AmCham EU

SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

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 FSR has resulted in significant new resource allocation needs across various teams within companies, as well as strained the Commission's ability to efficiently process notifications due to the overwhelming number of filings. To mitigate these challenges, the paper proposes key legislative changes, including annual reporting mechanisms, waivers for minor filings, a materiality safe harbour and alignment with State aid rules to reduce unnecessary compliance efforts. These recommendations aim to streamline the FSR's implementation, lower the burden on businesses and ensure that the regulation effectively supports EU competitiveness without unduly restricting investment or innovation.

Introduction

With over a year of Foreign Subsidies Regulation (FSR) implementation experience and broad calls to support Europe's competitiveness through simplification, this is an ideal moment to assess the burdens created by the FSR, evaluate how they can be alleviated without undermining the objectives of the Regulation and, in general, determine to what extent the FSR has created value for the EU.

Nearly a year and a half after the FSR's notification obligations entered into force, it has become clear that the mandatory filing obligations introduced by the Regulation are significantly more resource-intensive for companies and enforcers than initially envisaged.

For companies, FSR compliance has required investments in the design and development of data tracking systems that did not exist before the FSR's introduction. This has proven to be an extremely onerous exercise, requiring companies to invest significant human and technical resources across a variety of global teams to collect and maintain data – not collected elsewhere – in order to accommodate the FSR's unique real-time data requirements. For many companies, FSR filings are the most resource intensive filings done for transactions.

These burdens have not abated after a year, as the FSR continues to require unique and dedicated compliance systems involving a diversity of global teams.

In addition to companies, the Commission has also been strained by the large number and intensity of FSR filings. This apparent lack of capacity and resources could limit the effective enforcement of the FSR.

While the issuance of guidelines may provide more clarity on certain aspects of the FSR, the limited scope of the current evaluation (established by Article 46 of the FSR) does not address the main compliance issues currently faced by businesses. In addition, it is challenging to provide comprehensive feedback on the specific areas being evaluated due to a lack of significant case law or enforcement action from the Commission.

Accordingly, the Commission should, to the largest extent possible, use this evaluation to examine broader ways to strategically limit the number and length of filings required under the FSR. This would help avoid unnecessary notifications and allow the Commission to focus on areas where there is sufficient concern about economic distortions.

Going beyond the guidelines, the Commission should examine ways to streamline the provision of data relevant to investigations to alleviate the significant burdens on companies and enforcers alike. Despite not being covered by the FSR's mandatory guidelines, these are the areas where companies and enforcers have gained strong expertise and can provide sound and immediate feedback.

This response details the impact that the FSR has had on US and EU companies alike, provides insights relevant to the evaluation's priority areas and lists additional suggestions for ways to ensure that the FSR accomplishes its mission while limiting negative impacts on companies and enforcement teams.

FSR compliance burdens

The Commission's FSR impact assessment predicted, in the context of concentrations, that 'the additional administrative burden to prepare a notification would appear relatively small because it would be largely limited to gathering information on the foreign financial contributions received'. This, however, has not been the case. Compliance with the Foreign Subsidies Regulation has proven to be an expensive and resource-intensive process in comparison to the optimistic outlook given in the impact assessment.

The impact assessment severely underestimated the administrative burden linked to establishing FSR compliance systems and maintaining adequate data on a rolling basis.

On the company side, setting up FSR compliance systems requires the engagement of almost every business division across legal, tax, finance and accounting teams from potentially multiple legal entities in a country and local jurisdiction of operation, as well as the employment of external advisers and bespoke IT systems.

Beyond the initial investment, ongoing compliance remains a significant burden. Compliance requires companies to manually piece together disparate types of data from various business groups and functions using methods that do not fit cleanly into other transaction screening, accounting or corporate reporting procedures. One company estimated that FSR compliance globally requires the regular engagement of over 100 division managers alone, not counting the engagement of other relevant employees and the cost of employing external advisers and dedicated project managers. External advisers reflect this perspective.

These burdens are particularly acute given that most FSR notifications are subject to other overlapping transaction screening mechanisms (merger control and FDI screening). The unique real-time data needed for FSR notifications, coupled with the disparate state of various FDI screening regimes and increasing jurisdictional uncertainty in the merger control space, have become a significant drag on investment activity in the EU.

