ECLF
European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM

Draft Implementing Regulation Concerning Foreign Subsidies

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Observations on the European Commission's

Draft Commission Implementing Regulation Concerning Foreign Subsidies

1 Introduction

1.1 The European Competition Law Forum ('ECLF')[1] welcomes the opportunity to comment on the draft Implementing Regulation (**DIR**) for the Foreign Subsidies Regulation (**FSR**). The FSR, which complements the European Union (**EU**) existing State aid regime to protect the Internal Market against potentially distortive foreign subsidies, confers on the European Commission (**Commission**) sweeping new powers and will have significant practical consequences not only for foreign based companies investing in the EU, but also for many EU domiciled companies and businesses.

1.2 While the FSR is targeted at potential distortions arising from foreign subsidies, the notification mechanisms which it foresees for transactions and public tender bids are not triggered by the receipt of foreign subsidies but by "financial contributions", a concept which is cast widely and extends significantly beyond the grant of subsidies.

1.3 Indeed, the concept of financial contributions captures not only a broad range of public measures – irrespective of whether these measures involve actual subsidies – but also various commercial and economic relationships with public bodies and companies (including state owned enterprises and under certain conditions private companies) whose actions are somehow attributable to a third country, even where those relationships are based on market terms or are completely unrelated to a specific transaction or public tender. Accordingly, many benign transactions and public tender bids will inevitably come within the scope of the FSR's compulsory notification regime.

1.4 Against this background, it is important to ensure that the Implementing Regulation is carefully calibrated. While the Commission must be able to ensure the effective application of the FSR, every effort should also be made to minimize the costs and administrative burdens imposed on notifying parties.

1.5 In the interests of legal certainty, it should be clear from the outset what type of information and data must be provided as part of any notification. Moreover, information requests should be targeted. The objective should be to ensure that undertakings are only required to provide information which is necessary to enable the Commission to conduct its substantive assessment. This will also help to streamline the review process and allow the Commission to focus its resources on the key issues. In addition, it should also be an objective of the Implementing Regulation to ensure that sufficient procedural safeguards are in place to protect the rights of notifying parties (and where relevant interested third parties) throughout the course of the Commission proceedings.

1.6 It is respectfully submitted that the DIR, as currently drafted, does not fully achieve these objectives. The ECLF therefore invites the Commission to revise the current text. To this end,

[1] The European Competition Law Forum ('ECLF'), founded in 1994, is a group of leading practitioners in EU competition law, which is drawn from law firms across the EU. Its aim is to engage in an open dialogue on topical competition law issues and to consider proposals for reform. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group or their firms.

we propose several recommendations designed to identify drafting improvements that can be made to the proposed text. In summary, our submissions are set out below.

- *First*, the DIR requires extensive information and documentation to be provided to the Commission which goes far beyond what is reasonably necessary for the effective implementation of the FSR. Significant efforts will be required to compile and keep the requested information regularly updated (which in some case will not even be available to the parties) and there is a real danger that the notification process could become unmanageable. This is consistent with the feedback we have received from companies when discussing the DIR and the draft notification form. The Commission would risk being submerged by potentially voluminous information concerning financial contributions which are unrelated to the transaction (or public tender bid) and cannot reasonably be expected to amount to subsidies, let alone subsidies liable to produce distortive effects in the Internal Market. This would place an excessive administrative burden on notifying parties and the Commission. Accordingly, the ECLF recommends that a far more targeted approach is adopted which is specifically tailored to the potential harm which the FSR seeks to prevent. This means that the information provided as part of a notification should be focused on financial contributions which (i) amount (or are likely to amount) to subsidies, and (ii) have the potential to distort the Internal Market. We make some specific proposals for how such streamlining could be achieved which are set out in **Recommendations 1 to 6**.

- *Second*, the investigation tools and procedural safeguards foreseen in the DIR should be strengthened. Too many unjustified limitations are placed on the right of access to the Commission's file. These should be reconsidered to ensure that notifying parties – and where relevant interested third parties – can properly understand, verify, and if necessary, comment upon the observations or accuracy of information submitted to the Commission. Notifying parties should also have the right to request an oral hearing where the Commission is proposing to adopt a decision adverse to their interests. Furthermore, we would recommend that the Implementing Regulation foresees a role for the Hearing Officer with the power to adjudicate on procedural disputes which may arise during an investigation (*e.g.*, in relation to access to file or confidentiality issues). These matters are addressed under our **Recommendations 10 to 12**.

- *Third,* the DIR could usefully be expanded to address in more detail the question of remedies and some of the specific procedural issues which are likely to arise in this context. It would be useful, for example, to distinguish in the Implementing Regulation between different types of remedies (whether offered by way of commitments or imposed by the Commission) and to explain the circumstances in which those remedies are most likely to be relevant. The ECLF recommends that a distinction should be drawn between remedies which are designed to prevent an alleged distortion from arising and remedies which seek to correct and eliminate the negative effects of a distortion which has already materialized. These clarifications would create additional legal certainty and render the process and its potential outcomes more transparent and predictable – see **Recommendation 13**.

2 International law compliance, especially regarding Free Trade Agreements

2.1 Article 44(9) FSR provides that the FSR tools shall not be applied where this would be contrary to the EU's obligations under international law. This provision states explicitly that no action shall be taken under the FSR "*which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures and granted by a third country which is a member of the World Trade Organization*". However, Article 44(9) FSR is relevant to many additional international treaties. The ECLR recommends that this principle is reflected in the Implementing Regulation.

2.2 There are many comprehensive Free Trade Agreements (**FTAs**) between the EU and third countries which cover not only traditional trade issues (free movement, etc.) but also contain provisions on State aid and/or address subsidies. Broadly speaking, these categories can be identified:

2.2.1 The EEA Agreement (*sui generis* type), which contains State aid rules that are fully aligned with EU law.

2.2.2 The EU-UK Trade and Cooperation Agreement (*sui generis* type) with extensive provisions on "subsidies" which are, at least in terms of substance, largely similar to EU State aid law.

2.2.3 Association Agreements with explicit prohibitions of State aid (similar to EU law) and a control mechanism exercised by an independent authority. This is typical of most Stabilization and Association Agreements (*e.g.*, Turkey, Ukraine, Albania, Serbia, Bosnia and Herzegovina, Kosovo, Moldova).

