欧盟中国商会
CHINA CHAMBER OF COMMERCE TO THE EU

THE CCCEU FEEDBACK ON THE DRAFT OF THE IMPLEMENTATION OF THE FOREIGN SUBSIDIES REGULATION

The China Chamber of Commerce to the EU (CCCEU) covers around 1,000 Chinese companies operating in the EU. The chamber and its members welcome this opportunity to provide feedback on the draft of the Implementation of the Foreign Subsidies Regulation ("FSR") and recognise the Commission's effort in setting out the rules for applying the FSR.

However, the CCCEU has expressed concerns about the new tool targeting foreign subsidies allegedly distorting the internal market of the EU since the release of the White Paper by the Commission in this respect. These concerns are multifold, including the market openness of the EU towards foreign investments in the near future, the sound justification for any new and separate legal framework in addition to the existing mechanisms, the legal certainty that the new instrument could provide, the disproportional burdens the new instrument would impose on them that would unjustifiably impede legitimate business activities or unnecessarily increase the transitional cost, and most importantly, the potential discriminatory implementation of new instrument towards Chinese businesses, which in turn distorts the level playing field.

Despite the strong opposition of various stakeholders which share the same concerns, the new tool was adopted and published in December last year. The adopted FSR turns out to amplify the above concerns.

Notwithstanding, in view of the upcoming application of the FSR, the CCCEU supports the Commission's effort to provide more clarity regarding the practical and procedural aspects related to the application of the FSR for the purpose of addressing some of the above concerns. The CCCEU reiterates that an open and competitive market governed by non-discriminatory and clear rules is in the interests of all economic operators doing business in the EU. This requires that these rules and concepts are unambiguous, that any obligations arising from these rules to be assumed by economic operators are reasonable and proportionate to the objective to be achieved, that the procedure is transparent and fair, and that the rights of defence of the parties to such procedure are sufficiently safeguarded.

The draft FSR Implementing Regulation ("IR") together with its enclosed two annexes, published by the Commission on 6 February 2023, is the first step taken by the Commission in attempting to clarify the information required in the notification forms for concentrations and public procurement procedures. The draft IR also lays down rules on the calculation of time limits, on the access to the file and on the rights of the parties. According to the Commission, the draft IR would ensure the effectiveness of the Commission's proceedings as well as provide legal certainty to the procedural rights and obligations for the economic operators subject to FSR.

In this submission, the CCCEU presents the views and concerns of its members with respect to the draft IR, as well as more generally the FSR regarding its implementation as from 12 July 2023.

The CCCEU considers that the effectiveness and legal certainty that the Commission is pursuing through the draft IR are only partially achieved. Plenty of uncertainties remain relating to the FSR's application in the near future. The administrative burdens on economic operators, including our members, in order to meet the notification requirements set out in the draft IR are still disproportionately onerous. There is also room for improvement regarding the procedure to increase transparency and protection of the right of defence. Certainly, more guidance and clarifications need to be provided by the Commission on a timely basis relating to other aspects of the FSR implementation, including the distortion assessment and balancing test. The CCCEU elaborates on its views in turn below.

1. **Uncertainties remain in the key concepts and thresholds due to the lack of clear criteria and boundaries for their determination**

The draft IR mainly focuses on the procedural aspects related to the implementation of FSR. The Commission gave hardly any guidance regarding some key concepts and thresholds that underpin FSR and its application. For example, the term of financial contribution is referred to throughout the draft IR and the annexes thereto as one of the most important concepts in the fulfilment of notification obligations. Nevertheless, apart from the very broad and open definition laid down in Article 3(2) of FSR, there is no further clarification or explanation provided in the draft IR that set the clear boundary or lay down

