LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

Public Consultation on Investment Screening

Transposition of the EU Regulation Establishing a Framework for Screening of Foreign Direct Investments into the EU

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION (DBEI)

JUNE 2020

The Law Society of Ireland ("the Law Society") welcomes this Department of Business, Enterprise and Innovation ("DBEI") public consultation on Investment Screening of Foreign Direct Investments into the EU (the "Public Consultation") and is pleased to submit the following comments and responses to the questions raised.

1. Views on a proposal to introduce a national level Investment Screening mechanism for foreign direct investment in Ireland on the grounds of protecting security and public order.

1.1 The Law Society considers that early adoption by Ireland of a national level screening mechanism for certain types of foreign direct investment (FDI) is important. Further, we believe that a control mechanism of this type is warranted in respect of acquisitions of sensitive and critical infrastructure assets (such as energy, communications and certain transport networks), as well as deals involving Irish firms with access to significant amounts of information and/or personal data of Irish and/or EU citizens. The Law Society believes however, that any such screening mechanism should be proportionate and narrowly prescribed, and should not lessen Ireland's attractiveness to foreign direct investment.

1.2 Absent adequate safeguards, national security and public order could be compromised, not just in Ireland. Given how interconnected Ireland's network infrastructure is with other Member States, a continued free hand for foreign acquirers of sensitive Irish and pan-national businesses could potentially have adverse consequences across the EU. The Public Consultation is clear on this: experience in other Member States which operate investment screening mechanisms is that at least some foreign investments and acquisitions pose risks to security and public order. This is doubtless also the case in respect of some foreign investments in Ireland.

1.3 At the same time, given that the number of such transactions is likely to be low (again, from experience in other Member States), the Law Society respectfully submits that the burden imposed on businesses should be proportionate. As has been stated by Minister Humphreys, regulation of foreign direct investment should be implemented in a way that "*balances Ireland's continued attractiveness as a location for inward investment, with a robust, but proportionate Investment Screening Mechanism that protects security and public order*."

2. **In the event of introducing a Screening Mechanism on a statutory basis, what role and powers should be vested in the Minister for Business, Enterprise and Innovation, including:**

2.1 To assess/investigate, authorise, apply conditions, prohibit or unwind investments;

2.1.1 The Law Society considers that pre-acquisition (*i.e.*, pre-closing) approval of the Minister should be required for all transactions falling within scope of the legislation (discussed more fully under 2.1.3 below). In other words, the Law Society considers that a so-called "file-and-wait" system should be put in place, whereby parties to transactions which fall within the legislation are required to suspend closing pending Ministerial approval. We believe that the suspensory regime set out in Part 3 of the Competition Act 2002 (as amended) provides a good model to follow in this regard.

2.1.2 Given that issues involved in any substantive review could involve questions of national security (that will doubtless involve sensitive information), the Law Society considers that the Minister may be the appropriate person to exercise this function. It is also important that the Minister is empowered to consult other national and international agencies in reaching a decision (this should be explicitly provided for in legislation).

2.1.3 To ensure that pre-acquisition review and control is effective and consistent with the approach of EU and Irish merger control rules, the relevant legislation should prohibit the closing of transactions or investments pending Ministerial approval (or conditional approval) and, of course, prohibit closing if the Minister determines, on the basis of substantive and objective reasons, that the deal would give rise to national security or public order concerns (both of which should be appropriately defined in the legislation).

2.1.4 Legislation should explicitly permit the Minister to approve the proposed transaction, approve it conditionally (*i.e.*, on condition that stipulated commitments such as the adoption of secure ring-fencing, objective monitoring and reporting obligations and/or divestment of certain activities are agreed and met by the parties involved), or prohibit the proposed investment or transaction outright.

2.1.5 The Law Society recommends that the legislation should also provide for voluntary notifications and, in appropriate circumstances, the potential for the Minister to intervene in transactions that do not meet mandatory notification requirements where those deals may, in the Minister's reasonable view, nevertheless raise national security issues. To ensure such power is effective, the legislation would likely also need to permit the Minister (in appropriate circumstances and following review of the transaction) to order unwinding of the transaction if already consummated. To provide some certainty to business on this front however, the Law Society recommends that any such post-closing intervention would only be permitted within a limited period from closing (*i.e.*, 3 - 6 months).

2.2 **To request and receive information from both the investor and the company being acquired;**

2.2.1 To ensure any decision to allow, conditionally allow or prohibit certain FDI, it is critical that the agency charged with the oversight function has the requisite power to obtain all necessary information from the parties (including emails and other electronic documents), as well as third parties to the extent required, relevant to the agency's line of inquiry.