2.2.4 FTAs which contain explicit prohibitions of State aid (similar to EU law), but which do not have an enforcement system (Macedonia, Switzerland, Russia, Egypt, Israel, Morocco, Tunisia).

2.2.5 FTAs which do not contain an explicit ban on State aid but with a state aid monitoring mechanism (Armenia, Georgia, Canada, Japan, Mexico, Singapore, Vietnam).

2.2.6 FTAs without an explicit ban on State aid and (to a large degree) without any State aid monitoring (*e.g.*, Algeria, Chile, Lebanon).

Recommendation 1: Establish "white" and "grey" lists for FTAs and clarify the scope of Article 44 (9) regarding the ASCM

2.3 The ECLF recommends that the Commission clarifies in the Implementing Regulation that the FSR does not apply to financial contributions granted by third countries with which the EU has concluded a comprehensive FTA containing substantive provisions on State aid. These financial contributions should belong to a "whitelist" of financial contributions which are generally excluded from the scope of application (and/or at a minimum from any reporting requirements). FTAs referenced at points 2.2.1[2] to 2.2.3. above, and possibly also 2.2.4., would fall within this category.

2.4 The ECLF would also recommend to the Commission to combine the "whitelist" of FTAs with a "grey list" identifying FTAs that can benefit from a more flexible mechanism adapted to the specific provisions in those FTAs. Agreements referenced at points 2.2.5. and 2.2.6. above would fall within this category.

2.5 This approach would streamline the notification process. It would allow the Commission to use its limited resources on the more problematic subsidies and encourage third countries to enter into FTAs with the EU, which contain strict rules on subsidy control.

2.6 In addition, ECLF also recommends that the Commission clarifies the scope of the exclusion of any specific action against subsidies covered by the Agreement on Subsidies and Countervailing Measures. Such exclusion (which would apply both to the Commission's *ex officio* investigations and the mandatory notification procedures) should logically cover subsidies (i) granted by countries that are members of the WTO and (ii) that relate to manufactured goods.

[2] There is no compelling reason to investigate subsidies from EEA States (2.2.1.) under the FSR.

3 Reporting requirements should be decoupled from the notion of "financial contributions" to avoid imposing disproportionate burdens on companies

3.1 As noted above, the FSR's notification obligations are structured around the concept of "*financial contribution*" which pursuant to Article 3(1) FSR is one of the constituent elements of the definition of a "*foreign subsidy*". However, the FSR does not contain a definition of the concept of a "financial contribution" but instead provides a non-exhaustive list of examples in Article 3(2). These examples include all different types of transfers of funds and transactions – even the provision or purchase of goods or services – regardless of whether they are carried out on market terms.

3.2 Although the notions of a "foreign subsidy" under Article 3(1) FSR and "State aid" under Article 107 TFEU are similar, the legal implications are vastly different. In the State aid framework, only measures qualifying as State aid under Article 107(1) TFEU must be notified[3] to the Commission pursuant to Article 108 TFEU. By contrast, under the DIR, EU-based and foreign companies are required to

- keep track of, and share with the Commission, information concerning all financial contributions received by any member of their corporate groups (exceeding the low quantitative thresholds provided in the DIR's Annexes);
- determine whether certain financial contributions qualify as foreign subsidies, *i.e.*, whether those contributions are (i) selective; (ii) attributable to a third country; and (iii) confer a benefit to their recipients;
- determine whether such foreign subsidies would fall within "categories of subsidies most likely to distort the Internal Market" listed in Article 5 of the FSR; and
- establish internal systems and compliance mechanisms to perform such an analysis globally on continuous basis

3.3 The ECLF respectfully submits that, given the broad notion of a "financial contribution", the information requirements imposed by Annexes 1 and 2 of the DIR are not consistent with the goal of "*limiting administrative burden*" set out in Article 47(1)(a) FSR, nor with the Treaties' provisions on State aid. For undertakings (especially SMEs that participate in a public procurement procedure), the administrative burdens would clearly be excessive.

3.4 There is also significant risk that the Commission will be compromised in its handling of materials if it is overloaded with information. As the Commission is aware from its own decision-making practice, State aid review procedures can last many years, even when it is only the State aid nature of a given measure that is being contested – as the recent fiscal aid cases demonstrate. In some cases, legal proceedings can take many years. Under the DIR, the Commission would need to address a much larger number of measures in connection with fast-moving public procurement tenders and transactions, and it is highly questionable whether these can be handled quickly and effectively. Such an outcome could have a chilling effect on M&A activity and hamper public procurement processes taking place in the EU, and ultimately harm the EU's economy.

3.5 Importantly, the reporting requirements currently envisaged under the DIR would capture many financial contributions that do not amount to foreign subsidies or are not distortive. The voluminous amount of information that the Commission would need to analyse would seriously

[3] Unless excepted pursuant to the General Block Exemption Regulation (Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the Internal Market in application of Articles 107 and 108 of the Treaty.

risk undermining the FSR's core objective: to address foreign subsidies that distort the Internal Market.

Recommendation 2: Limit reporting obligations to foreign subsidies or establish "white" list for financial contributions (Annex 1 and 2 of the DIR)

3.6 In light of the broad concept of financial contributions (which extends beyond the concept of foreign subsidies or State aid), the reporting obligations of companies need to be targeted for the regime to be workable, particularly during the early stages of implementing the FSR (when companies and advisers will not have Commission precedents to rely on). Otherwise, there is a real risk that the FSR will not achieve its objectives of addressing 'foreign subsidies distorting the Internal Market' and will instead simply discourage investment into the EU.

3.7 There are several readily identifiable and generally benign categories of financial contributions which are unlikely to distort the Internal Market. The costs and burdens associated with reporting such financial contributions would be disproportionate. Moreover, not all financial contributions amount to foreign subsidies. By requiring undertakings to collect and report information regarding financial contributions and not foreign subsidies, the DIR goes beyond what is necessary to achieve the objective of the FSR and imposes a disproportionate administrative burden on undertakings.

3.8 Accordingly, the ECLF's primary recommendation is that the reporting obligations under the Implementing Regulation should not focus on financial contributions but should be limited to foreign subsidies received by undertakings active in the EU. This means that notifying parties would self-assess the financial contributions they have received and the Commission would in turn assess whether any contributions that have been reported as subsidies distort the Internal Market.

