

# Screening of Third Country Transactions Bill 2022

Bill No. 77 of 2022

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## Abstract

The Screening of Third Country Transactions Bill 2022 seeks to, among other things, provide a process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister for Enterprise, Trade and Employment.



## Contents

|   |    |
|---|----|
| Summary .....   | 2  |
| Introduction .....                                    | 4  |
| Table of provisions .....                             | 5  |
| Background.....                                       | 18 |
| Regulation (EU) 2019/452.....                         | 18 |
| Foreign Direct Investment in Ireland.....             | 24 |
| Contribution of FDI to employment in Ireland .....    | 25 |
| Public consultation .....                             | 29 |
| Regulatory Impact Assessment.....                     | 30 |
| Principal Provisions of the Bill .....                | 32 |
| Part 1: Preliminary and General .....                 | 32 |
| Part 2: Notification and Review of Transactions ..... | 34 |

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## Summary

- The [Screening of Third Country Transactions Bill 2022](#) was published on 02 August 2022 and comprises four Parts and 42 Sections.
- The purpose of the Bill is to provide a process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister for Enterprise, Trade and Employment.
- If enacted, the Bill sets out to<sup>1</sup>:
  - ensure Ireland can fulfil its obligations as set out in [Regulation \(EU\) 2019/452](#);
  - establish a screening mechanism for third country investment into Ireland for the first time;
  - define the nature, scale, and type of investments that require investment screening;
  - set out the factors that need to be considered when screening certain third country investments;
  - empower the Minister for Enterprise, Trade and Employment to assess, investigate, authorise, condition, or prohibit third country investments on a range of security and public order criteria.
- On 19 March 2019, the European Union formally adopted [Regulation \(EU\) 2019/452](#) of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments (FDI) into the EU.
- According to the [second annual report](#)<sup>2</sup> published by the European Commission, as of September 2022, 25 out of 27 EU Member States either:<sup>3</sup>
  - had a national FDI screening mechanism in place [Austria, Finland, Malta, Poland, Portugal, Slovenia, Spain]
  - amended an existing mechanism [France, Germany, Hungary, Italy, Latvia, Lithuania]
  - had a consultative or legislative process expected to result in updates to an existing mechanism [The Netherlands, Romania]
  - have adopted a new national FDI screening mechanism [Czechia, Denmark, Slovakia]
  - had a consultative or legislative process expected to result in the adoption of a new mechanism [Belgium, Croatia, Estonia, Greece, **Ireland**, Luxembourg, Sweden]
  - no publicly reported initiative underway [Bulgaria, Cyprus]

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<sup>1</sup> Department of Enterprise, Trade and Employment, Screening of Third Country Transactions Bill 2022. Published 02 August 2022. Available [here](#).

<sup>2</sup> European Commission, Report from the Commission to the European Parliament and the Council, [Second Annual Report on the screening of foreign direct investments into the Union](#). Published 01 September 2022.

<sup>3</sup> The list of screening mechanisms notified by EU Member States is published by the European Commission. The European Commission notes that they “shall make publicly available a list of Member States’ screening mechanism and it shall keep the list up to date”. This information is available [here](#).

- FDI contributes significantly to the Irish economy. Figures released by the [CSO in June 2022](#) showed that FDI positions in Ireland increased by approximately €16.9 billion in 2020 to €1.1 trillion.
- It is [estimated](#) that 20% of all private sector employment in the State is directly or indirectly attributable to FDI. Figures released by [IDA Ireland](#) in December 2021 showed that total employment in IDA client companies in Ireland as of 2021 is now 275,384, which represents the highest FDI employment level ever.
- The Department of Enterprise, Trade and Employment undertook a Regulatory Impact Assessment in March 2020. They also undertook a public consultation in April 2020.
- The L&RS has published a [Bill Briefing page](#) on this Bill [internal access only].

## Introduction

The [Screening of Third Country Transactions Bill 2022](#) (the “Bill”) was published on 02 August 2022<sup>4</sup>. The Bill contains four Parts and 42 Sections and seeks to, among other things, provide a process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister for Enterprise, Trade and Employment.

Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar T.D., in announcing plans to publish the Bill, [stated](#)<sup>5</sup>:

“The new law will introduce an investment screening mechanism, allowing the Minister for Enterprise, Trade and Employment to evaluate whether an investment poses a threat to Ireland’s security or public order and the powers to put a halt to such investment, if he or she deems it necessary. It will also result in better information sharing and co-operation with other European states.”

The Tánaiste further stated:

“We are a small, open economy. We work hard to create an environment which is welcoming to foreign direct investment. This will be even more important now as we recover from the pandemic and as we face increased competition for investment globally. However, it would be naïve to think that Ireland is immune to those with more sinister intentions. This new law is to give us the power to intervene if a non-EU actor is seeking to make an investment which would threaten our security or public order. Other EU countries are introducing similar legislation, so we will be able to better act in co-operation with them. I think it’s an important safeguard, which I hope we never have to use.”<sup>6</sup>

In this respect, it is reported that the Bill was developed partly in response to the EU Investment Screening [Regulation \(EU\) 2019/452](#) which was introduced “in response to growing concerns by Member States about the purchase of strategic European companies by foreign-owned firms” and some state-owned enterprises<sup>7</sup>.

If enacted, the Bill sets out to<sup>8</sup>:

- ensure Ireland can fulfil its obligations as set out in [Regulation \(EU\) 2019/452](#);
- establish a screening mechanism for third country investment into Ireland for the first time;

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<sup>4</sup> For the purposes of this Bill, a third country is defined as follows: ““third country” means a state or territory other than the State; a Member State; a state or territory, not being a Member State, that is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993, and; Switzerland”; see [Section 2 of the Bill](#) for further definitions.

<sup>5</sup> Department of Enterprise, Trade and Employment, Tánaiste to publish bill to allow Ireland screen investments from non-EU countries, Published 26 June 2022. Available [here](#).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Department of Enterprise, Trade and Employment, Screening of Third Country Transactions Bill 2022. Published 02 August 2022. Available [here](#).

- define the nature, scale, and type of investments that require investment screening;
- set out the factors that need to be considered when screening certain third country investments; and
- empower the Minister for Enterprise, Trade and Employment to assess, investigate, authorise, condition, or prohibit third country investments on a range of security and public order criteria.

