Statement by the Federal Government

on the Implementing Regulation pursuant to the Regulation on foreign subsidies distorting the internal market

(Ref. Ares(2023)842946 - 06/02/2023)

The Federal Government welcomes the entry into force in January 2023 of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation, FSR). Germany has supported this Regulation from the outset and is convinced that it will make a significant contribution to ensuring a level playing field in the EU single market.

We would like to remind the European Commission that the goal of the Regulation is to have a stringent tool to act in cases of foreign subsidies distorting the internal market, but not to make unnecessary red tape, useless data piles and create asymmetric bureaucratic costs for European industry. The drafts foresee an extensive notification system which creates enormous burden for undertakings as well as the Commission. Instead, the draft Implementing Regulation (including its notification forms) should limit the administrative burden to a necessary minimum and create a high level of legal security. To this end, significant changes are required. In particular,

- cases in which the EU Commission can grant waivers should be specified and expanded to ensure that financial contributions (e.g. supplies within the scope of public contracts) do not have to notified if they occur under normal market conditions,
- the threshold above which financial contributions must be notified is raised from EUR 200,000 to at least EUR 350,000; and
- such a threshold for notification of participation in procurement procedures should be introduced in the first place.

At the same time, the Federal Government takes the view that it is necessary for the European Commission to present further-reaching guidelines on the interpretation of key legal concepts as quickly as possible, particularly with regard to the criteria for determining whether there is a distortion of competition and with regard to the question of when a financial contribution is to be attributed to a third state. This is something the

Federal Government already emphasised on repeated occasions in the course of negotiations. Relevant clarifications and interpretation guidelines would also mutually interact with the draft that has been presented, limiting the bureaucratic administrative effort involved and streamlining application of the Regulation on the part of the European Commission.

The Federal Government has the following specific comments on the drafts presented:

I. The Implementing Regulation and cross-cutting issues

1. General comments

In principle, the Implementing Regulation should attempt to keep the bureaucratic administrative effort to a minimum. The current drafts, particularly of the notification forms, do not yet meet this requirement. It may be assumed that they will present both the undertakings concerned and the Commission with a bureaucratic workload that they will hardly be able to handle. We therefore call on the Commission to examine in principle how to reduce the bureaucratic workload. For example, it should be possible to use data that undertakings already have in particular formats, either on account of their existing statutory obligations or internal processes, e.g. IFRS reports (IAS 20) or country-specific tax reports.

2. Article 4 – Waivers

The Federal Government welcomes the fact that the Implementing Regulation provides an opportunity for waivers. However, the procedure does not yet appear to be sufficiently contoured.

On the one hand, the relationship between Article 4(4) and Article 5(5) of the Implementing Regulation to Sections C-E of the introduction to the concentrations notification form and to Sections D-F of the introduction to the public procurement notification form is unclear. It is also conspicuous that the Implementing Regulation only mentions cases where information is “not necessary for the examination“. The notification forms also (rightly) provide for waivers in cases where information is “not reasonably available“ to applicants.

On the other hand, to ensure legal security, clearer provisions should be made for cases where the Commission does not consider information to be necessary. Even if

such a list were not conclusive, and the decision on a waiver has to be at the Commission's discretion, a list of possible case studies could provide important information for undertakings.

In addition, further examples of situations where information is not available should be added. The notification obligations under the Regulation on foreign subsidies distorting the internal market apply as of 12 October 2023. It may also be assumed that at the beginning, many of the required data will no longer be available or verifiable. In such cases, the Commission should issue partial waivers, for example, and in substantiated cases, it should allow undertakings to report certain information in an aggregated and descriptive form.

3. Article 5 – Notifications and declarations in public procurement procedures

With regard to the possibility to issue waivers for public procurement procedures provided for in Article 5 of the Implementing Regulation, reference is made to the comments on Article 5(5) of the Implementing Regulation in the section above. In addition, the requirement laid down in Article 5(5) of the Implementing Regulation, that the Commission obtain the agreement of the contracting authority or contracting entity in charge of the public procurement procedure for an exemption, should be changed; exemption should be at the discretion of the Commission. To avoid unnecessary rounds of consultation, the Commission should be put in a position where it can make a decision without the involvement of the contracting authority, especially in standard cases.

4. Article 7: Effective date of notifications and declarations in public procurement procedures

With regard to Article 7(3) of the Implementing Regulation, it is unclear whether the completeness of the notification or declaration depends on the information situation at the time of submission of the notification or declaration or whether subsequent changes in the information situation can lead to an initially complete notification or declaration (with regard to the objective information situation at the time of its submission) later becoming incomplete. In the latter case, we see a risk that when the information situation is volatile, the point of time a notification or declaration takes effect is postponed again and again, thus ultimately postponing the award decision to an

ever-later date. The view taken here is that the completeness of a notification or declaration should be based on the (objective) information situation at the time of its submission.