practically enforceable criteria for economic operators to determine what constitutes a financial contribution potentially under scrutiny. This is particularly true considering a financial contribution could include the provision of goods or services or the purchase of goods or services, and such financial contribution could be potentially provided by a foreign public entity or even a private entity whose actions can be attributed to a third country government, under that article. Consequently, economic operators have to screen, in the absence of clear criteria or guidance, all business transactions in order to identify if any of them are attributable to foreign government and public authorities and as such are notifiable. In the case where economic operators are transacting with state-owned enterprises on market terms, which shall not automatically be considered as being attributable to the governments of third countries holding equity interests in the state-owned enterprises in question. The CCCEU believes that they do not constitute notifiable financial contributions. Nevertheless, economic operators might choose to report all transactions whatsoever with a view to avoiding this screening exercise done by themselves and to minimising the risks of overlooking any transaction in their notification. This is certainly not what the Commission envisaged to handle in the first place. Therefore, more guidance needs to be provided by the Commission to help economic operators to run the self-assessment on the basis of easily executable criteria, particularly with regard to the attribution test. Such guidance shall not give a broad interpretation of an act attributable to third country government or public authority. Certainly, it shall make the presumption that the activities of state-owned enterprises are likely attributable to the government of the country where they are located.

Another example is the amount of financial contributions received by an economic operator, which would be used to determine if they meet the

quantitative thresholds set for a concentration transaction or in a public procurement procedure for them to be notifiable according to the draft notification forms. No calculation methodology is provided in the draft IR, allowing economic operators to assess whether the thresholds are met so that they are required to fulfill the notification obligations. Nor is there an explanation of how to establish the benchmark for assessing if, for example, loans were granted at preferential conditions or goods or services were provided at less than adequate remuneration and as such constitute financial contributions. Without these basic practical guidelines, it is nearly impossible for economic operators to determine the amount of an individual financial contribution obtained, let alone the aggregate amount in a cumulative period of three years. Again, detailed guidance is needed to improve the practicality and enforceability of the rules in this respect.

A third example of the uncertainty of the concept is the use of term “a financial contribution”. The CCCEU members raised the question of whether it refers to one particular type of financial contribution or to one subsidy scheme provided by a particular foreign government or public authority. More doubts arise when the Commission used other terms like “each individual foreign financial contribution” and “the individual amount of the contribution” in the draft IR. Lack of express interpretation of these confusing concepts, economic operators will not be in a position to have a correct understanding of their scope and, as such, will be unable to correctly calculate the amount of financial contribution, either individually or cumulatively, and to determine whether the thresholds are met for notification purpose.

Moreover, in the notification form used in a public procurement procedure, Section 3 of Annex 1 to the draft IR requires the provision of

all foreign financial contributions, among others, relating to operating costs as indicated in the recital 19 of FSR. However, the latter recital only points out that a foreign subsidy granted for operating costs seems more likely to cause distortions than if it is granted for investment costs. Further clarification is required to help economic operators determine what forms of financial contributions are considered to be related to operating costs as opposed to those related to investment costs.

In view of the significant uncertainties arising from the imprecisely defined terms and concepts referred to in the FSR and the draft IR, the CCCEU urges the Commission to **provide more clarifications or precise definitions, or set clear boundaries to these terms and concepts as a matter of urgency**, before 12 July 2023. The guidance in this regard is indispensable for the good implementation of FSR and the well-functioning of the procedures stipulated in it. Economic operators also urgently need them to achieve compliance with the obligations prescribed by FSR and to increase the predictability and legal certainty in their business decisions and operations.

2. **Excessive administrative burdens on economic operators to meet up the notification requirements**

The CCCEU observed that the Commission has tried to limit the scope of the information to be provided for the notifications relating to a concentration transaction and in a public procurement procedure in the draft IR. To this end, the Commission formulated the forms to be used for such notifications in the two annexes attached to the draft IR. However, CCCEU members consider that the information that they potentially have to compile and provide to fulfil the requirements laid down in these forms is still massive. As such, the administrative burden

imposed on them by the draft IR and the notification forms is unbalanced and disproportionate to the objectives that FSR intends to achieve. The latter is reflected in the following aspects.

- The notifiable financial contributions remain too broad and inconsistent in the notification forms

In the notification form for a public procurement procedure, only those foreign financial contributions granted in the past three years and falling into the categories listed in Article 5(1) that are considered most likely to distort the internal market or those related to operating costs (yet to be defined) need to be reported under Section 3 of the form. Additionally, a foreign financial contribution is notifiable only if its aggregate amount is not less than EUR 4 million per third country in the three years prior to notification.

