its potential positive effects, especially when the subsidy fosters economic development within the EU or supports broader EU policy goals. These goals may encompass addressing market failures, such as underinvestment in R&D, or promoting environmental objectives like climate action and biodiversity protection.

Although considering the positive effects of subsidies is generally beneficial, the Draft does not provide a clear framework for claiming these effects. While it provides some direction on the types of positive effects that may be considered relevant, the descriptions remain vague and imprecise and, at times, are contradictory with other sections of the Draft. For example, the promotion of R&D is listed as a possible positive effect in paragraphs 105 and 108, while in other parts of the Draft this type of support is listed as possibly distortive (eg paragraphs 22, 54 and 73; and footnote 36). This is

contradictory and creates confusion for companies that benefit from R&D support outside the EU, especially given that such support could very well produce positive effects within the EU.

This situation mirrors the challenges previously identified in the EU Merger Guidelines on efficiencies, where providing clear guidance around how positive effects are measured proved necessary to allow parties to understand what types of arguments would be accepted. A clear test or standard for the assessment of positive effects, accompanied by indicative examples, would create more certainty for businesses and increase the effectiveness of the balancing test in supporting EU priorities.

The balancing test must also be viewed in the context of a transaction screening environment which is increasingly driven by subjective public policy considerations. Recent consultations and documents indicate that the Commission is considering introducing public policy considerations into other transaction screening mechanisms. Besides the FSR, the consultation on the Horizontal and Non-Horizontal Merger Guidelines contains a suite of questions pertaining to how transaction screening can explicitly address public policy considerations.

Resilience (paragraph 110)

Through references to the vague concept of 'resilience', the Draft could create overlaps with FDI screening procedures, which already include 'resilience' considerations related to national security and public order objectives. The Commission is also, similarly problematically, contemplating adapting the Horizontal and Non-Horizontal Merger Guidelines to address 'resilience' concerns. Introducing a second or third layer of 'resilience' screening through merger control and foreign subsidies screening would likely create unnecessary layers of review, leading to significant costs for companies as they need to interpret how 'resilience' will be assessed by two or three different authorities. Likewise, this would create significant complexity and burden for screening authorities themselves. This, in sum, goes against the Commission's ambition to simplify legislation.

Likewise, absent a clear definition of 'resilience', or indicative examples of what 'resilience' benefits the Commission may accept, the Draft does not provide companies with workable insights into how to claim 'resilience' benefits. This also creates a risk that 'resilience' benefits are unequally accepted depending on how 'resilience' is developed in relation to European strategic autonomy.

In any case, the Commission can best promote resilience by encouraging innovation, access to best-in-class capabilities and stability. All of these outcomes are best achieved by creating a predictable and clear screening environment which encourages healthy M&A activity. Addressing the question of 'resilience' through three separate instruments runs counter to clarity and predictability and could ultimately restrict Europe's ability to gain the resilience it needs.

Non-EU policy objectives (paragraphs 111-112)

The reference to "non-EU policy objectives" lacks the clarity needed to be a predictable and usable defence. Absent a clear understanding of what non-EU policy objectives the Commission may examine, companies will be unable to predict which factors they should anticipate being relevant in FSR assessments. The indicative list of 'global welfare improvement [...] preservation of global public goods [and] promotion of research and development activities that result in the availability of

innovative products or technology in the EU' does not provide sufficient clarity to companies on what criteria the Commission will assess.

Significant discretion in applying call-in powers (Section 4)

While the FSR allows the Commission to call in M&A transactions and tenders falling below the notification thresholds, the discretionary application of these powers could create significant uncertainty, given FSR compliance strategies are typically tied to the likelihood of a company's participation in a notifiable event. Even if not applied, the mere presence of these powers could require a wider set of businesses to establish costly FSR compliance regimes.

Therefore, the Guidelines should take steps to create further clarity around the Commission's call-in powers and limit their application to extreme circumstances where the notification thresholds prove inadequate. The Commission itself has already recognised the importance of clear notification thresholds, noting in its FSR impact assessment that 'because of the high proposed notification thresholds, SMEs will not be impacted by additional administrative burdens as a result of having to submit notifications'.

In the context of an increasingly uncertain investment environment, where many member states are introducing call-in powers under merger control, the application of call-in powers under the FSR would add additional compliance costs and uncertainty, which must be factored into any potential deals or bids. The Draft also seems to prioritise call-in powers for activities in strategic sectors, which could severely limit innovation in areas vital for Europe's competitiveness. For SMEs operating in these sectors, this would limit their access to appealing exits, discouraging them from establishing in Europe in favour of other jurisdictions that provide a suite of exit options for founders.

