**ICC response to the implementation of the Foreign Subsidies Regulation (FSR)**

## Concerns and challenges

There are significant challenges facing businesses in scope of the procedures for notifying the European Commission (“Commission”) of concentrations and public procurement bids, as laid down in Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (the Foreign Subsidies Regulation, or “FSR”).

The key concerns raised by businesses include:

1. There is insufficient guidance to confirm the proper interpretation of FSR requirements, especially in the context of taxation, creating significant uncertainty and commercial risk for businesses attempting to comply with notification requirements.
2. FSR imposes new demands on businesses’existing reporting operations. This burden is exacerbated by the disproportionately low de minimis threshold for reportable foreign financial contributions, combined with the short timelines for compiling data to meet FSR notification requirements after a public procurement tender is announced.
3. FSR requirements overlap with the existing reporting framework, resulting in duplicative effort and reporting fatigue that is at odds with the Commission’s broader ambition to reduce the administrative burden created by regulations.

The overall impact of FSR on businesses may deter investment and delay strategic decisions, undermining the competitiveness of the single market.

## Proposals

The ICC has collated practical proposals for the Commission to consider for adoption in a new or amended Implementing Regulation and/or FSR guidance, which would be supported by businesses operating in the EU and required to report under the FSR notification framework:

1. **Clarify the interpretation of FSR with respect to taxation**

Tax measures that are part of national tax legislation and therefore generally applicable to all taxpayers should not need to be reported under FSR.

The issue of interpretation faced by businesses can be attributed to including “the foregoing of revenue that is otherwise due” in the definition of a “financial contribution”, in combination with additional guidance in questions and answers (Q&A) prepared by the Commission services that confirm Annex I, Table 1, point B(6)(a) of Implementing Regulation (EU) 2023/1441 provides an exhaustive enumeration of ‘tax benefits’ that have to be reported.

A common sense interpretation would be:

* Deductions made in calculating total taxable profit for corporate income tax purposes, as proscribed in general provisions of national tax legislation that apply to any taxpayer, do not amount to a ‘tax benefit’ and should not be reportable (e.g., loss relief between group companies in the same jurisdiction).
* Items exempted from corporate income tax, as proscribed in national tax legislation that applies to any taxpayer, do not amount to a ‘tax benefit’ and should not be reportable (e.g., a participation exemption for a distribution or capital disposal).
* Timing differences, arising from the application of national tax legislation that applies to any taxpayer, do not amount to a ‘tax benefit’ and should not be reportable (e.g. accelerated depreciation / amortisation).
* There is no ‘tax benefit’ if different rates of corporate income tax, state, cantonal, city or municipal tax apply to a taxpayer, as proscribed in tax legislation that applies to any taxpayer.
* There is no ‘tax benefit’ if different rates of indirect tax apply to a supply of goods or services that falls into a specific category, including zero rates, as proscribed in national tax legislation that applies to any taxpayer.
* Patent box regimes, innovation box regimes, and research and development tax credits or similar regimes, which conform to OECD requirements and apply to any taxpayer that meet the relevant criteria, should not be reportable. The ICC notes that such regimes are also available in EU Member States.

Further guidance from the Commission is required to clarify other practical points of interpretation, including:

* How the grant date of a tax-related financial contribution should be determined, and
* How the value of a tax-related financial contribution should be calculated.
1. **Observe the principle of proportionality for FSR reporting**

The €1 million de minimis for FSR reporting is not proportionate and does not reflect an amount that would be potentially distortive or advantageous in commercial reality, in light of the minimum thresholds for public procurement tenders (€125m / €250m value) and concentrations (€500m turnover) that would trigger a FSR notification requirement.

The de minimis for reporting an individual financial contribution should be increased to the higher of (i) €50m per annum, or (ii) 10% of the total public procurement tender value / 10% of the consideration value for a concentration.

If the thresholds for reporting are not exceeded, neither a notification nor a declaration should be necessary or else the thresholds do not ease the administrative burden imposed by FSR.

The requirement for economic operators which do not exceed the relevant public procurement thresholds to declare all foreign financial contributions received and confirm that the foreign financial contributions received are not notifiable (Article 29) should therefore be removed.

1. **Focus the scope of FSR with respect to taxation**

Any entity in scope of FSR reporting requirements that belongs to a multinational group with an ultimate parent company located in a territory that has adopted the OECD’s Pillar II framework should not have to report any tax-related financial contributions included in Pillar II calculations.

The Pillar II framework should ensure that, globally, the multinational group is subject to a minimum effective tax rate of 15% in each jurisdiction in which they operate.

This effectively erodes the benefit of any tax related financial contributions the multinational group may have received.

Following the same logic, a similar exception for reporting tax-related financial contributions should exist for any financial contributions businesses include in tax calculations required under other minimum tax regimes, e.g., the Global Intangible Low-Taxed Income (GILTI) and Corporate Alternative Minimum Tax (CAMT) regimes in the US. Specifically for the US, every legal entity within a US federal consolidated filing group should qualify for this exemption as long as the group is required to calculate GILTI and/or CAMT as part of its total tax liability.

FSR reporting of tax related financial contributions should also be limited to territories included in the EU list of non-cooperative jurisdictions for tax purposes, on the basis jurisdictions not included in the list have tax systems that align with international tax good governance standards for tax transparency, fair taxation and measures against base erosion and profit shifting.

The EU list is already used in the application of administrative and legislative defensive measures to jurisdictions included in the list, and existing EU legislation explicitly refers to the list (e.g., mandatory automatic exchange of information and reporting requirements for tax schemes involving listed countries).