On the contrary, the criteria for a notifiable financial contribution are very different in the notification form relating to a concentration transaction. The latter requires that a foreign financial contribution be included in the notification if (i) the individual amount of the contribution is equal to or in excess of EUR 200,000, and (ii) the total amount of contributions per third country and per year is not less than EUR 4 million.

When comparing the criteria of notifiable financial contribution in these two forms, and in light of the relevant provisions of FSR, the CCCEU noticed that there does not exist the *de minimis* threshold of EUR 200 000 in the notification form for a public procurement procedure, despite that Article 4(3) of FSR expressly provides that a *de minimis* subsidy shall not be considered to distort the internal market.

As regards the notifiable financial contributions in the form for a concentration transaction, on the contrary, since no reference was made to the subsidy categories most likely to distort the internal market, virtually all financial contributions that meet the definition of Article 3(2) of FSR and the above quantitative thresholds would have to be reported, irrespective of their form and likelihood of distortive impact on the internal market. Given that this could potentially cover all transactions with any third party (considering of the difficulties in assessing their attribution to a foreign government or public authority or not, as above explained) that satisfy the thresholds, the work to be undertaken by economic operators to screen the transactions within massive records, to identify those meeting the thresholds, and to collect the information requested for notification purpose is colossal.

This goes without mentioning that the notification in a public procurement procedure needs to include the financial contribution granted not only to the main contractor or main concessionaire, but to the main subcontractors and main suppliers known as well. Likewise, the notification relating to a concentration transaction covers the reporting of financial contributions granted to the party acquiring the control power in the transaction, as well as all the entities and individuals that solely or jointly, directly or indirectly control it and controlled by it. The already excessive workload of reporting would be exacerbated by further expanding the reporting scope to many other associated entities, and as such become even more burdensome for economic operators.

- Information other than financial contribution to be provide is also excessive for notifying parties and sometimes inaccessible by notifying parties

In addition to the foreign financial contributions, notifying parties are also required to provide various other information, such as the description of the transactions concerned (concentration or public procurement procedure), information about the parties to the transactions or the notifying parties, impact on the internal market or justification for absence of undue advantage. Whilst some of them might overlap with the information to be provided in other notification procedure (in the case of merger control filing) or in the main public procurement procedure (in the case of tendering documents ESPD), others are not necessarily readily available to notifying parties.

The CCCEU takes the view that, on the one hand, not all the additional information requested in the notification forms is relevant to the assessment of the impact of the reported financial contributions on the transaction concerned and the internal market. For example, in the notification form relating to a concentration transaction, the notifying parties are asked to list all the sources of finance used to fund the transaction, or to provide due diligence reports or any equivalent documents prepared by external parties assessing the transaction from a strategic, legal, economic or tax point of view, including documents discussing the value of the transaction, or to explain the different business lines or activities of each of the parties to the concentration in internal market (including those that might be irrelevant to the transaction itself). Similarly, the notification form for a public procurement procedure requests notifying parties to provide not only the audited annual accounts and tax returns, but also the information on production and capacity statistics, stocks, employment, investments, purchase and purchase orders, quotes from suppliers and subcontractors, and business plans and market research underlying the decision to participate in public procurement procedure. CCCEU members consider

that the above-mentioned wide range of information requested in the form does not necessarily have any bearing on or is not absolutely needed for the analysis of whether the reported financial contributions constitute a subsidy and the effect thereof. Their inclusion in the notification is therefore unnecessary but excessive.

On the other hand, some information requested in the notification forms is not always accessible by the notifying parties. As such, requesting them to provide the information that they are unable to possess or obtain in the notification would be extremely unreasonable. This includes, for instance, the information relating to the other candidates to a bidding process of the concentration transaction, or relating to other undertakings who expressed an interest in the merger or the acquisition. Such information shall normally be provided by the target company in a concentration or the contracting authority rather than the notifying parties as the former has direct access to them whereas the latter usually doesn't.

