Regulation of Foreign Investment in Ireland

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A Practice Note setting out the proposed legal regime for governing foreign investment in Ireland once the *Screening of Third Country Transactions Act 2023* (STCTA 2023) is implemented into Irish law. While the STCTA 2023 was signed into law by the Irish president on 31 October 2023, it is yet to be implemented into Irish law. Such implementation is expected to take place in the second quarter of 2024 at which time the provisions of the STCTA 2023 will take effect.

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The legal regime in Ireland which will govern the screening of foreign investments is yet to be implemented into Irish law. The current lack of a legal regime in Ireland is in contrast to many other EU countries where certain strategic sectors have provisions in place for reviewing foreign investment (see, for example, *Practice Note, Foreign Investment in the Netherlands*).

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The only transactions involving foreign investments which are currently scrutinised from a regulatory standpoint are those transactions notifiable under Ireland's merger control regime where the thresholds specified under the *Competition Act 2002* are met and notification to the Competition and Consumer Protection Commission (CCPC) is required. In these circumstances, however, the CCPC's sole concern is whether the transaction will result in a significant lessening of competition in the State in the relevant market. For more information, see *Practice Note, Competition Law Overview (Ireland)*.

Legal scrutiny of foreign investments will begin once the *Screening of Third Country Transactions Act 2023* (STCTA 2023) is implemented into Irish law (with such implementation expected in the second quarter of 2024). While the STCTA 2023 was signed into Irish law by the Irish President on 31 October 2023, it has not yet been implemented in law.

This note focuses on the following legislation:

- *Regulation 2019/452/EU establishing a framework for the screening of foreign direct investments into the Union* (EU FDI Regulation) (see *EU FDI Regulation*).
- The STCTA 2023.

EU FDI Regulation

On 19 March 2019, the EU adopted the EU FDI Regulation. Under the EU FDI Regulation, natural persons or companies of a third country (that is, a country outside the EU) intending to make, or having made, a foreign direct investment must be screened by local authorities.

Under the EU FDI Regulation, foreign direct investment is investment of any kind by a foreign investor that aims to establish, or to maintain, lasting and direct links between the foreign investor and a party in an EU member state to carry on business in a member state.

Each member state screening foreign direct investment must notify the European Commission if they investigate a (proposed) qualifying investment. They must also notify other member states "whose security or public order is deemed likely to be affected" (Article 6, EU FDI Regulation).

If the Commission or the member state believes that the proposed investment is likely to affect security and public order in another member state, or holds relevant information on the transaction, they may, respectively, provide an opinion or make comments. These comments or this opinion must be provided within 35 days of the initial notification from the member state's government (Article 6(7), EU FDI Regulation). The member state's government remains in control of the final decision regarding the investment or transaction.

Accordingly, the term of duration of the screening process under the EU FDI Regulation is suspended if another EU member state, or the Commission, indicates its intention to provide comments or issue an opinion on the investment or transaction under review under the EU FDI Regulation. The suspension ends, and the term starts running again, when the opinion is received by the member state's government. Similarly, the term is suspended if the government requests the Commission, or another member state, to make comments or issue an opinion on the proposed investment.

Irish Implementation of the EU FDI Regulation

The EU FDI Regulation will be implemented into Irish law by way of the STCTA 2023 (with such implementation expected in the second quarter of 2024). This will introduce Ireland's screening mechanism for transactions involving foreign investment.

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The Irish Department of Enterprise, Trade and Employment acts as Ireland's national contact point for co-operation with the European Commission and with other EU member states on investment screening matters.

Status of the STCTA 2023

The implementation into Irish law of the STCTA is estimated to take place at some stage during the second quarter of 2024.

Aims of the STCTA 2023

The STCTA 2023 aims to review transactions involving foreign investment, in order to reduce the risks that such transactions may present to the security or public order of the State.

How Foreign Investment Will Be Governed in Ireland

Type of Transactions That Will Be Subject to Notification Under the STCTA 2023

The Irish Minister for Enterprise, Trade and Employment will review foreign investment transactions fulfilling certain criteria contained in the STCTA 2023.