5. **Article 12 - Submission of information on unduly advantageous tender**

In our view, the content of the provision of Article 12(1) of the Implementing Regulation is unclear. We do not understand why (by reference to Article 8 of the Implementing Regulation) a special procedural provision is made for submitting "justifications and related supporting documents". Under Article 29(1) of the FSR, these documents must be provided in the context of notification in any case and the general procedures and time limits laid down for the overall notification in the Implementing Regulation apply. The reference to Article 8 of the Implementing Regulation also appears incomprehensible insofar as there is (at first) no Commission decision of any kind that could trigger the one-month time limit laid down in Article 8(1) of the Implementing Regulation in the case of a notification under Article 27 ff. of the FSR.

6. **Article 14 – Time limits for the submission of commitments in investigations in the context of public procurement procedures**

As far as possible, the wording of the end of Article 14(2) of the Implementing Regulation should be more specific. The sentence currently allows various interpretations regarding consideration of the requirements of Article 48(2) of the FSR (separate implementation of an advisory procedure/taking the utmost account of the conclusions drawn from the discussion).

7. **Article 21 – Access to the file**

The provision on access to the file (Article 21) is very complex and difficult to understand. The Federal Government therefore suggests that some additional explanations or editorial corrections be made here. In particular, we suggest that clear provisions be made as to what information the "specified counsel" is allowed to transfer to the client; the provision of Article 21(4)(d) of the Implementing Regulation is not sufficient in this respect.

8. Cross-cutting issues

- **Notifiable financial contributions**

In the Federal Government's view, it is not comprehensible why different standards apply to financial contributions in notifications of concentrations and public procurements. Whereas Section 5 of the notification form concerning concentrations requires notification of all the financial contributions that have been granted (cf. 5.1.) and the only differentiation made concerns the elaboration of detail (cf. 5.3.), Section 3 of the public procurement notification form only requires notification of financial contributions that fall into any of the categories in Article 5(1) points (a) to (c) and (e) of the FSR or relate to operating costs.

Conversely, it is not clear why Section 3 of the public procurement notification form, unlike Section 5.1 (i) of the concentrations notification form, does not contain a minimum threshold for declaring financial contributions. Reasons for this unequal treatment are not discernible. In the view of the Federal Government, it is necessary to introduce an (increased) minimum threshold for public procurement as well.

Furthermore, we see the need to exempt certain standard transactions that take place under normal market conditions. Due to the broad definition of "financial contribution", undertakings would otherwise have an obligation to notify normal contracts for the exchange of services (e.g. supplies in the context of public contracts). One possible approach could be the introduction of a general waiver if the financial contribution is made in the context of an ordinary exchange of services.exchange contract and under normal market conditions. In order to ensure that such a potential waiver leads to real relief for the companies concerned and ensures that they do not have to collect and record all data as a precaution, the Commission should spell out in accompanying guidelines the conditions under which conditions such contributions are covered by the waiver.

- **Designation of notification forms**

The Federal Government suggests that the notification forms be more clearly designated and that the subject of each notification form ("concentrations" or "public procurement") be included in its designation.

II. The "concentrations" notification form

1. Section 3.7 – Acquisitions of control

Section 3.7. requires undertakings to list acquisitions of control made during the last three years of undertakings active in the Union. In the view of the Federal Government, this obligation should be limited to acquisitions of control subject to an obligation to submit a notification to the Commission.

2. Section 5.1. – Additional threshold values

The Federal Government welcomes the fact that Section 5.1. (i) of the concentrations notification form provides for an additional threshold value since this considerably reduces the bureaucratic effort for the undertakings concerned. In the view of the Federal Government, this threshold value should be raised to at least EUR 350,000, however.

3. Section 6 – Impact on the internal market

The information obligations are very far-reaching and some of them relate to information about other competitors. Some of them are of relevance to competition and are thus not generally available to undertakings. It is therefore logical for this information to be mentioned as an example in Section C. However, this in itself is not sufficient; in the view of the Federal Government, the extent of the respective information obligations should be limited in principle.

4. Table 1 – Required information

With regard to the required information in the table, options should be given to ease the bureaucratic burden on undertakings. For example, it is currently envisaged that undertakings be required to enter the date of the granting of the contribution. Alternatively, it should also be sufficient, for example, to indicate the date when the contribution was entered into the undertaking’s internal reporting system.

III. On the “public procurement” notification form

1. Section 3 – Foreign financial contributions

It is not clear why Section 3 of the public procurement notification form, unlike Section 5.1 (i) of the concentrations notification form, does not include a minimum threshold for

indicating financial contributions. Reasons for this unequal treatment are not discernible (see Section I.8. above). Thus, the (increased) minimum threshold should also be provided for public procurement procedures.

It is also not understandable why the second paragraph of Section 3.1 of the public procurement notification form is based on the aggregate amount of a single contribution. Should not the basis here be aggregate foreign financial contributions (in plural), as in Article 28(1)(b) of the FSR? Or is this standard to be understood as meaning that only individual contributions of more than EUR 4 million are notifiable?

