6 March, 2023

APDC Reply to the public consultation of the European Commission on the implementation of the Foreign Subsidies Regulation, 6 March, 2023

1. In the context of the public consultation launched on 6 February 2023 by the European Commission (the "Commission"), the *Association des Avocats pratiquant le droit de la concurrence* (Association of Lawyers Practicing Competition Law, hereinafter, the "APDC") welcomes the opportunity to comment on the Commission's draft implementing regulation ("IR") and its annexes aimed at providing procedural rules for the implementation of the EU's foreign subsidies regulation (Regulation 2022/2560, the "FSR"), which shall apply from 12 July 2023 and will require new merger and procurement notifications to the Commission from 12 October 2023.

2. The APDC notes that the FSR, which aims to regulate and take action outside the field of trade defense against subsidies granted by foreign authorities that may have an impact on the single market, is the first legislation of its kind in the world and is based on a unique mix of legal concepts stemming from State aid law, antitrust law and (international and EU) trade law. As a result, the scope and interpretation of these concepts (in particular the concept of financial contribution), which also play a key role in the draft IR, are not clearly defined today.

3. The APDC fully understands the Union's objective to level the playing field between companies that can only receive subsidies from EU Member States subject to the conditions laid out under EU State aid law and companies that may currently receive subsidies from non-EU Member States (and use such subsidies to distort competition in the single market) without any form of control. However, in light of the current uncertainty on the interpretation of the FSR, the APDC suggests that the contemplated IR should pursue the following objectives:

    - Efficient enforcement: the Commission should prioritize its enforcement (and the information it seeks to obtain) on the most distortive subsidies rather than casting an excessively wide net of information it seeks to obtain from companies;

    - Limitation of the administrative burden on companies: the Commission should avoid placing an excessively heavy burden on notifying parties (which will be both EU and non-EU based) in mandatory notification procedures and bear in mind that an excessively heavy procedure would only harm legitimate M&A and procurement processes in the EU, and ultimately the EU economy;

    - Legal certainty: the Commission should, to the extent possible, rely on clearly defined concepts in the context of its implementation of the FSR, and when necessary, provide the required clarifications of FSR concepts in the draft IR; and

    - Due process: the Commission should comply in its investigations and information requests with the commonly-accepted rules of due process, including with respect to legal privilege.

4. Based on these objectives, the APDC has identified a number of concerns or possibilities for clarification in the draft IR and its annexes that it will outline in this paper. In particular, the APDC submits that the information to be provided in the mandatory filing procedures (particularly on mergers) is excessively heavy or even impossible to gather for a number of companies (EU and non-EU based) and will not help the Commission focus on the truly distortive subsidies it intends to investigate. In particular, the requirement to provide a full list of financial contributions received is neither required under the FSR (which only lays down thresholds that must be exceeded to trigger notification obligations) nor practical (or even feasible) for a number of companies with presence in dozens of countries in the world and who may receive these financial contributions on a regular basis, without such contributions ever constituting a subsidy in the sense of the FSR.

5. The APDC also notes that the Commission does not appear to have provided yet for a simplified form for mergers (similar to the simplified form available under the EUMR) when the parties have received clearly unproblematic financial contributions. In order to correct this lacuna and organize upon entry into force a simplified procedure as envisaged in Article 47 of the FSR, the APDC includes in its contribution a proposal aimed at defining the criteria and the contents of a possible simplified form.

6. Finally, the APDC notes that regardless of the options chosen by the Commission the early implementation of the IR (in particular regarding the mandatory notification procedures) will likely raise numerous difficulties and errors that cannot be anticipated at this stage. Put simply, companies (whether in the EU or outside the EU) are likely not ready to implement this entirely new legislation. The APDC therefore suggests that the Commission apply a "grace period" of one year before considering any sanction against notifying parties providing incorrect information (unless such information was truly provided in bad faith).

7. In the following document, the APDC will therefore provide detailed comments on the draft IR and each of the Annexes (**1.**) and a proposal aimed at setting out a possible simplified procedure for concentrations covered by the FSR (**2.**).

1. COMMENTS ON THE DRAFT IR AND ITS ANNEXES

8. The APDC will first present comments on the draft IR (**1.1**), followed by comments on Annex 1 (**1.2**) and Annex 2 (**1.3**).

1.1. Comments on the draft IR

- **Necessary involvement of the hearing officer**

9. In the context of the notifications and the exercise of Commission's powers of investigation, the draft IR should expressly allow the parties to have access to DG COMP's Hearing Officer. Such intervention would be in line with the scope of the functions and terms of reference of the Hearing Officer whose task is to safeguard the effective exercise of procedural rights. It would also mirror the possibility for parties to have access to a trade officer in current anti-subsidy trade defence proceedings.

10. More broadly, the involvement of the Hearing Officer in the enforcement of the IR will bring legal certainty in the context of an entirely new regulation. In this respect, it should be noted that the role of the hearing officer in competition and trade defense proceedings has proven to be a very useful one, both from the perspective of the parties and of the Commission itself.

➢ **Remedies – Articles 13 to 17 of the draft IR**

11. As regards the commitments and redressive measures described in Articles 13 to 17, the APDC would like to highlight a few points:

- **Articles 13 and 14 relating to the time limits for the submission of commitments under notified concentration or in investigations in the context of public procurement procedures**:

  - The APDC understands that the Commission has adopted the usual deadlines of the commitment procedure already in force for merger control in Phase 2 proceedings. However, the APDC wonders whether it is justified to provide different deadlines between commitments submitted in relation to a concentration and in the context of public procurement procedures.

  - The APDC observes that the Commission does not envisage the possibility of submitting commitments within 20 working days as of receipt of the notification, before the opening of an in-depth investigation. The APDC would welcome the submission of commitments as early as during the merger control Phase I.

