LAW SOCIETY OF IRELAND

26 February 2024

Comments from the Business Law Committee of the Law Society of Ireland on the Department of Enterprise, Trade and Employment's *Inward Investment Screening Guidance for Stakeholders and Investors* (the "**Draft Guidance**").

1. **Background**

    a. Overview of the Legislation

        i. Ireland's *Screening of Third Country Transactions Act* 2023, expected to come into force in Q2 2024, establishes a mandatory 'file-and-wait' system for transactions that meet statutory reporting thresholds, termed in the Act Notifiable Transactions.

        ii. A filing must be made "*not less than 10 days before*" completion and, in cases where the Minister issues a "screening notice," completion suspended pending Ministerial review and approval.

        iii. Criminal penalties apply for failure to notify and for failure to suspend closing in cases where a screening notice issues (in both respects, up to €4 million fines and/or jail sentence for up to 5 years). In addition, parties to a Notifiable Transaction that fail to notify may not complete the transaction.[1]

        iv. The statutory reporting thresholds involve both a 'type-of-transaction' element and a 'size-of-transaction' element. The size-of-transaction element involves a relatively brightline test, namely is the deal consideration above €2 million.

        v. In contrast, as discussed below, the type-of-transaction test is based on less objectively quantifiable criteria involving relatively complex legal and fact-intensive questions that may be difficult to assess with certainty. This is particularly the case in respect of the Section 9(1)(d) reporting criteria.

[1] According to the Draft Guidance, "[*f*]*ailure to notify a notifiable transaction means that such a transaction will be deemed to represent a risk to the security or public order of the State and so cannot be put in effect*" (at page 21). Section 10(3)(a) of the Act states that in the event of a failure to notify a notifiable transaction before completion, "*… the transaction shall be deemed to be subject to a screening decision that the transaction affects, or would be likely to affect, the security or public order of the State" and Section 10(3)(b) provides further that "… such screening decision shall be deemed to have been made on the day before the date on which the transaction is completed*."

vi. The Minister has 135 days from issuance of a screening notice to decide to approve a deal, conditionally approve it, or veto it outright. This 135-day period can be extended if additional information is needed from the parties.

b. The Potential Number of Filings

i. According to the Commission Staff Working Document to the most recent EU Report on Foreign Direct Screening SWD (2022) 219 final, over 4,000 deals were done by foreign investors in the EU in 2021.

ii. The U.S. and UK dominated foreign transactions with 58% of the acquisitions and 60% of the greenfield investments. Information and Communications Technology was the top sector by number of foreign acquisition (30%).

iii. According to Table 5a of that Report, at page 11, investments via acquisitions of equity stakes in Ireland accounted for 6.7% of a total 600 U.S. investments in the EU (*i.e.*, around 40 deals), and 9.4% of a total 500 UK investments in the EU in 2021 (*i.e.*, around 45 deals).

iv. According to Table 5b, greenfield investments in Ireland accounted for 11.5% of a total 700 U.S. greenfield investments in the EU in 2021 (*i.e.*, around 80 greenfield investments) and 8.2% of a total 500 UK green field investments in the EU (*i.e.*, around 40 greenfield investments). This suggest that around 205 deals per annum may be notified from the U.S. and UK alone.

v. According to the same report, U.S. and UK foreign acquisitions and greenfield investments account for around 60% of total foreign investments in the EU. Assuming a similarly percentage for Ireland, this suggests that over 300 deals per annum may potentially be notifiable in Ireland.

vi. Given the criminal sanctions for failure to notify, as well as the legal risks to the deal, parties to transactions are likely to take a precautionary approach and file their transaction for legal certainty purposes.

vii. Against this background, it is welcome that the Draft Guidance states explicitly that "*only a small number of investments, mergers or transactions might pose a risk to our security and public order and so, the investment screening mechanism must be proportionate and tailored to these risks, without undermining Ireland's attractiveness to inward FDI more generally*" (at page 10).

