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Screening of Third Country Transactions Act 2023

Key features of Ireland's first foreign investment regime

The Screening of Third Country Transactions Act 2023 (the FDI Act) introduces the State's first investment screening regime, which will be implemented alongside Regulation (EU) 2019/452 (the EU Screening Regulation).

The FDI Act is expected to commence in September 2024 and will enable the Minister for Enterprise, Trade and Employment (the Minister) to review certain transactions that may present risks to the security or public order of the State. The Minister has published detailed draft 'Inward Investment Screening Guidance' (the Draft Guidance), which helpfully clarifies several elements of the FDI Act.

Key features

Key aspects of the new regime are:

Mandatory and suspensory notification regime: The FDI Act introduces a mandatory and suspensory notification regime, inspired by merger control. If a transaction meets the following four criteria, all parties must notify it to the Minister for approval:

1. **Acquirer from outside the Single Market:** a "third-country undertaking" ie from outside the EEA and Switzerland, or a person connected with such an undertaking, directly or indirectly:
   - Acquires control of an asset or an undertaking in the State, or
   - Changes the percentage of shares or voting rights in an undertaking in the State above 25% or 50%

   The Draft Guidance helpfully confirms that the concept of "control" is interpreted in line with the approach of the European Commission in a merger control context.

   Further, the Draft Guidance provides that, since the notification requirement only arises in the context of an acquisition of an asset or all, or part of, an undertaking, greenfield transactions and the creation of a joint venture will in general not require to be notified. The same approach applies to debt for equity swaps, which will only fulfil the first criterion where the lender acquires shares as result of an unpaid debt. Of course, all cases should be assessed on a case-by-case basis.

2. **Low value of transaction threshold is met:** the cumulative 'value of the transaction' and other transactions between the parties is at least €2 million in a period of 12 months before the date of the transaction. As expected, the Draft Guidance confirms that this threshold relates to the entire value of the transaction, ie the consideration being paid by the acquirer, including any international dimension.

3. **Not an internal reorganisation:** a transaction is not required to be notified if the same undertaking, directly or indirectly, controls all the parties to the transaction.

4. **Transaction relates to, or impacts on, one or more critical sectors:** The Draft Guidance helpfully confirms that an Irish nexus requirement applies to the following critical sectors. This means that the target must operate the "critical" element of its business, or the critical infrastructure must be located, in Ireland.

    - *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.

      The Draft Guidance clarifies that a notification will only be required where the infrastructure in question comes within one of the categories listed in Annex 1 of EU Directive 2022/2557 (the CER Directive).

    - *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.

      The Draft Guidance clarifies that a technology is critical, and within scope, if it is listed as either a dual-use item in Annex 1 of the EU's Dual Use Regulation (Council Regulation 2021/821), or as military technology or equipment in the EU's Common Military List (Council Common Position 2008/944/CFSP).

    - *Supply of critical inputs*, including energy or raw materials, as well as food security. This includes activities where the target is engaged in the extraction, production or supply of the critical raw materials.

    - *Access to sensitive information*, including personal data, or the ability to control such information. The Draft Guidance states that sensitive information is data that must be protected from unauthorised access and may be business, government or personal data (interpreted in accordance with the definition of Special Category Data under the GDPR).

      The Draft Guidance helpfully provides that a transaction is in scope if:

      - Sensitive data is held as an essential or critical part of the target business or asset, ie not only in relation to employees, and
      - The volume of such data is "substantial", or
      - The transaction relates to a business model that depends on generating turnover from such sensitive data.

    - *The freedom and pluralism of the media.* This category includes media businesses operating, selling or otherwise active in the State. The Draft Guidance clarifies that the level of activity of the media business in the State (based on sales, subscribers, viewers or other relevant metrics) must be substantive to trigger mandatory notification.

Asset acquisitions: the object of the transaction may be an asset, provided there is a change in control of the asset. The Draft Guidance provides that an asset does not need to be an asset constituting a business to which a turnover is attributable. For example, the sale, acquisition or licencing of IP rights could give rise to a notification requirement.

Target must be 'in the State': an asset is 'in the State' when it is physically located in the State or, in the case of an intangible asset, owned, controlled or otherwise in the possession of an undertaking in the State. An undertaking is 'in the State' when it is constituted or otherwise governed by the laws of the State or has its principal place of business in the State.