  - Articles 13(3) and 14 (2) of the draft IR provide that the Commission may allow commitments that are submitted after the deadlines in *"exceptional circumstances"*. The APDC would welcome examples of what such "*exceptional circumstances*" might be.

- **Article 15(4) relating to the signature of commitments**: commitments submitted in the context of both procedures must be signed by the notifying parties, as well as by "*any other persons involved on whom the commitments impose obligations*". However, it is unclear what would be the consequences of such signature for this "*other person*" being a third party to the proceeding, different from the notifying parties. Moreover, the notion of "any *other persons involved*" is defined only "*for the purpose of notifications of concentration*" under Article 2(2).

- **Article 16 relating to the appointment of independent trustees**:

  - The APDC understands that in a decision imposing redressive measures, the Commission may require the appointment of <u>several</u> independent trustees. The APDC would like to draw the Commission's attention on the very significant costs this may incur for undertakings of a single independent trustee.

  - The APDC would welcome clarification regarding the different methods for the appointment of trustees. The APDC notes that the Commission may now (i) directly appoint a trustee at the outset without requesting a list of proposals from the undertakings (which would be surprising considering current practice in merger control) and, more traditionally, (ii) appoint the trustee when the notifying party and the Commission cannot agree on the trustee.

- **Article 17 relating to the transparency and reporting obligations**: the APDC notes that Article 17 quotes Articles 7(5) and 8 of FSR, which expressly refer to the appropriateness, proportionality and necessity criteria. However, some of the information that could be requested under Article 17 seems neither appropriate, nor proportionate, nor necessary. More specifically, while Articles 7(5) and 8 FSR expressly provide for the possibility to request information on the implementation of commitments and the parties' participation in concentrations or public procurement procedures, they do not mention a possible reporting obligation on future financial contributions, which is now introduced in Article 17 (1) (a) of the draft IR. This new obligation is particularly broad and extensive, as it covers all such contributions (an already broad concept) for a "specified" period of time, without any limit as to what this period could be. This appears disproportionate and unfeasible, especially

given the questions raised by the definition of the notion of financial contribution (see below in our comments on the Annexes). The "*specified period of time*" during which transparency and reporting obligations would be applicable should be clearly justified and proportionate. The APDC would welcome a time limit for these obligations, defined at 17(1)(a), as well as a limit to the kind of financial contributions that should be reported (for instance by limiting these to specific contributions or to contributions amounting to subsidies under the FSR).

- Article 17(4) relating to the verification by the Commission of the proper implementation of commitments: this provision should recall that when a trustee has been appointed, the Commission can first and foremost exchange with the trustee, who controls the undertaking's compliance with commitments.

➢ **Access to file – Article 21 of the FSR**

12. The APDC has several comments with respect to access to file and use of documents described in Article 21:

- **Article 21(2) relating to non-accessible documents** : the draft IR adds to the categories of confidential information to which the right of access to the file shall not extend (which are defined in Article 42(4) FSR) a new category, namely documents of the third country concerned. The APDC has doubts about the compatibility of this exclusion with the FSR and general due process principles, especially in a context where such documents (assuming they were obtained by the Commission from the third country in question or other sources) could have a significant impact on the Commission's assessment. In any event, the APDC would welcome the express confirmation that the undertaking under investigation can submit a reasoned request to the Commission if it considers that, after having obtained access to the list of all documents in the Commission's file (pursuant to Article 21(3)), it requires knowledge of specific information for its defence that is not accessible pursuant to Article 21(2).

  This would be consistent with the provisions of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (Article 16 and Article 47). Moreover, the ADPC considers that this would be all the more necessary as internal documents of the authorities of Member States, or third countries could potentially be very relevant in the context of foreign subsidies.

- **Article 21(3) relating to accessible documents**: the APDC understands that the documents accessible to both the undertaking under investigation and its advisors, without terms of disclosure, will include (i) the non-confidential version of all documents mentioned in the grounds on which the Commission intends to adopt a decision and (ii) a list of all documents in the Commission's file. The APDC would like to emphasize that the list referred to in point (ii) must be sufficiently detailed to enable parties to identify documents that may be necessary for their defence. Consequently Article 21(3) should refer to a "*detailed list*".

- **Article 21(4) relating to accessible documents without redactions for confidentiality**: Article 21(4)(c) considers that the persons listed as counsel or experts (having access to confidential documents) may not be in a relationship of employment with or as part of the management of the undertaking under investigation, (i) for the duration of the investigation and (ii) for the three years after the end of the Commission's investigation. While the APDC understands the first restriction, it considers however that the second restriction should be deleted. Such a restriction (which to the APDC's knowledge is unprecedented in applicable EU legislation) would indeed be disproportionate and unjustified, having regard in particular to the fact that (a) the persons involved will already be

subject to strict confidentiality obligations and (b) legal advisers in particular will be bound by professional secrecy as part of their legal and ethical obligations. The APDC also notes that this same restriction is envisaged in the draft implementing regulation of the Digital Services Act (with ongoing public consultation now) and should also be amended accordingly.

- **Article 21(5) relating to the possibility for the Commission to decide not to disclose certain documents under the terms of disclosure set out in article 21(4)**: given the very significant curtailment of the due process rights that such a possibility would entail, the APDC would welcome clarification, including examples, of what is intended by "*exceptional circumstances"*, and confirmation in any event that such a notion will be interpreted very narrowly. In any event, the APDC fails to see how such an exception should apply to disclosure to external legal counsel within the confidentiality ring, under the terms of Article 21(4).

- **Article 21(6) relating to the reasoned request to the Commission to grant access to a non-confidential version of some documents to the undertaking and to receive additional access under the terms of disclosure to some confidential documents**: the deadline of "*one week*" is very short and should be extended in view of the possible very large size of the Commission's file.