The Department of Enterprise, Trade and Employment is responsible for implementing [Regulation \(EU\) 2019/452](#) and will act as Ireland’s National Contact Point for cooperation with the European Commission and with other EU Member States on investment screening matters<sup>9</sup>.

## Table of provisions

A summary of the Bill’s provisions is included in Table 1 below.

**Table 1: Table of provisions of the Screening of Third Country Transactions Bill 2022**

| Section                                | Title                         | Effect   |
|--|-------------------------------|--|
| <b>Part 1: Preliminary and General</b> |                               |  |
| 1                                      | Short title and commencement  | The Act may be cited as the <i>Screening of Third Country Transactions Act 2022</i> . It provides that different parts of the Bill may be commenced at different times through commencement orders.  |
| 2                                      | Interpretation                | Section 2 provides for definition of terms used in the Bill, including the key terms of “control”, “notifiable transactions”, “non-notifiable transactions”, “relevant material”, “third country”, and “transactions”, amongst others.   |
| 3                                      | Connected persons             | Section 3 provides a definition for the concept of “connected persons”. Subsection 1 defines the relationships that may comprise a “connected person” and subsection 2 discusses the concept of connected persons in the context of their role in an undertaking. Section 3, according to the <a href="#">explanatory memorandum</a> accompanying the Bill, is designed to prevent circumvention of the provisions of the Bill by investors using family members to acquire control over assets or undertakings. |
| 4                                      | Reporting on operation of Act | Section 4 provides that a report on screening activity must be laid before the Houses no more than 15 months after   |

<sup>9</sup> For further information, see Department of Enterprise, Trade and Employment, Investment Screening, which provides background information on investment screening, recent EU developments, and domestic policy developments. Available [here](#).

| Section  | Title                   | Effect  |
|--|-------------------------|---|
|  |                         | <p>this section comes into operation, and not less than once every 12 months thereafter.</p> <p>Subsection 2 provides details on the type of information to be included in the report (e.g., number of transactions notified to the Minister, number of non-notified transactions reviewed by the Minister, actions taken by the Minister in respect of transactions for which a screening decision has been made, information on sectoral trends).</p> <p>Subsection 3 provides provisions to address the sensitivity of commercial material and personal data, which shall not be included on the report.</p> |
| 5  | Regulations             | <p>Section 5 provides that the Minister may prescribe regulations relating to the function of any part of this Bill. Subsection 3 provides that such regulations should be laid before the Houses within 21 days.</p>   |
| 6  | Offences and penalties  | <p>Section 6 sets out the penalties that apply to offences in the Bill, both on summary conviction (a class C fine or to imprisonment for a term not exceeding 6 months, or to both) or on conviction on indictment (to a fine not exceeding €4 million or to imprisonment for a term not exceeding 5 years, or to both).</p> <p>Subsection 2 provides time limits that mean proceedings must commence within two years of an offence being committed. Where offences are committed by a corporate body, subsection 3 provides that responsible individuals in the undertaking can be held accountable.</p>     |
| 7  | Expenses                | <p>Section 7 provides that expenses incurred in the administration of this Act shall be paid out of monies provided by the Oireachtas.</p>  |
| 8  | Service of documents    | <p>Section 8 provides the conditions which must be met when documents relating to the screening process are being served to individuals.</p>  |
| <b>Part 2: Notification and Review of Transactions</b> |                         |   |
| 9  | Notifiable transactions | <p>Section 9 provides the transactions that must be notified to the Minister. Subsection 1 provides that 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, is a party to the transaction; (b) (i) the value of the transaction is greater than or equal to €2 million, or (ii) the amount that stands prescribed under subsection 3; (c) the transaction directly or indirectly</p>   |

| Section | Title  | Effect   |
|---------|--|--|
|         |  | <p>relates to, or impacts upon, one or more the matters referred to in points (a) to (e) of Article 4(1) of the Regulation and; (d) the transaction relates, directly or indirectly, to an asset or undertaking in the State.</p> <p>Subsection 2 defines the nature of control of an undertaking that requires mandatory notification (e.g., when an investor acquires more than 25% or 50% of an undertaking).</p> <p>Subsection 3 provides that the Minister, where it is necessary, may (a) provide for the more effective review of transactions under this Act; (b) respond to variations in economic, political or social conditions affecting transactions, but for subsection (1)(b) would be notifiable, or; (c) improve the security or public order of the State, prescribe an amount for the purposes of subsection (1) (b).</p>  |
| 10      | Requirement to notify Minister of transaction                        | <p>Section 10 provides the process for notification to the Minister.</p> <p>Subsection 1 provides the information that should be included by the transaction parties as part of the notification process. This is required so the Minister can assess the transaction to determine its risk and potential impact on security and public order. It provides that notification should occur at least 10 days prior to the transaction being completed.</p> <p>Subsection 2 provides the responsibilities of the parties to the transaction. In general, where a party is unaware of a transaction, no notification is required.</p> <p>Subsection 3 provides that where a party to a transaction fails to notify a transaction that requires mandatory notification, the transaction cannot be put into effect legally.</p> <p>Subsection 4 provides that failure to notify a transaction, or the submission of false information as part of a notification, constitutes an offence.</p> |
| 11      | Deemed compliance with requirement to notify Minister of transaction | <p>Section 11 provides the notification responsibilities of all parties to a transaction.</p> <p>Subsection 1 provides the process for one party to a transaction to inform other relevant parties of their intent to notify the Minister.</p>   |



