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THE EU FOREIGN SUBSIDIES REGULATION

FFC REPORTING OBLIGATIONS: THE “ACQUIRING FUND” EXCEPTION

CIAI WEBINAR – 6 DECEMBER 2023

M&A/CONCENTRATIONS - REPORTING OF FOREIGN FINANCIAL CONTRIBUTIONS

THE DISCLOSURE SYSTEM

1. Two-tier disclosure system:

- I. Detailed information required for most likely distortive subsidies equal or over €1 million;
- II. High-level overview for “other FFCs” (description by type and ranges of amounts per country).

2. For “other FFCs”, **disclosure if equal or over €1 million received** from a third country that has made aggregate FFCs of over €45 million in the last three years prior to the conclusion of the agreement / announcement of the public bid.

3. Exceptions apply to other FFCs, not to most likely distortive subsidies, therefore no disclosure in case of:

- I. Deferrals of payment of taxes or of social security contributions, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application.
- II. Application of tax reliefs for avoidance of double taxation in line with the provisions of bilateral or multilateral agreements for avoidance of double taxation, as well as unilateral tax reliefs for avoidance of double taxation applied under national tax legislation;
or
- III. Provision/purchase of goods/services (except financial services) at market terms in the ordinary course of business.
- IV. FFCs to the Target.
- V. ***FFCs to funds / portfolio companies not linked to the acquiring fund.***

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THE “ACQUIRING FUND” EXCEPTION 1/2

The reporting obligation of other FFCs applies **only to the FFCs to the acquiring investment fund or the legal entity controlled by or via an investment fund**, and not to FFCs granted to other investment funds managed by the same investment company, provided that:

(a) the fund proceeding with the acquisition / controlling the acquiring entity has **a majority of different investors** measured according to their entitlement to profit (or granted to portfolio companies controlled by these other funds) than other investment funds managed by the same investment company;

(b) the fund which controls the acquiring entity must be subject to **Directive 2011/61/EU on Alternative Investment Fund Managers or to an equivalent third country legislation** in terms of prudential, organizational, and conduct rules, including requirements aimed to protect investors; and

(c) the economic and commercial **transactions between the fund which controls the acquiring entity and other investment funds (and the companies controlled by these funds) managed by the same investment company are non-existent or limited**. Economic and commercial transactions include but are not limited to the sale of assets (including ownership in companies), loans, credit lines, or guarantees.

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THE “ACQUIRING FUND” EXCEPTION 2/2

- Significant impact on the information gathering by PE houses, funds, and their portfolio companies.

Questions

- How to assess the majority of different investors?
- What is a third-country legislation, regulatory regime, equivalent to the EU AIFMD?
- How to quantify the “limited” transactions between related funds?



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