

Ireland Update: Screening of Third Country Transactions Bill Passed by Dáil and Seanad

The Screening of Third Country Transactions Bill ("Bill") aims to implement the first screening process for foreign direct investment ("FDI") in Ireland and will require that certain investments in critical Irish industries that may present risks to the State's security or public order be reviewed by the Minister for Enterprise, Trade and Employment ("Minister").

Its publication follows on from the EU Regulation (EU) 2019/452 establishing an FDI screening scheme, which addresses EU Member State concerns on the purchase of strategic European undertakings by third-country, i.e. any non-EU / EEA country other than Switzerland, undertakings, while maintaining the EU's strong support for FDI.

This Bill has now been passed by the Dáil and the Seanad and the next step is for it to be signed into law by the President. While it is likely to be enacted this year, it is anticipated that it will not become operational until Q2 2024.

Transactions in Scope

Under the Bill, there will be an obligation to notify transactions where the following criteria are met:

- (a) a 'third-country undertaking'¹ or a person connected with such an undertaking acquires control of an asset or undertaking in the State² or the percentage of shares or voting rights

¹ 'Third country' is any non-EU/EEA country other than Switzerland. "Third country undertaking" means 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 persons that: (i) is a person referred to in paragraph (a); or (ii) is a third country national; or (c) a third country national.

² 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

held by the third-country undertaking as a result of the transaction changes from 25% or less to more than 25% or 50% or less to more than 50%;

- (b) the transaction relates to, or impacts on, one or more areas likely to affect security or public order in Ireland (discussed further below); and
- (c) the cumulative value of the transaction and each transaction between the parties to the transaction³ in the period of 12 months before the date of the transaction is equal to or greater than €2 million⁴.

There is no obligation to notify intra-group transactions provided the same undertaking, directly or indirectly, controls all the parties to the transaction.

As mentioned above, for a transaction to fall within the scope, it must relate to, or impact up, one or more areas likely to affect security or public order in Ireland. These areas are broad and are set out below:

- (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

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.

³ Or persons connected with third country undertakings that are parties to the transaction.

⁴ Note that in some cases the Minister will prescribe an amount in accordance with Section 9(2) where it is deemed necessary to do so.

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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; or
- (e) **The freedom and pluralism of the media.**

It is important to note that investments by UK and US undertakings that meet the criteria for notification will be subject to this regime as they are deemed to be 'third countries' under the Bill.

Other Key Elements

- (a) Parties to a notifiable transaction are required to submit a notification to the Minister at least 10 days prior to the completion of the transaction⁵.
- (b) The Bill places responsibility for notification on all parties to a relevant transaction. All parties will be deemed compliant with this notification obligation when one party makes the necessary notification with agreement of the other parties.
- (c) Transactions that fall within the mandatory reporting scheme but were not notified to the Minister may be reviewed for up to five years post-completion, or up to six months after the Minister first became aware of the transaction.

- (d) The Minister has the power to 'call-in' a transaction for review even if the criteria above have not been met where the Minister has reasonable grounds to believe that the transaction might impact security or public order. The Minister must exercise this power within 15 months of the completion of the transaction.
- (e) Failure to notify the Minister of a relevant transaction (or taking any actions such as completing or furthering a transaction where the screening process is ongoing, completing the transaction otherwise in accordance with the conditions the subject of the decision and / or completing a transaction when the Minister makes a screening decision blocking the transaction) will be a criminal offence, carrying a penalty of up to €5,000 and / or six months imprisonment on summary conviction or a fine not exceeding €4 million and / or up to five years imprisonment on indictment.
- (f) The Minister shall review the transaction and issue a decision within 90 days of notification or by a set date that is not more than 135 days from the notification date. The transaction may not complete during the review process or, should completion occur, the transaction will be deemed void under Irish law.
- (g) In the case of an adverse finding, the Minister will have wide-ranging powers to modify or terminate the transaction. The Minister may require the parties: (i) not to complete the transaction or specific parts of the transaction; (ii) to divest themselves of assets, shares or business interests; (iii) to modify their behaviour in specified ways; and / or (iv) to prevent the flow of competitively sensitive information. Where the transaction has already completed in the case of a non-notifiable transaction, the Minister may direct the parties to the transaction to take such

⁵ See *Commencement and Retrospective Effect* for filing deadline relating to transactions initiated but not completed before Bill comes into operation.

actions as the Minister may specify for the purpose of protecting security or public order.

Commencement and Retrospective Effect

Once enacted, the Bill will be implemented by Ministerial Order, which is expected in Q2 2024.

The Bill allows for the Minister to review transactions that were completed in the 15 months preceding the coming into operation of the Bill, regardless of whether the transaction has been notified to the Minister, or falls within the notifiable category.

Notifiable transactions that are completed no later than 10 days from the date on which the Bill comes into operation must be notified within 30 days of the transaction being completed.

Conclusion

It remains to be seen if the Bill will cause significant changes to the FDI landscape in Ireland, or if it will simply become another transaction planning step. What is clear is that the proposed screening process sets a relatively low threshold for deal value and grants wide-ranging powers to the Minister to review both notifiable and non-notifiable transactions. This wide scope and the impact of stalling transactions while the review process is completed, could cause significant delays to the completion of affected transactions.

How the Maples Group Can Help

If you require assistance or for further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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October 2023

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