| Section | Title   | Effect  |
|---------|---|---|
|         |   | <p>Subsection 2 provides that the second party is required to confirm their satisfaction with the information being supplied as part of the notification process.</p> <p>Subsection 3 addresses instances where a party supplies information to the Minister that differs from that agreed by other parties to the transaction.</p> <p>Subsection 4 provides the timelines for notification of transactions which are initiated before the legislation comes into effect, but which conclude after the commencement of legislation.</p> <p>Subsection 5 provides that the second party cannot frustrate a transaction by refusing to engage with the notification process.</p>  |
| 12      | Review of transactions with regard to security or public order of State | <p>Section 12 provides the requirement for the Minister to review both notified and non-notifiable transactions where the Minister believes that they may impact security or public order.</p> <p>Subsection 1(b) provides the Minister with the authority to review transaction others than those that are subject to mandatory notification.</p> <p>Subsection 2 limits the retrospective period within which a Minister can review transactions. For non-notified transactions, a five-year time limit is applied, or six months from the date on which the Minister first becomes aware of the transaction. In relation to a transaction that is not notifiable, a 15-month time limit applies. The Minister may only utilise their screening authority within these defined time limits.</p> |
| 13      | Considerations when reviewing transactions                              | <p>Section 13 sets out the factors that the Minister will consider when reviewing the threat to security or public order of the State.</p> <p>Subsection 1 provides that the purpose of the Bill is to consider the impact of an investment on security or public order.</p> <p>Subsection 2 provides details on the factors to be considered when reviewing a transaction. In this regard, the Minister must consider whether an investor is controlled by a third country government; the extent to which parties to the transaction are involved in activities related to security or public order; any evidence of criminality among the parties to a transaction; the likelihood of the transaction resulting in actions that are</p>  |

| Section | Title  | Effect   |
|---------|--|--|
|         |  | <p>disruptive to people, assets or undertakings in the State; the views of the European Commission and other EU Member States.</p> <p>Subsection 3 provides details on the screening process, providing the Minister with the power to consult with the advisory panel; information (if any) provides under section 10(1); written submissions by the parties to the transaction under section 21; consult with other Government Ministers or with other relevant parties to inform the review process.</p>  |
| 14      | Issuing of screening notice to parties to transaction being reviewed by Minister   | <p>Section 14 provides that the Minister issues a formal screening notice to the parties to a notified transaction, ensuring all parties are fully informed that screening has commenced.</p> <p>Subsection 2 provides that the screening notice shall be in writing and shall contain reasons for the transactions being review, that the person may make written submissions to the Minister regarding the transaction, and a statement of any other matters that the Minister considers to be appropriate in the circumstances.</p>   |
| 15      | Qualification of obligation to issue screening notice in exceptional circumstances | <p>Section 15 provides the Minister with some discretion to determine if the issuing of a screening notice, or the inclusion of certain information in such a notice, might pose a security risk. In the rare cases where the Minister decides not to issue a screening notice, subsection 2 provides information on how the schedule for conducting a screening review must be calculated.</p>  |
| 16      | Screening decision   | <p>Section 16 provides that the Minister is required to inform the parties to a transaction of a screening decision.</p> <p>Subsection 2 provides that the Minister shall inform the parties by notice in writing as soon as is practicable and provide reasons for the decision.</p> <p>Subsection 3 requires the Minister to have this decision completed within 90 days of a screening notice being issued. This period may be extended by an additional 45 days if required, however, it is envisaged that this would only occur in complex cases where risks to security or public order are perceived.</p> <p>Subsection 4 provides that failure to make such a decision within 90 days results in the transaction automatically being allowed to proceed.</p> <p>Subsection 5 provides that where the Minister believes that providing reasons for a screening decision would</p> |

| Section | Title  | Effect  |
|---------|--|---|
|         |  | create a security or public order risk, the Minister may decide not to provide the parties with such reasons and that the Minister may include in the notice a statement that they are declining to give reasons for the decision.  |
| 17      | Limitation on transaction under review         | <p>Section 17 provides that a transaction subject to a screening notice cannot be put into effect until the screening review has been completed.</p> <p>Subsection 2 provides that a person who fails to comply with this shall be guilty of an offence.</p>  |
| 18      | Powers of Minister in relation to transactions | <p>Section 18 provides the various decisions that are available to the Minister regarding the outcome of a screening review.</p> <p>If it is determined that a transaction impacts on security or public order, subsection 1 requires parties to comply with the Minister's direction.</p> <p>Subsection 2 provides that where a decision has been made, the parties cannot complete the transaction, other than in accordance with the Minister's direction.</p> <p>Subsection 3 provides that where there is a finding that a transaction poses a threat to security or public order, the Minister may allow the transaction to proceed subject to certain conditions being met.</p> <p>Subsection 4 provides that without prejudice to the generality of subsection 3, the conditions the Minister may specify parties to do or not to do, may be one or more of the following reasons:</p> <ul style="list-style-type: none"> <li>• Not to complete the transaction, or parts of it specified by the Minister.</li> <li>• Not to complete the transaction, or parts of it, before or after dates specified by the Minister</li> <li>• To sell or divest itself or divest itself of any matter</li> <li>• To modify or constrain its conduct in specified ways</li> <li>• To cease a specified conduct</li> <li>• To prevent the flow of sensitive information within an undertaking</li> <li>• To report to the Minister on parties' compliance with the conditions imposed</li> <li>• To pay the reasonable costs associated with monitoring compliance with conditions</li> </ul> |

| Section                        | Title   | Effect   |
|--------------------------------|---|--|
|                                |   | Subsection 5 provides that a person who fails to comply with this shall be guilty of an offence.   |
| 19                             | Notice of information   | <p>Section 19 provides the process required if the Minister determines that additional information is required from any of the parties to the transaction in order to inform the screening process. The Minister may request this information by issuing a “notice of information” to a relevant party.</p> <p>Subsection 2 provides what the notice shall specify, and that that the timeline for compliance with this process is 30 days.</p> <p>Subsection 3 provides measures to ensure that any information provided is submitted in a timely fashion.</p> <p>Subsection 4 provides that the information submitted must be complete and accurate.</p> <p>Subsection 5 provides offences relating to the provision of false information or failure to comply with an information request.</p> <p>Subsection 6 relates to the issue of legal privilege.</p> |
| 20                             | Calculation of period within which Minister shall make screening decision | <p>Section 20 provides for information on how and when the timeline is stopped and restarted in relation to a request for additional information.</p> <p>Subsection 1 provides that a notice of information issued by the Minister suspends the screening timeline.</p> <p>Subsection 2 provides that the timeline restarts within 10 days of the Minister receiving the requested information, as long as they are satisfied with the response.</p> <p>Subsection 3 provides the process to certify that the Minister’s request has been responded to in a satisfactory manner.</p> <p>Subsection 4 addressed the situation where a request is not fully satisfied.</p>   |
| 21                             | Written submissions   | <p>Section 21 provides parties to a transaction which is being screened with the right to make written submissions to the Minister.</p> <p>Subsection 2 sets out the timeline within which this must occur.</p>  |
| <b>Part 3: Appeals</b>         |   |  |
| <b>Chapter 1: Adjudicators</b> |   |  |