Multi-party obligation to notify: the notification obligation rests on all parties to a transaction meeting the relevant criteria, unless they are not aware of the transaction. Second and subsequent parties will be deemed to have complied where they are informed by the first party of its intention to notify on a particular date and the information it intends to provide, and the second party(ies) agree in writing before the notification is provided to the Minister. The Draft Guidance confirms that only one notification per transaction is required and the Department expects the buyer will take primary responsibility for the notification.

Receivership and examinership: the Draft Guidance confirms that no mandatory notification is required on the appointment of a receiver or an examiner because no change of control occurs. However, the Draft Guidance clarifies that a mandatory notification may be required where a receiver or examiner:

- exercises control of the asset or undertaking, or
- takes control of an asset within the scope of the FDI Act as a "mortgagee in possession" to enforce its security.

"Call in" powers: similar to the recently amended Irish merger control regime, the Minister may "call in" for review notifiable transactions that are not notified, ie 'non notified transactions'. Similarly, transactions that are not notifiable may be called in for review, where the Minister has reasonable grounds for believing the transaction affects, or would be likely to affect, the security or public order of the State. The Draft Guidance clarifies that this power is aimed at new or emerging technologies or sectors that are not captured by the mandatory notification criteria set out in the FDI Act.

The Minister must exercise the 'call in' power within 15 months of the transaction being completed in the case of transactions that are not notifiable. In the case of non-notified transactions, the Minister the applicable time limit is the later of 5 years from completion or 6 months from the Minister becoming aware of the transaction.

Retrospective application: the Minister can 'call in' for review any transaction that completed not more than 15 months before the commencement of the relevant provisions of the FDI Act.

No voluntary regime: the FDI Act does not provide for voluntary notifications.

Timing of notification: the Draft Guidance suggests that parties may submit a notification on the basis of a "good faith intention" to complete a transaction. The FDI Act includes transitionary provisions for notifiable transactions that complete within 10 days of the FDI Act coming into force. In such circumstances, parties will be deemed to have complied with the notification obligation if they provide the required information to the Minister no later than 30 days after completion.

Offence of gun-jumping: it is a criminal offence under the FDI Act to complete, or take steps to complete, a non-notified transaction or a notified transaction under review by the Minister prior to the Minister issuing a screening decision clearing the proposed transaction or making it subject to conditions. Where the transaction is subject to a conditional screening decision, it is an offence to complete the transaction other than in accordance with those conditions.

Information requests: as is the case under the existing Irish merger control regime, the Minister may request further information. Failure to comply with a 'notice of information' or the provision of false information in response is a criminal offence under the FDI Act.

Lengthy review timeline: the Minister is required to make a screening decision within 90 days from the date on which the Minister issues a screening notice in relation to the transaction.

The 90-day review period may be extended to 135 days at the discretion of the Minister. The review period is suspended by the issuance of a notice of information and resumes on the date that the notice is deemed to be complied with.

The Draft Guidance confirms that the Department considers 90 days to be the out bound of the statutory review period, not the target, and in practice many transactions will be cleared quicker.

Wide-ranging powers to impose remedies: the Minister may prohibit the transaction, or parts of it, or impose conditions. Conditions can include divestment requirements, behavioural requirements, ring-fencing requirements, and compliance reporting obligations.

Criminal sanctions: persons found guilty of an offence under the FDI Act may be liable, on summary conviction, to a fine not exceeding €5,000 and/or up to 6 months imprisonment or, on conviction on indictment, to a fine not exceeding €4 million and/or up to 5 years imprisonment.

Appeals: parties to a transaction may appeal a screening decision to an independent adjudicator and must notify the Minister that they are appealing no later than 30 days after being notified of the screening decision. The appellant must submit the appeal to the adjudicator within 14 days after providing notice to the Minister. A decision of an adjudicator may be appealed on a point of law to the High Court.

Conclusion

The FDI Act is one of the most significant developments in Irish M&A in recent years and it has the potential to cast a wide net. As the FDI Act commences imminently, investors should start thinking now about key questions such as:

- Does the transaction meet the criteria for a mandatory notification?
- Is there a possibility that the transaction will not complete before commencement of the FDI Act?
- Should provision be made in the deal documentation for a potential notification?
- What is the potential impact of a notification on the deal timeline?
- What remedies could be offered to address any public order and/or security concerns?
- If the transaction is not mandatorily notifiable, has already closed, or is likely to close prior to commencement of the FDI Act, is it at risk of being called-in for review by the Minister?

Early engagement on these and other questions is advisable. Please get in touch with a member of our Competition & Antitrust team for more information.

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