The STCTA 2023 will apply to all transactions, acquisitions, agreements or other economic activities that directly or indirectly relate to, or impact on, a relevant matter (see Relevant Matter") and where there is:

- A change in control of an asset in Ireland (that is, an asset acquisition) that involves a third country undertaking or a person connected with such an undertaking.
- An acquisition of a part (or all) of any interest in an undertaking in Ireland (that is, a share acquisition) where the percentage of shares or voting rights held by the person in the undertaking changes from 25% or less to more than 25% or 50% or less to more than 50% that involves a third country undertaking or a person connected with such an undertaking.

A third country undertaking means any undertaking that is:

- Constituted or otherwise governed by the laws of a third country (a third country means any country that is not a member state of the EU, a member of the EEA or Switzerland).
- Controlled by 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.
- A third country national.

Relevant Matter

The definition of relevant matter under the STCTA 2023 is linked directly with Article 4 of the EU FDI Regulation.

A relevant matter means a transaction that has a value equal to or greater than EUR2 million (or such other amount as the minister may prescribe from time to time) that relates to any of the following:

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- 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 (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.
- The freedom and pluralism of the media.

(Section 9, STCTA 2023.)

Non-Notifiable Transactions

Regardless of whether the transaction meets the above thresholds for notification under the STCTA 2023, the minister retains the power to call in transactions for review under the STCTA 2023 if "the Minister has reasonable grounds for believing that the transaction affects, or would be likely to affect, the security or public order of the State". This ministerial power applies to both of the following:

- Transactions that have completed up to 15 months prior to the STCTA 2023 being implemented into Irish law.
- Transactions that have completed not greater than 15 months prior to coming to the minister's attention.

(Section , STCTA 2023.)

Notification Process

Timing for Notification

Parties to a notifiable transaction are responsible for notifying the minister of their transaction "not less than ten days before the date on which the transaction is completed". In practice this means that the parties must notify the minister on signing their proposed transaction and therefore await a decision, or deemed decision, of the minister before completing their transaction.

Information Required

The notification to the minister must include the following information:

- Identities of the parties.
- Ownership structure of the parties to the transaction, including information on persons participating in the capital of the undertaking and persons exercising control over the parties.
- Details of the transaction, including the projected completion date of the transaction, the approximate value of the transaction, the funding behind the transaction and the source of funds.

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- Information on the products, services and business operations of the parties to the transaction.
- 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.
- State or territory under whose laws the parties are constituted, registered, or otherwise organised.
- Annual turnover and total number of employees of each party.
- Details of any sanctions or restrictive financial measures imposed on the parties by the EU.
- Any other information necessary for the minister to review the transaction.

(Section , STCTA 2023.)

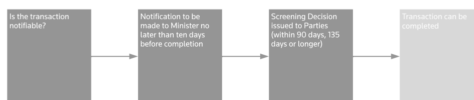
Duration of Screening Process

The minister will issue a screening notice within ten days of a transaction being notified. After the screening notice has been issued, the minister has 90 days from the date of notification of the transaction to come to a decision as to whether a transaction may pose a risk to the security or public order of the State. This period of 90 days can be extended to 135 days by the minister at their discretion. In addition, the review timetable may be temporarily suspended (and thereby extended) should the minister request further information from the parties to a transaction during the screening process.

Once the minister has reached a decision, the parties will be informed in writing, as soon as practicable, of that decision. The minister may provide reasons for a screening decision but will not do so if providing such reasons may create a risk to the public order or security of the State.

(Sections 14, 16 and 19, STCTA 2023.)

Statutory Timeline for Notifications



Minister's Considerations with Respect to Notified Transactions

When assessing whether a transaction affects, or would be likely to affect, the public order or security of Ireland, the minister shall have regard to the following:

- Whether or not a party to the transaction is controlled (whether through ownership structures or by other funding) by a government of a third country and, where relevant, the extent to which such control is inconsistent with the policies and objectives of the State.
- Whether a party to the transaction has previously taken actions which affect the security or public order of the State.
- Whether there is a serious risk of a party to the transaction engaging in illegal or criminal activities.

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- 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 the State.
- 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 the State.

(Section , STCTA 2023.)