2. Section 4 – Justification for absence of undue advantage

It appears unclear to what extent it is guaranteed that the contracting authority or - when information is provided by subcontractors or suppliers - the main bidder does not gain knowledge of information that must be provided in accordance with this section (but also of any other sensitive information that must be provided in the context of a notification or declaration). Within the context of the FSR's legal possibilities, it is suggested that an examination be carried out of the extent to which the diversion of sensitive information to the contracting authority, contracting entity or main bidder can be prevented.

3. Section 7 – Declaration

Section 7 provides for a declaration obliging notifying parties to indicate "all foreign financial contributions received". The content is not subject to limitations of any kind and no threshold value is linked with the amount of the contribution. Under certain circumstances, this may result in notifying parties that have no notifiable foreign contributions expending more effort to complete the declaration than notifying parties that do receive notifiable contributions. Whereas notifying parties that have no notifiable contributions fall under the unlimited notification obligation of Section 7, notifying parties that have notifiable contributions are only required to fulfil the notification obligation under Section 3, with limited content (but not limited by a threshold value like concentrations). Such a result cannot be intended and should be corrected as a matter of urgency.

Thus, Article 29(1) of the FSR is also problematic. According to its second sentence, where the conditions for the notification of financial contributions in accordance with its Article 28(1) and (2) are not met, economic operators must always list in a declaration

all foreign financial contributions received and confirm that these are not notifiable under Article 28(1), point (b). Interpreted literally, this provision means that in every public procurement procedure within the meaning of Article 2(3) of the FSR, including public procurements where the value of the contract is below the threshold of Article 28(1)(a) of the FSR, all foreign financial contributions received must be notified in a declaration under Article 29(1) of the FSR. This is because in such procurement procedures, the condition to notify a financial contribution in accordance with Article 28(1) and (2) of the FSR has not be fulfilled (since the value of the contract is less than EUR 250 million), which means that Article 29(1) second sentence of the FSR applies. The consequence is that this fundamentally opposes the FSR's objective to cover only procurement procedures where the value of the contract is more than EUR 250 million. Thus, the Federal Government suggests that it be examined how the Implementing Regulation could clarify that a different interpretation is required.

IV. Editorial comments

1. On the Implementing Regulation/ cross-cutting issues

- Recital 12: In our opinion, this should refer to Article 42(4) of the FSR, not Article 42(2) of the FSR.
- Article 5(3): In our opinion, this should refer to Article 27, not Article 29.
- Article 6(1): Here, the abbreviation "FSR" is used instead of the designation "Regulation (EU) 2022/2560" used everywhere else.
- Article 7(1) first sentence: In our opinion, (as in Section 1 second sentence) the reference should be to Article 29(4) of the FSR, not Article 7(3) of the Implementing Regulation.
- Article 7(2) first sentence: The reference to Directive 2014/24/EU is incomplete here.
- Article 7(4): In our view, this should refer to Article 26, not Article 29 of the FSR.
- Article 12(1): In our view, this should refer to Article 29, not Article 27 of the FSR.
- Article 14(1): In our opinion, this should refer to Article 30(5), not Article 29(5) of the FSR.
- Article 21(4): Do letters (b) and (d) contradict one another concerning the economic party's employees? Under letter (b), legal and economic counsel and

technical experts must be, inter alia, employees of the undertaking; under letter (c), they are not allowed to be employees of the undertaking.

- Article 26(3): The full stop is missing at the end of the sentence.

2. The “concentrations” notification form

- In Section 5, there is an empty page on page 16.
- In Section 6, subsection 6.9 has only the heading “Contact Details”, but no further text.

3. On the “public procurement” notification form

- Paragraph (2) of the introduction: In our opinion, the sentences under (a) and (b) are grammatically incorrect ((a): “…means…refers to…“; (b): “…means…is…“).
- Paragraph (9) of the introduction: Which “Annex” is meant here? If the reference is to Annex 2, should the wording not be “in this form”?
- Paragraph (10) of the introduction: Reference is made here to “heading 6”. Is this intended to mean Section "F" of the introduction? If so, clear reference should be made to Section “F” and not to “heading 6”.
- Section 1 requires the notifying party to be specified in an “executive summary”. According to our interpretation of Section 1, it is sufficient to provide the summary of the information required in Part 1 of Annex 2 of the European Single Procurement Document (ESPD), either by importing the relevant parts of the ESPD (in the case of Section 1(2) and (3)) or by providing the relevant information in this Section (in the case of Section 1(4)). In order to clarify that, in the case of Section 1(4), the obligation to provide an executive summary is fulfilled by providing the information required in Part 1 of Annex 2 to the ESPD and no additional contents are required, we suggest that Section 1(4) be worded as follows: “Where the notifying party(ies) do not submit their information through the ESPD, the obligation to provide an executive summary of the public procurement procedure should be fulfilled by filling in this section with the information required in Part 1 of Annex 2 of the ESPD.”
- In our opinion, Section 3.1 should refer not only to Article 3(2) of the FSR, but to Article 3 of the FSR as a whole.

- In Section 3, the references to paragraphs (25) and (26) of the introduction are not correct.
- In Section 3.4, footnotes 8, 9 and 10 are missing.
- Table 1 has been included twice.