2. **COMMENT 1: It would be helpful if the Draft Guidance provided for opportunity to contact Department officials to obtain pre-notification guidance on the application of the notification thresholds and on the scope of the information to be submitted.**

a. The Draft Guidance state that the Department's Case Management System will be used "… *to manage all of the interaction between the notifying parties and the Department*" (at page 21).[2] It appears, therefore, that the Draft Guidance does not provide for pre-notification engagement with Department officials.

b. As mentioned above, the type-of-transaction test is based on less objectively quantifiable criteria involving relatively complex legal and fact-intensive questions that may be difficult to assess with certainty. This is particularly the case in respect of the Section 9(1)(d) reporting criteria requiring that the deal "… *relates to, or impacts upon, one or more of the matters referred to in points (a) to (e) of Article 4(1) of Regulation (EU) 2019/452.*"

c. Essentially, this involves assessing whether the target is involved in or operates:

   i. infrastructure necessary "*for the provision of an essential service*;"

   ii. relatively widely defined "*critical technologies*;"

   iii. an EU defined expanding list of "*critical inputs*;"

   iv. "*sensitive information*" (including personal data); and

   v. whether the deal impacts "*freedom and pluralism of the media*."

d. Given the fact-intensive nature of the type-of-transaction test, a system of pre-notification engagement with Department officials could help reduce the number of unnecessary filings and thereby lower the administrative burden on the Department.

3. **COMMENT 2: It would be helpful if the Draft Guidance explicitly permitted filing before the parties conclude a definitive agreement, on the basis of, *e.g.*, a letter of intent, agreement in principle, or public announcement of the intention to make a tender offer.**

a. Parties to Notifiable Transactions will wish to make filings at the time they deem most efficient. To facilitate coordination with other regulatory filings (including, for instance, merger control filings to the Competition and Consumer Protection Commission (**CCPC**), as well as equivalent filings in other jurisdictions that may be required), this may be at a relatively early stage in the deal finalisation process.

b. The legislation does not stipulate that notification is contingent on a definitive transaction agreement being in place. Rather, the statutory obligation to file, in terms of timing, is that it be made "*not less than 10 days before*" completion.

c. For a number of years now, the CCPC has allowed for filings on the basis of a good faith intention to complete. Consistent with this approach, it would be helpful if the

[2] According to the Draft Guidance, Glossary of Terms, at page 5, the Case Management System is "*DETE's online tool to facilitate communication and interaction between the Department and notifying parties throughout the notification and screening process*."

Department allowed formal notification before a definitive agreement is signed and, to that end, that the Draft Guidance made this clear.

4. **COMMENT 3: The Draft Guidance could provide more clarity on what deals will be cleared following an abbreviated initial review, without a Screening Notice.**

    a. As the Draft Guidance rightly states, "*only a small number of investments, mergers or transactions might pose a risk to our security and public order*." Experience from Irish merger control enforcement, to the extent analogous, suggests that around 5% of notified deals raise potential substantive issues meriting in-depth investigation and around 2% of notified deals result in interventions in the form of conditional approvals or outright vetos.

    b. Given that the vast majority of Notifiable Transactions will not raise security or public order concerns, a "proportionate and tailored" investment screening mechanism should be designed to permit such transactions to proceed expeditiously.

    c. As we read the Draft Guidance, the Department proposes to achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period, and subjecting only transactions that raise material security and public order concerns to more extended review periods.

    d. More specifically, as we understand it, a Screening Notice will not issue in respect of every Notified Transaction. Rather, most notifications will be dealt with via issuance by the Department of a form of "comfort letter" informing the parties that they may proceed with their transaction because it does not fall within the mandatory notification regime.[3]

    e. This reading is based on the following:

        i. According to the legislation, a Screening Notice will issue if a notified deal is "*being reviewed*" by the Minister on security and/or public order grounds. The purpose of the Screening Notice is to permit the parties opportunity to "*make written submissions … regarding the transaction*" (Section 14(2)). The Minister must issue a Screening Notice "*as soon as practicable after commencing a review of a transaction*."

        ii. According to the Draft Guidance, "[*f*]*or notifications received that are determined not to fall within the scope of the mandatory regime, the Department will issue a letter to the parties confirming that mandatory notification does not apply*" (bullet 2, at page 22).

    f. Accordingly, we take it that only a relatively small percentage of Notified Transactions will require in-depth review via issuance of a Screening Notice. But it would be helpful

[3] We note, however, that *Figure 1: Main Elements of Screening of Third Country Transactions Act* on page3 9 of the Draft Guidance does not include reference to the issuance of any comfort letter suggesting that issuance of a Screening Notice is the sole step following notification.