  Article 21(7) relating to the response given by the Commission to the reasoned request pursuant to Article 21(6): the APDC would welcome an indication of the timeframe within which it is intended that the Commission would respond to any such request. It could be specified that the Commission gives an answer as soon as possible within [5] days.

- **Article 21(8) relating to the possibility for the Commission to not grant access to confidential documents pursuant to Article 21(4)**: the APDC considers that access to documents pursuant to Article 21(4) should not be excluded since it is essential to the rights of defence. Further, we are not sure what the Commission means in this paragraph when mentioning a possible "*combination*" of two methods of granting access to file ("- *or in combination with* -"), and how this would differ from what is already provided for pursuant to Article 21(3) (non-confidential documents) and Article 21(4) (confidential documents).

➢ **Articulation of the FSR with other procedures**

13. The FSR raises some questions as regards its articulation (i) with other international procedures and (ii) with other procedures of the Commission, which are not answered by the draft IR.

- **Articulation of the FSR with other international procedures**

  Article 44(9)[1] of the FSR relates to the specific case where the FSR may not be applicable when an investigation or a decision would be contrary to the Union's obligations emanating from any relevant international agreement. In this respect and considering the draft IR:

  - The APDC observes that Article 44(9) is an important limitation to the scope of the FSR. Under this provision, the Commission cannot undertake any "*specific action*", against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and granted by a third country that is a member of the World Trade Organization ("WTO"). Under the WTO Appellate Body's case law, the notion of "specific action" is particularly

[1] According to article 49(3), the FSR "*shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements. An investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into. In particular, no action shall be taken under this Regulation 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.*"

broad. The Commission should clarify in the IR what are the consequences of this notion for the information is may require, both in the context of ex officio investigations and in the context of mandatory notifications. Indeed, requiring information that the Commission will not be able to use in any event in light of Article 44(9) FSR would not be a proper use of the Commission and the investigated parties' limited resources.

- The SCM Agreement applies to subsidies to manufactured goods. The APDC would also welcome clarification as to whether this implies that the FSR cannot be used against such subsidies, and that such subsidies (and the corresponding financial contributions) should be out of scope of the draft IR entirely. In such case, the APDC understands that the reporting obligations in the Annexes of the IR should only cover financial contributions / subsidies in the services sector or that are directly related to a specific concentration (and could therefore arguably constitute subsidies to investments rather than to the export of goods).

- Third, the EU is bound by a number of agreements that provide for disciplines on subsidies and a specific dispute settlement format for any litigation on such subsidies (e.g. with the UK, with Accession countries, or other trading partners). The IR and Annexes should specify to which extent these countries should also be covered by the FSR so as to reduce the level of information on financial contributions/subsidies from such countries to the minimum.

- **Articulation of the FSR with other procedures of the Commission**

  - **Commitments under notified concentration** - the APDC wonders what will be in practice the articulation between the commitments submitted under merger control regime pursuant to Regulation 139/2004 and the commitments under Article 25(3) of the FSR, potentially in relation to the same concentration, and would welcome clarifications on this point.

  - **Use of information by the Commission** (Article 19) - Article 43(1) FSR provides that "*Information acquired under this Regulation shall be used only for the purposes for which it was acquired, unless the provider of the information agrees otherwise*". Article 19 of the draft IR sets out a procedure for waivers relating to the use of the information acquired under this Regulation. Article 19 should recall that such waivers should remain exceptional, with the rule being that laid out under Article 43(1). In particular, the Commission should refrain from asking waivers regarding information acquired in the context of merger control/ procurement proceedings, as this would allow the Commission to easily circumvent the basic rule of protection of confidential information laid out in Article 43.

14. Finally, and apart from very formal points[2], the APDC would like to stress the necessary very strict exception that should be envisaged for the disclosure by the Commission of confidential information:

- Article 20 provides for several rules aimed at the protection of confidential information provided to the Commission.
- However, Article 20 (6) provides for a broad and vague exemption to such protection, which could allow the Commission to publish or disclose confidential information related to the existence of a distortive foreign subsidy without any safeguard.
- While the APDC understands that Commission decisions must be properly reasoned and such requirements may conflict with the protection of confidential information, this should not allow the Commission to freely dispose of confidential information under its protection. The APDC suggests transposing the principles of the State Aid Procedural Regulation (Article 9) in this respect[3].

[2] With regard to formal points, the APDC takes the liberty of noting that a few references would need to be updated or modified, notably: (i) the reference to Article 29(5) in Article 14(1) seems incorrect and should be replaced by a reference to Article 30(5); and (ii) in Article 15(1), the reference to Article 29 should replace the reference to Article 27 as the latter does not exist.

[3] Article 9 of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union provides that "*the Commission shall not use confidential information provided by respondents, which cannot be aggregated or otherwise be anonymised, in any decision taken in accordance with paragraphs 2 to 5 of this Article, unless it*

1.2. Comments on Annex 1

15. The comments below deal with Annex 1 and the information to be included in a notification or declaration to the Commission of a foreign financial contribution in concentration covered by the FSR.

➢ **Foreign financial contributions – Section 5**

16. Section 5 of Annex 1, which lists the information about financial contributions that shall be communicated in the notification form of a concentration, raises a number of issues that the APDC intends to highlight here:

- **The use of the concept of "*financial contribution*"**:

  - Section 5 requires notifying parties to provide substantial information on each financial contribution received by the parties. The APDC notes the Commission's willingness to limit the detailed information to be provided for all foreign financial contributions that have been granted, by setting thresholds for such foreign contributions to be listed by undertakings (see section 5.1) or by referring to certain categories of foreign subsidies (see section 5.3).

    However, the APDC considers both the amount and the degree of accuracy of the requested information to remain very difficult to achieve and excessively burdensome (or even unfeasible) for undertakings, particularly those with presence in numerous countries.

