IOGP Europe's response to the call for evidence on Foreign Subsidies Regulation (FSR)

Reflecting on the experience already gathered from implementing the FSR, we would like to draw attention to some important elements that the Commission should reconsider, reviewing some of the design elements of the FSR in order to ensure that the objectives of addressing distortive foreign subsidies are pursued in a manner that is proportionate, consistent and effective. We invite the Commission to take into account the following recommendations:

- Eliminating the general notification-based system for mergers, simplifying it or at least significantly raising the thresholds.
- Aligning the reporting perimeter for Foreign Financial Contributions (FFCs) with accounting standards.
- Narrowing the reporting obligation to measures that qualify as subsidies and may have a distortive effect.
- Extending exemptions to cover all measures granted at market conditions and clarifying that sector-wide measures of general application should not be considered selective subsidies.
- Considering whether the objectives pursued by the FSR could be more effectively achieved through existing frameworks such as Foreign Direct Investment (FDI) screening, thereby avoiding duplication and unnecessary burdens.

1) **Appropriateness of the FSR as a regulatory tool:** While we appreciate and understand the objectives underlying the adoption of a notification-based system as the FSR, we question whether it is the most suitable and proportionate tool to address the concerns it is meant to tackle.

   With further reflection over the past years, it appears that the issues raised by foreign subsidies are essentially linked to EU economic security, through protection against unfair competition arising from foreign subsidies, in a similar reach as the antidumping regulatory framework.

   Following this line of reasoning, we would like to suggest that such concerns could be addressed more efficiently within the existing framework of Foreign Direct Investment screening mechanisms, which are expressly designed to safeguard national and EU strategic interests.

   As the FSR inevitably creates an additional regulatory layer with significant compliance costs on businesses, in addition to other existing instruments such as the EU Merger Regulation (EUMR) and FDI screening, we invite the Commission to reflect on the real added value of filing notifications under the FSR in the wider EU regulatory framework, taking into consideration the extensive burdens it inevitably entails, both in terms of compliance costs and in terms of proliferation of processes and notifications.

2) **Is a notification system for mergers really necessary?** While we consider that a notification-based system in the context of public procurement may be justified and proportionate, also in light of the different scope of the reporting obligation, in the field of mergers such a mechanism appears less warranted.

   In public procurement, disclosure of potential subsidies helps provide the Commission with visibility on situations that may merit scrutiny under the FSR and that, in the absence of notification, might not be visible to the Commission. In this framework, notification is integrated into existing procedures, since the contracting authority collects the relevant information together with the tender documentation, and the additional burden for operators remains more manageable.

By contrast, in the field of mergers, transactions within the Union are already tracked under the EUMR, which requires companies to notify qualifying concentrations. This ensures that the Commission has full visibility of relevant transactions and retains the ability to exercise its existing call-in powers in a focused manner where there are indicators of concern. Such an approach would allow the Commission to concentrate resources on genuinely problematic cases, without imposing generalized notification requirements.

As designed, a notification-based FSR system can produce disproportionate outcomes, such as requiring notification of the acquisition of an EU business by another EU company. There are concrete cases where, under FSR, a company acquiring another company in the same Member State (a transaction of purely national relevance, already referred by the Commission to the relevant competition authority under the EUMR) still falls under the FSR notification requirement. This appears contrary to the very rationale of the Regulation.

A blanket notification obligation for mergers under the FSR risks generating significant administrative costs for companies while adding limited enforcement value and potentially absorbing resources that could be directed to more relevant cases.

As an alternative, we propose: a simplified mechanism whereby, whenever a concentration is notified under the EUMR, no parallel FSR notification would be required unless specifically requested by the Commission according to objective criteria established by law or implementing regulation, that are easily applicable by the parties involved.

Such an approach would ensure that the Commission may scrutinize cases of potential concern, while at the same time avoiding unnecessary duplication of procedures and administrative burdens for companies.

Should the Commission nevertheless consider a blanket notification system indispensable, it would seem important at least to **substantially raise the thresholds or introduce sector specific thresholds so that only transactions of genuine concern are captured.**

3) **Scope of reporting obligations:** We consider that the misalignment between the scope of the reporting obligations applicable to mergers and those applicable to public procurement under the FSR is not justified. The approach adopted under public procurement seems more proportionate and should be preferred, whereby the scope of reportable FFCs covers only the parent companies and subsidiaries of the notifying party (and not "sister companies" within the same group a concept that we respectfully submit is excessively far-reaching).

   Furthermore, the concept of "control" should follow established accounting principles, as companies are generally in a position to obtain reliable information on foreign financial contributions only where they exercise control (as understood from an accounting perspective) and therefore have sufficient leverage to access the relevant data. **Requiring companies to report financial contributions of non-controlled entities, often located overseas and unrelated to the notified transaction, creates an obligation that is extremely difficult to comply with in practice. For similar reasons, entities already divested from the corporate group should also be excluded from the scope of reportable FFCs.**

   The current waiver mechanism does not provide a sufficiently predictable solution, as its effectiveness depends largely on the approach taken by the Commission's Case Team. Given the strict time constraints that typically apply in merger proceedings, companies may find themselves in situations of uncertainty that are difficult to manage.

4) **Concept of FFC:** In our experience, the current definition of "financial contribution" in the FSR is disproportionately broad. What is most relevant for the Commission's purposes are actual foreign subsidies (such as cash grants without economic return, selective company-specific advantages, or similar targeted measures). By contrast, a wide range of financial measures currently captured by the reporting obligation, including those provided at market terms (such as loans or guarantees from State-linked banks), are neutral from an FSR perspective as they do not present any distortive quality.

   This breadth has important practical implications: many of these financial flows are not systematically tracked in companies' accounting systems, making it extremely burdensome to identify and map every possible transaction.

   While we welcome the limitations introduced by the Implementing Regulation, we note that the misalignment between the data required to calculate the notification thresholds and the information ultimately requested in the

notification form results in companies being obliged to collect and process large amounts of data which, in practice, are not used in the Commission's assessment. Furthermore, in practice the European Commission goes beyond the aggregated data provided in the filing form and requests detailed, specific information on individual FFCs. As a result, both for calculating regulatory thresholds and responding to requests for information (RFIs) from the Commission's Case Team, the intended reduction in administrative burden outlined in the Implementing Regulation does not actually materialize. **We therefore invite the Commission to consider aligning the scope of FFCs relevant for the notification thresholds with the scope of FFCs subject to reporting obligations,** and to exercise its discretion to ask for detailed FFCs sitting behind the summarised information presented in the filing sparingly, in order to reduce inefficiency and alleviate unnecessary administrative burden.

Furthermore, the concept of selectivity should be limited to specific undertakings and not extended to entire sectors.

If an entire sector benefits from the same measure under the same conditions (for example, a sector-wide tax exemption), this should be regarded as a general policy measure rather than a selective advantage.

In this context, **we recommend that the Regulation place greater emphasis on foreign subsidies and their potential distortive effects, and that it set out, in a more illustrative manner, the categories of financial measures that are considered to be potentially problematic foreign subsidies.** Such clarifications would improve legal certainty, alleviate administrative burdens, and allow the Commission to direct its analysis towards the measures most likely to distort competition in the internal market.

5) **Scope of exemptions:** Finally, while we welcome the exemptions introduced by the Implementing Regulation, **we suggest that the scope should also cover financial measures granted at market conditions** (eg. loans or guarantees from State-owned banks provided at market rates), as it is highly unlikely that such measures have a distortive effect.

IOGP Europe stands ready to continue engaging on this topic and to provide further input and expertise as needed.