Ogier

Overview of the Screening of Third Country Transactions Act 2023

Insights - 26/01/2024

The Screening of Third Country Transactions Act 2023 (Act), which we previously discussed in an article from earlier this year, was signed into law on 31 October 2023. The Act will introduce a foreign direct investment (FDI) screening regime to Ireland for the first time. This reflects recent international legislation on enhanced FDI control (e.g., the UK's National Security and Investment Act). More significantly,it specifically addresses Ireland's obligations under the EU FDI Regulation (EU 2019/452).

The Act's primary purpose is to protect security and public order in Ireland by providing for mandatory notification of certain FDI transactions into industries of strategic interest to the Minister for Enterprise, Trade and Employment (the **Minister**), who is given broad powers of review.

Although now enacted, the legislation has not yet commenced, with the Irish Government indicating that the Irish inward investment screening mechanism is likely to commence during the course of Q2 2024. We outline some of the key features of the Act below:

Which transactions are notifiable?

The Act applies in respect of acquisitions, agreements or other economic activities resulting in:

- the acquisition of all or part of, or any interest in, an undertaking (e.g., company) constituted, governed or with its principal place of business in Ireland (Irish Undertakings); or
- a change in control of either (i) assets physically located in Ireland or (ii) intangible assets (e.g., intellectual property), owned, controlled or possessed by an Irish Undertaking (Irish Asset).

Defining a notifiable transaction

A Transaction is notifiable under the Act where each of the following criteria are met.

Acquisition of Control by a Third Country Undertaking

The Transaction will result in a third country undertaking (see below) or a person connected with such an undertaking acquiring (i) control of an Irish Asset or Irish Undertaking or (ii) increasing its voting rights in an Irish Undertaking from 25% or less to over 25%, or from 50% or less to over 50%.

A person shall be regarded as having control of an asset where that person has the ownership of, or the right to use, all or part of the asset and of an undertaking where that person can exercise decisive influence over the activities of the undertaking by any means.

Financial Threshold

Unless a different amount is prescribed by the Minister, the Transaction has a deal value over €2 million (to include the accumulative value of transactions between the parties or connected parties in the preceding 12-month period).

Intra-Group Exception

The same undertaking does not, directly or indirectly control all the parties to the Transaction.

National Strategic Interest

The Transaction relates to, or impacts upon, one or more of the following matters:

1. Critical infrastructure (physical or virtual);
2. Critical technologies and dual use items;
3. Supply of critical inputs, including energy or raw materials and food security;
4. Access to sensitive information or the ability to control such information;
5. The freedom and pluralism of the media.

Third Country Undertaking

A third country is a state or territory other than Ireland, a member of the EU, the EEA or Switzerland. Notably, the UK (including Northern Ireland) and the US are third countries under the Act.

A Third Country Undertaking is defined as an undertaking that is:

1. constituted or otherwise governed by the laws of a third country;
2. a third country national (i.e. a natural person who is ordinarily resident in a third country or an unincorporated group or partnership of natural persons at least one of whom is ordinarily resident in a third country); or
3. controlled by at least one director, partner, member or other person, who falls within (a) or (b).

Mandatory notification and "Call In" power

If the Transaction is notifiable as outlined above, the parties to the Transaction must notify it to the Minister for prior approval not less than 10 days before it is due to complete. Certain prescribed information must be given as part of the notification.

Even where the Minister is not required to be notified, he or she can still review transactions where there are reasonable grounds to believe that the Transaction could affect security or public order in Ireland. The Minister has a period of 15 months after completion to 'call-in' such transactions.

Process and timetable for review

The overarching consideration for the Minister when reviewing a Transaction is whether it affects, or would be likely to affect, the security or public order of Ireland with the Minister to have regard to various factors in undertaking this consideration. During the review, the Minister will consult with an advisory panel, consider information provided by parties to the Transaction and where he or she considers it prudent, consult with other Government Ministers.

As soon as practicable after commencing the review, the Minister is obliged, apart from in certain exceptional circumstances, to issue a 'screening notice' to the parties to the Transaction and subsequently must issue a 'screening decision' within 90 days of the screening notice (which may be extended to 135 days). Suspension of the timetable can also occur where further information is requested.

Before the screening decision has been provided, the parties cannot complete or take any action towards furthering the Transaction. Where the Minister makes a screening decision that the Transaction affects, or would be likely to affect, the security or public order of the State and the Minister makes no other specific directions, the parties shall not complete the Transaction. The Minister also has broad power to make various other directions as part of his/her screening decision (e.g. not to complete certain aspects of the Transaction/divestment of assets or shares).

Parties may appeal the Minister's decision to an independent adjudicator. The adjudicator's decision can then be appealed to the High Court on a point of law only. Decisions of the Minister and the Adjudicator are both subject to judicial review.

Retrospective review, offences and penalties

The Act has partial retrospective effect whereby the Minister can decide to review Transactions that have been completed up to 15 months before the Act comes into operation. Transaction parties will therefore need to consider the Act now in terms of deal management and contractual protection.

Non-compliance with the obligations imposed by the Act (including failure to notify) are offences and the Act imposes harsh penalties for non-compliance including fines up to €5,000 and/or up to 6 months imprisonment (on summary conviction), or fines of up to €4 million and/or up to 5 years imprisonment (on conviction on indictment).

Impact

All parties, advisors and promoters in the FDI space considering a Transaction in Ireland should be aware of this legislation and the impact it may have on transaction timing and, potentially, execution. While national security considerations are at the heart of the regime, the legislation is written in a broad manner so that it may impact many types of deals at relatively low financial thresholds and across many sectors whereby a notification may be the most prudent course of action where there is any doubt whether the notification obligation applies or not.

While these considerations are becoming a more common factor internationally and it is likely that the Irish regime will aim to strike a balance between the continued promotion of Ireland as an attractive FDI location, it remains to be seen how the new Irish regime will work in practice and the impact it will have on transactions.

It is likely that the Irish Government will publish further guidance on the regime before it goes 'live' and we will continue to provide updates on further developments.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Dominic Conlon

Partner

Ireland

E: dominic.conlon@ogier.com

T: +353 1 232 1075

Key Contacts

Ryan Duggan

Senior Associate

Ireland

E: ryan.duggan@ogier.com

T: +353 1 237 3083

Lisa Quigley

Trainee Solicitor

Ireland

E: lisa.quigley@ogier.com

T: +353 1 632 3118

Related Services

Corporate

Mergers and Acquisitions

Regulatory

Ireland Local Legal Services

Related Sectors

Foreign direct investment (FDI)