3.9 As an alternative, albeit second-best option in case the Commission does not limit the reporting obligations to foreign subsidies, it is recommended to exclude certain categories of financial contributions from the reporting obligations.

- *First,* Article 19 of the FSR specifies that the Commission's assessment of a foreign subsidy in a concentration shall be *"limited to the concentration concerned"*. Section 5.2. of Annex 1 of the DIR requires undertakings to explain, in the accompanying Table 1, whether the reportable financial contributions have a "*possible link with the concentration*". The DIR thus covers a broader set of financial contributions than what is required under the FSR, including, for example, financial contributions that have been received by a target undertaking pre-transaction. However, such financial contributions will generally not be linked to a notified transaction and will therefore not involve subsidies capable of distorting the Internal Market.

- *Second,* the notion of a financial contribution potentially covers many tax measures which are not capable of distorting competition. It is therefore important that the Commission narrows down the list of reportable "tax" financial contributions to those that amount to subsidies (in line with EU case law on State aid). For instance, the notion of financial contribution could encompass tax exemptions justified by objective, non-selective criteria which are often automatically and generally available from government bodies or public authorities, including for example:

    - Property transfer relief, by which Governments and/or public authorities provide tax exemptions to private companies seeking to transfer property in the context of internal group restructurings (where a "transfer tax" or "stamp duty" would otherwise apply). The Court of Justice of the European Union (**CJEU**) has already established that such

exemptions do not amount to "aid" under EU State aid law given the nature and generality of such schemes (*e.g.*, in Germany).

- Offsetting losses, by which companies are permitted to offset tax losses from prior years under the rules of most tax systems, as a matter of ordinary course, provided certain conditions are met.

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- *Third,* many financial contributions do not amount to subsidies, because they do not confer a benefit or are not specific. This includes the supply or purchase of goods or services on market/arm's length terms. Yet, the DIR appear to envisage that parties will be required to track and (when a notification is triggered) report (i) the supply of any goods or services by the transaction parties to any entities (private or public) attributable to third country governments, and (ii) the purchases of any goods or services by the transaction parties from any entities (private or public) attributable to third country governments. In contrast with special or exclusive rights under the FSR, such supplies or purchases appear to be reportable irrespective of whether the remuneration is "adequate". This means that parties would have to track and report supply and purchasing agreements concluded in the free market on an arms-length basis and using market-standard terms. The ECLF submits that such financial contributions cannot distort competition in the Internal Market. In addition, even if goods or services are supplied or purchased without adequate remuneration, the supply of certain classes of goods and services supplied to public bodies is unlikely to be the source of material concern. This includes, for example:

  - The supply of enterprise software products to public sector bodies under subscription. This is a current "hot spot" for investment, with software businesses having very large numbers of customers including public bodies. However, these deals are unlikely to be of real interest from an FSR perspective. By contrast, a number of these types of transactions which involve cybersecurity, do get reviewed under Member State foreign investment rules;

  - The supply of products to public healthcare systems in price-regulated markets. This has also been a "hot spot" for investment in recent years and review by the Commission of the terms of supply to national healthcare systems would simply duplicate an effort already being made by national regulators performing this function.

- *Fourth*, most financial contributions arising in the context of certain investment structures are not capable of distorting competition in the Internal Market. This includes limited partner investments in companies managed by private equity (**PE**) firms. Most PE funds are legally structured as limited partnerships and are comprised of: (i) general partners (**GPs**) – which generally actively control the fund's investment decisions and capital deployments, and (ii) limited partners (**LPs**) – which, passively invest in/provide capital to a fund upstream for investment/deployment downstream by the GP. The notion of financial contributions under the DIR could capture an unmeasurable number of passive investments made by a very large number of LP investors globally, including national or regional pensions funds and schemes, public universities, and small or larger sovereign wealth funds. The Commission has historically acknowledged that the disclosure of information relating to LPs in EU merger control filings (including, for example, their level of investment in certain funds, and their identities) is not required because such information is not relevant to the assessment of a transaction's effect on competition in the Internal Market. The same approach should be adopted in the context of the FSR.

- Such investments by LPs are normally completely passive: the LP agrees to "commit" certain capital to a fund, which is then called upon and/or invested in third-party companies at the direction of the GP only. In other words, the LP is not in a position to exercise direct control (or indeed, aware) of where their capital is being invested (including the specific amount, country, or target company/companies).

- LPs tend to make investments across a range of different funds controlled by separate GPs, as well as different funds controlled by the same GP (*e.g.*, Fund "1" and "2" of PE firm X), to spread risk and broaden exposure to a range of sectors/asset classes. It is not in an LP's financial interests to invest in one specific fund focused on one sector in a particular third country (let alone any particular target company/companies), nor do investment funds tend to have such narrow investment strategies.

- *Finally,* PE sponsors often acquire new businesses independently from any portfolio company (in "sponsor-led transactions"). This is distinct from the situation where a PE-owned portfolio company leads a transaction and completes an "add-on deal" to integrate another business within that portfolio company. In the latter scenario, financial contributions received by the portfolio company which will integrate the target business post-merger may be relevant to the assessment under the FSR. The situation is different for sponsor-led transactions, where there is no intention to integrate the target with a portfolio company post-merger. PE houses can own a very large number of diverse businesses, with no relation to each other and their strategy is to run each portfolio company independently over an investment period of 3-5 years. Whilst merger control treats all portfolio companies under the control of the same GP entity affiliated to the PE house as part of the same group, a requirement of disclosure over the same very broad group of diverse companies that are operated independently on a day-to-day basis does not serve the purpose of the required disclosures under the FSR. The opposite conclusion would require the disclosure of information on financial contributions in unrelated markets and in unrelated parts of the world on any transaction.

