A&L Goodbody

CORPORATE AND M&A

New screening of Foreign Direct Investment regime in Ireland

Key considerations for
Private Equity Sponsors

Ireland's Screening of Third Countries Transactions Bill (the **Bill**) will, when enacted (anticipated to be early 2024), introduce a screening mechanism for foreign direct investment (**FDI**) into Ireland for the first time. In line with broader international developments in the area, the focus will be on transactions in sectors which could present risks to national security or public order.

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This article explores the key considerations of the incoming regime for private equity deals in Ireland, with a particular focus on practical implications for sponsors considering transacting in Ireland.

Notifiable transactions

The legislation will introduce a mandatory notification system for certain transactions. A transaction will be mandatorily notifiable where it satisfies **each** of the following criteria:

'Third country' undertaking, or a person connected with such an undertaking, as a result of the transaction:

- acquires control of an asset in Ireland, or
- changes the percentage of shares or voting rights it holds in an undertaking in Ireland:
  - from 25% or less to more than 25%, or
  - from 50% or less to more than 50%

The value of the transaction is equal to or greater than €2m.

The transaction relates to, or impacts upon, one or more of the below:

- **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
- **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
- **supply of critical inputs**, including energy or raw materials, as well as food security
- **access to sensitive information**, including personal data, or the ability to control such information; or
- **the freedom and pluralism of the media**

These headings are taken directly from the EU FDI Regulation and so will be familiar from comparable EU regimes already in force. The reference to 'third country' means any country that is not a member state of the EU, a member of the EEA or Switzerland. As such, UK and US sponsors would be caught.

In practical terms, it's clear that many private equity deals with a non-EU component (such as a non-EU sponsor or transactions otherwise involving non-EU entities) may meet the above requirements and be notifiable transactions. Given the potential for criminal sanction (discussed further below), we therefore recommend that sponsors engage with local counsel early on to understand the regime's potential application to any transactions involving an Irish target or assets.

Making a notification

Parties must notify the Minister for Enterprise, Trade and Employment (the **Minister**) of the transaction not less than **ten days** before the date on which the transaction is completed. As with the Irish merger regime, we expect that notifications will typically be made as soon as possible following the signing of transaction documents. Any notification must be accompanied by an extensive amount of information and the Minister retains the discretion to request any other information that is necessary to review the transaction.

The information required includes:

- the identities of the parties (including, name, registered address, domicile, and registration number)
- the ownership structure of the parties to the transaction, including information on persons participating in the capital of the undertaking and persons exercising control over the parties
- details of the transaction, including projected date, approximate value, funding and source of funds

Sponsors will be acutely aware of the commercial implications of the scope of the above notification obligations. While we have not yet seen these notifications operating in practice in Ireland, anecdotally, we are aware that in some jurisdictions regulators have been very focused on fund structure to understand details of controlling interests behind investments. This includes relationships between funds and investment managers and the identities of investors. Regulators elsewhere have also tended to focus on the intended operation of acquired assets post-transaction. Sponsors will want to consider these matters and may seek to mitigate any potential concerns when engaging with regulators.

While all parties to the transaction are responsible for complying with the regime it may make commercial sense for one party (likely the sponsor) to assume responsibility for fulfilling the notification requirements. Well-counselled sponsors should be in a good position to avoid risks associated with failure to notify and be in the best position to minimise commercially sensitive disclosures to the extent practicable.

Lookback

Significantly, like other comparable regimes, the Minister will have the power to review transactions that have completed within 15 months of the Bill coming into force. This means that transactions that are currently under way are likely to be reviewable given the expectation that the Bill will be commenced this year. As such, sponsors looking at targets now should factor this lookback review mechanism into their deals, notwithstanding that the legislation is not yet in force.

Review process

If the Minister choses to review the transaction, the Minister will be required to issue a written "screening notice" to the parties as soon as practicable. The screening notice will summarise the reasons for which the transaction is being reviewed and inviting parties to make written submissions. A "screening decision" must then be made within 90 days of the issuance of the screening notice (which can rise to 135 days by notice of the Minister). Once a screening notice is issued, parties to the deal cannot complete or take action furthering the transaction until a screening decision is issued. Where the Minister finds that a transaction affects or would be likely to affect the security or public order of the State, the Minister is empowered to take several measures including to direct parties:

- not to complete the transaction or parts of the transaction specified by the Minister (at all, or before or after such dates as the Minister may specify)
- to sell or divest themselves of any matter including business, assets, shares and real or intellectual property
- to modify, constrain or cease specified conduct or practices
- to report to the Minister on parties' compliance with imposed conditions
- to meet the Minister's reasonable costs with monitoring compliance with imposed conditions

Where a transaction has already completed (for example, a non-notified transaction) the Minister may direct parties to take specified actions for the purpose of protecting the security or public order of Ireland.

Non-compliance

Non-compliance is subject to punitive measures. Parties who fail to comply with the regime for example by failing to notify a notifiable transaction may be liable for a fine not exceeding €4m and/or to a term of imprisonment not exceeding five years. Where a party to a notifiable transaction fails to comply with the notification requirement before the transaction is completed, a negative screening decision will be imposed empowering the Minister to take actions of the kind mentioned above.

We recommend that parties engage with legal counsel at the earliest opportunity to assess deal structure against the requirements of the regime. The due diligence process will be fundamental in providing the necessary detail for timely and fulsome notifications.

Practical considerations

Given the ambit of the Bill, we recommend that sponsors:

- review deal structure early on to understand whether an obligation to notify exists
- be clear on who is notifying, when they are doing so and what is being notified (**who, when, what**)
- structure and document transactions clearly to deal with the risk of notification
- consider preventative structural measures (e.g. carving out assets, operations or subsidiaries)
- consider making a voluntary notification
- seek specialist legal advice to minimise any risks associated with a complex and evolving area of law

To discuss the contents of this article, please reach out to your usual ALG contact.

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Resources

- Screening of Third Countries Transactions Bill — READ MORE
- EU's Regulation on foreign direct investment screening — READ MORE
- Explanatory Memorandum — READ MORE
- Foreign direct investment screening in Ireland – key features of the Screening of Third Country Investments Bill 2022 — READ MORE