

### Additional M&A Screening Regime

The EU Foreign Subsidies Regulation (**FSR**), which became partially applicable from 12 July 2023, empowers for the first time the European Commission (**Commission**) to investigate “financial contributions” received by businesses operating in the EU from non-EU countries.

Among other screening tools<sup>1</sup>, the FSR introduces a new mandatory notification regime for M&A deals that meet certain financial thresholds, which will sit alongside existing EU and national merger control and foreign direct investment screening. Below these thresholds, the Commission will be able to intervene in transactions on its own initiative.

#### Notification Thresholds

Transactions where the target (one of the merging parties or the joint venture) is established in the EU<sup>2</sup> and has EU revenues of at least €500 million, and all deal parties (combined) have received at least €50 million in “foreign financial contributions” in the preceding three calendar years, will need to be notified from 12 October 2023 against a standstill obligation pending approval by the Commission.

In addition to the usual M&A considerations (such as completion timetable, closing conditions and risk allocation in deal documents), the FSR introduces a substantial administrative burden on private equity (**PE**) firms.

### M&A Implications for PE Firms

The concept of “financial contribution” is extremely broad and includes not only subsidies, but also tax breaks, and transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, debt forgiveness and public contracts for the sale and purchase of goods and services, meaning that, with a few limited exceptions, virtually any dealings with non-EU public authorities and state-affiliated private companies would have to be taken into account for the notification thresholds.

PE firms in particular will have to identify and quantify such contributions for all their controlled portfolio companies as well as capital injections at the fund level (including by sovereign wealth funds and state pension funds) to determine whether the notification thresholds are met.



### Narrower Reporting Requirements

In an attempt to reduce the heavy administrative burden companies would face under the new rules (and following industry-wide concerns raised during public consultation on the draft Implementing Regulation), the Commission sought to reduce the notification requirements in the final text of the Implementing Regulation, which was adopted on 10 July.

#### 1. Increased *De Minimis* Threshold

While foreign financial contributions of any value will count towards the notification thresholds, only financial contributions of individual, per-party value of €1 million or above will need to be included in the notification (increased from €200,000).

#### 2. “High Risk” Financial Contributions

Detailed information will only be required for financial contributions deemed to be high risk, i.e. unlimited guarantees, support to ailing companies, support directly facilitating M&A or public procurement tenders, and non-OECD compliant export financing. For all other financial contributions, only summaries will be required.

#### 3. Sale of Goods/Services on Market Terms

The sale or purchase of goods or services (except financial services) to or from third countries on market terms and in the ordinary course of business will not be reportable. Somewhat incongruously, these dealings will have to be taken into account when calculating the €50 million notification threshold but will not be reportable, and the Commission accepts that they will be unlikely to raise substantive concerns.

<sup>1</sup> The FSR includes a screening tool for public procurement tenders in the EU. This note deals only with the M&A screening regime.

<sup>2</sup> “Established in the EU” should be understood in accordance with the case law of the Court of Justice and includes the incorporation of a subsidiary as well as a permanent business establishment in the EU. This means that, for instance, in the case of an acquisition of control over an entity that is established in a third country (e.g. the UK) and has a subsidiary in the EU, that condition will be met.

## 4. Special Exemption for PE Firms

Having acknowledged that PE firms will face a disproportionately higher administrative burden under the new rules compared to other types of companies, the Commission introduced in the Implementing Regulation an exemption specifically for PE-led deals. Financial contributions granted to other investment funds managed by the same PE firm (but with a majority of different investors) do not need to be disclosed, provided that:

- a. the fund controlling the acquiring entity is subject to the Alternative Investment Fund Managers Directive (2011/61/EU) or to an equivalent third-country legislation; and
- b. there are no or limited economic and commercial transactions<sup>3</sup> between the acquiring fund and the other funds/portfolio companies managed by the same PE firm.

It may, therefore, be possible for PE firms to structure deals in a way that significantly reduces the reporting obligations.

## Readiness Will Be Key for Deal Planning

Whilst the Implementing Regulation has narrowed down the reporting requirements, the administrative burden involved in determining whether the FSR notification thresholds are met remains substantial. PE firms will have to take heed of what information is required both for determining if an FSR notification is triggered and during the notification process, and consider:

- Introducing centralised reporting/record keeping systems for financial contributions received at the fund/investor and portfolio company level
- Integrating the FSR into their usual preclosing due diligence (screening will need to expand to cover foreign financial contributions)
- Assessing the impact of the FSR on deal timelines and SPA provisions early on (*NB*: whilst the notification obligation kicks in on 12 October 2023, it also captures transactions that have signed on or after 12 July 2023 but have not closed by 12 October, and the Commission will not accept notifications before 12 October, meaning that pre-notification discussions with the Commission will be essential to reduce delays)
- Assessing the possibility of *ex officio* investigations by the Commission where notification thresholds are not met but the acquirer has received “high risk” subsidies

## Authors



### Diarmuid Ryan

Global Chair of Competition – Antitrust,  
Brussels, London  
T +44 207 655 1310  
E diarmuid.ryan@squirepb.com



### Tatiana Siakka

Senior Associate, London, Brussels  
T +44 20 765 5 1692  
E tatiana.siakka@squirepb.com



<sup>3</sup> Economic and commercial transactions include, but are not limited to, the sale of assets (including ownership in companies), loans, credit lines, or guarantees.

## Contacts

If you have any questions or concerns regarding the application of the FSR to your business, please contact your usual lawyer at the firm, or any of the contacts listed below.



**Diarmuid Ryan**

Partner, Brussels, London  
T +44 207 655 1310  
E [diarmuid.ryan@squirepb.com](mailto:diarmuid.ryan@squirepb.com)



**Tatiana Siakka**

Senior Associate, London, Brussels  
T +44 20 765 5 1692  
E [tatiana.siakka@squirepb.com](mailto:tatiana.siakka@squirepb.com)



**Oliver Geiss**

Partner, Brussels  
T +322 627 11 12  
E [oliver.geiss@squirepb.com](mailto:oliver.geiss@squirepb.com)



**Erling Estellon**

Of Counsel, Paris  
T +33 1 5383 7060  
E [erling.estellon@squirepb.com](mailto:erling.estellon@squirepb.com)



**Brian Hartnett**

Partner, Brussels  
T +322 627 11 01  
E [brian.hartnett@squirepb.com](mailto:brian.hartnett@squirepb.com)



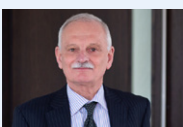
**Francesco Liberatore**

Partner, London, Milan, Brussels  
T +44 207 655 1505  
E [francesco.liberatore@squirepb.com](mailto:francesco.liberatore@squirepb.com)



**Gorka Navea**

Partner, Madrid  
T +34 91 426 4805  
E [gorka.navea@squirepb.com](mailto:gorka.navea@squirepb.com)



**Martin Rees**

Partner, London, Brussels  
T +44 207 655 1137  
E [martin.rees@squirepb.com](mailto:martin.rees@squirepb.com)



**Will Sparks**

Partner, Brussels  
T +322 627 76 10  
E [william.sparks@squirepb.com](mailto:william.sparks@squirepb.com)