3.10 If these aforementioned categories are not explicitly carved out from the notion of financial contributions, the ECLF recommends that they should be exempted from the notification and declaration requirements in Annex 1 and 2 – *i.e.*, such reporting exemptions (which should be regularly reviewed and updated) should apply at least to:

- financial contributions that are not linked to the transaction, other than financial contributions identified in Article 5(1) of the FSR;

- financial contributions in the form of standard tax exemptions or general tax measures and all general government programs under which a company has received contributions from a State or State-owned enterprises;

- financial contributions that do not amount to subsidies because they do not confer a benefit or are not specific, in particular the supply or purchase of goods or services on market/arm's length terms;

- Limited partner investments in companies managed by PE firms; and

- financial contributions received by PE sponsors or their portfolio companies that are entirely distinct from and unrelated to the transaction subject to notification (including in particular financial contributions received by unrelated portfolio companies and funds that are not investing in the notified transaction).

3.11 Screening these categories of financial contributions would not contribute to the FSR's stated objective and would absorb significant Commission resources. It would also impose a very significant burden on companies which would be forced to track and subsequently report all such contributions. This would negatively impact multinational conglomerates and PE firms (which potentially receive many different financial contributions across all their controlled entities) as well as SMEs which operate internationally but lack the resources to establish extensive reporting mechanisms. The ECLF expects that sellers will require representations from buyers regarding the overall level of financial contributions received (to assess whether the thresholds are met) as well as reporting-readiness (to ensure that the deal will not be held up for an uncertain and potentially lengthy period of time). There is a genuine risk that many potential buyers (including PE firms in particular) will be excluded as potential transaction counterparties if the notification requirements are not streamlined.

Recommendation 3: Clarify and/or redefine the de minimis threshold (Annex 1, Section 5.1)

3.12 Section 5.1 of Annex 1 to the DIR requires the provision of a detailed list of all the financial contributions granted to the undertakings concerned in the past 3 years. Under a *de minimis* exception, information for financial contributions is excluded if (i) the individual amount is below EUR 200,000; and (ii) the total amount of contributions *per third country* and *per year* is below EUR 4 million.

3.13 A *de minimis* exemption is a good idea in theory and can be useful in certain cases (*i.e.*, for undertakings that meet the EUR 50 million filing threshold set by the FSR on a standalone basis) but will not in practice, as currently drafted, meaningfully reduce the administrative burden imposed on companies.

- *First*, the *de minimis* thresholds are set too low to be effective. For the first limb of the Section 5.1. of Annex 1 test, the Commission has been inspired by the *de minimis* threshold applicable under the EU State aid rules, whereby aid not exceeding EUR 200,000 over any period of three fiscal years is not subject to notification.[4] However, the very low monetary threshold will, in the ECLF's view, not filter out many financial contributions that are irrelevant to the Commission's assessment, especially where one considers the very broad notion of financial contributions under Article 3(2) FSR.

- *Second*, the practical assessment of financial contributions under the thresholds is fraught with significant legal uncertainty for companies doing business in the EU. Whilst the concept may appear clear, ascertaining the amount of a financial contribution (and therefore whether the disclosure thresholds are met) will be challenging in practice for many types of financial contributions (*e.g.*, tax exemptions, the granting of special or exclusive rights without adequate remuneration, and the provision or purchase of goods or services). In particular:

    - it is unclear whether companies are required under Section 5.1.(ii) of Annex 1 to collect information on *all* financial contributions (*i.e.*, including those that are not equal to or in excess of EUR 200,000), as the current draft could be read to suggest that all financial contributions ought to be factored in for the purpose of assessing the EUR 4 million "*per third country*" and "*per year*" threshold.

    - it is unclear how companies ought to allocate single, but recurring, financial contributions across different years or to what extent recurring financial contributions

[4] See Article 3 (2) first subparagraph of Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

should be considered on an individual or aggregate basis for the purposes of assessing the thresholds.[5]

- *Third*, undertakings are not exempted from the duty to collect information regarding financial contributions and to keep an updated register to (a) ascertain whether the notification thresholds are met; and if so (b) calculate whether the disclosure thresholds are met. This creates disproportionate reporting requirements far exceeding the objective of the FSR. In practice, multinational companies in particular must be very thorough and diligent in their record keeping since they will rarely be able to rely in practice on the exemption, when one considers that the aggregated financial contributions received by controlled legal entities within their corporate group (or, in the case of PE firms, across all of their controlled funds, as well as all of their controlled portfolio companies and their respective corporate groups).

3.14 Against this background, and consistent with our primary recommendation above, the ECLF recommends that the Commission should specify in the Implementing Regulation that Section 5 of Annex 1 requires undertakings to identify only foreign subsidies that exceed the *de minimis* threshold. The questions of whether a financial contribution qualifies as a subsidy should be an assessment that is left to the recipient, as is the case with Member States in the State aid framework. In the case of those foreign subsidies only, notifying parties would need to:

- take a position on the **potential application** of the legal presumptions in Article 5(1)(a)–(d) of the FSR; and

- explain whether any of those financial contributions are **linked** to the notified transaction.

3.15 In any event, it would remain open to the Commission to request further information from the notifying parties and/or from other interested parties, if needed.

3.16 In the alternative, the ECLF recommends that the Commission:

- increases the current EUR 200,000 threshold (or at a minimum make that threshold subject to review after a certain period);

- clarifies how to calculate the amount of the financial contribution, especially for exemptions, the granting of special or exclusive rights, and the provision or purchase of goods or services;

- clarifies the concept of "*individual amount*" and "*total amount*" in relation to the disclosure thresholds as well as the relationship between the two thresholds. In this respect, it should be made clear in Section 5.1. of Annex 1 that an individual financial contribution is reportable *only* if both limbs of the test are exceeded. Likewise, it should be made clear that only financial contributions in excess of EUR 200,000 (or the increased amounts, as recommended above) should be considered in calculating whether the EUR 4 million threshold has been met; and

- clarifies how companies should allocate single, but recurring, financial contributions.

[5] For instance, if services are provided to a foreign state entity on a regular basis (*e.g.*, government cleaning services) such that individual payments for such services are below the EUR 200,000 threshold but exceed that threshold in the aggregate over a 12-month period, would these be reportable under Section 5.1(i) of Annex 1 and/or would they have to be taken into account for the Section 5.1(ii) calculations?

Recommendation 4: Clarify notifiable financial contributions and define scope of declarations (Annex 2, Sections 3.1 and 7)

3.17 Similar considerations as those discussed above also apply to the notification form for public procurement, Annex 2 to the DIR.