if the Draft Guidance could make this clear by explicitly stating that only certain Notifiable Transactions will result in issuance of a formal Screening Notice.

g. Moreover, it would be helpful if the Draft Guidance could clarify the circumstances in which the Department will issue a letter to the parties that "*notifications received … are determined not to fall within the scope of the mandatory regime*."

h. While the legislation does allow for voluntary filing of non-Notifiable Transactions, parties will typically notify deals on the basis that they are Notifiable Transactions. When notifying, therefore, the parties' legal advice may well be that their deal is a Notifiable Transaction. In such circumstances, a Department comfort letter that the Notifiable Transaction does not merit issuance of a Screening Notice may provide greater comfort and legal certainty to the parties than a letter stating that the deal may not be notifiable.

i. This is particularly the case given that the Draft Guidance also expressly states that a Department letter to the effect that a Notifiable Transaction is outside the scope of the mandatory regime "… *does not impact upon the Minister's power to subsequently review a transaction on the basis of their discretionary power under section 12 of the Act (i.e., the Minister reserves the right to review a transaction, regardless of whether it fulfils the criteria for mandatory notification)*" (bullet 2, at page 22).

j. Similarly, it would be helpful if the Draft Guidance could provide more clarity on the circumstances in which a Screening Notice will issue. It would also be helpful if the Draft Guidance could provide guidance on the timeframe within which a Screening Notice will typically issue. Currently, the Draft Guidance states that a Screening Notice will issue "ASAP" (Figure 1, page 9).

5. **COMMENT 4: The proposed notification form could be more proportionate and tailored.**

a. Reflecting that only a small number of investments will raise substantive issues, a proportionate and tailored investment screening system would permit an abbreviated notification form subjecting only transactions that raise material security and public order concerns to more extended notification requirements.

b. The Committee respectfully submits that initial notification requirements should be limited to information needed by the Department to determine whether the transaction raises substantive issues meriting further investigation.

c. Section 10(1)(b) of the Act lays down minimum information that must be provided in a filing of a Notifiable Transaction. But we understand that the Department proposes to require parties to all Notifiable Transactions to provide more extensive information. This is because the Department proposes to use as its standard-form notification form a 21-page EU form for providing information to be submitted under the cooperation mechanism under Article 6 of Regulation (EU) 2019-452.DOCX.

d. According to the Draft Guidance, "[*t*]*he form used by the Department replicates the form used by the European Commission to facilitate the exchange of information between Member States. While the form is lengthy, and there is an element of duplication in some sections, the Department considers this preferable to requiring investors to fill in separate national and EU notification forms, as often occurs in other Member States*" (at page 22).

e. A more tailored and proportionate approach would be to require this additional information only if a Screening Notice issues in respect of a notified transaction. There are various ways to provide flexibility in the initial review:

   i. Alternative notification formats – different initial notification formats varying with the likely complexity of the analysis of the transaction; examples include: (a) advance ruling certificates, which enable the merging parties to use a simplified advance procedure instead of a formal notification; and (b) short and long form notification options, enabling the parties to elect to submit abbreviated information in transactions that do not present material security or public order concerns.

   ii. Discretionary waiver – extensive initial notification requirements coupled with procedures providing Department officials discretion to waive responses to information specifications that are not sufficiently relevant to the Department's review of the transaction to justify the burden that the responses would impose.

   iii. Discretionary supplementation – abbreviated initial notification requirements coupled with procedures providing Department officials discretion to seek additional information during the initial review period.

6. **COMMENT 5: The Draft Guidance statement on criminal liability is helpful.**

   a. Regarding the potential for criminal prosecution for failure to comply with the mandatory notification regime, it is helpful that the Draft Guidance states that "[*s*]*uch offences … are intended to counter deliberate attempts to circumvent the screening regime, rather than to punish honest mistakes*" (at page 15).

