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CORPORATE AND M&A

Foreign direct investment screening in Ireland – *key features of the Screening of Third Country Investments Bill 2022*

The landscape of foreign direct investment (**FDI**) into Ireland will be changed significantly by the Screening of Third Country Investments Bill 2022 (the **Bill**), which introduces an investment screening mechanism in Ireland for the first time.

Once introduced, the Bill will allow the Minister for Enterprise, Trade and Employment (the **Minister**) to scrutinise a wide range of transactions involving a non-EU/EEA/Swiss undertaking (person, company, or other entity) and relating to the control of Irish businesses and assets in key sectors including critical technology and infrastructure.

6 MIN READ

A system for the mandatory notification of in-scope transactions

Impacted sectors

The Bill applies mandatory notification obligations to transactions of €2m or above, involving a third country undertaking (a non-EU/EEA/Swiss person, corporate, partnership or unincorporated entity, or a connected person) and relating to an asset or undertaking in Ireland in one or more of the following sectors:

a. critical infrastructure (whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure)

b. critical technologies and dual use items (including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies)

c. supply of critical inputs (including energy or raw materials, as well as food security)

d. access to sensitive information (including personal data, or the ability to control such information)

e. the freedom and pluralism of the media

Notifiable Transactions

Under the Bill, it is mandatory to notify "notifiable transactions" (**mandatory notifiable transactions**) to the Minister for prior approval where the following four criteria are satisfied:

- a party (whether or not a purchaser) to the transaction is a third country undertaking or person connected with them
- the value of the transaction is €2m or greater
- the transaction directly or indirectly, relates to an asset or undertaking in the State
- the transaction directly or indirectly relates to, or impacts upon, one or more of the areas set out above

If the transaction concerns the acquisition of shares or voting rights, it will be notifiable where it satisfies the above four criteria and where the percentage of share or voting rights changes (i) from 25% or less to more than 25%, or (ii) from 50% or less to more than 50%.

Transactions

- The definition of 'transaction' under the Bill is extremely broad and extends beyond transactions typically subject to a merger notification. It could potentially apply to a wide range of transactions involving goods and services in Ireland.
- A transaction under the Bill includes (but is not limited to) any transaction, acquisition, agreement or other economic activity relating to:
  a. a change in control of an asset in Ireland, or
  b. the acquisition of all (or part of, or an interest in) an undertaking in Ireland
- An "asset in Ireland" includes where it is physically located in Ireland (and for an intangible asset (e.g. intellectual property), where it is owned, controlled or otherwise in the possession of an undertaking in Ireland).
- An "undertaking in Ireland" includes (a) where it is constituted or governed by the laws of Ireland, and (b) where it is controlled by a person: (i) that is an undertaking constituted or governed by the laws of Ireland, or (ii) which is ordinarily resident in Ireland.
- A person will be regarded as exercising "control over an undertaking where they can directly or indirectly exercise influence over the activities of the undertaking by any means, including (a) the exercise or possession" of voting rights, securities, contracts, (b) ownership of, or the right to use all or part of, the assets of the undertaking, or (c) rights or contracts enabling influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

Can other transactions be reviewed?

Outside of mandatory notifiable transactions, a range of transactions can also be screened at the discretion of the Minister if:

- the Minister has reasonable grounds to believe that it affects, or would be likely to affect, Ireland's security or public order and
- the transaction has resulted in, or would if completed result in, a third country undertaking (or connected person) acquiring, or changing the extent to which it has:
  a. control of an asset or an interest in an undertaking in Ireland
  b. legal rights in relation to a person, asset or undertaking in Ireland
  c. the ability to exercise effective participation in the management or control of an undertaking in Ireland
  d. the ability to exercise control over an undertaking in Ireland through a change in ownership or legal structure of that undertaking

The notification procedure

- Parties to a mandatory notifiable transaction must notify the Minister at least ten days prior to completion. In practice, this means that, upon signing, parties will notify the Minister and await a decision (or deemed decision) before completing the transaction.
- Similar to the existing Irish and EU merger control regime, the Bill prescribes a standstill or suspensory obligation until a decision is received from the Minister. This means that mandatory notifiable transactions will require the prior approval of the Minister before they can be completed.
- An extensive amount of information on the parties and the transaction is required to be furnished to the Minister, similar to what is expected in a merger notification to the Competition and Consumer Protection Commission (**CCPC**). While the focus of the CCPC is on competition law, this screening focuses on security and public order and so there will be additional information required, with 11 items specified in the Bill, which include information on the funding source and details of any sanctions or restrictive financial measures imposed on the parties by the EU.
- While all parties to a mandatory notifiable transaction have a notification obligation, the Bill sets out a procedure for one party, upon agreement with the remaining parties, to make the notification to the Minister, resulting in deemed compliance by the remaining parties.
- Unlike Ireland's merger control rules, there is no voluntary notification procedure under the Bill and no mechanism, as of yet, to seek informal guidance from the Minister.
- The Minister may review all other transactions for up to 15 months after the transaction is completed.