2.2.3 To ensure that the Minister has the requisite power to investigate fully notified transactions, the legislation should permit the Minister to:

(i) stipulate the minimum level of information required as part of any application for approval;

(ii) require the parties to the investment or transaction (including buyer and vendor entities at corporate group/ownership level) to provide additional information (including information electronically stored both in and outside the State) within stipulated timeframes as may be sought by the Minister;

(iii) require third parties, that the Minister reasonably considers may have information relevant to the transaction, to provide that information within stipulated timeframes; and

(iv) review, analyse and use all such information so obtained for the purpose of reaching a view on the proposed transaction (including, to the extent permitted by law, any and all derogations required to applicable EU and Irish data protection and privacy rules on national security grounds).

2.2.4 It is important that the Irish oversight agency would have the power to require parties to disclose information relevant to parent entities at group level (*i.e.*, to the highest level of ownership of any proposed buyer), as well as relevant information held outside the State within the power of procurement of the buyer group.

2.3 To establish an Investment Screening Board to support the Minister in relation to decision making in the context of Investment Screening.

2.3.1 The Law Society considers that the establishment of an Investment Screening Board would be helpful and appropriate, not least to assist in the review of matters which raise serious issues. To minimise the burden and cost of the establishment of a full time Investment Screening Board, the Law Society suggests that such a board could be established on an ad hoc basis (chosen perhaps from a pre-selected panel of experts) to assist the Minister in the review of complex cases.

2.3.2 To establish what cases are sufficiently complex to warrant scrutiny by an Investment Screening Board, the Law Society considers that a two phase review process could be adopted, akin to that provided for in Part 3 of the Competition Act 2002. This would allow for the expedited clearance of most cases via a short Phase 1 review period.

2.3.3 Obligatory timeframes should apply to reviews, placing the onus to conduct timely reviews on the Minister. This system has worked extremely well in the Irish merger control context, in which the Competition and Consumer Protection Commission (and the Minister in the context of media mergers) is obliged to take Phase 1 and Phase 2 decisions within stipulated timeframes. In 18 years of merger control, and over 1,000 deals reviewed, a deal has been cleared tacitly for want of a CCPC decision within the statutory timeframes only once.[1] Adoption of a similar system to screen foreign direct investment deals would effectively mean that deals would be deemed to be approved if no decision to the contrary is taken by the Minister within the statutory timeframe. This would provide businesses with clarity on the timing of any review. In addition, by providing for a two-phase review – allowing more time to review complex transactions – such a system also provides sufficient time to conduct proper investigations of notified deals. If necessary, the review regime could provide for "stop-the-clock" pauses in the review period, particularly if a significant amount of information is required from parties.

3. What types of investment should be screened on security and public order grounds, having regard to the provision of the EU Regulation? For example:

3.1 Should additional particular sectors or financial/turnover thresholds be set out which would automatically trigger screening?

3.1.1 In the Law Society's view, an approach that requires screening only for specific identified sectors may provide a more targeted, focused and predictable regime for foreign investors. As long as clear, workable definitions of the sectors included can be established (as well as those not included), such an approach would be targeted and thus perhaps more likely to feel proportionate to investors. Investors active in sectors falling outside the screening regime would also have clarity that a transaction will not be subject to review.[2]

3.1.2 The Law Society considers that there could also be merit in enacting legislation with a similar scope as that of other EU Member States in this respect. The Law Society understands that, in Germany and France, for example, FDI screening regimes apply to specific, identified sectors.

3.1.3 While the Law Society understands that other jurisdictions (including the U.S. and Australia) may have systems which permit wider, more general screening of foreign real estate investments, it believes that adopting the approach outlined in paragraphs 3.1.1 and 3.1.2 above would be preferable. This is on the basis that we believe that adopting a regime which provides screening only for specific identified sectors will provide certainty to all parties in the context of potential transactions, while at the same time providing appropriate safeguards to public order and security.

1 M/06/044 *Topaz/Statoil*, see https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m06044-topaz-statoil-ireland/.

2 This is also consistent with a recommendation of the United Nations Conference on Trade and Development, UNCTAD Investment Policy Monitor, National Security-Related Screening Mechanisms for Foreign Investment, December 2019, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d7_en.pdf, page 7.

3.2 **Should certain investments be obliged to be automatically notified to the Minister by the investor based, for example, on the country of origin of the investment?**

3.2.1 While certain jurisdictions have adopted such automatic notification regimes, the Law Society considers that such an automatic notification system based on country of origin would not be in line with the spirit of the Regulation (which provides, at recital 15, that rules and procedures relating to screening mechanisms *"should not discriminate between third countries"*). Instead, the key question should be whether the investment is, in fact, *"likely to affect security or public order"* which the Law Society believes is best regulated by the approach outlined in paragraph 3.1 above.