| Section   | Title  | Effect  |
|---|--|---|
| 22  | Appointment of adjudicators                            | <p>Section 22 provides for the appointment of adjudicators to hear an initial appeal against a Minister's screening decision. Subsection 1 provides for the Minister to form a panel of adjudicators. Subsection 2 provides for the qualification criteria for such appointments.</p> <p>Subsection 3 provides that there will be no conflict of interest between the advisory panel and the adjudicators panel. Subsection 4 provides that the Minister shall ensure an appropriate gender balance is achieved in appointing persons to the adjudicators panel.</p> <p>Subsection 5 provides that the adjudicators functions shall be carried out independently.</p> <p>Subsections 6 to 10 provide for the terms and conditions of the appointment and the process that provides for removal from office.</p> |
| 23  | Revocation of appointment as adjudicator               | <p>Section 23 provides for the Minister to revoke an adjudicators appointment. Subsection 2 outlines the terms under which such a revocation can occur. These include, for example, illness and misconduct.</p> <p>Subsections 3 to 6 provide the process for revoking an appointment. Under this, the Minister is required to provide notice of their intent to the affected party; certain information must be contained in this notice including the Minister's reasons for revocation; representations to the Minister are to be permitted; a final notice setting out the Minister's decision must be issued.</p>  |
| 24  | Liability of adjudicators                              | <p>Section 24 provides that an adjudicator shall not be liable for damages in respect of any act performed by the adjudicator in the performance of their duties unless the act was performed in bad faith.</p>   |
| 25  | Rules concerning conduct of appeals before adjudicator | <p>Section 25 provides that the Minister shall prescribe rules regarding how the appeals process shall operate. Subsection 2 provides examples of the types of rules that may be prescribed. Subsection 3 provides that the Minister shall provide the necessary administrative support to ensure adjudicators fulfil their functions.</p>  |
| <b>Chapter 2: Review of decisions of Minister</b> |  |   |
| 26  | Jurisdiction to review decisions of Minister           | <p>Section 26 provides parties with a way to appeal a Minister's decision about a transaction.</p>  |
| 27  | Procedure for appeal of screening decisions            | <p>Section 27 sets out the right for parties subject to a screening decision to appeal. Appellants must notify the Minister that they intend to submit an appeal regarding a</p>  |

| Section | Title        | Effect   |
|---------|--------------|--|
|         |              | <p>screening decision or in respect of a Minister's decision not to provide full disclosure of their reasons for making a screening decision.</p> <p>Subsection 2 sets out that this notification must be made within 30 days of a party being informed of a Minister's screening decision.</p> <p>Subsection 3 provides that once the Minister has been made aware that an appeal has been filed, they will appoint an adjudicator to hear the appeal, and will notify the appellant with details of the designated adjudicator and set out the means by which an appellant can make their appeal.</p> <p>Subsection 4 provides that thereafter an appellant has a further 14 days to file their appeal. They must state the grounds under which an appeal to the adjudicator is being made, and they must provide all the documents and evidence on which they intend to rely.</p> <p>Subsection 5 provides that the Minister will be the respondent to such an appeal and must also state the grounds upon which they intend to respond to the appeal, as well as the evidence upon which they will rely.</p> <p>Subsection 6 provides that a party to an appeal is not entitled to make written submissions to the adjudicator, other than submissions relating to the grounds stated for in the appeal or relating to evidence provided for under previous sections.</p> <p>Subsection 7 provides that, where appropriate, the adjudicator may permit written submissions over and above the evidence referenced previously.</p> <p>Subsection 8 notes that the adjudicator may also refuse such submissions, documents or evidence deemed irrelevant.</p> <p>Subsection 9 confirms that an appeal to the adjudicator does not suspend the screening decision being appealed.</p> |
| 28      | Oral hearing | <p>Section 28 provides that appeals to the adjudicator may be decided without an oral hearing unless it is determined that one is necessary.</p> <p>Subsection 2 details the rules requiring attendance and subsection 3 provides for cross-examination under oath. Subsection 4 outlines the time limits within which submissions may be made. Subsection 5 provides that</p>   |

| Section  | Title  | Effect  |
|--|--|---|
|  |  | failure to comply with the direction of the adjudicator is an offence.  |
| 29   | Decision of adjudicator  | <p>Subsection 29 provides the powers of the adjudicator regarding the Minister's initial screening decision.</p> <p>Subsection 1 outlines that the adjudicator may allow the appeal and may remit it to the Minister for reconsideration within a specified period, or they may affirm the Minister's decision.</p> <p>Subsection 2 requires that this decision is notified to the parties as soon as practicable and is final, other than via an appeal to the High Court, which is provided for in subsection 3.</p>  |
| <b>Chapter 3: Exceptional provisions regarding sensitive material and evidence</b> |  |   |
| 30   | Treatment of certain material of relevance to security or public order of State in appeal against decision of Minister | <p>Section 30 deals with the ability of the Minister to provide sensitive evidence to the adjudicator in a manner that protects national security.</p> <p>Subsections 1, 3, and 4, provide for the sharing of redacted or summarised information with the parties to appeal, where appropriate. The adjudicator is still able to take all relevant material into consideration in making their decision, regardless of whether the material has been provided to the appellant, and the adjudicator retains powers to determine what can be safely shared.</p> <p>Subsection 2 provides an outline of the process to facilitate the provision of information on oath or affirmation and that such evidence shall not be disclosed publicly.</p>   |
| 31   | Appeals to be held otherwise than in public  | <p>Section 31 provides that the Minister may determine that an appeal to the adjudicator can be held in public if it does not create a risk to the security or public order of the State. Otherwise, appeals will be held other than in public.</p> <p>Subsection 1 provides for those that may attend a hearing held otherwise than in public. This includes the parties to the transaction, legal representatives, and witnesses.</p> <p>Subsection 2 empowers the Minister to permit appeals to be held in public so long as this does not create a risk to the security or public order of the State.</p> <p>Subsection 3 provides for the process to inform the impacted parties of this decision.</p> <p>Subsection 4 provides that the decision to hold an appeal otherwise than in public extends to subsequent appeals against the decision of the adjudicator (section 34).</p> |



