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Irish Foreign Investment Screening Regime: The Screening of Third Country Transaction Act 2023

The Screening of Third Country Transactions Act (the **"Act"**) was enacted in October 2023 and is expected to be commenced in September 2024. The Act gives effect to Regulation (EU) 2019/452 (the **"EU FDI Regulation"**) and forms part of a broader EU effort to screen foreign direct investment that could potentially harm the security or public order of the Union.

The Act introduces a new mandatory notification regime, whereby parties are required to notify qualifying foreign acquisitions of Irish targets (whether assets or undertakings) active in particular sectors to the Minister for Enterprise, Trade and Employment (the **"Minister"**). This sits alongside a broad power of the Minister to call in for review deals that are not within the scope of the mandatory regime. Qualifying acquisitions may not be implemented until the Minister has approved the acquisition. The Minister has wide-ranging powers, including to prohibit, or impose remedial measures, where a transaction may present risks to the security or public order of the State. With the introduction of the regime, Ireland will join the other 22 EU Member States who have already introduced an FDI screening mechanism.

In advance of commencement, the Department of Enterprise, Trade and Employment (the **"Department"**) have published a draft notification form (https://enterprise.gov.ie/en/publications/publication-files/inward-investment-screening-notification-form.pdf) and draft guidance (https://enterprise.gov.ie/en/publications/publication-files/inward-investment-screening-guidance-for-stakeholders-and-investors.pdf) to assist stakeholders and investors to understand the procedure, jurisdictional thresholds and substantive analysis which will be applied in the new regime. These are discussed in further detail below.

With a growing number of regimes in the EU and elsewhere, deal-makers are increasingly required to factor FDI approvals into transaction planning and documentation. This will now also be the case for deals involving foreign acquisitions of Irish targets in particular sectors. While Ireland has consistently adopted policies which encourage FDI, the new regime casts the net relatively widely and will require mandatory notification of many deals (including those involving acquirers from 'friendly' jurisdictions such as the US and the UK).

In this briefing, we outline the main aspects of the Act.

Overview of the New Irish FDI Regime

Background and key features

Important points for deal-makers to bear in mind about the Irish regime are:

The thresholds for mandatory notification under the Act may catch many foreign acquisitions of Irish targets, with a low threshold for deal value, and potential application to a wide range of sectors. Additionally, where the target is an undertaking, there is no requirement for control to be

acquired (an increase of shareholding or voting rights from below 25% to above 25% or below 50% to above 50% will suffice), although an acquisition of control of an asset or undertaking could also trigger mandatory notification.
A standstill obligation will apply, meaning that a deal that is caught by the mandatory notification regime will have to be notified and cleared before completion. This will increase the number of deals requiring a split signing and completion.
Sufficient time for the Minister to review a transaction will need to be built into transaction timelines. Under the Act, the Minister has 90 days to review a transaction from the date the Minister issues the *"screening notice"*, which is extendable to up to 135 days where further time is required by the Minister to assess and/or mitigate risk. The draft guidance from the Department clarifies that it is envisaged that in practice the 90-day review period is *"the out bound of the time permitted to complete the screening process, not the intended target"* and that *"in practice many notified transactions will be cleared quicker than this if the evidence supports such an outcome"*. It also suggests that the 135-day review period would be used in *"complex cases"*.
Failure to notify a notifiable transaction will be a criminal offence and a person found guilty will be liable on summary conviction, to a class A fine (€5,000) and/or six months imprisonment, and on indictment, to a fine not exceeding €4,000,000 and/or a term of imprisonment not exceeding five years. It will be possible for the Minister to review an unnotified transaction for up to the later of 5 years post-completion or 6 months from the date on which the Minister first becomes aware of it.
The Act allows the Minster to call-in for review transactions that fall outside of the mandatory notification regime where security or public order concerns arise. The Minister has a period of 15 months post-completion to call-in deals that do not require mandatory notification. In practical terms this means that the risk of a call-in will need to be considered going forward and contractual protections may be needed to protect parties' positions if transactions are called-in post-completion.
On a transitional basis, the Act will allow the Minister to call-in for review transactions that completed within 15 months of the call-in power provisions coming into operation. This means that the Act will be relevant to recently completed, as well as upcoming, transactions.

When will mandatory notification of a transaction be required?

The Act applies to any acquisition, agreement or other economic activity resulting in a change in control of an asset in the State or the acquisition of all or part of, or of any interest in, an undertaking in the State (a **"Transaction"**).

Under the Act, a Transaction will need to be notified to the Minister where **all** of the following criteria are met:

a. The Transaction relates to an asset or undertaking in the State. An asset will be regarded as being in the State where it is physically located in the State (in the case of tangible assets) or where the asset is owned, controlled or otherwise in the possession of an undertaking in the State (in the case of intangible assets). An undertaking will be regarded as being in the State where it is either constituted or otherwise governed by the laws of the State or has its principal place of business in the State.
b. A third country undertaking, or (importantly) a person connected with such an undertaking:
   - acquires control of an asset or undertaking in the State[1], or
   - changes the percentage of shares or voting rights it holds in an undertaking in the State from 25% or less to more than 25%, or from 50% or less to more than 50%;
c. The cumulative value of the Transaction and each Transaction between the parties to the Transaction or relevant connected persons in the preceding 12 months is at least €2,000,000 (in the absence of an amount prescribed by the Minister);
d. The same undertaking does not, directly or indirectly, control all the parties to the Transaction. (This means that intra-group transactions will not be mandatorily notifiable

under the regime); and

e. The Transaction relates to, or impacts upon one or more of the following sensitive areas:
   - critical infrastructure whether physical or virtual
   - critical technologies and dual-use items
   - supply of critical inputs
   - access to sensitive information or
   - the freedom and pluralism of the media.