3.19 Article 29(1) of the FSR establishes, in addition, the system of "notification" or "declaration" in the context of public procurement. In principle, the distinction between these two approaches is welcomed, insofar as it is designed to limit reporting requirements. However, the wording of Article 5(2) of the DIR and Section 7 of Annex 2 to the DIR is ambiguous and could be interpreted as always requiring that, at the very least, a declaration is provided to the contracting authority or contracting entity which includes a list of *all* foreign financial contributions received. In the view of the ECLF, the inclusion of such an obligation would significantly – and disproportionately – increase the information burden for participants in public tenders.

3.20 In addition, Section 3.1 of Annex 2 to the DIR provides that "*a foreign financial contribution granted to any notifying Party … must be included in this list if its* [emphasis added] *aggregate amount equals or exceeds EUR 4 million per third country in the three years prior to notification*".

3.21 Accordingly, the ECLF recommends that the Commission clarifies:

- that Article 5(2) of the DIR and Section 7 of Annex 2 to the DIR requires undertakings to make a **declaration** only where the threshold in Article 28(1)(a) of the FSR is satisfied, but where the threshold in Article 28(1)(b) is *not* satisfied. Under Article 28 of the FSR, a **notification** is required where *both* thresholds are satisfied; and

- whether Section 3.1 of Annex 2 to the DIR refers to the notification threshold in Article 28(1)(b) of the FSR or to a different threshold.

4 The DIR's notification forms impose onerous compliance burdens

4.1 The list of information requirements contained in the DIR Annexes is extensive and imposes an onerous compliance burden on companies. In particular, the Annexes request information which:

- is unnecessary insofar as it relates to financial contributions which do not or are unlikely to constitute foreign subsidies, let alone subsidies which have the potential to distort the Internal Market;

- goes beyond what is necessary for the assessment of the notified transaction or tender participation; and

- the notifying parties will not – and must not (for antitrust reasons) have available to them.

4.2 Article 4(4) of the DIR provides that the Commission may, upon request,[6] dispense with the obligation to provide particular information, including certain documents, where the Commission considers that compliance with those obligations or requirements is *not necessary for its examination of the case.*[7] It is also possible for notifying parties, in exceptional circumstances, to request a waiver for the submission of certain information which is *not reasonably available.*[8]

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6 See Recital 7 of the Introduction to Annex 1 and Recital 5 of the Introduction to Annex 2.

7 See Section D of Annex 1 and Section E of Annex 2.

8 See Section C of Annex 1 and Section D of Annex 2.

4.3 The ECLF welcomes the possibility to request waivers and assumes that it is the Commission's intention to use the waiver mechanism to exempt parties from reporting financial contributions that cannot, by their nature, distort competition in the Internal Market (even if they technically speaking exceed the *de minimis* thresholds).

4.4 However, this mechanism alone does not go far enough and does not provide sufficient comfort to undertakings which are preparing for a screening to take place under the FSR (especially in the limited time available until 12 October 2023). In the view of the ECLF, the conditions for the grant of a waiver are too restrictive. Indeed, the proposed test for the grant of a waiver is the provision of "*adequate reasons why the relevant information is not reasonably available or not necessary for the examination of the case*" and/or the provision of "*best estimates for the missing data*". The only concrete example cited by the Commission as justifying the grant of a waiver concerns target-related information which is not available in the case of a contested bid.[9]

4.5 It is submitted that there should be greater flexibility to obtain waivers, particularly if contrary to the recommendations we make in Section 3 above, financial contributions which do not amount to subsidies are not excluded from reporting.

4.6 In addition, the ECLF makes the following five specific recommendations.

Recommendation 5: Remove the reporting requirement for past transactions (Annex 1, Section 3.7)

4.7 Section 3.7 of Annex 1 requires the notifying party to submit a list of acquisitions of control over undertakings active in the EU that have been made during the last 3 years (irrespective of whether they had to be notified under merger control or foreign direct investment rules). Such a requirement is not included in the FSR and goes beyond what is necessary and reasonable. It is acknowledged that such information could, in principle, be requested under the *ex officio* investigatory powers contained in the FSR but should not form part of the notification of a concentration process.

4.8 The ECLF therefore recommends that the Commission deletes Section 3.7 of Annex 1.

Recommendation 6: Clarify and streamline information requirements about financial contributions referenced in Article 5(1) of the FSR (Annex 1, Section 5.3-8)

4.9 Sections 5.3 to 5.8 of Annex 1 require that the notifying party submits additional supporting evidence with respect to the following financial contributions:

- to an **ailing undertaking**;
- in the form of an **unlimited guarantee**,
- in the form of an **export financing measure** that is not in line with the OECD Arrangement on officially supported export credits; or
- directly facilitating a concentration.

4.10 The ECLF recommends that the Commission:

- clarifies how to assess whether a financial contribution falls within one of the categories referred to in Article 5(1) of the FSR;

[9] See Section C of Annex 1.

- clarifies the concept of an "ailing undertaking", as defined in Article 5 (1) (a) FSR, in a manner consistent with State aid principles.[10] This would apply at the level of the single economic unit, *i.e.*, companies should not be required to determine whether each legal entity within a group is in financial difficulties; and

- streamlining the detailed list of sub-questions (form, granting entity, rationale, accompanying conditions) in Section 5.3 to Section 5.8 of Annex 1, in a way that reflects the type of specified information that is unlikely to be needed for the assessment.

Recommendation 7: Require only publicly available information on a structured bidding process (Annex 1, Section 6)

4.11 Section 6.1 of Annex 1 requires the provision of information on concentrations which took place as a result of a structured bidding process (description of other candidates, description of formal steps of the bidding process such as letter of intent, non-binding offers, and binding offers).

4.12 The requirement in Section 6.1.3 to indicate how many other candidates expressed an interest in the target company, concerns information which notifying parties will typically not possess and are generally not supposed to know. Details of the identity and conduct of rival bidders who expressed an interest in the target, or who may have competed with the notifying party(ies) during the bidding process, are generally only available to the seller(s), who design(s), implement(s) and manage(s) the bidding procedure. Bidding processes are commercial negotiations where the parties involved do not know each other's hands. To require the seller(s), post-signing, to effectively show its/their hand could weaken the seller(s) bargaining position in potential future processes and a seller may not be willing to provide this information to the successful bidder.

