

Kluwer Competition Law Blog

Five Things Funds Need to Know About the Foreign Subsidies Regulation

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The EU Foreign Subsidies Regulation took effect on 12 July 2023 to much fanfare. We take a look at the top five things PE funds need to know when considering acquisitions with a European footprint.

The Foreign Subsidies Regulation (“**FSR**”) is the European Commission’s attempt to level the playing field for M&A deals by creating a mechanism to screen transactions involving investors who have received financial support from non-EU countries.

1. Only significant targets count

The first step in an FSR assessment is to determine if the target had at least €500 million in EU-wide turnover in the previous financial year. If it did not, no FSR filing is required.

“The Foreign Subsidies Regulation is a net designed to catch the big fish because only big fish have the teeth to do damage to the internal market.”

EVP Margrethe Vestager

2. But most funds will meet the FFC threshold

If a Target does have sufficient turnover, the second step is to consider whether it meets the combined foreign financial contributions (“**FFC**”) threshold of €50 million over the last three years. The concept of FFC includes all contracts for goods and services between a state entity (or a public or private body whose actions are attributable to the state) and the fund and all of its portfolio companies. It also captures all investments by non-EU State-affiliated entities into the fund (*i.e.* as an LP investor), as well as support to portfolio companies, such as government guarantees, direct funding, contracts concluded with public bodies, COVID-19 support, and “*classic*” subsidies, such as support for renewable energy generation. It is likely that any fund with material operations outside the EU will meet this threshold.

3. It is time to get ready, as deals signed today can trigger FSR notifications

All new deals can trigger an FSR notification.

There is an exemption for deals signed before 12 July 2023 and they do not need to be notified.

Deals signed on or after 12 July 2023 that will close before 12 October 2023 are also exempt from notification (but could in theory be investigated *ex officio*). If you have signed a deal that can be closed quickly, it is still possible to avoid an FSR notification. But for all other deals, you need to get ready to make an FSR notification.

4. Filings will be relatively short unless distortive FFCs are involved

The FSR filing form draws a distinction between “*likely distortive*” FFCs and other FFCs.

- Detailed information must be provided for **likely distortive FFCs**. This category will capture unlimited guarantees, contributions to failing companies and subsidies granted for the purposes of directly facilitating an acquisition. For funds co-investing with sovereign wealth funds (“**SWFs**”) or with SWF LPs in their structure, even as minority participants, any funding committed for the purposes of a particular transaction may fall into this category.
- The FSR filing form requires a high-level overview of **other FFCs**, requiring high-level detail for other FFCs that are above €1 million per measure and less than €45 million per third country over a three-year period. **The overview needs to be prepared for the fund and all portfolio companies** (the target is exempt from overview disclosure). General tax measures and reliefs and contracts with public authorities concluded on market terms (except for financial services) can all be excluded from the overview and the €45 million total. For funds having State-backed LPs in their structure, general funding committed (not for a specific transaction) would likely need to be disclosed. FFCs to other funds managed by the same General Partner (“**GP**”) do not need to be disclosed, provided certain conditions are met (*g.* the funds feature different majority investors, and there is a demonstrable lack of commercial and financial links between the funds). Likely distortive FFCs attributable to other funds managed by the same GP will not benefit from this exemption.

5. But collecting the data for the filing may be complicated

While the notification form only requires a high-level overview of most FFCs, it will still not be a simple task to collect the data required. The data on FFCs is not something that funds will collect in the ordinary course of business – so the data will need to be especially collected from the fund itself and all portfolio companies and aggregated by the third country involved. Therefore, it will be crucial that effective information-gathering protocols are put in place to confirm the status of various funds’ relationships for the purposes of the fund exemption and up-to-date information on all reportable FFCs. The vast majority of deals will not run into substantive problems under the FSR, but funds will need to ensure that they have effective means to identify relevant information from their co-investors and LPs and have a ready cache of their own portfolio companies’

information on hand to minimise unnecessary headaches and delays.

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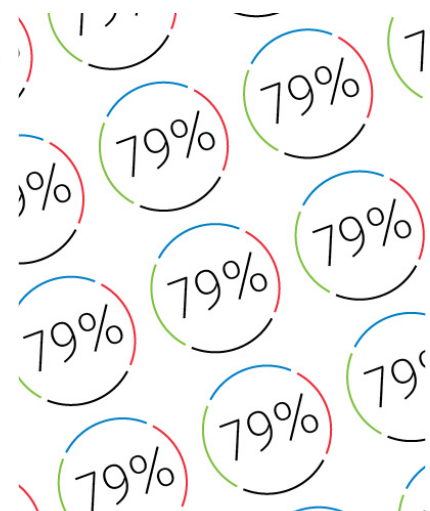
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