The commitments offered in the *Emirates Telecommunications Group / PPF Telecom Group* decision ('e& decision') already afford the Commission a proportionate call-in mechanism that satisfies part of the factors considered in the Draft. Applying a mandatory sub-threshold notification requirement as an exceptional commitment, in cases where no other remedy would alleviate the risk, allows the Commission to call in transactions involving companies which demonstrate a high risk, without creating additional costs and uncertainty for all companies. When doing so, the Commission can consider many of the factors listed in paragraph 169, including the characteristics of the market in which the acquiring party participates (subparagraph b), the business strategy of the acquiring party (subparagraph c), and the subsidies received by the acquiring party (subparagraph d).

In the context of public procurement, the Draft states that the Commission should 'endeavour to limit interference' with the procedure, particularly by considering how close the procedure is to the contract award (paragraph 170). However, the Draft does not provide any concrete criteria or thresholds for assessing how and when the Commission will consider it appropriate to intervene, nor does it explain what 'limiting interference' should entail in practice. This creates a level of uncertainty that could be problematic in procedures governed by short deadlines.

It is important to note that no such limitations or safeguards are provided in the context of concentrations. The absence of timing constraints leaves companies exposed to potential intervention

at very late stages of the deal process. This is problematic in cases where the transaction documents do not include conditions precedent in relation to FSR clearance – either because the transaction falls below the notification thresholds or because, based on available indicators, the parties to the transaction reasonably did not anticipate scrutiny.

Recommendations for legislative improvements

Although the Guidelines could bring clarity to investors in certain areas, the Commission must also focus its efforts on making structural changes to the FSR to ensure that its administrative burdens are proportionate to the problems the Regulation is seeking to address.

Our response to the FSR Evaluation provides more extensive recommendations, but we reiterate a few below.

Streamlined scope

Alignment with State aid rules

- The Commission should exempt from notification any FFCs that would not be notifiable if granted by an EU Member State, such as those covered by GBER (eg R&D incentives, energy efficiency aid, general tax relief measures).
- This would reduce administrative burdens, enhance clarity for businesses and ensure equal treatment of EU and non-EU incentive schemes, in line with Recital 9 of the FSR.
- This would also be a logical extension of the Draft, which already acknowledges that 'policy objectives which are covered by communications, guidelines, or other frameworks adopted by the Commission in relation to State aid are of particular relevance when applying the balancing test'.
- This exemption would be without prejudice to the Commission's ability to request additional information on a case-by-case basis where needed for its assessments.

A 'white list' for incentive schemes

- Many countries offer incentive schemes that are not limited in law or in fact to specific companies or sectors and therefore cannot be deemed to constitute subsidies. This is the case, for example, with most US federal, state and local R&D tax credits, green energy incentives and employment support.
- The Commission should consider 'white-listing' these ubiquitous incentive schemes when it determines that they do not constitute subsidies, building on the exemptions in the Implementing Regulation.
- Introducing clearer criteria for determining whether an FFC is 'limited in law or in fact' would also create helpful certainty for companies.

Materiality safe harbours

- A large number of incentives are either broadly available to all businesses or effectively confined to a specific market, limiting their potential to distort competition.

- Introducing a safe harbour based on the materiality of such incentives to the receiving company would help businesses assess whether FFCs with no clear EU nexus require notification under the FSR. This safe harbour could be calculated by comparing the size of the relevant FFCs to a company's turnover or EBIT, with contributions below that threshold presumed to be non-distortive due to their limited impact relative to the company's overall size.

- This would be consistent with the Draft, which already acknowledges that 'the size of the undertaking, of its activities in the internal market, the size of the sector […] or the value of the investment' are relevant factors in the Commission's distortion analyses.

Procedural simplification

Annual reporting mechanism

- Providing real-time data is a major burden for companies, requiring company-wide coordination to gather and maintain unique information. This real-time accounting provides no EU added-value, given that the vast majority of notifications do not result in in-depth investigations.

- Adopting an annual reporting mechanism would allow companies to file based on the jurisdictional triggers from the EUMR (ie from the last audited year), as well as the standards for substantive information. If, upon review, the Commission identifies a need for real-time data, it could then issue an RFI that would require the notifying party to start collecting and sharing real-time data.

