Executive summary

Stepping into line with its European counterparts, Ireland has introduced a new foreign direct investment regime which will come into force in September 2024. This note sets out an overview of the rules (who needs to file, in what circumstances, at what point in the deal cycle and what the impact might be on a deal timeline). We also outline the significant consequences of failure to notify (criminal sanctions as well as financial), and examine the recently published draft guidance.

Background

On 31 October 2023, the Screening of Third Country Transactions Act 2023 (the "STCT") was signed into law. Once the STCT begins to apply, parties to transactions which meet the criteria under the STCT will be required to submit a mandatory, suspensory notification and obtain clearance before the transaction can close. While Ireland is one of the few remaining European Member States to introduce a foreign direct investment regime, its substance largely replicates the framework set by the EU's Foreign Direct Investment Regulation.[1] While the regime remains to be tested in practice, the Department of Enterprise, Trade and Employment ("**DETE**") has published a robust and comprehensive draft guidance document (the "**Draft Guidance**") which speaks to the operation of the regime and the types of investment the STCT seeks to address.

This article is based on the Draft Guidance as published by the DETE at the time of writing.

Who files?

The STCT applies to the acquisition of control by "third country undertakings" which means a state or territory, other than: an EU Member State, a member of the EEA, or Switzerland. Acquisitions by UK or US undertakings are therefore in scope of the STCT. An investor will be considered a "third country undertaking" if:

a) investors are constituted or otherwise governed by the law of a third country;

b) entities are controlled by at least one director, member, or another person who is ordinarily resident in a third country; or

c) by natural persons or partnerships that are ordinarily resident in a third country.

Thresholds

For a transaction to be subject to a mandatory notification, a transaction must meet all the criteria in Section 9(1) of the STCT. In brief:

- **Acquisition threshold**: a transaction is notifiable where a third country undertaking acquires control of an *asset or undertaking* in Ireland or changes the percentage of shares or voting rights it holds in an undertaking from 25% or less to more than 25%, or from 50% or less to more than 50%. An asset will be regarded as in Ireland where it is "physically located within the

territory”, or if intangible, where it is owned, controlled or otherwise in possession of an undertaking in Ireland. In the case of undertakings, it shall be regarded as in the Ireland where (a) it is constituted or governed by the laws of Ireland or has its principal place of business in Ireland.

- **Transaction value**: the cumulative value of the transaction and each transaction between the parties to the transaction (including connected persons) in the period of 12 months before the date of the transaction is equal to or greater than EUR 2 million. According to the Draft Guidance, the value relates to the value of the entire transaction, including any international dimension that might include assets or undertakings not located in the State.

- **Target activities**: The transaction “relates to or impacts on” one or more of the following activities:

- 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;
- critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies as well as 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; or
- the freedom and pluralism of the media.

Those familiar with FDI regimes around Europe will recognise that the categories replicate the sectors set out in the EU FDI Regulation. The Draft Guidance sets out in further detail what may be captured in the categories. While the Draft Guidance may ultimately change, the categories included directionally indicate the types of activities and sectors that the regime intends to capture.

Note that the activities can “*relate to*” or “*impact on*” the activities referred to above – investors should therefore carefully consider the industry verticals that the target businesses serve, even if on the face of it, the business does not immediately appear to be directly involved in the sectors themselves.

It is important to note that the Minister may “call-in” a transaction which does not meet the above cumulative criteria, if the Minister deems that the transaction may pose a risk to security or public order.

Considerations when reviewing transactions

In the Draft Guidance, DETE considers that “*only a small number of investments, mergers or transactions might pose a risk to our security and public order*”. When making its assessment, the Minister must consider several factors in its assessment of a notified transaction, including:

· Whether an investor is controlled by a third country government.

· The target’s activities and if they are involved in activities related to security or public order or could have a negative impact on the activities cited above (i.e., critical infrastructure, etc.).

· Any evidence of criminal or illegal activities amongst the parties to the investment.

· The likelihood of the transaction resulting in actions that are disruptive or destructive.

· Whether the transaction will result in investors accessing sensitive assets, people, data or information (that is of general important to the security or public order.

· The views of the European Commission and other EU Member States) including whether the transaction could impact on projects or programmes of Union Interest.

· The views of the Investment Screening Advisory Panel.

Consequences of failure to notify

If the parties to a notifiable transaction fail to notify, the transaction shall be deemed to be subject to a decision such that the transaction is deemed to, or would be likely to affect, the security or public order of the State and the parties will be prohibited from completing or taking action to complete the transaction.

Failure to notify a transaction which is caught by the STCT can result in a person being liable to a fine not exceeding **EUR 4 million** or up to **5 years imprisonment.**

Timeline

Parties to a notifiable transaction must notify the Minister 10 days before the date on which the transaction is completed. Failure to notify within the timeframe would result

in the transaction being deemed to be the subject of a negative screening decision by the Minister.

Once the transaction has been notified, the Minister shall provide parties to the transaction with a notice (a “screening notice”) which shall confirm the reasons for which the transaction is being reviewed (or, alternatively, confirming that the transaction is able to proceed without screening). [2] The screening notice must be issued “as soon as practicable” and as such, there is no statutory timeline for the Notice to be issued. The Minister must decide as to whether the transaction affects, or would be likely to affect, the security or public order of the State on or before the 90 days from the data on which the screening notice. In exceptional circumstances, the time may be extended by the Minister by an additional 45 days.

Note that the regulator has the power to issue requests for information which will pause the 90-day timeline. The timeline will only recommence once confirmation is issued to the notifying party that the information requested has been received.

Retrospective application

The STCT applied to transactions that have been completed in the 15 months prior to the commencement of the STCT. Thus, for any acquirers currently in the process of acquiring businesses which meet the criteria for mandatory notification, care should be given to the inclusion of any conditions precedent with regard to the STCT, should there be a live risk that the Minister will want to review the transaction under contemplation.

Other process considerations

Note that once a screening notice has been issued, the notification will be shared with the European Commission and other Member States, as required under the EU cooperation mechanism. This provides an opportunity for other Member States to probe the transaction and thus, notifying parties need to be confident in their conclusions as to the applicability of any other European foreign direct investment regimes (e.g., if the target has subsidiaries in one or more Member States).

Comparison to the UK and other FDI regimes

In comparison to the UK’s FDI legislation[3], the Irish regime is markedly different on a number of fronts, including that the STCT:

(1) captures “third country undertakings” (whereas the UK is buyer-jurisdiction agnostic);
(2) has a longer review period than the UK (90 days rather than the UK’s 30 working days);
(3) has a materiality threshold (the UK has no monetary floor for notifiable transactions); and
(4) does not capture internal restructurings.

Next steps

While DETE has published Draft Guidance, the final version of the guidance is still awaited. However, for any parties considering transactions with an asset or undertaking in Ireland, it is prudent for buyers to consider if there is a possibility that the STCT could apply to their transactions and plan accordingly. This will include:

(1) running a due diligence exercise on the target business and whether its activities are in scope;
(2) considering the timeline for notification (and whether the transaction may require retrospective validation);
(3) including any necessary protections within the draft of the relevant merger documentation.

For further information, please contact annalie.grogan@kpmg.co.uk.

---

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the “EU FDI Regulation”).

[2] In rare instances, the Minister may proceed to screen a transaction but can opt not to issue a Screening Notice.

[3] National Security and Investment Act 2021.