Invest Europe response to the Foreign Subsidies Guidelines Call for Evidence

Invest Europe would welcome the opportunity to highlight some key points on the operation of the 'investment fund' exemption (which limits the FSR reporting obligations to the funds involved in the transaction).

As the Commission will be aware, Invest Europe and its member base welcome the exemption and the flexibility of the Commission in listening to the concerns of the industry when the reporting obligations were set. We are pleased that certain investment funds have been able to successfully rely on the scope of the exemption to narrow down their reporting obligations – with resulting benefits from both an efficiency and deal-deliverability standpoint. However, and as noted by the Commission in its policy brief, a "notable trend" has been the relatively large number of transactions that involve an investment fund as a notifying party – roughly one third of all cases. Given this high number of mandatory notifications, coupled with the non-problematic nature of such deals from an FSR perspective to date, we consider there to be scope to further reduce the significant reporting burden on firms seeking to avail themselves of the exemption without risking the overall aims of the Regulation.

By way of example:

Condition 1: The first condition of the reporting exemption (requiring the acquiring fund to have majority different investors from the firm's other funds under common management) has resulted in a burdensome process for firms seeking to rely on it. As an illustration, we understand that firms have been required to produce lists of individual LP contributions across different funds (rather than being able to rely, for example, on anonymised and aggregated lists). We would argue that there is scope for the Commission to accept a lighter touch approach in unproblematic cases.

Condition 2: The experience of some (often larger) investment firms has been that the second condition of the exemption (requiring the acquiring fund to have non-existent or limited transactions with the firm's other funds under common management) has been conservatively applied. We understand that firms have needed to respond to detailed questions on transactions / arrangements between funds and, in some cases, on transactions / arrangements between portfolio companies. This has required firms to conduct burdensome internal inquiries across multiple funds and large numbers (even hundreds) of portfolio companies – an exercise which has, in some cases, taken months to conduct.

Whilst we consider there to be scope to broaden the exemption in the medium term (once the Commission has built up a bank of cases and experience in applying the FSR to the private equity and investment fund sectors), we consider that shorter term pragmatism over the amount of (detailed) information required of firms seeking to avail themselves of the exemption would be appropriate and more proportionate to the type of investments involved.

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