    Such information related to financial contribution is more complex to provide than the one related to turnover in merger control since it has to be monitored by undertakings on a constant basis and updated for each concentration, as the 3-year "look-back" period for which information must be provided starts from the triggering event of the notification. This is objectively a heavier burden than in EUMR merger control filings, where the parties' turnover (or market shares) are generally based on calendar years and can therefore be calculated once and used in all subsequent filings during the same year.

    The information required also appears disproportionate compared to the objective pursued, since it will cover financial contributions that do not constitute (i) subsidies, or (ii) distortive subsidies, or (iii) subsidies against which the Commission can take action under Article 44 of the FSR. This, combined with the lack of clear definitions (see below section 5.2), is all the more problematic that the FSR provides for significant sanctions for the parties that fail to provide complete or up-to-date information.

  - In order to make this notification form practicable for companies involved in large M&A or public procurement processes in the EU, the APDC therefore suggests the following modifications:

    (i) Article 19 FSR provides that "*when assessing whether a foreign subsidy in a concentration distorts the internal market within the meaning of Article 4 or 5, that assessment shall be limited to the concentration concerned*". Consequently, Section 5 should at least be limited to the financial contributions as currently listed in Table 1 of the draft form that have a link with the concentration (see below regarding the notion of "link")

has obtained their agreement to disclose that information to the Member State concerned. The Commission may take a reasoned decision, which shall be notified to the undertaking or association of undertakings concerned, finding that information provided by a respondent and marked as confidential is not protected, and setting a date after which the information will be disclosed. That period shall not be less than 1 month".

and that fall (instead of "*may fall*")[4] into any of the categories of Article 5(1), points (a) to (d) of the FSR.

(ii) At the very least, financial contributions that cannot reasonably be considered as directly or indirectly related to the concentration (self-assessment by undertakings) should be excluded from the scope of Section 5.

(iii) Consistently with the exclusion of the *de minimis* financial contributions, financial contributions obtained under normal market conditions should be excluded from the scope of the detailed list of foreign financial contributions to be provided in Table 1. This exclusion could be inserted in Section 5.1, just below the exclusion of *de minimis* foreign financial contributions, with a reference to recital (13) of the FSR which provides useful examples of what normal market conditions are. This would in particular cover sales or purchases to or from governments and government-controlled entities that are made at a market price or pursuant to a tender or similar competitive procedure (which are otherwise likely to account for hundreds, if not thousands, of lines in Table 1 as currently contemplated with very limited benefits for the Commission).

(iv) The Commission should also clarify which "*financial contributions*" should be listed in Section 5 as far as tax measures are concerned. In particular, individual tax rulings should only qualify if they relate to the categories mentioned under Articles 5(1) points (a) to (d) FSR.

- In addition, the APDC considers it necessary to have a clarification on the thresholds referred to in Section 5.1. A foreign financial contribution needs to be included in this list if: (i) the individual amount of the contribution is equal to or in excess of EUR 200,000; and the total amount of contributions per third country and per year is equal to or in excess of EUR 4 million. In this respect, the scope as the limitation on the reporting obligation at Section 5.1(ii) resembles, but does not match, Article 4(2) FSR – which states that foreign subsidies are unlikely to be distortive in circumstances where the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over any consecutive period of three years.

- **Section 5.2**: undertakings are requested to indicate, as regards each of the foreign contributions listed in Table 1, "*whether they have or they have not a possible link with the concentration*". The APDC would welcome clarification of what a "*possible link with the concentration*" might be[5].

  Furthermore, requesting the notifying parties to mention the "*possible link*" and to "*explain the connection*" with the concentration raises issues of self-incrimination and shifting of the burden of proof. Since guidelines defining this concept will be published too late and prenotification is also too late for undertakings to get clarity, the Commission should consider adding footnotes and/or clarifying the scope of all key definitions directly in Section 5. The APDC understands in this respect that this concept may be separate from that of a contribution facilitating the concentration, which is dealt with separately in Section 5.8. For instance, the APDC submits that the following financial

[4] This wording would be consistent with the wording of Annex 2.

[5] A welcome clarification could for example specify that financial contributions that have "no direct functional link" with the concentration should be presumed to bear no link with the concentration and that therefore beneficiaries of such financial contributions should be considered eligible to the simplified procedure. On what could constitute a "link with the concentration", the Commission could take inspiration from the *EY Denmark* case before the European Court of Justice (ECJ) in which the question arose as to whether an operation preparatory to a concentration could be considered as bearing a sufficient link with the concentration so as to characterize a "gun jumping" situation if implemented before the merger clearance. In this case, the ECJ ruled that only operations that have a "*direct functional link*" with the concentration should be considered as being a part of the concentration itself. (see ECJ Judgment of 31 May 2018 in Case C 633/16, *Ernst & Young P/S Konkurrenceradet*, § 49.

contributions should be considered as not having a possible link with the concentration : (i) financial contributions relating to relevant markets where there is no overlap or no vertical link between the parties (as it is difficult to envisage how these could have any effect on the concentration); and (ii) financial contributions received by the target before the concentration was implemented (as such contributions would not be specific to the concentration).

- **Section 5.3**:

  - This section includes a number of detailed questions on some of the financial contributions listed in section 5.1. In order to simplify the process and avoid unnecessary and burdensome work, the APDC suggests asking questions listed in Sections 5.3.6, 5.3.7 and 5.4. first (as they determine whether the financial contribution constitutes a subsidy) and exempting the notifying parties from answering the other questions if the financial contribution does not constitute a subsidy.