These areas of activity are derived from the EU FDI Regulation (Article 4(1)). The draft guidance published by the Department elaborates further on the intended scope of the sensitive areas listed above.

What is a "third country undertaking"?

To fall in-scope of the Act, the investor must be a third country undertaking or a person connected with a third country undertaking.[2] A third country undertaking is defined as an undertaking that is:

a. constituted or otherwise governed by the laws of a third country,
b. controlled by at least one director, partner, member or other person, that is an undertaking constituted or otherwise governed by the laws of a third country or is a third country national; or
c. a third country national.

A third country means a state or territory other than Ireland, a member of the EU, a member of the EEA or Switzerland. Both the US and the UK are considered third countries under the Act.

What is the timing of the notification process?

The key timelines are as follows:

a. the parties must notify *not less than 10 days* before the date of completion;
b. the Minister will issue a screening notice *'as soon as practicable'* after commencing the review; and
c. the Minister will issue a screening decision on whether or not the Transaction will affect the security or public order within the State *within 90 days from the screening notice*, though this may be extended to *135 days from the date of the screening notice*.[3]

What are the potential outcomes of the Minister's review?

Clearance: If the Minister issues a screening decision that the Transaction has not affected, or would not be likely to affect, the security or public order of the State, the parties will be able to complete the Transaction from the date of the screening decision.

Adverse screening decision: The Minister will have wide-ranging powers in the event of a finding that the Transaction affects or would be likely to affect the security or public order of the State. The Minister can make directions to the parties, including a direction not to complete the Transaction or part of the Transaction, to divest certain assets, shares or property, or to modify or cease conduct in a certain way.

What information is contained in the draft guidance from the Department?

In its draft guidance, the Department provides a number of useful clarifications and directions in respect of the operation of the new regime. Amongst others, the draft guidance:

Elaborates further on the intended scope of the five sensitive areas listed above which may trigger a mandatory notification requirement. The Department explains that several of these sectors should be interpreted in light of underlying EU directives and regulations. For example:

- the 'critical infrastructure' sector should be interpreted with reference to EU Directive 2022/2557 on the resilience of critical entities.
- the 'critical technologies and dual use' sector should be interpreted by reference to the definitive list of dual-use items set out in Annex 1 of EU Regulation 2021/82.

Clarifies that it is the activities of the target which are the focus for the Irish screening mechanism. Provides certain other clarifications in relation to the notification thresholds, such as the fact that the €2 million threshold refers to the value of the entire transaction, including any international dimension that might include assets or undertakings not located in the State.

Clarifies that the Department will adopt the guidance on the meaning of 'control' and 'decisive influence' in EU and Irish merger control law. The guidance in the merger control area is well-developed and comprehensive, so this will be a useful source for parties determining whether their transaction triggers an Irish FDI filing.

Describes how notifications will be submitted and the steps involved in the screening process. The draft guidance clarifies that where the Department determines that a transaction does not fall within the scope of the mandatory notification thresholds, it will issue a letter to the parties confirming this and the transaction may proceed without screening. There is some ambiguity in the legislation as to the process applicable to notified transactions which the Department considers are out of scope, so the Department's clarification is welcome.

What does the draft notification form look like?

The draft notification form is a replica of the form that is used by the European Commission to facilitate the exchange of information between Member States. It requests detailed information on the investor, the target, their ultimate controllers and other relevant entities within their respective groups. This includes information on whether relevant parties are subject to financial restrictive measures (sanctions), receive funding from non-EU governments, and/or produce products subject to export controls. The draft notification form designates certain of the requested information as voluntary but also requests parties declining to provide the information to explain whether the information *"is not available or could only be provided with a disproportionate effort"*. The Department has explained the use of this form avoids investors having to fill in separate national and EU notification forms.

What are the Next Steps?

The Department has indicated that the Irish FDI regime will commence in September 2024 and that the finalised notification form and guidance will be published on its website in the coming weeks. The Department will also provide guidance on the case management system that will be used to facilitate notifications and communications with the Department in due course.

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1. Under the Act, a person is regarded as exercising control of an asset where that person owns, or has the right to use, all or part of the asset. A person will be regarded as exercising control of an undertaking, were that person can exercise decisive influence over the activities of the undertaking by any means, including as a consequence of (i) the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking, or (ii) ownership of, or the rights to use, all or part of the assets of the undertaking.
2. Under section 3(1) of the Act, a person is connected to a third country undertaking if the person is a spouse, civil partner, parent, sibling or child of

a relevant person; acting in the capacity as the trustee of any trust where the principal beneficiaries are a relevant person, the spouse civil partner, parent, sibling or child of a relevant person, or an undertaking controlled by a relevant person; or in partnership with a relevant person. If the third country undertaking is an individual, a relevant person is that individual. If the third country undertaking is not an individual, a relevant person means the third country national who exercises control over the undertaking.

3. Where no screening decision is issued in this timeframe, the transaction is deemed to be cleared. In addition, where an information request is issued, the clock will stop until the relevant information is provided.

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