| Section  | Title  | Effect   |
|--|--|--|
|  |  | Subsection 5 provides for applications to suspend the effect of a screening decision (section 35) unless the Minister determines that such treatment is no longer required.  |
| 32   | Confidentiality of proceedings                                     | <p>Section 32 relates to the need to maintain confidentiality around certain types of information obtained by a party via the appeal process.</p> <p>Subsection 1 outlines who certain information may be shared with.</p> <p>Subsection 2 sets out certain criminal offences relating to the disclosure of such information.</p>  |
| 33   | Designation of legal representatives in respect of certain matters | <p>Section 33 sets out the grounds for the Minister to approve or designate certain legal representatives in sensitive cases.</p> <p>Subsection 1 provides the definition of “approved legal representatives”. Subsection 2 provides the types of qualifying conditions that apply to such persons.</p> <p>Subsection 3 outlines the conditions under which such a designation can be used. Subsection 4 ensures that the Minister’s decision in this regard must be shared with the parties as soon as practicable. Other conditions in relation to approved legal representatives include the requirement to publish a list of approved persons on a website maintained on behalf of the Minister.</p> |
| <b>Chapter 4: Appeal against decision of adjudicator</b> |  |  |
| 34   | Appeal against decision of adjudicator                             | <p>Section 34 provides parties to a transaction with a right of appeal against a finding of the adjudicator.</p> <p>Subsection 1 provides that a party may, by leave of the High Court, appeal to that court on a point of law within 30 days of the adjudicator’s finding. The Minister also has the right to appeal against and outcome from the adjudication process.</p> <p>Subsections 2 and 3 provides that such an appeal should be determined as expeditiously as possible.</p> <p>Subsection 5 provides that the decision of the High Court is final.</p>   |
| 35   | Application to suspend effect of screening decision                | Section 35 permits an appellant to ask the High Court to suspend a screening decision until the appeal is determined. Otherwise, the lodging of an appeal does not suspend the initial effect of a screening decision.   |



| Section                           | Title  | Effect   |
|-----------------------------------|--|--|
| 36                                | Treatment of evidence in relation to appeals against decision of adjudicator | <p>Section 36 deals with the issue of sensitive material in an appeal to the High Court.</p> <p>Subsection 1 provides limitations on the sharing of evidence (summaries or redacted material may be provided where it is affirmed that a threat to security or public order could otherwise be compromised).</p> <p>Subsections 3 and 4 provide information on the provision of evidence under oath and rules of non-disclosure.</p>   |
| 37                                | Hearing of matters otherwise than in public                                  | Section 37 sets out who may attend an appeal to the High Court, limiting attendance to the judge, necessary court personnel, the parties to the appeal, and legal representatives, unless there are grounds not to limit attendance.   |
| 38                                | Proceedings before court other than High Court                               | Section 38 provides that sections 35 to 37 shall also apply in instances where a court other than the High Court deals with an appeal in relation to which leave is granted under section 34(5).   |
| <b>Part 4: The Advisory Panel</b> |  |  |
| 39                                | Establishment and function of advisory panel                                 | Section 39 provides the process for appointment of members to a Screening Advisory Panel. Subsection 2 provides that the advisory panel shall consist of a chairperson and no fewer than seven ordinary members in accordance with section 40. Subsection 3 provides the function of the advisory panel. Subsection 4 provides that the advisory panel may request that persons provide assistance, with the consent of the Minister. Subsection 5 provides that the Minister may remove a member of the advisory panel for stated reasons or may dissolve the advisory panel. |
| 40                                | Appointment to advisory panel  | Section 40 provides the level of officer to be appointed to the advisory panel, and the Government Departments to be represented. It also sets out other rules relating to membership and terms of appointment.  |
| 41                                | Meetings of advisory panel   | Section 41 provides that the advisory panel may hold as many meetings as necessary for the performance of its function. It also provides that the minimum number of people needed to hold meetings or make decisions shall be four. It provides that the advisory panel may act notwithstanding one or more vacancy among its membership. Finally, it provides how the meetings of the advisory panel shall operate.   |

| Section | Title                    | Effect   |
|---------|--------------------------|--|
| 42      | Consultants and advisers | Section 42 provides that the advisory panel may engage with consultants and advisers with the consent of the Minister. |

Source: Derived from the [Screening of Third Country Transactions Bill 2022](#) and the accompanying [explanatory memorandum](#).

## Background

This section provides an overview of the policy context relating to the main aspects of this Bill. It provides information on [Regulation \(EU\) 2019/452](#) which establishes a framework for the screening of foreign direct investments into the EU. It also outlines findings from the [second European Commission annual report](#) on investment screening in the EU. It then provides a snapshot of current foreign direct investment in Ireland.

### Regulation (EU) 2019/452

On 19 March 2019, the European Union formally adopted [Regulation \(EU\) 2019/452](#) of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the EU<sup>10</sup>. The Regulation came into force on 10 April 2019 and applied broadly from 11 October 2020<sup>11</sup>. As outlined by A&L Goodbody (2019)<sup>12</sup>:

“To date, there has been no general EU-wide framework relating to the screening of foreign direct investment into the EU. While certain mergers, acquisitions and joint ventures (including those involving foreign investors) may be subject to review by the European Commission (the Commission) under the EU Merger Regulation, that review is limited to ensuring that a transaction would not significantly impede effective competition in the EU (or in a substantial part of the EU). The introduction of the new Regulation marks an important first step by the EU towards an EU-level foreign investment screening framework similar to the review process of the Committee on Foreign Investment in the United States (CFIUS) in the US. While the Regulation stops short of introducing any form of CFIUS style blocking mechanism or suspension powers at EU-level in relation to foreign investment, it does introduce a comprehensive cooperation and information-sharing framework between the Commission and EU Member States, which will have a material procedural (and timing) impact for European deal-making falling within the Regulation's scope in the years ahead. The adoption of the Regulation may also embolden individual EU countries that do not currently have foreign investment controls in place to introduce new CFIUS-style review processes and screening mechanisms at the national level. Essentially, this will mean a more complex procedural environment for certain categories of foreign investment activity in Europe going forward.”