  - The APDC also notes the possibility for notifying parties to request waivers to submit certain information in the course of prenotification contacts (see recitals (8) to (10) of Annex 1). In this respect, clear guidance and concrete examples would be highly appreciated and should already be inserted in the IR, without waiting for the guidelines to be published in the coming months / years and/or the prenotification discussions to take place, since it would be too late for undertakings to get clarity. For instance, the APDC anticipates difficulties for companies to demonstrate whether the financial contribution has been obtained under normal market conditions, due to the lack of information and transparency in some foreign countries.

  - In order to provide some predictability to undertakings and assist case handlers in ensuring consistent enforcement, Annex 1 to the IR should provide a list of typical cases in which a waiver should (absent exceptional circumstances and without prejudice to the Commission's ability to withdraw the waiver later) be granted, and clearly define what are "*exceptional circumstances*", what is "*reasonable*", what is "*not necessary*".

- **Section 5.4**: as mentioned above, the APDC recommends deleting or amending section 5.4. Indeed, financial contributions provided exclusively for the purpose of non-economic activities do not constitute foreign subsidies (see recital (16) of Regulation (EU) 2022/2560). As such, they should be excluded from the scope of the detailed list of foreign financial contributions. Alternatively, it could be asked whether the parties receive public contributions for their non-economic activities with the predefined answers: [yes - no - n/a].

- **Section 5.5**: the APDC would highly appreciate further clarification of what a "*restructuring plan include[ing] a significant own contribution*" might be. For example, adding a footnote and referring to the Commission's State aid practice and rules in this respect could be considered. The Commission should also clarify the scope of the concept of "undertaking" for the purpose of determining Article 5(1)(a) of the FSR and clearly indicate that this concept should be applied at the level of a single economic unit rather than at the level of each entity of a group.

- **Section 5.8**: undertakings are requested to indicate if any of the foreign financial contributions listed in Table 1 is "*directly facilitating the concentration*". The APDC would welcome clarification of how a financial contribution would / could facilitate a concentration. As previously mentioned, since guidelines defining this concept will be published too late and prenotification is also too late for companies to get clarity, the Commission should consider adding footnotes and/or clarifying the scope of all key definitions directly in the questions.

- **<u>Impact on the internal market of the foreign financial contributions in the concentration – Section 6</u>**

17. With respect to Section 6 of Annex 1, the APDC would like to highlight a few points:

- As a preliminary matter, the ADPC notes that Section 6 raises particularly detailed questions on the bidding process. In this context, the APDC underlines that the acquirer is generally not the most adequate person to answer questions on other candidates and is not even supposed to have this kind of information (such as the profile of the other bidding candidates, number of letters of intent and non-binding offers, etc.). The seller may also not be willing to share such information with the acquirer. The notifying party should therefore not be required to provide such information. In any case, failure to communicate these elements should not affect the completeness of the file nor give rise to sanctions.

- **Section 6.1**: the wording "*structured bidding process*" is unclear. A more precise definition should be provided given that most selling processes are competitive by nature irrespective of whether they gave rise to a formal bidding process and that some processes may take place in several stages over a long period of time (e.g. reopening of bilateral discussions after the initial failure of an open formal bidding process).

- **Section 6.2 requires the notifying parties to provide detailed information on the due diligence carried out during the assessment of the transaction**:

  - The very broad wording adopted seems to impose the communication of any document prepared in the context or for the needs of the transaction. A request for a sample or key documents would seem more realistic. In any event, in order not to unnecessarily increase the administrative burden weighing on undertakings and to limit the work of the Commission to the documents relevant for its analysis, it would seem reasonable to restrict the scope of the documents requested.

    At the very least, the Commission could consider clarifying that this Section cannot be interpreted as covering any general / earlier / not transaction-specific market study carried out ahead of entering the bidding process (or similar work not specifically carried out in the context of the transaction/process at hand).

  - The APDC also fears that this very broad wording, which targets legal assessment carried out by third parties, may infringe legal professional privilege. The Commission should at least consider deleting any reference to documents assessing the transaction from a legal point of view or provide for a specific exception for documents covered by legal privilege.

  - Finally, Section 6.2. seems to be somewhat duplicative with Section 8. The Commission could consider requesting that all supporting documentation be listed in Section 8 (one stop-shop for all documents to be provided).

- **Section 6.3**: providing contact details of "*all other undertakings who expressed an interest in the acquisition or the merger*" may prove very difficult or unfeasible since the notifying party may not have such information (see our preliminary comment above). In any case, the Commission could consider placing this requirement under section 6.1 for consistency.

- **Section 6.6**: the APDC considers that it is up to the Commission to assess the possible impact of a subsidy on competition. The current requirement to explain whether the foreign contribution is liable

to improve the parties' competitive position seems to transfer the burden of the proof to the notifying parties. It is far too vague to provide the parties with the required legal certainty that their response is *"true, correct and complete",* to use the terms of the attestation that they have to provide under section 9. At the very least, section 6.6. should be limited to financial contributions that amount to subsidies. More generally, the APDC notes that the Commission's expectations and theories of harm should be described in detail in the guidelines to be adopted under Article 46 FSR. Pending the adoption of such guidelines, notifying parties should not be required to fill this section 6.6.

- **Sections 6.7 and 6.8**: these requests could be moved to Section 3 (on details of the concentration, ownership and control), as they do not relate to the impact of the subsidies on the internal market (and at the time of pre-filing or filing, there will be no substantive information available to be provided).

- **Section 6.10**: the APDC would welcome clarification of (i) whether the notifying party should provide the five largest competitors in the EU or the five largest competitors of the target that are active in the EU, (ii) whether the five competitors should be provided at the EU level or at the level of the national market(s) where the target is active, and (iii) in the context of the target being active in different markets/activities, whether the information should be provided by market/activity. In order to alleviate the burden for notifying parties, should the Commission opt for asking for information on separate product markets and countries, it should specify a materiality threshold below which it will not seek this information.

