

COMPETITION AND REGULATED MARKETS

An Overview of the Proposed Foreign Investment Screening Regime in Ireland

April 2023

In line with international developments, the Government has proposed to introduce a new foreign investment screening regime in Ireland. An initial draft of the Screening of Third Country Transactions Bill 2022 (the “**Bill**”) was published on 2 August 2022 and an updated draft of the Bill was published on 25 January 2023. The Bill sets out a framework to enable the Minister for Enterprise, Trade and Employment (the “**Minister**”) to review, for the first time, transactions involving foreign investment that may impact on security or public order in Ireland.

KEY PROVISIONS OF THE BILL

Notifiable transactions

The Bill covers any transaction, acquisition, agreement or other economic activity resulting in a change of control of an asset in Ireland or the acquisition of all or part of any interest in an undertaking in Ireland. Such transactions are notifiable on a mandatory basis if they meet all of the following criteria:

- A third country undertaking (as described below), or a person connected with such an undertaking, as a result of the transaction:
 - acquires control of an asset in the State;^[1] or
 - changes the percentage of shares or voting rights it holds in an undertaking in the State^[2] from: (a) 25 per cent or less to more than 25 per cent; or (b) 50 per cent or less to more than 50 per cent;
- The transaction relates to, or impacts upon, one or more of the relevant matters (as described below); and
- The value of the transaction is equal to or greater than an amount to be specified by the Minister (or, in the absence of specification, €2 million for one natural person or body corporate in a period of 12 months).^[3]

Third Country Undertakings

A “third country undertaking” is defined as any undertaking^[4] that is:

- constituted or otherwise governed by the laws of a third country;
- controlled by^[5] at least one director, partner, member or other person, who is a third country national or is constituted or governed by the laws of a third country; or
- a third country national.

A “third country” is defined as any country that is not a member state of the EU, a member of the EEA or Switzerland. Thus, for example, investments by UK and US undertakings that meet the criteria for notification would be subject to the Irish investment screening regime.

Relevant matters

Reflecting Article 4(1) of the EU FDI Regulation,^[6] the Bill applies to transactions that directly or indirectly relate to, or impact upon, one or more of the following matters:

- **Critical infrastructure**, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities,

including the land/real estate used crucial for the use of such infrastructure;

- **Critical technologies and dual use items^[7]**, including AI, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, 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; and
- **The freedom and pluralism of the media.**^[8]

Minister’s power to ‘call in’ non-notifiable transactions for review

It is important to note that, under the Bill, the Minister also has a broad discretion to ‘call in’ transactions for review regardless of whether they are notifiable or notified if the Minister has reasonable grounds for believing that they would affect, or would be likely to affect, the security or public order of Ireland.

The Minister cannot ‘call in’ a non-notifiable transaction more than 15 months after the transaction has completed.

Procedure for notifying

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. Failure to notify within this timeframe would result in the transaction being deemed to be the subject of a negative screening decision by the Minister (see below for more on screening decisions), made on the day before the date on which the transaction is completed. In addition, a failure to notify a notifiable transaction within this time-frame is a criminal offence (see below for more on penalties). The Bill provides for a transitional arrangement for transactions that are proposed but not completed before the relevant provision of the Bill comes into operation under which the parties to the transaction have additional time to notify.^[9]

Under the Bill, a notification must include at a minimum the following information:

- Details of the parties;
- The ownership structure of the parties to the transaction, including information on persons participating in the capital of the undertaking, the names of the natural persons who own the parties (in the case of bodies corporate) and persons exercising control over the parties;
- Details of the transaction, including projected date, approximate value, funding and source of funds;
- Information on the products, services and business operations of the parties to the transaction;
- The nature of the economic activities carried out in Ireland by the parties to the transaction and the EU Member States where the parties carry out economic activities;
- The state or territory under whose laws the parties are constituted, registered, or otherwise organised;
- The annual turnover and total number of employees of each party; and
- Details of any sanctions or restrictive financial measures imposed on the parties by the EU.

Who is required to notify?

The obligation to notify applies to all parties to a notifiable transaction (except for any party that is unaware of the transaction).

The Bill provides for a process under which a party to a notifiable transaction can consent to another party notifying on its behalf.

Minister's power to review non-notified transactions

The Minister can commence a review of a notifiable transaction that has not been notified for up to five years from the date of completion of the transaction or 6 months from when the Minister becomes aware of the transaction, whichever is later.