Divergent timelines between merger control, FDI screening and the FSR, particularly during in-depth investigations, can undermine the feasibility of deals with fast-moving timelines – like those in many 'critical sectors'. In addition, divergent concepts of control across these instruments continue to create significant additional compliance costs. These costs can only be mitigated by further alignment between these three screening mechanisms.

In the public procurement space, “main contractors” currently have to submit one co-notification per bidding economic operator and per internal legal entity. This means one single deal might require a main contractor to prepare and sign dozens of documents. This workload is often multiplied by the number of deals a single economic operator may be involved in across the EU.

In addition, these costs must be viewed in the overall context of increasing administrative burdens and risks in the EU and in other jurisdictions. On the competition side, FSR compliance overlaps with data and teams working on merger and FDI compliance. On the trade side, FSR compliance must be viewed within the context of anti-subsidy and trade defence work. On the tax and accounting side, architectural work done for FSR compliance is happening simultaneously to significant systemic change being done to comply with the global minimum corporate income tax (Pillar 2) and public Country-by-Country Reporting rules worldwide. These teams are also being stretched to comply with proliferating corporate responsibility requirements in the EU and globally.

Evaluation areas

Concept of distortion

Article 4(1) of the FSR sets out a two-pronged test for a distortion to exist. A distortion will occur where (emphasis added):

a foreign subsidy is **liable** to improve the competitive position of an undertaking in the internal market,
and
the foreign subsidy **actually** or **potentially** negatively affects competition in the internal market.
The Commission’s Staff Working Document (SWD) of 26 July 2024 provided further clarity on how the Commission currently interprets this legal test. Notably, it emphasised that a foreign subsidy must be shown to have a clear relationship (that there is for the Commission a ‘need to establish a relationship’) with an activity in the EU.

Multi-national organisations engage in transactions of a very local nature outside of the EU. These can include local property tax abatements, purchases from (non-private) local suppliers/sales to local customers, measures to boost local employment and beyond. As the Commission has confirmed, it is not apparent how these local measures, and many other measures, would have any meaningful effect on a company’s competitive position in the EU and thus negatively affect competition. Should the Commission investigate a company’s potential for cross-subsidisation (as highlighted in the SWD), it should be incumbent on the Commission to have *prima facie* indications that such cross-subsidisation exists. In other words, the burden of proof should, in principle, rest with the Commission. Likewise, given the assumptions in the SWD, the Commission should evaluate the exemption of FFCs awarded to local subsidiaries that do not cascade up through the group (ie, extend the procurement exemptions to concentrations)

In the context of mergers and acquisitions, a question that is recurringly discussed is what ‘market(s)’v the FSR is intended to principally address. Is it the market for the goods or services served by the target undertaking post-acquisition? Is it the market served by the buyer? Or is it the acquisition process itself (pursuant to Section 6.1. of Form FS-CO), ie, where buyers compete for acquisition

opportunities and where a foreign subsidy could give one of the buyers the upper hand in any bidding contest? Access to private capital will be key to meet the EU's investment goals needed to power its green transition, to build out energy, telecommunications and transport infrastructure and to boost its security. If prospective buyers of EU targets were to fear severe Commission intervention in their ability to fund and to invest in their newly acquired EU businesses (ie through commitments limiting their ability to do business in the future) and subject to monitoring, this could have a chilling effect on the EU's ability to attract capital to sectors crucial to the EU's competitiveness.

Balancing test

The SWD's efforts to align the FSR balancing test with EU State aid rules is a strong start to providing clarity for business.

Specifically, the SWD states in question 9 that 'where certain positive effects on the internal market have been acknowledged under the EU State aid rules, such positive effects would likely be taken into account in the assessment under Regulation (EU) 2022/2560'. This alignment with State aid creates certainty for business while again indicating that a foreign financial contribution ('FFC') must have some clear impact on the EU internal market to be considered notifiable.

The Commission could go further in providing clarity to industry on the balancing test by stating – in the guidelines – that the subsidy **must have a clear and apparent effect on the EU**.

Sub-threshold notifications

Some AmCham EU members have extensive experience filing for FSR clearance both in the context of mergers and acquisitions ('M&A') and public procurement while others do not. Although FSR readiness will differ between companies, most businesses have built FSR systems suitable for their individual, specific needs. The rigour of such systems differs based on the likelihood of a company bidding for a public procurement contract valued above EUR 250 million or the acquisition of an undertaking generating more than EUR 500 million of revenues in the EU (which could trigger FSR jurisdiction for public tenders and M&A deals, respectively).

