

# Ireland Update: Commencement of the Inward Investment Screening Regime

## What You Need to Know

- Ireland has introduced legislation that implements a first screening process for foreign direct investment in the State.
- The Government can review certain investments in critical Irish industries that may present risks to the State's security or public order.

## Background

The Screening of Third Country Transactions Act 2023 (the "Act") which was signed into law on 31 October 2023 is expected to commence in the latter part of Q4 of 2024.

The Act will 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 enactment 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 undertakings (i.e. undertakings from any non-EU / EEA country other

than Switzerland), while maintaining the EU's strong support for FDI.

The Minister has published a draft notification form and detailed draft 'Inward Investment Screening Guidance for Stakeholders and Investors'<sup>1</sup> ("Draft Guidance") which helpfully clarifies several elements of the Act. We expect to see a revised draft of this guidance prior to commencement.

## Transactions in Scope

Under the Act, there is an obligation to notify transactions where the following criteria are met:

- a "third country undertaking"<sup>2</sup> or a person connected with such an undertaking acquires control<sup>3</sup> of an asset<sup>4</sup> or undertaking in the State<sup>5</sup> or the percentage of shares or voting rights 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%;
- the transaction relates to, or impacts on, one or more areas likely to affect security or public order in Ireland (discussed further below); and
- the cumulative value of the transaction and each transaction between the parties to the

<sup>1</sup> <https://enterprise.gov.ie/en/what-we-do/trade-investment/investment-screening/>

<sup>2</sup> "Third country" is any non-EU/EEA country other than Switzerland and Ireland. Both the US and the UK are considered third countries under the Act. "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 person that: (i) an undertaking constituted or otherwise governed by the laws of a third country or (ii) is a third country national; or (c) a third country national.

<sup>3</sup> The Draft Guidance confirms that the concept of "control" will be interpreted in line with the approach of the European Commission in a merger control context.

<sup>4</sup> The Draft Guidance states that an asset does not need to be an asset constituting a business to which turnover is attributable. For example, the sale, acquisition or licensing of IP rights could give rise to notification requirements.

<sup>5</sup> 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.

transaction<sup>6</sup> in the period of 12 months before the date of the transaction is equal to or greater than €2,000,000<sup>7</sup>.

## Exemption

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

## Critical Sectors

As mentioned above, in order for a transaction to fall within the scope, it must relate to, or impact upon, one or more areas likely to affect security or public order in Ireland. These areas are broad and are set out below. The Draft Guidance has confirmed that the relevant target asset or undertaking 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 states that a notification will only be required where the infrastructure element of a transaction relates to one or more of the categories listed in Annex 1 of EU Directive 2022/2557;
- **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 confirms that a technology is considered critical if it is listed as either a dual-use item, or as military

technology or equipment. The definitive list of dual-use items is set out in Annex 1 of Council Regulation (EC) 2021/821 and equipment covered in the Council Common Position 2008/944/CFSP is also within the mandatory scope of the Act;

- **Supply of critical inputs**, including energy or raw materials, as well as food security. The Draft Guidance notes that the European Commission has created a list of critical raw materials ("CRMs") for the EU<sup>8</sup>. This list is subject to regular review and updates. The resulting list of CRMs underpins consideration of whether a transaction should be notified – if the Irish target undertaking is engaged in the extraction, production or supply of the identified CRMs, then notification is mandatory;
- **Access to sensitive information**, including personal data, or the ability to control such information. The Draft Guidance confirms that sensitive information is data that must be protected from unauthorised access to safeguard the privacy or security of an individual, organisation or the State. It may relate to personal, business and government data. Access to "sensitive information" includes the ability to process, license, sell or store such information.

For the purposes of the mandatory notification requirement, a transaction is notifiable if it involves sensitive data that is held as an essential or critical part of the business or asset (i.e. not in relation to data held on employees of the target undertaking or asset, or not essential or critical to the operation of the business). The volume of such data should be "substantial" and / or the transaction should relate to a business model that depends on generating turnover from such sensitive data; and

<sup>6</sup> Or persons connected with" third country undertakings" that are parties to the transaction.

<sup>7</sup> 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.

<sup>8</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Critical Raw Materials Resilience; Charting a Path towards greater Security and Sustainability, COM (2020) 474.

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- **The freedom and pluralism of the media.** Transactions that relate to media businesses that operate, sell or are otherwise active in the State are within the scope of the Irish inward investment screening mechanism. The level of activity in the State – based on sales, subscribers, viewers or other relevant metrics – must be substantive in order to trigger mandatory notification.

## Call-in Powers

The Minister has the power to 'call-in' a transaction for review, even if the criteria above has not been met in circumstances 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.

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 Act.

## Failure to Notify

Transactions that fall within the mandatory reporting scheme but are 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.

Failure to notify the Minister of a relevant transaction or to provide accurate information, will be a criminal offence, carrying a fine not exceeding €5,000 and / or up to six months imprisonment on summary conviction or to a fine not exceeding €4 million and or up to five years imprisonment on indictment.

## Notification

Parties to a notifiable transaction are required to submit a notification to the Minister at least 10 days prior to the completion of the transaction. The Draft Guidance states that parties may submit a

notification on the basis of a "good faith intention" to complete a transaction and therefore parties to a transaction may decide to submit a notification at whatever time is most convenient for their purposes.

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

The Act 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. The Draft Guidance states that the Department expects that the acquiring party (or their representative) will typically take primary responsibility for the notification.

## Review Period

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.

## Power to Modify / Terminate Transactions

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:

- not to complete the transaction or specific parts of the transaction;
- to divest themselves of assets, shares or business interests;
- to modify their behaviour in specified ways; and / or
- to prevent the flow of competitively sensitive information.

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

## Retrospective Effect

The Act allows for the Minister to review transactions that were completed in the 15 months preceding the coming into operation of the Act, regardless of whether the transaction has been notified to the Minister or falls within the notifiable category. As a result, the Act is relevant to recently completed transactions as well as future transactions.

## Conclusion

Whether the Act will lead to substantial changes in Ireland's FDI landscape or merely become an additional step in transaction planning remains uncertain. What is evident, however, is that the Act represents one of the most significant advancements in Irish mergers and acquisitions in recent years.

It establishes a relatively low threshold for deal value and grants the Minister extensive powers to review both notifiable and non-notifiable transactions.

This broad scope, coupled with the potential for transaction delays during the review process, could result in significant postponements in the completion of affected deals.

## How the Maples Group Can Help

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

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