➢ **Supporting documentation – Section 8**

18. With respect to the supporting documentation, described in Section 8, the APDC would welcome clarification of the scope of the request:

- As mentioned above, the APDC considers that the request in sections 8.1 and 8.2 should be limited to financial contributions that may have a possible link with the concentration pursuant to Section 5.2 and that are actually in the notifying party's possession. This would typically exclude documents "from the grantor", which should therefore be removed from Section 8.2.
- Moreover, part of the information required in Section 8.1 and 8.2 could be covered by legal privilege.

➢ **Simplified form**

19. According to the APDC, on top of the simplifications outlined above for the Long Form provided in Annex 1, the Commission should consider adopting a Short Form for concentrations that will clearly not raise any issue under the FSR, similarly to the procedure followed in merger control under the EUMR. The APDC refers to (**2.**) of this contribution for a proposal on this topic.

1.3. Comments on Annex 2

20. The comments below deal with Annex 2 and the information to be included in a notification or declaration to the Commission of a foreign financial contribution in a public procurement procedure covered by the FSR.

➢ **Introduction – Recitals (1) to (27)**

21. The APDC considers that when the provisions refer to public procurement or public procurement procedures (e.g., Paragraph A), it would be appropriate to also refer to concessions or concession contracts in line with the provisions of the FSR.

22. As regards Introduction of Annex 2, the APDC would like to highlight the following points:

- **Paragraph B(3) related to the definitions and instruction for the purposes of the notification form:** the provisions extend considerably the scope of "*notifying parties*" in light of the provisions of the FSR. Therefore, the APDC would welcome their removal. At the very least, APDC would welcome clarification of (i) the wording of "*subsidiary companies without commercial autonomy*" and (ii) the wording of "*holding companies*".

- **Paragraph D(7) related to the information that is not reasonably available[6]:** the APDC understands that in "*exceptional circumstances*" the notifying parties may request an exemption. However, the APDC considers that the Commission should be able to exempt the notifying parties from providing information in any situation. Given the very large scope of the information requested under other sections of the Annex, such exemption may be needed even absent "*exceptional circumstances*".

- **Paragraph F(11) dealing with pre-notification contacts and waiver requests:**

    - The APDC would welcome examples of "*circumstances*" in which waivers are likely to be granted.

    - The Commission could also specify on which basis and when the pre-notification discussions may be initiated by the parties and, in particular, at which stage of the public procurement procedure (i.e. before/after the publication of a call for competition and/or a contract notice).

- **Paragraph G related to the requirement for a correct and complete notification or declaration[7]:** the APDC considers that the Commission could issue a "completeness" letter acknowledging receipt of the notification and setting a time-limit after receipt of the notification upon which the Commission shall decide whether the notification is complete or not to avoid any undue and counter-productive delays.

➢ **<u>Foreign financial contributions – Section 3</u>**

23. As mentioned with respect to Section 5 of Annex 1, the scope of the required information is too far-reaching, mostly unclear and not concretely feasible. Such a broad scope of required information might increase the risk of notifications being declared incomplete by the Commission. It should therefore be shortened to what is strictly needed by the Commission to perform its assessment under the Regulation. This should be particularly the case in the context of government procurement notifications, which may involve several notifying parties. More specifically, the APDC emphasises the following points (most of which are similar to the comments on Section 5 of Annex 1):

- The Commission should exclude from the scope of the requests of this Section the following contributions:

    - Foreign financial contributions obtained under normal market conditions.

[6] A similar comment can be made regarding Annex 1 for notification of concentrations, Paragraph C(5) of the recitals.
[7] A similar comment can be made regarding Annex 1 for notification of concentrations, Paragraph F of the recitals.

- Contributions provided exclusively for the purpose of non-economic activities, which do not constitute foreign subsidies (see recital (16) of Regulation (EU) 2022/2560). Alternatively, it could be asked whether the parties receive public contributions for their non-economic activities with the predefined answers: [yes - no - n/a].
- Those additional exclusions would be fully consistent with the exclusion of de minimis contributions from the detailed list that is already provided for by the draft Annex 2.

- The Commission could consider deleting the requirement to provide information relating to the "*possible link with the public procurement*" as it transfers the burden of proof on the undertakings and raises issues of self-incrimination. At minimum, if this requirement is to be kept, the Commission should consider clarifying what "*possible link with the public procurement*" means as the reference to "*possible link*" seems too vague.

- Some requests for information seem to go beyond the scope of the Regulation, see for instance section 3.3.2 "*identify any other financial contribution [..] (e.g. because it is used as a source of financing [..] or other*". The Commission should consider clarifying the scope of this request.

- Similar to concentrations, the Commission should consider the inclusion of a simplified form as of the entry into force of the FSR.

➢ **<u>Justification for absence of undue advantage – Section 4</u>**

24. Section 4 requires from the notifying parties to provide a "*justification for absence of undue advantage*". Section 4 seems to transfer the burden of the proof to the notifying party whereas it should be to the Commission to identify, where applicable, an undue advantage. More generally, the APDC notes that the Commission's expectations and theories of harm should be described in detail in the guidelines to be adopted under Article 46 FSR. Pending the adoption of such guidelines, notifying parties should not be required to fill this section 4.

➢ **<u>Supporting documentation – Section 6</u>**

25. The APDC notes that some requests for information seem to go beyond the scope of the FSR and unrelated to the assessment the Commission will conduct for the purpose of the FSR, especially sections 6.3(c) (information on "*stocks, employment*…") and 6.3(d) ("business plans and market research underlying the decision to participate…").

➢ **<u>Declaration – Section 7</u>**

26. The APDC fears that the form for the declaration may be construed as very far-reaching in terms of information required. The APDC would welcome to insert a list of the types/categories of non-reportable contributions received. Then, the Commission should consider clarifying which foreign financial contributions shall be listed in the declaration. The Commission should consider setting time limits and thresholds to contain the scope of information requested.