- Declaration of no notifiable financial contribution is practically pointless

In the notification form for a public procurement procedure, where no foreign financial contributions in the last three years that meet the notification thresholds have been granted to the notifying parties, the latter need to make out a declaration in accordance with Section 7 of the form. Apart from that, they are still required to complete Sections 1, 2 and 8 of the form, as well as to provide a list of all foreign financial contributions received despite not meeting the notification requirements pursuant to the obligation prescribed in Article 29(1) of FSR. The latter amounts to requesting economic operators, which should not have the

obligation to file a notification, to provide a quasi-full notification, in particular that relating to the reporting of foreign financial contributions under Section 3 of the form. As such, no effective relief from the reporting obligation is provided in the draft IR for a tender having no notifiable financial contributions as compared to that having them. The CCCEU considers this request very unreasonable.

- Ineffective waiver procedure

The draft IR and its two annexes provide for a pre-notification contacts procedure during which the notifying parties are allowed to request waivers to submit certain information required by the notification forms in circumstances where the relevant information is not necessary for the examination of the case or where it is not reasonably available to the notifying parties. Although the pre-notification contacts and waiver request procedure ought to be very valuable to significantly reduce the information required for notification, a closer review of the procedure reveals that this procedure might not be very effective or does not necessarily bring substantial benefit to the notifying parties.

First, the waiver request has to be submitted within the framework of pre-notification contacts together with a draft notification form already pre-completed by the notifying parties. There is no clear procedural framework provided for in the draft IR regarding the pre-notification contacts that notifying parties could follow. Nor any indication exist to which extent the draft notification form has to be completed. The notifying parties would have to work on the notification forms on a massive scale anyway before the information request can be reduced through waiver.

Second, for the purpose of requesting a waiver, the notifying parties would still need to provide adequate reasons why the relevant information is not reasonably available and to provide best estimates for the missing data, identify the sources for these estimates, or indicate where any of the requested information that is unavailable could be obtained by the Commission where possible, or why the relevant information is not necessary for the examination of the case. This amounts to imposing on the notifying parties similar levels of burdens regarding information collection and information relevance analysis.

Third, the Commission has the wide discretion to determine if the notifying parties' request for waiver can be accepted, and thus the obligation to provide particular information is dispensed, or not. No guidance is provided in the draft IR giving indications about the criteria or circumstances on the basis of which the information requested is considered unavailable or unnecessary for the assessment. In any event, it is made clear that such an exemption does not prevent the Commission from requesting that information at any time during the proceedings. As such, the waiver, even if granted, is of suspensive nature only. The Commission is entitled to change its mind at any time and ask for that information at its will. There is, therefore, no guarantee of such burden relief at all. This does not effectively help the notifying parties in terms of legal certainty and eventual administrative burden.

In light of the above identified shortcomings regarding the notification obligations of economic operators, the CCCEU requests the Commission to strike the right balance between the need for a proper assessment of foreign subsidies and their potential effect on the internal market on the one hand and the administrative burden on economic operators to produce the information in their notification for that purpose

on the other hand. The CCCEU thus suggests that the draft IR or the annexed **notification forms shall be improved as follows**:

- The notification form relating to a concentration transaction shall limit the reporting of financial contributions to those categories listed in Article 5(1) of FSR. This is because only those categories are considered most likely to distort internal market and thus shall be under scrutiny. Reporting any transactions going beyond those categories would be an overkill and unnecessary for the purpose of flagging out and addressing the most problematic subsidies.
- A *de minimis* threshold of notifiable financial contribution like that in the notification form relating to a concentration transaction shall equally exist in the form for a public procurement procedure.
- The quantitative thresholds for notifiable financial contributions need to be adjusted upwards in proportion to the value of the notifiable transaction concerned, and considering their potential impact on that transaction and internal market.
- The notification forms shall focus on the entity and undertaking that is directly concerned by the transaction. The subsidiary companies and holding companies of them shall be removed from the scope of notifying parties. Where the reporting of information relating to them is absolutely necessary, the notification forms shall limit the scope of associated entities and of the notifiable financial contributions to those that would most likely be involved with the transaction concerned. A reasonable boundary shall be set regarding the number of levels and scope of indirect control by the notifying party for reporting purpose, in order to avoid excessive and irrelevant information having to be reported.
- The notification forms shall exclude the reporting of information on the provision or purchase of goods or services to/from third-

country governments or public authorities on market-based terms from the notification obligations, since such transactions would not confer any benefit, and thus do not amount to subsidies. They shall also exclude the reporting of information that is not closely related to the transaction under examination.