The Regulation does not require Member States to establish a national screening mechanism. However, [Article 3](#) sets out an obligation for any EU Member States with an FDI screening mechanism to ensure that it has certain features. In particular, it sets out an obligation to ensure it has defined timeframes; is transparent and non-discriminatory; allows for comments by other Member States and the opinion of the European Commission to be taken into account; allows for

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<sup>10</sup> Report from the Commission to the European Parliament and the Council, First Annual Report on the screening of foreign direct investments into the Union. Published 23 November 2021. Available [here](#).

<sup>11</sup> A&L Goodbody, [The new EU Regulation on the screening of Foreign Direct Investments](#). 07 May 2019.

<sup>12</sup> Ibid

relevant parties to seek recourse against an adverse decision by an FDI screening authority; and maintains measures to prevent avoidance of FDI screening mechanisms and related decisions<sup>13</sup>.

The European Commission has requested that all Member States have a national screening mechanism in place. In its [Communication on the Trade Policy Review \(2021\)](#), it stated<sup>14</sup>:

“In the security field, under the FDI Screening Regulation, the Commission restates its call to all Member States to set up and enforce a fully-fledged FDI screening mechanism to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU. The Commission will continue implementing the cooperation mechanism with Member States’ authorities to protect security and public order from risky foreign direct investments and consider enhancing the cooperation mechanism established by the FDI Screening Regulation”.

As outlined by the [Department of Enterprise, Trade and Employment](#), the Regulation includes an Annex which contains a list of EU projects and programmes of particular interest from an investment screening perspective. This Annex is reviewed regularly, with the most recent update occurring on 23 December 2021. The [updated Annex](#) contains 18 “projects or programmes of Union interest referred to in Article 8(3)”<sup>15</sup>.

Article 8(3) states:

“For the purpose of this Article, projects or programmes of Union interest shall include those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order. The list of projects or programmes of Union interest is set out in the Annex.”

The list of projects or programmes of Union interest referred to in Article 8(3) in the updated Annex include:

1. [European GNSS programmes \(Galileo & EGNOS\)](#)
2. [Copernicus](#)
3. [Preparatory Action on Preparing the new EU GOVSATCOM programme](#)
4. [Space Programme](#)
5. [Horizon 2020](#) including research and development programmes pursuant to Article 185 TFEU, and joint undertakings or any other structure set up pursuant to Article 137 TFEU
6. [Horizon Europe](#), including research and development programmes pursuant to Article 185 TFEU, and joint undertakings or any other structure set up pursuant to Article 137 TFEU
7. [Euratom Research and Training Programme 2021-25](#)

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<sup>13</sup> Report from the Commission to the European Parliament and the Council, First Annual Report on the screening of foreign direct investments into the Union. Published 23 November 2021. Available [here](#).

<sup>14</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Trade Policy Review – An Open, Sustainable and Assertive Trade Policy. Published 18 February 2021. COM(2021)66. See p. 20. Available [here](#).

<sup>15</sup> Article 8 deals with ‘foreign direct investments likely to affect projects or programmes of Union interest’.

8. [Trans-European Networks for Transport \(TEN-T\)](#)
9. [Trans-European Networks for Energy \(TEN-E\)](#)
10. [Trans-European Networks for Telecommunications](#)
11. [Connecting Europe Facility](#)
12. [Digital Europe Programme](#)
13. [European Defence Industrial Development Programme](#)
14. [Preparatory Action on Defence Research](#)
15. [European Defence Fund](#)
16. [Permanent structured cooperation](#)
17. [European Joint Undertaking for ITER](#)
18. [EU4Health Programme](#)

This includes some projects and programmes under the new [Multiannual Financial Framework](#) for the period between 2021 and 2027<sup>16</sup>. The main EU budget programmes included in this framework are Digital Europe Programme (worth €7.6 billion), Connecting Europe Facility (worth €2.07 billion), Horizon Europe (worth €95.5 billion), InvestEU (worth €26.2 billion), Creative Europe MEDIA (worth €1.4 billion), EU4Health (worth €5.3 billion), and Recovery and Resilience Facility (worth €672.5 billion).

The **Multiannual Financial Framework (2021 – 2027)** is the EU's long-term EU budget. Its aim is to boost digital technologies and aid in the recovery from the pandemic. Its entire budget is €1.21 trillion.

### European Commission Annual Reports

To date, the European Commission has published two annual reports on the screening of FDI into the European Union. The [first report](#)<sup>17</sup>, published in November 2021, provided an overview of FDI into the European Union; legislative developments in Member States since 2019; Member State screening activities in 2020; and an update on EU cooperation on FDI screening. The [second report](#)<sup>18</sup>, published in September 2022, provides an update on these identified metrics. In this section, we summarise some of the main findings.

Figure 1 (overleaf) shows the current status of EU Member States with respect to the introduction of a screening mechanism. The report states that, as of September 2022, 25 out of 27 EU Member States either:<sup>19</sup>

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<sup>16</sup> Further information on the Multiannual Financial Framework can be found in the 2021 research paper by the PBO, 'EU Budget: The Multi-annual Financial Framework and the Next Generation EU (NGEU) instrument'. Available [here](#).