2. POSSIBLE SIMPLIFIED PROCEDURE FOR CONCENTRATIONS COVERED BY FSR

27. The section below develops the objective of a simplified procedure (**2.1**), what could be the eligibility criteria (**2.2**) and the Short Form (**2.3**). This proposal focuses on a potential Short Form for a concentration covered by the FSR, but most of it would be also relevant for a potential Short Form related to a public procurement covered by the FSR.

2.1. Objectives of a Simplified Procedure

28. Although the draft Implementing Regulation is currently silent on this issue, many commentators have indicated that the Commission is planning to adopt, at some point, a simplified procedure for the FSR, similar to the procedure which is available for merger control under the EUMR, and this possibility is expressly mentioned in Article 47 (1) (a) FSR.

29. From a business point of view, such a proposal would clearly be very welcome. The APDC notes and welcomes the proposed simplification effort that has been made in the current draft, in particular as regards (i) the possibility for parties to engage in pre-notification discussions with the Commission to narrow the extent of their disclosure obligations, in particular through the use of waiver requests; and (ii) the exclusion from the draft Notification Form of financial contributions below the threshold of EUR 200,000 individually and EUR 4 million annually per third country. However, the APDC considers that the current draft still places an unnecessary burden on businesses in clearly unproblematic cases. In particular:

    (i) As explained in paragraph 16 above, the requirement to list *all financial contributions*, regardless of whether these amount to *subsidies* and of whether they have *any possible link* with the concentration at issue, is particularly burdensome;
    (ii) While the envisaged waivers may ultimately allow businesses to reduce the amount of information to be provided, the procedure for requesting and agreeing such waivers with the Commission still needs to be clarified/improved and will in any event create an additional administrative burden on notifying parties and will risk adding both delay and uncertainty to the notification process.

30. For clearly unproblematic cases, which we aim to define below (under ***Eligibility Criteria***), the APDC suggests that it would be more efficient and in the interests of good administration, for there to be a *presumption* that the financial contributions received do not raise any concerns and do not need to be reported in detail. Limiting the amount of information to be provided in such cases would reduce the administrative burden both on businesses and on the Commission's resources, while still providing sufficient information to allow the Commission to exercise its control and, if necessary, to request further information and revert to a complete/normal notification.

2.2. Eligibility Criteria

31. For notifiable concentrations, the following alternative criteria should be sufficient to define unproblematic cases that should qualify for simplified review under the FSR:

    (i) ***No subsidies beyond the threshold unlikely to distort the internal market***: none of the financial contributions received by the parties qualify as subsidies within the meaning of Article 3 FSR beyond the threshold for subsidies unlikely to distort the internal market under

Article 4(2) FSR, i.e. EUR 4 million over any consecutive period of three financial years. In other words, this criterion would be met if:

a. all the financial contributions have been provided on market terms or are not limited to one or more undertakings or industries (and therefore do not constitute foreign subsidies); OR
b. provided none of the financial contributions received by the parties in the past three years falls under any of the categories of Article 5(1)(a) - (d) FSR:
   i. the value of [each individual] foreign subsidy effectively received over the past three years is EUR 4 million or less ; OR
   ii. the total value of the subsidies received by any notifying party from any single third country in the year preceding the transaction does not exceed [10%] of that party's turnover in the EU.

Justification: under the FSR, the Commission may only take action against financial contributions that constitute a distortive foreign subsidy and for which the balancing test is negative. It therefore seems disproportionate to seek detailed information about financial contributions that clearly do not constitute subsidies (indent a), or that – should they qualify as subsidies - would be unlikely to distort competition under Article 4(2) FSR (indent b (i)). Further and in addition to the "brightline" EUR 4 million threshold already provided for in the Regulation another pragmatic approach would be for the Commission to look at any potential subsidy relative to the notifying party's total turnover in the EU: where this is limited, it seems unlikely that any such subsidy would have a negative impact on the concentration, so that it could also usefully be reviewed by the Commission under the simplified procedure (indent b(ii)).

This logic mirrors that of the simplified procedure for merger control under the EUMR, where the Commission does not seek detailed information on transactions that are unlikely to give rise to a significant impediment to effective competition. The exception for financial contributions falling under Articles 5(1) (a) to (d) FSR would still allow the Commission to get access to more detailed information in cases involving financial contributions that are the most likely to give rise to distortive subsidies.

OR

(ii) ***No direct link to the concentration***: where all financial contributions received by the parties, even if they may qualify as a 'subsidy' under Article 3 FSR, clearly have no link to the concentration, the APDC suggests that these could still be addressed by means of a simplified procedure – if necessary after confirmation from the Commission following pre-notification discussions.

Justification: under Article 19 FSR, in concentration proceedings the Commission must limit its assessment of the distortive nature of any foreign subsidy to the "concentration concerned". However, it is unlikely that a subsidy that has no link with the concentration would have an impact on that same concentration.

OR

(iii) ***Financial contributions against which the Commission cannot take action under the FSR.*** Where the financial contributions received by the parties are subject to specific trade agreements prohibiting the Commission from taking specific action against certain subsidies. This would cover:

a. Certain bilateral or regional trade agreements providing for disciplines and specific dispute resolution mechanisms on subsidies (e.g. the TCA, certain association agreements); and
b. Financial contributions that would be covered by the WTO SCM agreement if they amounted to subsidies (i.e. subsidies in the manufactured goods sector).

Justification: under Article 44.9 FSR "*an investigation pursuant to this Regulation shall not be carried out and measures shall not be imposed or maintained where such investigation or measures would be contrary to the Union's obligations emanating from any relevant international agreement it has entered into*." It would be useless and disproportionate to require information on financial contributions that would be covered by this provision. This would require the Commission to clarify what it considers to be the geographical and sectoral scope of the exemption provided for under Article 44.9 FSR, which in the APDC's opinion would in any event be advisable.