4.13 Moreover, and importantly, such information is generally highly confidential and commercially sensitive since it could give the notifying party(ies) a potential insight into the strategy of its competitors. Sellers may choose the bidder who does not have to make an FSR notification in order to avoid information disclosure. Moreover, such information may also have to be submitted to the Commission without the consent of the third parties involved.

4.14 Accordingly, the ECLF recommends to the Commission to confirm in the Implementing Regulation that information to be provided in response to Section 3.1 of Annex 1 is limited to publicly available information. If any further information – beyond what is publicly available – is required by the Commission, that information should be requested directly from the seller(s) under the investigative powers provided in the FSR (*e.g.*, Article 13 FSR).

Recommendation 8: Request only due diligence reports not covered by legal professional privilege (Annex 1, Section 6.2)

4.15 All requests for documents inevitably place a burden on the notifying party(ies) and therefore must be appropriately scoped. Against this background, it is respectfully submitted that the request under Section 6.2. of Annex 1 which refers to a considerable number of documents, including all "*due diligence report(s) and equivalent documents*", is disproportionate. This request goes beyond what is necessary to ensure the effective implementation of the FSR, particularly because such reports and documents are likely to relate to target-specific risks and will not concern any financial contributions or foreign subsidies that the notifying party(ies) may have received.

[10] Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01), para. 22.

4.16 The ECLF notes in particular that Section 6.2.2. of Annex 1 requires the notifying party to provide copies of certain "*documents prepared by external parties assessing the transaction from a […] legal […] point of view*". It should be noted that such materials will not be (fully or partially) available for submission where the documents in question are protected by legal professional privilege. The importance of legal privilege was most recently confirmed by the CJEU (sitting as a Grand Chamber) in *Orde van Vlaamse Balies.*[11] The judgment emphasises the importance of protecting legal professional privilege and confirms that such privilege does not only apply in the context of an investigation but applies to all legal advice regardless of the purpose, timing, or subject matter of that advice. Should legal due diligence reports be requested by the Commission, the notifying party(ies) can only be required to provide a privilege log to enable the Commission to confirm that the communications are protected by legal privilege.

4.17 Accordingly, the ECLF recommends to the Commission to:

- remove the requirement to provide all "*due diligence report(s) and equivalent documents*" as part of a notification; or in the alternative to limit the scope of the due diligence reports to those "*prepared by or for or received by any member(s) of the board of management, the board of directors, or the supervisory board […] or the shareholders' meeting*", consistent with the requirement in Section 5.4 of the Form CO; and
- remove the requirement to provide as part of a notification documents "*documents prepared by external parties assessing the transaction from a […] legal […] point of view*".

Recommendation 9: Specify the supporting documentation to be provided with notification (Annex 1, Sections 8.1 and 8.2; Annex 2, Sections 6.1 and 6.2 of Annex 2).

4.18 Section 8 of Annex 1 and Section 6 of Annex 2 require the provision of documents, including *inter alia* (a) the supporting documents mentioned under Section 5.2, and (b) analyses, reports, studies, surveys, presentations, and any comparable documents either from the grantor or from the undertaking receiving the foreign financial contribution discussing its purpose and economic rationale. This list of documents requested is, with respect, excessively wide.

4.19 In this regard, the concept of "supporting documents" is not clearly defined, *e.g.*, it is not explained what these supporting documents should contain in terms of information or, put differently, what information should be accompanied by supporting documents. In particular, the submission of all documents under point (b) might concern a wide array of confidential internal documents. In many situations, the notifying party may not be in a position to provide such documents if they are covered by non-disclosure agreements with the grantor of a financial contribution, or if the documents are from the grantor and the notifying party has not received a copy (which will probably be the case in most instances).

4.20 Another burden associated with these documentary requests lies in the fact that Recital 18 of Annex 1 requests that the notifying parties provide translations of documents that are not in one of the EU's official languages. The production of translations is a costly and time-consuming exercise, particularly if numerous documents and languages are involved.

4.21 The ECLF recommends to the Commission to:

- limit these information requirements to financial contributions which amount to subsidies falling within the scope of Article 5(1), points (a) to (d) of the FSR.

[11] Judgment of 8 December 2022, Case C-694/20, *Orde van Vlaamse Balies and Others*, ECLI:EU:C:2022:963.

- specify that the documents to be submitted should concern the purpose and economic rationale for financial contributions that are relevant to the Commission's assessment of the related notifiable concentration; and

- specify that that documents to be submitted should constitute only these documents of the notifying party(ies).

5 Unavoidable time constraints limit the potential for FSR pre-notifications in public tender bids

5.1 Sections E of Annex 1 and F of Annex 2 encourage the notifying parties to engage in pre-notification discussions on the basis of a draft Notification Form. While one could argue that this procedural step – provided it adheres to the Commission's established Best Practices – does not have a (major) impact on the overall timing when submitting a notification for a concentration, the considerations are completely different in the context of public procurement procedures.

5.2 Tenders in a procurement scenario typically have hard submission deadlines. Bid windows (at pre-selection or at tender stage) are only open for a few weeks (on average, four weeks). It is thus highly likely that pre-notification discussions cannot be accommodated within this timeframe. In drafting these provisions, the Commission may have not fully considered the different types of constraints that may arise and has mechanically transposed merger control-related principles. For examples, bidders that are obliged to submit a notification might find themselves in a *de facto* disadvantageous position, as they will be unable to satisfy the suspensory mandatory requirements which the process dictates.

5.3 The ECLF therefore recommends to the Commission to reflect upon the timing constraints present and to factor them into the timelines in order to accommodate the procurement process rhythm. Along these lines, the Commission should limit the amount of information which bidders must collect and provide within such a tight timeframe and should commit to starting the review clock as soon as possible without any (or only following a very short round of) prenotification discussions.

6 Potential to standardize the use of investigation tools under the FSR

6.1 Chapter III of the DIR contains provisions concerning the Commission's investigation powers. These are similar to those available in EU merger control and antitrust investigations, including the power to conduct interviews and carry out inspections. Interestingly, the Commission will have the power to conduct dawn raids outside the EU. The Commission's powers to carry out preliminary reviews and in-depth investigations are subject to a ten-year limitation period, starting on the day on which a foreign subsidy is granted. However, the limitation period is interrupted by the opening of a preliminary review, the forwarding of an information request, or the carrying out of an inspection.