Clearer guidance around required documents

- The Commission should provide a non-exhaustive list of documents or supporting information that may be requested on FFCs to help companies sufficiently prepare for investigations.

Empty form notification

- Parties must submit notification forms even when no reportable data exists, if FFCs meet the threshold but are fully covered by exemptions

- The Commission should consider waiving this requirement to avoid unnecessary notifications

Waivers

- An initial waiver granted during a notifiable transaction should remain valid for a defined period, reducing the need for full notifications in subsequent cases.
- During this period, only limited supplementary information should be required, focusing on FFCs directly linked to the transaction or those covered under Article 5(1) of the FSR.

Alignment with international accounting standards

- There are significant inconsistencies regarding when an FFC is deemed granted for accounting purposes and when it is deemed granted for FSR compliance purposes.
- Aligning the FSR's valuation of subsidies with international accounting standards, generally accepted accounting principles, or similar standards, would significantly simplify compliance for businesses.

Introducing evidentiary standards for RFIs

- Increasing evidentiary standards for RFIs would avoid the current discretionary approach, which undermines the exemptions in the FSR and Implementing Regulation.

Procurement-specific concerns

Confidentiality

- The FSR requires data to be transmitted from the bidding entity to the contracting authority or entity, and then to the Commission. When bidding alone, this creates significant cybersecurity concerns, even though the password is only provided to the Commission. In the context of consortia, this creates antitrust concerns as parties are forced to share commercially sensitive and confidential information with other members, even in its encrypted form.
- The Commission should allow parties to communicate their FFCs directly and separately to the Commission through encrypted means.

Clarity on the timeline of notification

- The Commission only begins its preliminary review once the contracting authority transfers a filing. While the FSR provides that this transfer should occur 'without delay', in practice, contracting authorities often have significant discretion in determining when to transfer the filing, which could result in delays of several months. To avoid such inefficiencies, the Commission should allow the bidding entity to submit the FSR filing directly to the Commission.
- In any case, the Commission should notify relevant bidders upon receipt of the filing. Under the current process, bidders are not informed when notification forms are transmitted by the

contracting authorities and are, accordingly, unaware of when the 20-day review period begins.

Notification with intent to bid

- Article 29 of the FSR requires notifications at the point when economic operators request to participate in a tender. However, economic operators typically have only 30 days to respond to a request to participate. Requiring parties to gather and notify data while undertaking pre-notification discussions creates significant complexities for potential bidders.

Thresholds

- With regard to notification thresholds in public procurement procedures, a more proportionate and targeted approach would be to base the threshold on the actual value assigned to a contractor under a Framework Contract, rather than on the total value of the Framework Agreement for all bidders. Requiring all contractors who bid under the Framework Agreement to submit a notification – regardless of the value involved – can lead to unnecessary administrative burdens and inefficient processes and is not aligned with the objectives of the Foreign Subsidies Regulation. Adjusting the threshold criteria in this way would help avoid superfluous notifications and better reflect the practical realities of contract implementation.

FSR data confidentiality

- FSR data is uniquely comprehensive and is not submitted for any other tax or competition purpose globally. Accordingly, it gives the Commission privileged access to businesses' sensitive commercial activities at the national, regional and local levels around the world.

- Although we do not assume nefarious intent, the Commission should clarify how this data is protected and whether/how it is used for non-FSR-related activities.

Conclusion

While the Draft aims to clarify the FSR's scope and application, it ultimately reinforces the Regulation's disproportionate burden on businesses and exacerbates legal uncertainty. Rather than offering workable clarity or streamlining compliance, the Draft entrenches an expansive interpretation of the FSR that captures a wide array of FFCs, many of which bear little relevance to competition in the EU.

To restore balance and ensure the FSR contributes meaningfully to the EU's objectives including maintaining a level playing-field, the Commission should pursue legislative and procedural reforms. On the legislative front, this includes narrowing the scope of notifiable FFCs, creating materiality-based safe harbours, clarifying the standards of proof and assessment criteria and aligning FSR requirements with other EU regulatory instruments. Procedural improvements — such as annual

reporting, clearer documentation guidance and timelines and confidentiality safeguards — are equally essential to reduce compliance costs and legal uncertainty.

Ultimately, if the FSR is to remain a credible tool for addressing distortive subsidies, it must become more targeted and proportionate. The Commission must take this opportunity not only to refine the Guidelines, but also to recalibrate the Regulation itself to ensure that it supports, rather than hinders, the EU's long-term competitiveness and level playing field.