2.3. Content of the Short Form under the simplified procedure

32. Please see below in Schedule 1 the APDC's proposal for a Short Form under the simplified procedure for concentration covered by the FSR.

Schedule 1 - Comments on Annex I to the Draft Implementing Regulation and Proposed outline for Short Form Notification

Annex I to the Draft Implementing Regulation	APDC Proposal for Short Form Simplification
Sections 1-4	
Description of the Concentration, Information about the Parties, Details of the Concentration (including means of financing) and Jurisdictional Thresholds	No comment: the Short Form can follow the Long Form Importantly, the questions relating to the financing of the acquisition in Section 3 should enable the Commission to exercise its control
Section 5: Foreign Financial Contributions	
5.1. Provide a **detailed list** of **all financial contributions** granted in the **three years** preceding the concentration	5.1. Instead of a detailed list of individual contributions, we suggest (i) identifying those countries for which the total amount of financial contributions in the **1 year preceding** the concentration exceeded EUR 4 million, **excluding** (a) the value of any sales and purchases to/ from governmental entities on an arms length basis; and (b) any tax rulings; and (ii) for each of these countries, providing an approximate value of the total financial contributions received (excluding the value of sales and purchases to/from governmental entities on an arms length basis and any tax rulings), if necessary within a range, as well as, if applicable, a detailed list of any foreign subsidies received from this country. Note: This would give the Commission a broad picture of the size and origin of contributions or main subsidies received by the notifying party, with the possibility for the Commission to "zoom in" and request further information as necessary if any of these contributions appears disproportionate or otherwise "suspicious." This type of targeted approach would overall be more proportionate than upfront full detailed disclosure of large swathes of information, ultimately likely to be irrelevant to the Commission's assessment, and would not require the parties to calculate the exact amounts of financial contributions received from each country, which necessarily requires to identify each and every financial contribution and can be very burdensome

Annex I to the Draft Implementing Regulation	APDC Proposal for Short Form Simplification
	Consider excluding financial contributions from countries mentioned in criterion (iii) above
A foreign financial contribution needs to be included in this list if: (i) The individual amount of the contribution is equal to or in excess of EUR 200,000; and (ii) The total amount of contributions per third country and per year is equal to or in excess of EUR 4 million	
5.2 Please indicate as regards **each of the foreign contributions** listed in Table 1 whether they have or have not a possible link with the concentration and, if so, please explain its connection	Apply only to the foreign ***subsidies*** listed individually in Table 1
5.3. Additional information in respect of any financial contribution which may fall into any of the categories of Article 5(1) (a) to (d) of Regulation (EU) 2022/2560	5.3. ***Not Applicable***: Proposed Simplified Procedure would not apply if any financial contribution falls into any of the categories of Article 5(1) (a)-(d) of Regulation (EU) 2022/2560 (***see Eligibility Criteria***)
5.4. Indicate (i) if any of the parties has non-economic activities and (ii) if so, whether any of the contributions listed above were provided exclusively for the purpose of these non-economic activities	***Suggest deleting if parties have received no subsidies.*** We do not consider this information to be relevant in the context of a simplified procedure and in the absence of any subsidies
5.5, 5.6, 5.7 and 5.8: Additional information regarding (i) foreign financial contributions granted to an ailing undertaking, (ii) unlimited guarantees, (iii) export financing and (iv) direct facilitation	***Not Applicable*****:** Proposed Simplified Procedure would not apply if any financial contribution falls into any of the categories of Article 5(1) (a)-(d) of Regulation (EU) 2022/2560 (***see Eligibility Criteria***)
Section 6: Impact on the Internal Market of the Foreign Financial Contributions in the Concentration	
	As a general comment: we believe that, with the possible exception of Sections 6.7 to 6.11 (information on merger control and other filings in the Union and competitor contact details), Section 6 should fall away entirely in the context of a simplified procedure, which by definition only applies in the absence of any distortive subsidies, such that any distortive impact on the internal market of financial contributions can be excluded. Further, we note that some of the information requested (e.g. Section 6.2 on documents relating to the concentration, Sections 6.4 and 6.5 on the parties'

Annex I to the Draft Implementing Regulation	APDC Proposal for Short Form Simplification
	products/services) relates more closely to the merger control assessment and, if applicable, should therefore be provided in this context, rather than under the FSR in the absence of any possible distortive subsidy
Section 7: Possible Positive Effects	
7.1 If applicable, list and substantiate any possible positive effects on the development of the relevant subsidised economic activity on the internal market. Please also list and substantiate any other positive effects of the foreign subsidy such as broader positive effects in relation to the relevant policy objectives, in particular those of the Union, and specify when and where those effects have or are expected to take place. Please provide a description of each of those positive effects.	***Not applicable***
Section 8: Supporting Documentation	
8.1 copies of all the supporting documents relating to the financial contributions that may fall into any of the categories of Article 5(1), points (a) to (d) of Regulation (EU) 2022/2560 pursuant to Section 5.2	***Not applicable*** (see Simplified Procedure Eligibility Criteria)
8.2 analyses, reports, studies, surveys, presentations and any comparable documents [either from the grantor or] from the undertaking receiving the foreign financial contribution discussing the purpose and economic rationale of the foreign financial [contribution/subsidies] as well as possible positive effects within the meaning of Section 7	See our general comments on Section 8: we consider that the request for supporting documents should be limited to subsidies only and should not extend to all foreign financial contributions granted on market terms
8.3 an indication of the internet address, if any, at which the most recent annual accounts or reports of the parties to the concentration are available, or if no such internet address exists, copies of the most recent annual accounts and reports of the parties to the concentration	No comment – OK to include