3.3 **Would a system of mandatory notification of investments based on defined thresholds (or other criteria) be preferable to a system that either relies on voluntary notification or that empowers the Minister to screen any investment that he or she believes represents a threat to security and public order?**

3.3.1 From our experience of Ireland's merger control regime (which offers some parallels), the Law Society considers that a system of mandatory notification for deals that meet stipulated reporting thresholds and fall within a specified sector provides a clear and transparent process for business.

3.3.2 Voluntary notification systems, on the other hand, rely to a significant extent on threat of potential post-closing investigation by the authority concerned and, ultimately, possible unwinding of the deal. They also require ongoing monitoring and policing of markets by Department officials to ensure no deals are consummated which might raise issues. In the interest therefore of ensuring certainty in respect of deal execution and timetables, the Law Society favours the approach outlined in paragraph 3.3.1.

3.4 **In assessing whether an investment from a 3rd country might represent a risk, what measure or definition of "control" or "significant influence" might be applied to the acquiring party vis-à-vis the entity being acquired?**

3.4.1 Given the sensitive national defence and public security nature of certain foreign investments, the Law Society considers that the level of control or influence over a business which is required to trigger notification should be relatively low. Certainly, notification should be required where there is an acquisition of control or decisive influence over an undertaking. Given how levels of interest (even below a decisive influence threshold) can give shareholders access to important and confidential company information, and some influence over strategic direction for instance via Board participation, the Law Society suggests that acquisition of anything above a 10% share should be notifiable, other things being equal.

3.4.2 The Law Society understands that several EU jurisdictions (such as Germany, France and Spain) have introduced screening of acquisitions of minority shareholdings, or minority voting rights. In Germany and Spain, acquisitions of a 10% share of an entity in certain sectors are subject to screening, while in France, acquisitions of 25% or greater of an entity's shares or voting rights are screened.

3.4.3 The Law Society also notes that the definition of "foreign direct investment" in the Regulation includes investments that "*enable effective participation in the management or control of a company*."[3] As such, Ireland may wish to follow the approach of other Member States in screening acquisitions of minority interests, given that such interests may allow the acquirer to participate in the management of the relevant entity or gain access to sensitive information regarding the entity or industry involved.

4. What type of sanctions might be applied in relation to:

4.1 Investors failing to provide the information necessary to conduct an adequate screening of a particular investment;

4.1.1 Unless meaningful civil fines can be imposed for breach of information provision obligations, the Law Society recommends that the legislation should deem clearances of deals based on false or misleading information to be void. Further, the Law Society suggests that the legislation makes it a criminal offence to fail to provide full and frank disclosure of information required by the Minister for the purpose of reviewing any relevant foreign investment.

4.2 Investors failing to adhere to any conditions the Minister may impose in order to permit an investment to proceed;

4.2.1 The Law Society recommends that the legislation makes it a criminal offence to fail to adhere to any conditions which the Minister may impose in order to permit an investment to proceed. If civil sanctions were possible, the Law Society recommends substantial penalties or fines for such conduct (*i.e.*¸10% of worldwide turnover of the guilty party).

4.3 Investors who attempt to circumvent or ignore a Ministerial order prohibiting a particular investment;

4.3.1 The Law Society recommends that the legislation makes it a criminal offence to attempt to circumvent or ignore a Ministerial order prohibiting a particular investment. If civil sanctions were possible, the Law Society recommends substantial penalties or fines for such conduct (*i.e.*¸10% of worldwide turnover of the guilty party).

5. Any views or comments on any of the issues raised above.

5.1 The substantive test by reference to which foreign investments and acquisitions may be reviewed by the Minister is obviously critical. The Law Society recommends that this test would strike a balance between bright-line clarity (thereby ensuring that the screening process does not make Ireland a less attractive destination for investment and cross-border deal making, consistent with rights of defence) and affording the Minister the scope necessary to prohibit deals within specified sectors which raise substantive concerns.

[3] Article 2(1) of the FDI Regulation.

5.2 In this regard, the Law Society notes that some national tests focus on broad and somewhat subjective concepts such as “national interest” (e.g. Australia). Others are more specific and objectively definable, such as the German test, which the Law Society understands to be whether an investment poses a threat to “public order or security” and the United States’ test of “national security”. Experience in those countries suggests that more objectively definable terms give greater clarity to potential investors and are, therefore, more likely to accord with the stated intention to continue to protect Ireland’s attractiveness as a location for inward investment.

We hope that these comments are helpful to the Department in its consideration of these issues. The Law Society is available to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
Email: f.cullen@lawsociety.ie