Potential Actions That Minister may take with Respect to Notified Transactions

The minister will have the following powers with respect to transactions that have been notified under the STCTA 2023:

- Clear transactions that have been notified.
- Prohibit the transaction entirely or prohibit parts of the transaction.
- Impose conditions on the parties to a transaction, including:
  - to sell or divest itself of any matter, including business, assets (tangible or intangible), shares, real property or intellectual property;
  - to modify or constrain its conduct or practice in specified ways;
  - to cease a specified conduct or practice;
  - to prevent the flow of competitively sensitive information between undertakings or within divisions, units, departments or other organisational units within an undertaking.
  - to report to the minister, on such terms as the minister may specify, on the parties' compliance with conditions imposed by the minister.

(Section , STCTA 2023.)

Penalties for Non-Compliance

It will be a criminal offence to:

- Fail to notify the minister of a notifiable transaction.
- Complete a notifiable transaction prior to a screening decision being issued.

Significant penalties will apply should the above offences be committed. These penalties include:

- A fine not exceeding EUR5,000 and/or imprisonment of no more than six(6) months on summary conviction.
- A fine not exceeding EUR4 million and/or imprisonment of no more than five (5) years on indictment.

(Section 6, STCTA 2023.)

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Anti-Money Laundering Laws

Foreign buyers from jurisdictions or sectors that are considered higher risk (in terms of money laundering) may find they are subject to enhanced due diligence procedures and measures to establish source of funds or wealth. These checks will typically be carried out by their Irish legal advisers (or sometimes by the other parties' advisers depending on the nature of the risk) pursuant to the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* (CJA 2010). There have been a number of amendments to the CJA 2010, most recently being the *Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021*.

The CJA 2010 implements EU's AML legislation, currently the *Fourth Money Laundering Directive ((EU) 2015/849)* (MLD4) and the *Fifth Money Laundering Directive ((EU) 2018/843)* (MLD5). For more information on MLD4 and MLD5, see *Practice Notes, Fourth Money Laundering Directive (MLD4)* and *MLD5*. The CJA 2010 implements MLD4 and MLD5.

There are various *Competent Authorities for AML* depending on the sector involved. If, as a result of these checks or otherwise, a firm in the regulated sector (and their employees) has knowledge of, or a suspicion of, or there are reasonable grounds to suspect money laundering or terrorist financing then, under the CJ2A 2010 it must be reported by submitting a suspicious activity report to the relevant competent authority. Solicitors need to report such transactions to the Money-Laundering Reporting Committee of *the Law Society of Ireland*. Banks or other financial institutions report to the *Central Bank of Ireland*.

Solicitors are obliged to vet every client for AML. See the Law Society's latest *2018 AML Guidance* and *AML 2021 Solicitor Update* for the current requirements.

Money laundering means an offence under Part 2 of the CJA 2010.

An offence is committed if:

- The person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:
  - concealing or disguising the true nature, source, location, disposition, movement, or ownership of the property, or any rights relating to the property;
  - converting, transferring, handling, acquiring, possessing, or using the property; or
  - removing the property from, or bringing the property into, Ireland.
- The person knows or believes (or is reckless about whether or not) the property is the proceeds of criminal conduct.

(Section 7(1), CJA 2010.)

A person who commits an offence is liable to either:

- On summary conviction, a fine not exceeding EUR5,000 or imprisonment for a term not exceeding 12 months (or both).
- On conviction on indictment, a fine or imprisonment for a term not exceeding 14 years (or both).

If the bank has reported the suspicious transaction to the CBI under section 42 of the CJA 2010, then it has not committed an offence (section 7(7)(B), CJA 2010).

Money Laundering Outside Ireland

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A person who, in a place outside Ireland, engages in conduct that would, if the conduct occurred in Ireland, constitute an offence under section 7 of the CJA 2010 commits an offence if any of the following circumstances apply:

- The conduct takes place on board an Irish ship, within the meaning of section 9 of the *Mercantile Marine Act 1955*.
- The conduct takes place on an aircraft registered in Ireland.
- The conduct constitutes an offence under the law of that place and the person is:
    - an individual who is a citizen of Ireland or ordinarily resident in Ireland; or
    - a body corporate established under the law of Ireland or a company registered under the *Companies Act 2014* or previous Companies Acts.
- A request for the person's surrender, for the purpose of trying them for an offence in respect of the conduct, has been made under Part II of the *Extradition Act 1965* by any country and the request has been finally refused (whether or not as a result of a decision of a court).
- A European arrest warrant has been received from an issuing state for the purpose of bringing proceedings against the person for an offence in respect of the conduct, and a final determination has been made that:
    - the European arrest warrant should not be endorsed for execution in Ireland under the *European Arrest Warrant Act 2003*; or
    - the person should not be surrendered to the issuing state.