- Similar to the notification form for a public procurement procedure, the form relating to a concentration transaction shall be partially combined or at least aligned with the merger control filings or national investment screening filings if the latter procedures are triggered simultaneously for the same transaction. Since much of the basic information in these filings, such as the parties to the transaction, the nature and background of the transaction, the economic rationale thereof and market analysis, is very similar if not identical, and considering that the procedural timeline between merger control filings and the foreign subsidies notifications is already aligned, the information requested could be structured in a way that can be commonly used in multiple filing procedures like the ESPD in a public procurement procedure in order to diminish the administrative burdens of the filing parties.
- In the case of no notifiable financial contributions in a public procurement procedure, the declaration and other reporting obligations shall be limited to the minimum extent, including the provision of a listing of financial contributions received, in order not to extend unnecessary obligations to the parties.
- The IR shall provide further clarity on the criteria to be applied for the assessment of granting exemption from certain reporting obligations (i.e. a waiver). In other words, a concrete catalogue of circumstances in which information or documents are considered as “not necessary for the examination of the notification” described in Articles 4(4) and 5(5) of the draft IR would be particularly useful.

This helps reduce the burden on economic operators in monitoring and collecting information within their organisations for the determination of whether the exemption conditions are met.

- The Commission shall also dispense with the reporting obligations in the circumstances where the notifying parties are bound by the mandatory laws of their residence countries which prevent them from disclosing or transferring abroad certain information that are deemed classified information by the third country governments, in particular those relating to the classified transactions with the governments or public authorities.
- Explicit rules shall be laid down regarding under what circumstances the Commission would be allowed to request the provision of information that has been previously exempted. This could include, for instance, when the reasons preventing the notifying parties from obtaining the requested information disappear or if the reasons underpinning the waiver decision turn out to be false.
- The waiver shall be granted on a non-discriminatory basis to all economic operators having the same or similar circumstances.

3. Ambiguous balancing test

The draft notification forms contain a section (Section 5 in the form for a public procurement procedure and Section 7 in the form relating to a concentration transaction), requesting possible positive effects of the reported foreign financial contributions. The CCCEU understands the information to be reported in this section is used for conducting the so-called “balancing test”. Given the very general nature of the request in this section, with main focus on the positive effects on the internal market of the EU or in relation to the relevant policy objectives of the EU,

economic operators have hardly any indications of what could be the positive aspects on the internal market or what are the policy objectives that the Commission is looking into.

The CCCEU believes that the balancing test shall take into consideration the positive effects such as the active participation of non-EU companies in bringing consumer welfare, the innovation on the EU internal market, the positive effects to local stakeholders in the case of local manufacturing as well as those on achieving environmental policy objectives. To this end, in the same way as the subsidy categories under Article 5 of FSR, the Commission shall release a catalogue of policies and/or sectors relating to which financial contributions or subsidies are considered most likely to produce a positive effect. Alternatively, the Commission shall provide guidance as to the concrete scenarios for which the balancing test will apply, including as to how and where such effects must materialise on the internal market. This will be paramount not only to protect the legitimate interests of economic operators that contribute to those aspects, but more importantly, it may encourage them to help achieve the EU's overarching policy objectives.

Also, the CCCEU considers that when conducting a balancing test, the Commission shall not be limited to considering the positive effects on the EU internal market but also take into account the positive effect in the country of granting the subsidies, as the latter may pursue similar policy objectives as those in the EU, such as social equality and sustainability which are shared value and interests with the EU. The latter positive effects sponsored by the subsidies under scrutiny shall not be overlooked or disregarded.

Furthermore, the Commission shall lay down in the IR a procedural framework encouraging and allowing stakeholders including contracting authorities, labour organisations, national or local governments in the EU, and consumer organisations to come forward and provide their views and information to the same effect. It would be preferable that in such procedural framework, the Commission shall actively seek feedback from other stakeholders, in addition to the information requested in the notification form and provided by notifying parties. In doing so, the Commission would obtain a complete picture of all possible positive effects that the alleged subsidies will have, such as on local employment and welfare, and thus take due consideration of them in its assessment.