The screening process and timings for approval

- Once a notification is received by the Minister, the clock begins to run on the 90-day review period (extendable up to 135 days).
- The Minister may write to the parties to request further information (in which case, the 90-day period is suspended temporarily).
- The Minister will review the transaction with the assistance of an advisory panel and on the basis of a range of nine security and public order criteria. These include whether a party to the transaction is controlled by a third country government and the extent to which such control "is inconsistent with the policies and objectives" of Ireland.
- Once the transaction has been reviewed, the Minister will issue a screening decision as to whether or not the transaction affects, or would be likely to affect, the security or public order of the State. If there is no response from the Minister in the 90-day review period, the transaction is deemed approved.

The screening decision

The Minister will decide if a transaction poses a risk to Ireland's security or public order. The Minister may:

- prohibit
- authorise, or
- authorise a transaction, subject to conditions

Conditions on a transaction

- The Minister can impose conditions on completed and uncompleted transactions, which include requiring the parties, jointly or separately:
  - not to complete the transaction (at all or before a specific date)
  - not to complete specific parts of the transaction (at all or before a specific date)
  - to sell or divest of any business, assets, shares or property
  - to modify, constrain or cease any conduct or practice
  - to prevent the flow of competitively sensitive information between undertakings or within an undertaking
  - to report to the Minister on compliance and pay the "reasonable costs" associated with the Minister's monitoring of compliance
- Failure to comply with conditions will be an offence (fines of up to €4m and/or imprisonment of up to five years).

Right of appeal and penalties

A screening decision can be appealed within 30 days, with a further right of appeal possible to the High Court on a point of law.

Penalties for non-compliance

- It will be an offence to fail to notify the Minister about a mandatory notifiable transaction and it will not be lawful to complete such a transaction.
- It will be an offence to put a notified transaction into effect while it is under review by the Minister.
- The undertaking involved and any director, manager, secretary or other officer of the undertaking who enabled the offence with consent or connivance or with wilful neglect may be guilty of an offence and subject to fines of up to €4m and/or imprisonment of up to five years.

Comment

The Bill bears many of the hallmarks of the merger control procedure. It will have a marked impact on FDI in Ireland (including M&A deals), imposing an additional separate mandatory notification regime on in-scope transactions. It is very widely drafted and has the potential to capture a large number of transactions in the Irish market due to the range of affected sectors, the low transaction threshold and the powers of the Minister to consider transactions that are not notifiable.

It is hoped that greater clarity will emerge on the parameters of the Bill as it progresses through the legislative process. The Bill is expected to be considered by the Irish parliament (the Oireachtas) in the autumn and is likely to become law before the end of the year. Parties with transactions that have completed in or around the last 15 months, or which are likely to complete in the coming months, should keep a close watch on the progress of the Bill. Anyone investing in Ireland from outside the EU/EEA/Switzerland will need to be aware of this Bill.

The new regime will add uncertainty and time delays to transactions. Similar to the new powers of the CCPC under the Competition (Amendment) Act 2022, more transactions are potentially at risk of review and of conditions being imposed. The proposed 90-day Ministerial review period is also significantly longer than the current 30-day CCPC Phase 1 review period. The potential for such a long period between signing and completion of a transaction is likely to lead buyers to seek increased gap protection provisions given the extended time period and possibly even Material Adverse Change (MAC) clauses.

For more information on this topic please contact our Corporate and M&A team.

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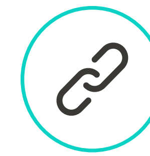
Resources

Screening of Third Country Investments Bill 2022 READ MORE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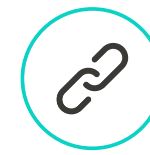
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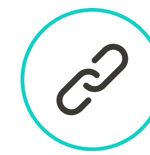
EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union READ MORE

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