Deal and tender timelines are frequently aggressive, and it is time consuming to gather and analyse FFCs and prepare a notification to the Commission. If the Commission initiates investigations into public tenders and M&A deals below the thresholds, companies that may not possess the requisite level of readiness (on the buyer/seller or tender bidder side) could experience disruption, resulting in companies withdrawing from (or not participating in) opportunities because they do not possess adequate resources to comply with FSR requirements.

Likewise, increasing exit opportunities for high-growth companies is a priority area for the Commission, as identified in the Savings & Investment Union Communication. Along with initial public offerings (IPOs), acquisitions by established companies are a highly attractive exit option for high-growth companies. Exposing high-growth companies to significant uncertainty and compliance costs through merger control and foreign subsidies screening would severely undermine this ambition.The Commission must carefully assess whether the distortion risks posed by subsidised sub-threshold activities justify imposing significant costs and uncertainty for businesses engaged in those activities,

as well as additional caseload for the Commission's under-resourced enforcement teams. The Commission may instead want to consider acquiring more experience enforcing the FSR within the thresholds set out therein, focus on identifying existing gaps to the extent they exist and eventually propose appropriate changes to the thresholds if meaningful gaps are identified.

Sub-threshold concentrations

Requiring the prior notification of sub-threshold concentrations would create significant uncertainty and unpredictability for M&A transactions in the EU. This would exacerbate the uncertainty already created by authorities' increasing efforts to subject sub-threshold transactions to FDI screening and merger control, which have reduced clarity and certainty around regulatory timelines and potential outcomes. The main risk for Europe is that so much insecurity is now injected into M&A transactions that it will discourage investment into the EU economy and divert capital elsewhere. Clear regulatory timelines and certainty of outcomes are vital to acquirers and sellers to preserve the value of businesses, to secure financing, to quickly realise expected synergies and to reassure investors and customers.

Efforts to address sub-threshold concentrations at the Commission and Member State level have already faced significant legal challenges – ranging from the landmark *Illumina/Grail* case to the recent challenge of the *Nvidia* decision in Italy. Legal issues aside, every figuration has led to a notable increase in costs for companies, which could be better invested inter alia in further developing purchased assets as well as in innovation.

In any case, the Commission has already created a proportionate and targeted mechanism to screen sub-threshold concentrations from companies which they have demonstrated to have received distortive subsidies. The *Emirates Telecommunications Group / PPF Telecom Group* ('e& decision') decision included a mandatory notification commitment for sub-threshold acquisitions made by e&, which the Commission should impose only in exceptional cases, where no other remedy would alleviate the risk.

If the e& decision set the precedent for the Commission to require the mandatory notifications of sub-threshold concentrations from a demonstrably high-risk company, it is not necessary to subject the rest of the business community to expensive and disproportionate call-in or mandatory notification requirements. Given that the Commission has not published any decision publicly since the FSR's implementation, increasing the number of notifications the Commission receives would only decrease its bandwidth to impose these commitments.

Other recommendations

Procedural simplification

Annual reporting mechanisms

The provision of real-time data continues to be the biggest burden for companies. Administering these processes is time and resource-intensive, requiring significant investments and engagement across IT, legal, tax, finance and accounting teams from different companies and divisions. As real-time data is

not required for any other transaction screening mechanism, resources dedicated to these systems provide no other value than supporting FSR compliance.

Given that the vast majority of FSR notifications do not result in in-depth investigations, a simple way to reduce this burden would be adopting an annual reporting mechanism, like the one used in Merger Control.

In practice, an annual reporting mechanism would ideally 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, they would then issue an RFI that would require the notifying party to start collecting and sharing real-time data.

An annual reporting mechanism aligned with the jurisdictional and substantive requirements from the EUMR would minimise the need to collect real-time data for filings of no interest to the Commission while aligning with data collection done for merger filings. Companies would, accordingly, maintain these systems but only need to activate them upon request from the Commission.