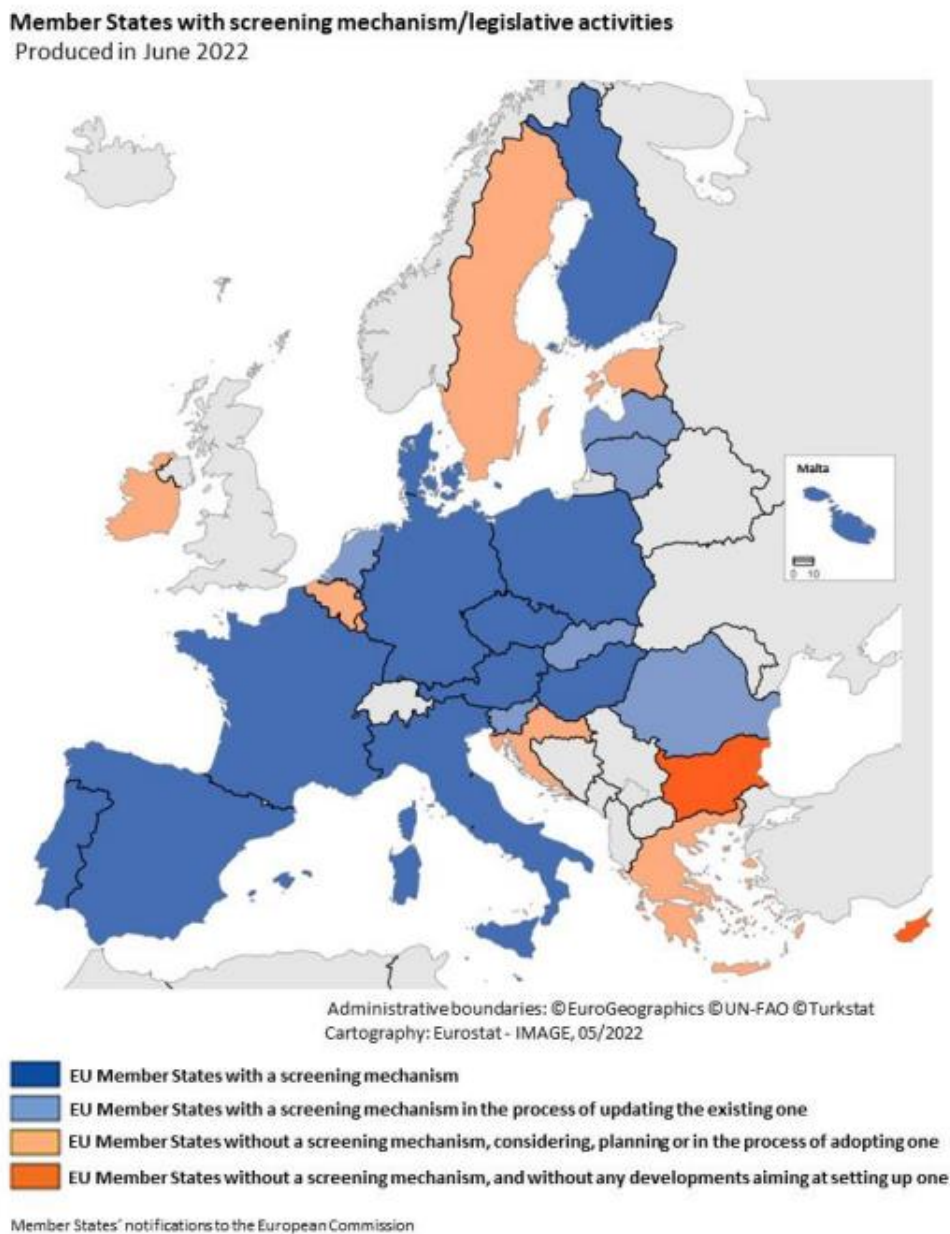
<sup>17</sup> European Commission, Report from the Commission to the European Parliament and the Council, [First Annual Report on the screening of foreign direct investments into the Union](#). Published 23 November 2021.

<sup>18</sup> European Commission, Report from the Commission to the European Parliament and the Council, [Second Annual Report on the screening of foreign direct investments into the Union](#). Published 01 September 2022.

<sup>19</sup> The list of screening mechanisms notified by EU Member States is published by the European Commission. The European Commission notes that they "shall make publicly available a list of Member States' screening mechanism and it shall keep the list up to date". This information is available [here](#).

- had a national FDI screening mechanism in place [Austria, Finland, Malta, Poland, Portugal, Slovenia, Spain]
- amended an existing mechanism [France, Germany, Hungary, Italy, Latvia, Lithuania]
- had a consultative or legislative process expected to result in updates to an existing mechanism [The Netherlands, Romania]
- have adopted a new national FDI screening mechanism [Czechia, Denmark, Slovakia]
- had a consultative or legislative process expected to result in the adoption of a new mechanism [Belgium, Croatia, Estonia, Greece, **Ireland**, Luxembourg, Sweden]
- no publicly reported initiative underway [Bulgaria, Cyprus]

**Figure 1: Member States with screening mechanism/legislative activities (2022)**



Source: European Commission, [Second Annual Report on the screening of FDI into the Union \(2022\)](#)

Box 1 highlights the key findings with respect to EU Member States' FDI screening activities, as reported in their second annual report.

### Box 1: Key findings on EU Member States FDI screening activities

1. Compared to 2020, the proportion of formally screened cases increased (from 20% to 2020 to 29% in 2021).
2. There was an uneven distribution of authorisation requests received across EU Member States. Four countries accounted for approximately 70% of all applications received. This compares to 86.5% in the first annual report.
3. Of the cases formally screened in 2021, the majority (73%) were authorised without conditions, which means the transaction was approved without any additional action required from the investor. This compares to 79% in the first annual report.
4. 23% of the decided cases required mitigating measures (compared with just 12% in the last report).
5. Finally, national authorities blocked transactions for 1% of all decided cases (compared to approximately 2% in the first report), while the remaining 3% resulted in the transaction being withdrawn by the parties (compared to 7% in the first report).

Source: European Commission, [Second Annual Report on the screening of FDI into the Union \(2022\)](#)

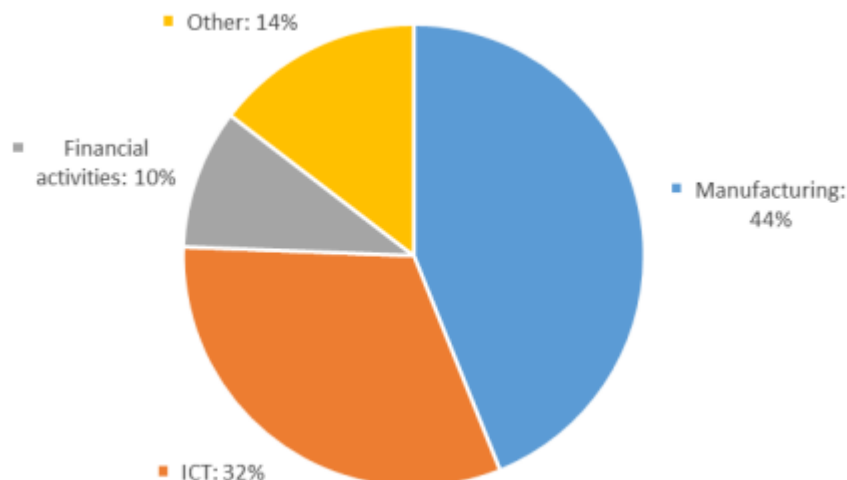
In terms of sectors, the highest number of notified transactions were found in ICT (36%), Manufacturing (25%), Financial Activities (9.5%), Wholesale and Retail (8.5%), and Construction (4%).

