



INSTITUTE OF DIRECTORS
IN IRELAND

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Briefing

Acquisition of non-UK companies and assets will be subject to UK FDI regime if they carry on activities in the UK

The National Security and Investment Act 2021 (the “Act”) was passed into law on 29 April and is expected to enter into force later this year pending secondary legislation. The Act overhauls the UK's national security screening regime, conferring power on the UK Government to investigate, impose conditions on or block investments which pose an unacceptable risk to national security.

The scope of the new regime is far-reaching. All sectors of the economy are within scope- but mandatory notification is required only in sensitive sectors. Importantly from an Irish perspective, acquisitions of non-UK companies and assets are in scope if they carry on activities in the UK. There are no de minimis thresholds regarding deal size or party size, and acquisitions of less than a controlling stake are within scope.¹

Reflecting this wide scope, the UK government has indicated that it expects between 1000 and 1800 deals will be reviewed each year, of which 75-90 will be subject to detailed review and 10 will require remedies.

Notification – Mandatory in “core areas”, Voluntary in other areas & for asset transactions

Mandatory Notification

One of the most significant changes introduced by the Act is the mandatory clearance requirement for sensitive “core” sectors. There are 17 core sectors

¹ The lowest percentage threshold triggering a mandatory notification under the Act requires an acquisition of more than 25 per cent of votes or shares in a qualifying entity.

provisionally outlined,² which will be finalised in secondary legislation. Under the Act, notification is mandatory in these sectors and there is a prohibition on closing before approval. If parties close without prior clearance, the transaction is void and there is the potential to incur significant penalties. The Act provides for up to five years imprisonment and fines of up to £10m for individuals or the higher of £10m or 5% of global turnover for companies. Once the Government discovers a failure to notify, it can call in the transaction for review. The proposed core sectors requiring mandatory notification are as follows:

- (a) Advanced Materials
- (b) Advanced Robotics
- (c) Artificial Intelligence
- (d) Civil Nuclear
- (e) Communications
- (f) Computing Hardware
- (g) Critical Suppliers to Government
- (h) Critical Suppliers to the Emergency Services
- (i) Cryptographic Authentication
- (j) Data Infrastructure
- (k) Defence
- (l) Energy
- (m) Engineering Biology
- (n) Military and Dual Use
- (o) Quantum Technologies
- (p) Satellite and Space Technologies
- (q) Transport

Voluntary Notification

In all other sectors, notification is voluntary. However, the UK government can “call in” a transaction which has not been voluntarily notified for 5 years post-closing. This enables the Government to assess deals outside of the mandatory “core” sectors which potentially pose risks to national security. The 5 year call in period can be shortened to 6 months by the parties making the Secretary of State aware

² In March 2021 the UK Government published draft definitions for each sector following a period of consultation. The UK Government’s response to Consultation is available at the following link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965784/insi-scope-of-mandatory-regime-gov-response.pdf.

of the transaction. Acquisition of assets do not fall within the mandatory regime but may be voluntarily notified. The ambit of the voluntary regime is broad encompassing land and intellectual property including “*ideas, information or techniques which have industrial, commercial or other economic value*”.

Timing

The Act applies retrospectively, capturing deals from 12 November 2020.³ However, the notification procedure will only become operative when the Act comes into force. On acceptance of a notification, the initial review of the transaction will take place within 30 working days. The Government may progress to a more detailed review. If a detailed review is undertaken, the Government has a further 30 working days, but this can be extended by an additional 45 working days, and thereafter can be extended indefinitely with the agreement of the investor.

Conclusions

For all investments it will be important to consider whether, in addition to merger control, the UK’s national security regime is in play. It will clearly be relevant to investments in UK companies. However, it also needs to be considered for investments in Irish companies- for example, it could apply to an investment in an Irish company that supply goods or services into the UK or to an Irish group that has a UK subsidiary. Outside of the mandatory notification sectors, if there is a concern that the transaction may give rise to national security issues, it would be important to consider whether the UK Government should be made aware of the transaction so as to limit the call in power to 6 months instead of 5 years.

3 In relation to a trigger event taking place during the period from 12 November 2020 and ending the day before commencement day, if the Secretary of State became aware of the trigger event before commencement day, a call-in notice may not be given after 6 months beginning with the commencement day. Alternatively, if the Secretary of State became aware of the trigger event on or after commencement day, a call-in notice may not be given after 6 months beginning with the day on which the Secretary of State became aware of the trigger event. “Commencement day” meaning the day on which Chapter 1 of the Act comes into force.

Further information is available from



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