4. Safeguard due process and the right of defence

FSR provides for significant fines and sanctions in case of violation that could have a serious impact on businesses. Consequently, the procedures to be followed must be extremely transparent and must ensure that the parties subject to the procedures have had ample chances to express their views and to exercise their right of defence.

In order to **increase transparency and safeguard the right of defence**, the CCCEU has the following **recommendations for the Commission's consideration**.

- Article 13 and Article 15 of FSR empower the Commission to request any information it considers necessary from any parties including a third country government as well as to conduct inspections within and outside the EU. Article 16 of FSR prescribes serious consequences when the parties fail to produce the information requested by the Commission that decision could be

taken on the basis of the facts available or presumption be made directly that a foreign subsidy is granted and a financial contribution confers a benefit. In view of this very unbalanced position between the Commission and any parties subject to the information request of the Commission, more procedural requirements are needed in order to limit the power of the Commission to a reasonable extent. This could include the obligation of the Commission to explain upfront to the party being requested the relevance of the information that it requested to the investigation underway. This could also be that in case where the party tried to produce the requested information to its best ability, the fact that the provided information is incomplete or not entirely accurate or the information was provided shortly beyond the time limit shall not be considered as non-cooperation on the part of the party, and therefore no adverse consequence shall be imposed on the latter as a sanction. The decision of the Commission shall still be made on the basis of all the best information available to it, rather than presuming the existence of distortive foreign subsidies.

- The transparency and reporting obligations imposed on undertakings under Article 17 of the draft IR shall be limited in time with a maximum time limit that is necessary for monitoring purpose. Otherwise, undertakings would be unreasonably subject to indefinite reporting obligations. The scope of information to be reported shall also be limited to that meeting the notification thresholds. For instance, *de minimis* threshold shall be equally applied in order to exclude immaterial transactions.

- The IR shall ensure that all parties concerned have the right to oral hearings at all stages of the proceedings.

- Article 21(1) of the draft IR shall be amended to clarify that access to the Commission's file is automatically granted to the undertaking under investigation, without the need for it to request such access. The access to the Commission's file shall be made available as soon as it intends to adopt a decision to initiate an in-depth investigation or it requests information from the party under investigation in accordance with Article 13 of FSR or conducts inspections in accordance with Articles 14 or 15 of FSR, whichever is earlier.

- Article 21(2) of the draft IR shall be amended to ensure the access to the file includes internal documents or correspondence of public authorities that contain exculpatory information.

- Article 21(3) of the draft IR shall be amended to ensure that access to the file for the party under investigation covers the entire file rather than just the documents mentioned in the Commission's grounds for adopting a decision.

- A procedure to involve DG COMP's hearing officer shall be established in cases where a procedural right of the undertaking under investigation is considered being violated, for instances where the Commission refuses access to a file or the protection of confidential information and/or business secrets is breached.

- The time limit for the submission of commitments in the procedures and for the submission of observations shall be extended as long as the timely conclusion of the relevant procedures can be ensured in order to allow undertakings enough time to react and protect their legal interest.

- Affected third parties, other than the party under investigation, shall have the right to be heard with respect of all aspects relating to potential market distortion (and in particular the lack thereof as per Articles 4 and 5 FSR) and potential justifications for absence of undue advantage (as per Section 4 of Annex I of the draft IR), as well as all aspects relating to the balancing test (as per Article 6 FSR).

5. Earlier release of guidelines or clarifications relating to distortion assessment and balancing test is highly expected

Lastly, according to Article 46 (1) of FSR, the Commission shall publish at the latest until 12 January 2026 guidelines regarding the determination of the existence of market distortion and the assessment of distortion in public procurements as well as regarding the balancing test. The CCCEU understands from the Commission's statement, announced on the same day of the publication of FSR in the Official Journal of the EU, that it committed to making the initial clarifications public in these respects within 12 months after the application of relevant provisions.

The CCCEU respectfully requests the Commission to publish the said clarifications as quickly as possible for the consultation of stakeholders in the same way as the draft IR, preferably prior to the application of these provisions. The earlier release of these clarifications is essential to give more legal certainty to an already volatile business environment in which economic operators within and outside the EU, including our members, are operating nowadays.