6.2 These powers could benefit from further standardization of the tools that are foreseen to be used. In that respect, inspiration from the procedure used under trade law instruments could be of appropriate help.

Recommendation 10: Standardize use of the investigative tools

6.3 The ECLF recommends to the Commission to:

- generate standard questionnaires to send to the various parties involved in the procedure. The relevant parties/recipients of such questionnaires would include the beneficiaries of the financial contributions, as well as the complainants or other interested parties; and

- include in the investigation procedure steps which allow an exchange of views of the various parties involved and the opportunity for them to comment within prescribed deadlines (again, investigations under trade-related instruments could prove to be especially helpful).

7 Only limited "access to file" foreseen under the DIR

7.1 Chapter VII of the DIR contains provisions concerning access to file during Commission investigations made under the FSR. To safeguard investigated undertakings' rights of defence and the rights of interested third parties, these provisions should be enhanced in several ways.

7.2 It is respectfully submitted, for example, that Article 21(2) of the DIR, which excludes access to all internal documents from the Commission, authorities of Member States and third countries is too restrictive.

7.3 It should be recalled that Article 15(3) TFEU confers on any citizen of the EU, and any legal or natural person a right of access to documents from the European Parliament, Council and Commission, subject to the principles and conditions which may exclude confidential information. Along these lines the provisions which aim at supporting transparency within the EU have further developed these principles.

7.4 Also borrowing from the trade law context, interested parties and even representatives of exporting countries concerned may inspect all non-confidential information made available to the Commission by any party to an investigation, at least to the extent that it is relevant to the defence of their interests and insofar as it is used by the Commission in the investigation.[12]

7.5 However, the ECLF is conscious that, in the State Aid context, the access of interested parties to documents held by the European institutions (including the Commission) is granted but subject to considerable limitations. Article 4(2) of Regulation 1049/2001[13] provides that the access shall be refused where it might undermine the investigations or the proceedings, unless there is an overriding public interest in mandating disclosure. The CJEU has also thus far interpreted the term "public interest" narrowly.[14]

7.6 Article 21(2) of the DIR is potentially very broad in scope and excludes from access to file all correspondence between the Commission and Member States or third countries. In particular, while Article 42(4) FSR only excludes Commission documents and correspondence with Member states from access to file, Article 21(2) also purports to exclude correspondence with third countries. This (i) is potentially a significant additional restriction of the investigated undertaking's due process rights, if one considers that such correspondence might have a bearing on the Commission's assessment of the subsidies at stake; and (ii) is in any event inconsistent with the FSR.

7.7 Moreover, while restrictions in relation to access to documents exchanged between the Commission and Member States may have a very clear justification in the context of Article 101 and 102 TFEU proceedings (*e.g.*, Advisory Committee, exchanges within ECN), that rationale

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12 Article 6(7) of Regulation (EU) 2016/1036 of the European Parliament and of the Council on protection against dumped imports from countries not members of the European Union.

13 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

14 Case T-134/17, *Hércules Club de Fútbol SAD* v *Commission*, paras. 52 ff.

cannot be transposed to the FSR in which documents exchanged between the Commission and Member States or third countries might contain key information relevant to the parties' rights of defence.

7.8 In addition, it remains unclear whether Article 21(2) DIR constitutes an exception to Article 21(3). In other words, is correspondence between the Commission and Member States or third countries excluded from the access to the file obligation, even if the Commission has relied on those materials as grounds for its decision.

7.9 Article 21(4) of the DIR sets out special safeguards which are intended to ensure the confidential treatment of information to which access is granted. The ECLF considers that the proposed limitation in section (c) concerning legal and economic counsel is without justification, especially if one takes into consideration that professionals such as legal advisors are already bound by confidentiality obligations with their clients and under their operative Bar Rules, and thus do not require such traditional restrictions.

7.10 The procedure envisaged in Article 21(6) and (7) DIR seems too complex and potentially non-operational. If access to confidential information is provided exceptionally under Article 21(4) DIR, access to a non-confidential version can still be requested under Article 21(6) DIR. The Commission is obliged to review the request and to ask the information provider for a non-confidential version, and even adopt a decision setting out the terms of disclosure under Article 21(7) in the case of disagreement with the information provider. Such a multi-tier procedure seems likely to have a significant impact on timing and the right of defence of the undertaking under investigation. It may be very challenging to potentially align such a complex procedure with the timing and pressure exerted over the undertaking as a result of the investigation.

Recommendation 11: Enhance access to file

7.11 Accordingly, the ECLF recommends to the Commission to:

- include correspondence between the Commission and Member States or third countries as documents accessible during the access to the file process;
- clarify that correspondence between the Commission and Member States or third countries in all situations constitute accessible documents when the Commission proposes to rely on those materials as evidence which supports its proposed decision, and
- remove the restriction in Article 21(4)(c) of the DIR, at least with respect to external counsel.

8 Only limited hearing of undertakings' views foreseen under the DIR

8.1 Article 8 of the DIR foresees that the undertakings submit their views to the Commission in the form of written submissions following the opening of an in-depth investigation. Article 18 of the DIR foresees the same scenario following their receipt of the grounds upon which the Commission intends to adopt its decision. These are appropriate forms in which affected parties can express their views but, it is respectfully submitted that they are not sufficient to enable the Commission to consider all relevant aspects of a case nor to safeguard an investigated firm's fundamental rights of defence. The procedures under the EU Merger Regulation constitute an appropriate regime that can be adopted in this regard.

Recommendation 12: Enhance the right to be heard

8.2 The ECLF recommends to the Commission to give notifying parties the right to:

- request an oral hearing where needed to corroborate or further develop their arguments outlined in the written submissions; and

- involve the Hearing Officer to safeguard the effective exercise of their procedural rights by analogy with the prevailing merger control procedure.

8.3 The ECLF also recommends that the Commission (either in the Implementing Regulation or in separate 'best practice' guidelines) foresees the possibility of "State- of-Play" meetings (similar to "State-of-Play" meetings in merger control proceedings) to provide companies with a more informal setting to engage in open and frank discussions with the Commission and give them an extra opportunity to clarify information or to express views on the status of the case after the investigation has commenced.