Empty form notification

In certain cases, parties must send notification forms even when there is no data to report. This occurs when (i) the sum of all financial contributions in the three years prior to the triggering event meets the threshold for notification, but (ii) no financial contribution must be reported as a result of the exceptions under point 6 of the instructions for Table 1 of the Implementing Regulation. The Commission should consider waiving the notification requirement in such cases.

Waivers

The Commission should consider a procedure whereby an initial waiver, granted on the basis of information provided in the context of a notifiable transaction, remains valid for a certain period of time thereafter. For subsequent notifiable transactions falling within that period of time, only limited supplementary information would be requested, covering, for example, FFCs directly linked to the transaction or that fall into categories listed in article 5(1) of the FSR.

Streamlined scope

The Commission should assess how to narrow the categories of FFCs that are considered necessary for its distortion analyses. In this regard, a comprehensive framework of ex ante exemptions – building on existing exemptions in the Implementing Regulation, as well as practice with the ad hoc waiver system – would be especially welcome. These exemptions should address the large number of exemptions and incentives which are freely available to all entities, as accomplished in the EU’s General Block Exemption Regulation (GBER).

Alignment with State aid rules

To ensure efficient procedures and a level playing field, the Commission should exempt the notification of any categories of FFCs that would not be notifiable if granted by an EU Member State.

The GBER, for example, identifies various categories of aid granted by Member States that are presumed to be non-distortive, exempting them from the EU's ex ante State aid notification and authorisation regime. This includes, for example, certain incentives for R&D, workplace training, audiovisual production, energy efficiency, renewable energy production, reverse logistics and natural disaster mitigation. Similarly, tax reliefs, tax incentives and tax amortisations of general application would not be deemed selective and would therefore not require approval under the EU's State aid regime.

Exempting FFCs that would fall under GBER from the scope of the FSR's notification obligations would not only reduce administrative burdens for notifying parties and provide clarity for businesses considering whether to apply for certain FFCs, but it would also ensure equal treatment of domestic and foreign incentive schemes. This aligns with Recital 9 of the FSR, which stipulates that the FSR 'should be applied and interpreted in light of the relevant Union legislation, including that relating to State aid'. These exemptions would be without prejudice to the Commission's ability to request further information where necessary for its investigations.

Materiality safe harbours

A large number of incentives and subsidies used by businesses are either freely applicable to all businesses, or otherwise 'trapped' in a certain market (as discussed in the distortion section).

Introducing a safe harbour for incentives and subsidies based on their materiality to the company in question would help companies better anticipate whether a subsidy with no clear EU nexus would be notifiable under the FSR. This type of safe harbour could be calculated based on, for example, the size of the relevant FFCs in relation to a company's turnover or earnings before interest and taxes (EBIT), with incentives falling below that safe harbour being counted as non-distortive given their lack of materiality in relation to a company's size.

Procurement-specific concerns

Confidentiality

The filing system set up under the FSR for procurement creates largely irreconcilable confidentiality issues for parties filing alone or in consortia. Pursuant to Article 29(1) of the FSR, FSR filings for public tenders should be notified to contracting authorities or entities. Recital 26 of Annex II of the FSR Implementing Regulation provides that 'In cases where the notification is completed by more than one notifying party, business secrets may be submitted under separate cover, and referred to in the notification as an annex. In order for a notification to be considered complete, all such annexes must be included in the notification'.

Under this system, the data is, first, transmitted from the bidding entity to the contracting authority or entity (a party that is not the intended reviewer of this data) and second to the Commission. While the password is provided exclusively to the Commission, encrypted documents are not entirely secure, as they remain susceptible to decryption such as brute force attacks. This poses a significant risk because the internal systems of the contracting authority or entity may not be fully secure against cyberattacks.

This issue is even more acute when multiple notifying parties are involved, such as in a consortium or where there are main subcontractors or suppliers, because the FFCs of a non-economic operator also must be transmitted to the economic operator. In the future, the bidding parties should not be put in a position where they must share commercially sensitive and confidential information with other members of the consortia.

Instead, the notifying parties should each be able to communicate their FFCs directly and separately to the Commission. The contracting authority should be empowered to, as a control feature, ask for the bidders to submit the case number provided by the Commission.

Similarly, there should be a more secure mechanism for communicating FFCs to the Commission. Currently, parties send the password to the Commission on EU Send using a method that is not end-to-end encrypted. At a minimum, the password and any FFC files should be sent using end-to-end encryption.