7. **COMMENT 6: The Draft Guidance could provide greater clarity on the Minister's Call-in Right**

   a. The Act provides that the Minister may call in non-notified deals up to 5 years from the date on which the deal is completed or 6 months from the date the Minister first becomes aware of the transaction (Section 12(2)(a)).

   b. For deals that are not notifiable, the Minister has 15 months after completion to call any such deal in (Section 12(2)(b)). Further, the Minister has a general power in respect of all deals completed within 15 months before the coming into operation of the Act to call in a deal (Section 12(2)(c)).

c. According to the Draft Guidance, "… *the Minister will be able to initiate screening of other investments which do not require mandatory notification, but which the Minister deems, on reasonable grounds, may pose a risk to security or public order*."

d. The Draft Guidance goes on to state that "[*t*]*his ensures that the screening system is flexible enough to adapt to changing economic and technological developments and allows the Minister to respond to deliberate attempts to circumvent the screening mechanism*."

e. Without unduly fettering the Minister's statutory call-in power, it would be helpful to give business, stakeholders and practitioners greater clarity on when the Minister may exercise this call-in power.

f. For instance, it would be helpful if the Draft Guidance could clarify in what circumstances a transaction by a foreign investor might be called in by the Minister where the business concerned does not involve one of the matters referred to in points (a) to (e) of Article 4(1) of the Regulation.[4]

8. **COMMENT 7: The Draft Guidance could provide for opportunities for meetings or discussions between Department officials and the parties at key points in the screening process.**

a. Although scheduling meetings may not be necessary in non-complex cases, in appropriate cases the parties should be afforded an opportunity to meet with Department officials at key points of the investigation.

b. For example, wherever possible, the parties should have an opportunity to meet with Department officials prior to the Minister's decision not to permit a transaction or to permit it subject to conditions.

c. As early as feasible, the Department should be prepared to discuss its current evaluation of the transaction with the parties and attempt to identify potentially dispositive issues.

d. We note in this regard that section 13(3)(f) of the Act provides that the Minister may "… *enter into discussions with the parties to the transaction … with a view to identifying measures that would ameliorate any effects of the transaction on the security or public order of the State*."

[4] We note in this regard that the UK authorities have issued explicitly written clarification as to when a similar call-in right may be invoked under equivalent UK legislation. See, National Security and Investment Act 2021: Statement for the purposes of section 3 - GOV.UK (www.gov.uk)

Comment 8: The Draft Guidance could provide for simplified treatment of acquisitions of decisive influence, and any subsequent of a 50%+ stake, where a buyer has already been cleared to acquire 25%.

a. According to Section 9(1) of the statute, "[a] transaction is notifiable where it satisfies each of the following criteria:

(a) a third country undertaking, or a person connected with such an undertaking, as a result of the transaction—

(i) acquires control of an asset or undertaking in the State, or

(ii) changes the percentage of shares or voting rights it holds in an undertaking in the State—

(I) from 25 per cent or less to more than 25 per cent, or

(II) from 50 per cent or less to more than 50 per cent.

b. This suggests that acquisition of control, defined in the statute by reference to "decisive influence," could be required in respect of transactions where the buyer has previously been cleared to acquire 25% or more.

c. In many circumstances, acquisition of a 25% stake may not give the buyer "decisive influence" over the target business. But acquisition of an additional material stake, albeit one that does not give the buyer a 50%+ stake, may confer "decisive influence" on the buyer, to the extent the buyer thereby gets veto rights over key strategic decisions, such as over the annual budget or business plan and/or appointment of senior management of the target business.

d. We note in this regard that the Draft Guidance states that "[n]otification is required, therefore, when either "control" of an asset or undertaking is acquired, or when shares or voting rights are acquired in line with the thresholds set out in Section 9" (at page 11).

e. Assuming the intention is that new and separate notifications are required in respect of an acquisition of control *and* acquisitions of 25%+ and 50%+ stakes in respect of the same target business and buyer, the Draft Guidance could provide for a simplified notification procedure and more rapid approval timeframes for those subsequent acquisitions.

9. **Comment 10: Publication of Screening Decisions**

a. According to the Draft Guidance, "[i]ndividual screening decisions or details about any individual transaction will not be published" (at page 27).

b. While public order and national security reasons may mean that certain parts of the Minister's decisions, or indeed in exceptional cases, the entirety of a decision, may require redaction, publication of decisions should be the norm.

c. Publication of decisions will not only promote transparency in decision making. It will also be critically important to ensure predictability and foreseeability for stakeholders, especially foreign investors, in the system. This is particularly in the case of prohibition or conditional decisions.

d. We note in this regard that the UK authorities publish notice of final orders made under equivalent UK legislation (see, Notices of final orders under the National Security and Investment Act 2021 – GOV.UK (www.gov.uk)).

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