9 The DIR is silent on the adequacy of key remedies and other corrective measures

9.1 The FSR gives the Commission the power to prevent or to remedy distortions to the Internal Market that have been triggered provoked by foreign subsidies by imposing redressive measures or by rendering commitments proposed by the undertakings under investigation to be made binding on them.

9.2 Article 7 of the FSR specifies that commitments and redressive measures include structural and non-structural remedies, aside from the repayment of the foreign subsidy. However, both the FSR and the DIR fail to distinguish between:

- remedies to prevent the envisaged distortion ("preventive remedies"); and

- remedies to restore the situation to what it was before ("restorative remedies") the alleged distortion had occurred.

9.3 The first category of remedies is most fitting in relation to investigations triggered by notifications (Articles 20 and 28 FSR), whereas the second could be particularly effective in *ex officio* investigations and cases of violation of notification obligations. Additionally, certain types of measures (*e.g.*, divestitures) could more effectively address distortions caused by concentrations than would be the case under public procurement procedures.

9.4 Moreover, under Article 7(3) FSR, the Commission can only accept or impose commitments or corrective measures that fully and effectively remedy the identified distortion. When accepting such commitments, the Commission must make them binding on the undertaking under investigation in a Commitment Decision adopted in accordance with Article 11(3) FSR. Article 15 DIR refers to the procedure described in Articles 26 and 27 DIR which deal with the transmission and signature of documents in general, without going into greater depth in relation to the specificities stemming from the application of corrective measures.

9.5 As per Article 7 (6) FSR, it is possible to remedy a distortion by ordering the repayment of the foreign subsidy, including an appropriate interest rate. The Commission shall accept such repayment as a commitment only where it can determine that the repayment is *transparent, verifiable, and effective*, while considering the risk of circumvention.

9.6 Finally, it is noted that although Articles 7(5) and 8 FSR entitle the Commission to impose reporting and transparency obligations "*regarding the implementation of the commitments and redressive measures*" over a given period, Article 17 DIR appears to exceed that mandate since Article 17(1)(a) DIR introduces reporting obligations relating to future financial contributions, whereas Article 17(1)(b) DIR introduces reporting obligations relating to future concentrations and public procurement procedures.

Recommendation 13: Elaborate on suitable corrective measures and specify the procedure to follow (Article 15 DIR)

9.7 The ECLF recommends that the Commission:

- identifies, at least in terms of preference, the circumstances in which a particular corrective measure should apply, with the objective of increasing legal certainty for undertakings and of making those measures adopted more effective;

- specifies further the applicable procedural rules to be followed to ensure the effectiveness of commitments and redressive measures adopted;

- specifies the role of third countries in the implementation phase of any corrective measures, especially as concerns the repayment of the foreign subsidy;

- establishes a pre-defined process for repayment of a foreign subsidy as a remedy to the identified distortion, for instance by depositing the amount of the subsidy received (together with the interest due) in a blocked bank account; and

- narrows the reporting obligations stemming from Article 17 (1) (b) DIR relating to future events, by introducing for instance a triggering threshold.

10 The FSR's inherent uncertainties calls for moderate enforcement

10.1 The FSR introduces novel proceedings into the EU's legal framework. The ECLF welcomes the taken approach to draw inspiration from, among others, the existing merger control, State aid and public procurement rulebooks. Unfortunately, the inspiration that has been drawn from these three existing legal regimes has been patchy and not always consistent with 'best practice' under one of the other regimes. Moreover, there are several areas where the formulation of the rules require improvement in the interest of legal certainty and to limit the requested data to the necessary minimum. The ECLF understands the aims behind the FSR regime, but the aim of protecting the Internal Market must not produce a chilling effect which *de facto* ringfences the Union from external investments.

10.2 It is paramount to keep in mind that when applying the FSR, existing court and administrative practice are not fully applicable (even in cases where the same or similar terms are used in other EU acts). Moreover, the FSR uses novel terms, and its information-gathering remit is more ambitious compared to other EU legislation. As a result, the FSR regime will undoubtedly cause understandable uncertainty amongst undertakings and their external advisers. This situation is compounded by the fact that that guidelines on specific elements of the FSR do not need to be introduced before 12 January 2026 (FSR Article 46(1)).

10.3 At least the following issues could become relevant when preparing a notification or declaration:

- As not all obligations are clear and unambiguous, certain difficulties in interpretation will be inevitable. In particular, uncertainties might arise because the proceedings under the FSR will involve information collected from non-EEA jurisdictions whose legal traditions and terminologies can be very different to those applicable in the EU.

- Not all data would be readily available under the proposed procedures, as it is not collected or at least not collected in the relevant format (*e.g.*, some of the relevant data might be recorded using different management accounting protocols than would typically be used within the EU). This can (and in practice tends to) lead to mistakes in the provision of data.

- The provision of data might involve the need to obtain approvals at different levels of the governance chain, which might be complex and can take time.

10.4 The sanctions foreseen under the FSR for cases where an undertaking supplies incorrect or misleading information, are substantial (*e.g.,* Articles 17(1), 26(1)(2) FSR). Fines can amount up to 1% of the previous year turnover and up to 5% of the daily turnover of the non-compliant undertaking. In addition, the Commission has broad powers to consider the filings made in those contexts as not being complete (Article 6(1) DIR), with the consequence that the FSR's deadlines do not start to run, which would in turn mean that a transaction would remain in a stand-still mode for potentially protracted periods of time. This could have serious ramifications for the entities involved and could *de facto* block a concentration – and similar considerations apply to the award of a public procurement contract.

Recommendation 14: Enforce the new regime with moderation

10.5 The ECLF recommends that the Commission, at least during the FSR's initial implementation period:

- ensures that sanctions for any possible failures to provide complete information are not imposed where the potential failure is due to the novel nature of the regime or as yet unsettled legal interpretations;

- imposes fines for failure to provide information, or for providing incomplete/ misleading information, only where an undertaking has deliberately attempted to mislead the Commission; and

- allows the notifying parties to focus on information that is necessary for the Commission to fulfil its mandate under the FSR and provide missing "nice-to-have" information upon request at a later stage of the procedure, without negative ramifications.

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