MAPLES GROUP

UPDATE

Ireland Update: The Inward Investment Screening Regime Has Commenced

What You Need to Know

- New Irish legislation mandates the review of certain investments in critical sectors that may pose risks to national security or public order.
- Transactions involving third country undertakings that acquire control of assets or undertakings in Ireland must be notified to a designated Irish government minister.
- The legislation permits such transactions to be reviewed, modified or even terminated by the designated government minister.

Background

After some delay, the Screening of Third Country Transactions Act 2023[1] (the "Act") which was signed into law on 31 October 2023 commenced on 6 January 2025.

The Act implements the first screening process for foreign direct investment ("FDI") in Ireland and requires 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.

Prior to the commencement of the Act, the Department of Enterprise, Trade and Employment ("Department") published the following final documents on their website[2]:

- The Inward Investment Screening Guidance for Stakeholders and Investors (the "Guidance");
- The Inward Investment Screening Notification Form (the "Notification Form"); and
- The Inward Investment Screening Notification Portal User Guide (the "Portal User Guide").

The Guidance helpfully clarifies several elements of the Act we will discuss in this update.

Transactions in Scope

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

- A 'third country undertaking'[3] or a person connected with such an undertaking acquires control[4] of an asset[5] or undertaking in the

[1] https://www.irishstatutebook.ie/eli/2023/act/28/enacted/en/print

[2] https://enterprise.gov.ie/en/what-we-do/trade-investment/investment-screening/

[3] '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.

[4] The Guidance confirms that the concept of 'control' will be interpreted in line with the approach of the European Commission in a merger control context.

[5] The 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.

State[6] 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%. Notification is also required where a third country undertaking, or a person connected with such an undertaking, increases its shareholding or voting rights 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) or the security or public order in another EU Member State; and

- The cumulative value of the transaction and each transaction between the parties to the transaction[7] in the period of 12 months before the date of the transaction is equal to or greater than €2 million[8].

The Guidance confirms that mandatory notification is required:

- Where the direct investor or the ultimate owner of the investor is a third country undertaking; and

- In transactions where the direct acquirer meets the definition of third country undertaking under the Act but is ultimately controlled by an EU / EEA / Swiss parent, i.e. not meeting the definition of a third country undertaking.

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 or the security or public order in another EU Member State. These areas are broad and are set out 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.

  The Guidance states that Ireland has not yet published a list of identified and designated critical infrastructures and therefore, for the purposes of the Act, investors should take into account the definitions used in EU Directive 2022/2557[9] (the "Critical Entities Directive") when determining whether a transaction meets the threshold for notification. Annex 1 of the Critical Entities Directive identifies 11 categories of infrastructure, the subsectors related to these infrastructures and the categories of entities operating such infrastructure.

  Investors and parties to transactions dealing with cybersecurity issues should also be cognisant of entities in scope of EU Directive 2022/2555[10].

  In conjunction with the critical infrastructure categories, the circumstances outlined in Article 6 of the Critical Entities Directive must also be considered, specifically whether the target:

[6] 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.

[7] Or persons connected with 'third country undertakings' that are parties to the transaction.

[8] 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.

[9] https://eur-lex.europa.eu/eli/dir/2022/2557/oj/eng

[10] https://eur-lex.europa.eu/eli/dir/2022/2555/oj/eng

- Provides one or more essential services;
- Operates, and its critical infrastructure is located, on the territory of that Member State; and
- An incident would have significant disruptive effects, as determined in accordance with Article 7(1) of the Critical Entities Directive on the provision by the target of one or more essential services or on the provision of other essential services in the sectors set out in the Annex that depend on that or those essential services.

When considering whether transactions involving financial entities are within scope, the Guidance states that parties should consider the Critical Entities Directive while also noting a number of additional categories which may be within scope including:

- Payment systems and payment institutions;
- Electronic money institutions;
- Market operators and investment firms that operate a multilateral trading facility or an organised trading facility;
- Central securities depositories; and
- Significant issuers of asset-referenced tokens or e-money tokens and crypto asset service providers operating trading platforms for crypto-assets.

- ***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 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[11] and military technology and equipment covered in the Council Common Position 2008/944/CFSP[12] is also within the mandatory scope of the Act.

- ***Supply of Critical Inputs*** including energy, raw materials, food security and critical medicines.

The Guidance notes that the European Commission has published the Critical Raw Materials Act 2024[13] ("CRMA") aims to strengthen the EU's critical raw materials capacities along all stages of the value chain. The CRMA identifies a list of Critical Raw Materials ("CRMs") and a list of Strategic Raw Materials ("SRMs") crucial for technologies for the green and digital transition, as well as for defence and space, listed in Appendix 2 of this document. The lists are to be updated every three years or as required due to supply chain pressures/risks. The CRM and SRM lists underpin consideration of whether a transaction should be notified under Ireland's screening mechanism – if the Irish target of a third country transaction is engaged in the extraction, production or supply of the identified crucial raw materials in Ireland, then notification is mandatory.

The Guidance further states that the European Medicines Agency Union list for critical medicines will provide further guidance in this regard noting however that this list may not be exhaustive and a case-by-case consideration is required.

- ***Access to sensitive information***, including personal data, or the ability to control such information. The Guidance confirms that sensitive information is data that must be

[11] https://eur-lex.europa.eu/eli/reg/2021/821/oj/eng
[12] https://eur-lex.europa.eu/eli/compos/2008/944/oj/eng
[13] https://eur-lex.europa.eu/eli/reg/2024/1252/oj/eng

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

- ***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 have 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 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 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.

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

As provided for in Section 21 of the Act, the Guidance notes that, in addition to the information provided via a notification form, a notifying party to a transaction that is subject to a screening notice may also make an additional submission to the Minister that relates to their application and that such submission will be taken into consideration by the Minister when reviewing the transaction. This is a useful tool for notifying parties to voice their views on potential national security concerns of a transaction.

Review Period

The Minister shall review the transaction and issue a decision within 90 days of notification and, in exceptional circumstances, the review period may be extended by an additional 45 days. It is an offence to complete a transaction during the review process.

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.

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, i.e. transactions completed between 6 October 2023 and 6 January 2025, 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

The introduction of this Act marks a pivotal shift in the regulatory landscape for foreign investments in Ireland. While the Act empowers the Minister to scrutinise and potentially intervene in foreign investments that may pose risks to national security and public order, it is important to note that the majority of foreign investments will continue to be welcomed and encouraged.

Despite only a limited number of transactions are expected to raise significant concerns, the new screening regime introduces an additional layer of regulatory oversight for third country investors. As we navigate this novel regulatory framework, there will likely be an initial wave of precautionary notifications as parties seek to clarify the boundaries of the notification requirements.

Overall, while the new screening regime presents certain challenges, it also underscores Ireland's commitment to balancing the need for security with the continued attraction of foreign investment.

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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January 2025