Minister's power of retrospective review

The Bill allows the Minister to review transactions that completed up to 15 months prior to the coming into operation of the relevant provision of the Bill regardless of whether they are notified or notifiable.

Timetable for reviews

The Minister will issue a written "screening notice" to the parties as soon as practicable following the commencement of the review, and will issue a "screening decision" within **90 days** from the date on which the screening notice in relation to the transaction is issued. The review timetable can be extended to **135 days**.

Where a screening notice has been issued, the transaction cannot be completed and the parties cannot take any action for the purpose of completing or furthering the transaction until the Minister makes a screening decision approving the transaction.

Where the transaction has already completed (e.g. a non-notified transaction), the Minister may direct the parties to the transaction to take such actions as the Minister may specify for the purpose of protecting the security or public order of Ireland (including divestment of the business, shares, assets, property or intellectual property in question).

Requests for further information

The Minister may, at any time following the commencement of a review, issue a "notice of information" where further information is considered necessary. The issuing of a notice of information suspends the review timetable, starting from the date on which the notice is issued until the date on which the Minister confirms that the relevant party has provided all of the requested information.

Considerations when reviewing transactions

In reviewing a transaction, the Minister will assess whether the transaction affects, or would be likely to affect, the security or

public order of Ireland, having regard to the following factors:

- Whether a party to the transaction is controlled by a government of a third country and the extent to which such control is inconsistent with the policies and objectives of Ireland;
- The extent to which a party to the transaction is already involved in activities relevant to the security or public order of Ireland;
- Whether a party to the transaction has previously taken actions affecting the security or public order of Ireland;
- Whether there is a serious risk of a party to the transaction engaging in illegal or criminal activities;
- Whether the transaction presents, or is likely to present, a person with an opportunity to undertake actions that are disruptive or destructive to persons in Ireland, improve their access to sensitive undertakings, assets, people or data, or undertaking espionage affecting or relevant to the interests of Ireland;
- Whether the transaction would likely have a negative impact in Ireland on the stability, reliability, continuity or safety of the relevant matters (as set out above);
- Whether the transaction would result in persons acquiring access to information, data, systems, technologies or assets that are of general importance to the security or public order of Ireland;
- Comments of EU Member States and the opinion of the European Commission;
- The extent to which the transaction affects, or is likely to affect, the security or public order of another EU Member State or the European Union; and
- The extent to which the transaction affects, or would be likely to affect, projects or programmes of Union interest.^[10]

The Minister is required to take into account written submissions made by the parties to the transaction and to consult with such members of the "advisory panel" (comprising civil servants drawn from a number of key government departments) as the Minister considers appropriate, as well as other government ministers.

The screening decision

The Minister's screening decision would either authorise the transaction with or without conditions or would prohibit the transaction on security or public order grounds. Conditions can include

divestment requirements, behavioural requirements, ring-fencing requirements, and compliance reporting obligations.

The Minister must inform the parties to the transaction of the decision in writing as soon as practicable, together with the reasons for the decision. The Minister may decide not to provide reasons if doing so would create a risk to security or public order.

Penalties for non-compliance

Under the Bill, it is a criminal offence to:

- Fail to notify a notifiable transaction as required under the Bill;
- Where a screening notice has issued in respect of a transaction, complete the transaction, or take any action for the purpose of completing or furthering the transaction until the Minister makes a screening decision approving the transaction;
- Where a transaction is subject to a conditional screening decision, complete the transaction other than in accordance with the conditions;
- Where the Minister makes a screening decision blocking a transaction, complete the transaction, or take any action for the purpose of completing or furthering the transaction;
- fail to comply with a notice for information;
- provide the Minister with information that the party knows is false in a material respect, or is reckless as to whether it is false in a material respect.

Criminal penalties for non-compliance on any of these grounds may apply to companies and individuals, and include fines of up to €4 million and/or a term of imprisonment of up to 5 years (for conviction on indictment).

Appeals

The Bill provides that the 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.

IMPACT ON M&A TRANSACTIONS IN IRELAND

The introduction of a mandatory and suspensory foreign investment screening regime in Ireland will be a significant development in the regulatory landscape in Ireland.

Once the Bill is enacted, parties to transactions will need to assess the applicability of the new regime to their transaction and, where a filing obligation arises, plan for a potentially lengthy review period and its impact on the deal timetable. This includes transactions that have not completed by the time the Bill is enacted and commenced (currently expected to be during the course of 2023). Parties will also need to consider the potential implications of the Minister's ability to retrospectively review transactions that have already completed when the new regime comes into operation.