Finally, to enhance security in transferring sensitive FFC data, notifying parties should be required to submit the relevant information once (as opposed to having to submit the same information multiple times for different bids).

Adequate resourcing for DG GROW

The Directorate-General for Internal Market, Industry, Entrepreneurships and SMEs (DG GROW) has received an unexpected number of notifications and declarations – over 2,000.

Although the Commission has done its utmost to set up a case team within a DG that typically does not handle enforcement, significant investments in staff and resources are necessary to ensure that DG GROW is able to efficiently process the large number of notifications and declarations it receives, conduct in-depth investigations and undertake the capacity-building exercises necessary to ensure the effective application of the FSR by contracting authorities.

Providing these resources must be a top-line priority for the Commission and co-legislators.

Notification with intent to bid

As outlined in Article 29 of the FSR, 'in a multi-stage procedure, the notification or declaration shall be submitted twice, first with the request to participate and then as an updated notification or updated declaration with the submitted tender or final tender'. However, in this type of public procurement procedure, bidders usually have only 30 days to issue a request to participate (or 'intent to bid'). Therefore, the time allowed to gather and notify data in such cases is unnecessarily short, and in addition, makes it difficult for bidders to undertake pre-notification discussions. The Commission should address this in the Guidelines or in a future legislative revision.

Clearer guidance for contracting authorities

The effectiveness of the FSR relies heavily on contracting authorities understanding the legislation and being able to communicate effectively with tenderers and DG GROW to indicate whether a bid meets the notification thresholds in the FSR, and to provide updates on the status of an FSR investigation.

Under the current EU Public Procurement Directives, contracting authorities must indicate to a tenderer whether a contract is covered by the Agreement on Government Procurement (GPA). The Commission should introduce a similar requirement for contracting authorities to indicate whether specific contracts are covered by the FSR. While this requirement is already foreseen in Article 28 of the FSR, inclusion in the EU Public Procurement Directives would strengthen its application.

Moreover, as the Commission seeks to improve the FSR and the Public Procurement Directives, it must empower DG GROW to educate and build the capacity of contracting authorities across Europe to comply with the FSR.

Finally, given that filings are carried out by contracting authorities (not by the bidders themselves), bidders are often not aware of when the contracting authority submits the notification forms to the Commission, and when the 20-day timeline clock starts to run. The Commission should inform the relevant bidders when a form is received.

FSR data confidentiality

The data submitted to the Commission in FSR filings is uniquely comprehensive. It is not submitted for any other tax or competition purpose globally and gives the Commission privileged access into businesses' sensitive commercial activities globally at the national, regional and local level.

This unprecedented access to granular information about a company's operations at any given moment raises concerns about the potential usage of such data.

Although business does not assume nefarious intent, the Commission should clarify how this data is protected, and whether/how it is used for non-FSR-related activities. Ideally, the Commission should refrain from using data gathered from the FSR for other activities within or beyond the competition space, due to the cross-cutting nature of this data. This is in line with Article 43 of the FSR. Likewise, it should clarify the retention policy of the data submitted.

Conclusion

The costs and compliance burdens created by the FSR are significantly higher than anticipated in the Impact Assessment and bring into question its value in relation to the costs it creates. The current framework forces companies to dedicate vast resources across legal, tax, finance, and IT teams without delivering meaningful enforcement outcomes in most cases. Real-time data collection, and duplicative filings make the process unnecessarily complex, diverting attention from real competition concerns.

The importance of investment in the EU is emphasised across EU reports and strategies including, most recently, the Savings & Investment Union Communication. Likewise, AmCham EU's Transatlantic Economy 2025 report demonstrates the value of investment from key stakeholders like the US, with

the EU and US counting as each other's primary source and destination for foreign direct investment, and US FDI stock in Europe standing at $4 trillion in 2023.

To prevent the costs of the FSR on investors from outweighing its potential benefits and impacting the future of investment in the EU, legislative action is needed beyond what is included in the Commission's current evaluation. Key reforms should include shifting to an annual reporting system, aligning notification requirements with existing State aid rules and introducing clear exemptions for FFCs that are non-distortive or have no nexus to the EU Single Market. The Commission must also address confidentiality risks and DG GROW must be properly resourced to handle the high number of filings it is receiving.