(Section 8(1), CJA 2010.)

The penalties are the same as for section 7(1) above.

The following are also offences with the same penalties as sections 7 and 8:

- An attempt outside Ireland to commit an offence in Ireland (section 9, CJA 2010).
- Aiding, abetting, counselling, or procuring outside Ireland the commission of offence in Ireland (section 10, CJA 2010).

Registration and Disclosure of Beneficial Ownership

Following an acquisition of shares the new holder of the shares (including any new shares issued as part of the acquisition or investment) will need to be recorded in the target company's register of members. For more information see, *Practice Note, Company Registers and Minute Books (Ireland): Register of Members*.

There are also obligations in Ireland to disclose the beneficial ownership of most corporate entities and trusts. For information on what is required see *Practice Note, Company Registers and Minute Books (Ireland): Register of Beneficial Ownership-Corporate Entities* and *Practice Note, Company Registers and Minute Books (Ireland): Register of Beneficial Ownership: Trusts*.

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Following the judgement of the Court of Justice of the European Union (CJEU) in the joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim, the public search facility of the Irish Central Register of Beneficial Ownership was suspended, with access expected to be available to designated persons only. This is because the CJEU ruled that the provisions in the 5th EU Anti-money-laundering Directive whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public, is invalid, constituting a serious interference with the fundamental rights to respect for private life and to the protection of personal data.

In June 2023 the Irish Government introduced amending regulations (*European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities)(Amendment) Regulations 2023(SI 308/2023)Opens in a new window* to deal with the *Sovim* case. To comply with *Sovim*, these Regulations remove the right of access of the **general public** to the RBO. Public access to the RBO is essentially limited to investigative journalists and public interest groups who must make a formal submission to the Registrar of Beneficial Ownership of Companies. The Registrar before granting access must be satisfied that the person seeking the information is:

Engaged in the prevention, detection or investigation of money laundering or terrorist financing offences.

Seeking access to the information in pursuit of the prevention, detection or investigation of money laundering or terrorist financing offences (but such activity need not necessarily relate to cases of pending administrative or legal proceedings in respect of the relevant entity concerned).

They must also prove to the Registrar that the entity under scrutiny is:

Connected with those convicted of money laundering or terrorist financing offences.

Holds assets in a high-risk third country (as defined in Article 9 of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015).

Implications of Foreign Investment Restrictions on Private M&A Transactions

The new screening regime for the review of foreign direct investment in Ireland appears, on its face, relatively cumbersome under the STCTA 2023. This is particularly relevant in circumstances where a high proportion of foreign direct investment in Ireland comes from the UK and the USA, both of which are classed as third countries under the STCTA 2023.

The STCTA 2023, once implemented, may have an effect on transaction timelines for Irish M&A activity. The lengthy standstill period of up to 90 or 135 days under the STCTA 2023 (during which parties to a transaction will be unable to complete their transaction until approval has been granted by the minister) will introduce elements of deal uncertainty that go significantly beyond the timing currently applicable to reviews under the separate Irish merger control law. In addition, the low transaction value of EUR2 million, as well as general uncertainty regarding the application of the notification criteria (at least at the outset of the STCTA 2023's implementation), will likely see a large number of transactions being notifiable or, at least, notifying on a precautionary basis due to the potential for criminal liability to arise for failure to notify. This position is further exacerbated by the ability of the minister to call in transactions for review that would not, by reference to the criteria in the STCTA 2023, otherwise be notifiable.

More clarity may be provided by the Minister's department in due course, but at this moment, it seems likely that the STCTA 2023 will add deal uncertainty and have significant implications for transactions currently being considered where the parties to such transactions are third-country undertakings.

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RESOURCE HISTORY

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Suspension of Public Search Facility of the Central Register of Beneficial Ownership of Companies.

We have added an additional paragraph at the end of the section *Registration and Disclosure of Beneficial Ownership* to reflect the impact of the judgement of the Court of Justice of the European Union (CJEU) in the joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim.

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