We will provide an updated briefing once there are any further substantive amendments to the Bill or it is enacted. For further information, please contact a member of the Arthur Cox team.

This briefing contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

[1] The Bill provides that an asset shall be regarded as being in the State where it is physically located within the territory of the State or, in the case of an intangible asset, where it is owned, controlled or otherwise in the possession of an undertaking in the State.

[2] The Bill provides that an undertaking shall be regarded as being in the State where it: (i) is constituted or otherwise governed by the laws of the State; or (ii) has its principal place of business in the State.

[3] The inclusion of the reference to the €2 million value threshold being "for one natural person or body corporate in a period of 12 months" is intended to prevent a person or undertaking from avoiding the provision of the Bill by making several smaller investments that do not individually meet the €2 million threshold.

[4] An "undertaking" includes "any person (including an individual, a body corporate, a partnership or any other unincorporated body of persons) engaged for gain in the production, supply or distribution of goods, the provision of services, the making or holding of investments or the carrying out of any other economic activity, but does not include a natural person whose role in such activities is limited to working under a contract of employment or a contract for services for an undertaking."

[5] Section 2 of the Bill provides that a person shall be regarded as exercising control of an undertaking where that person can exercise decisive influence over the activities of the undertaking by any means, including as a consequence of: (i) the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking; or (ii) ownership of, or the right to use, all or part of the assets of the undertaking. Separately, a person shall be regarded as exercising control of an asset where that person has ownership of, or the right to use all of part of, the asset.

[6] Regulation (EU) 2019/452.

[7] As defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009.

[8] Ireland already has an existing regime for the review of "media mergers" as set out in Part 3A of the Competition Act 2002 (as amended). The media merger regime will continue to apply in parallel with the investment screening regime.

[9] The parties have 30 days from the later of the date of completion of the transaction or when the relevant provision of the Bill comes into operation.

[10] As defined in Article 8 of the EU FDI Regulation

Our team



Richard Ryan
Partner
+353 1 920 1240
richard.ryan@arthurcox.com

"I can't speak highly enough of Richard Ryan. The support and advice Richard and his team provided was critical."
Chambers Europe, 2023

"He is an excellent lawyer, pragmatic, responsive and committed to delivering and getting the right result for his client. His dedication to the task at hand is second to none."
Chambers Europe, 2023

"Excellent lawyer, very personable, exudes decency. Very responsible and engaging relationship partner. The best in the country for competition law advice, extremely knowledgeable and always contextualises his advice appropriately. Very high level of service." *The Legal 500, 2022*

"Richard Ryan ... has an outstanding reputation in state aid and competition investigations." *The Legal 500, 2022*



Patrick Horan
Partner
+353 1 920 1063
patrick.horan@arthurcox.com

"Patrick Horan is an excellent competition lawyer, he understands our business and is aware of the commercial realities and how to navigate through issues which might impact on our business."
Chambers Europe, 2023

"He offers superb knowledge, experience and support."
Chambers Europe, 2023

"Patrick Horan is an expert in competition law; he combines that expertise with a depth of commercial awareness and experience, which is extremely valuable to his clients." *Chambers Europe, 2022*

"Patrick Horan is very impressive." *The Legal 500, 2021*



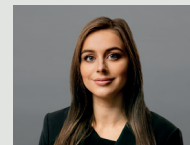
Ronan Scanlan
Of Counsel
+353 1 920 2446
ronan.scanlan@arthurcox.com



Simon Breen
Senior Associate
+353 1 920 1971
simon.breen@arthurcox.com



Edel O'Connell
Associate
+353 1 920 2112
edel.oconnell@arthurcox.com



Bridget Clinton
Associate
+353 1 920 1298
bridget.clinton@arthurcox.com



James Dowling
Associate
+353 1 920 1930
james.dowling@arthurcox.com



Ailbhe Ó Faoláin
Associate
+353 1 920 2136
ailbhe.ofaolain@arthurcox.com



Robert Byrne
Associate
+353 1 920 2111
robert.byrne@arthurcox.com

Dublin
+353 1 920 1000
dublin@arthurcox.com

London
+44 207 832 0200
london@arthurcox.com

San Francisco
+1 415 829 4247
sanfrancisco@arthurcox.com

Belfast
+44 28 9023 0007
belfast@arthurcox.com

New York
+1 212 782 3294
newyork@arthurcox.com

Arthur Cox LLP
arthurcox.com