Generally, the report notes that FDI Screening is undertaken in two phases:

- **Phase 1:** all notified transactions are assessed.
- **Phase 2:** detailed assessment of cases that could possibly affect security or public order in more than one Member State. The number of transactions proceeding to Phase 2 is expected to be limited.

They found that the main sectors at issue in Phase 2 were Manufacturing, ICT and Financial activities (see Figure 2). In terms of the origin of the ultimate investor, the five main countries were the USA (40%), the UK (10%), China (7%), the Cayman Islands (5%), and Canada (4%). They report that this largely reflects overall investment trends in the EU regarding the main sectors and origin of the ultimate investor.



**Figure 2: Phase 2 main targeted sectors in 2021 cases**

Source: European Commission, [Second Annual Report on the screening of FDI into the Union \(2022\)](#)

Finally, the report notes that a significant number of cases notified by Member States involved one or more of the factors for consideration listed in Article 4 of the Regulation (see Box 2 for details of Article 4 of the Regulation). This included critical infrastructure, technology and dual use items, and access to sensitive information, as well as possible government ownership or control of, or influence over, the foreign investor.

### **Box 2: Article 4 of Regulation (EU) 2019/452**

#### **Factors that may be taken into consideration by Member States or the Commission**

1. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on:
  - a. critical infrastructure,
  - b. critical technologies,
  - c. supply of critical inputs (e.g. energy),
  - d. access to sensitive information,
  - e. the freedom and pluralism of the media.
2. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular:
  - a. whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding,
  - b. whether the foreign investor has already been involved in activities affecting security or public order in a Member State, or
  - c. whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

Source: [Regulation \(EU\) 2019/452 of the European Parliament and of the Council](#)



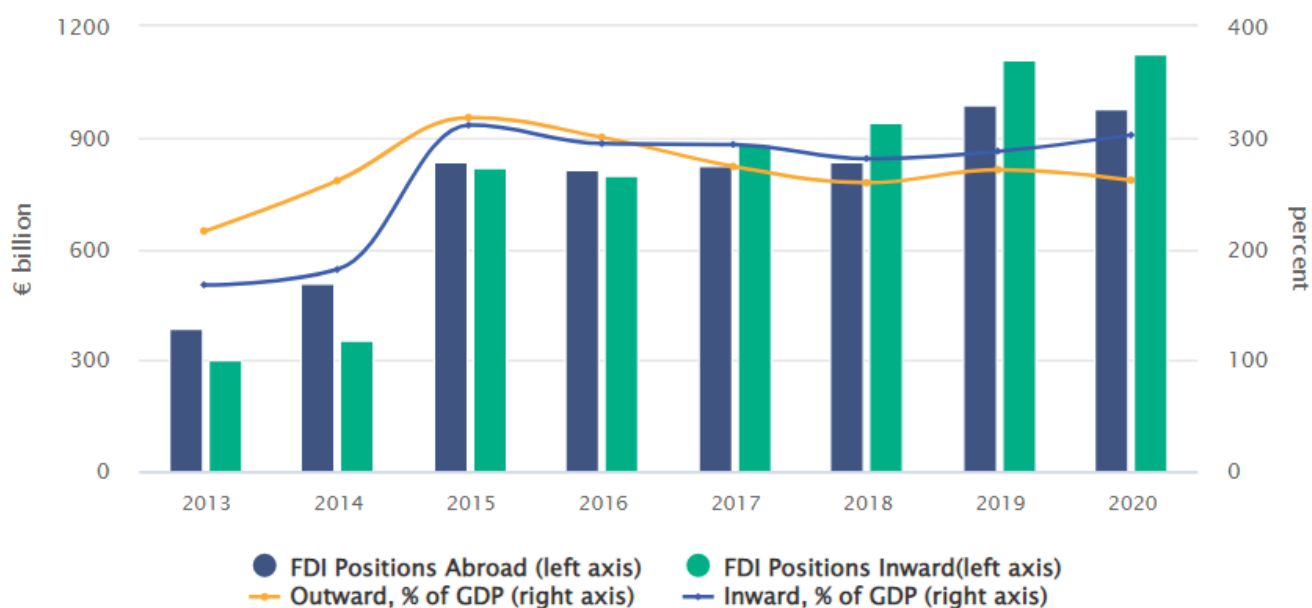
## Foreign Direct Investment in Ireland

The CSO define 'direct investment' as<sup>20</sup>:

"...a category of international investment that, based on an equity ownership of at least 10%, reflects a lasting interest by a resident in one economy (the direct investor) in an enterprise resident in another economy (the direct investment enterprise). A direct investment relationship can exist between a number of affiliated enterprises whether the linkage involves a single chain or a number of chains. It can extend to a direct investment enterprise's subsidiaries, sub-subsidiaries and associates. Once the direct investment relationship is established, all subsequent financial flows between the related entities are recorded as direct investment transactions."

Figures released by the [CSO in June 2022](#) showed that FDI positions in Ireland increased by approximately €16.9 billion in 2020 to €1.1 trillion. Inward investment as a percentage of GDP increased by 14%, while outward FDI decreased by 9% (see Figure 3 below). When compared to other OECD countries, Ireland is one of the most globalised economies in Europe, second only to Luxembourg<sup>21</sup>.

**Figure 3: FDI Positions in Ireland and Abroad**



Source: [CSO, Foreign Direct Investments in Ireland 2020, published June 2022](#).

<sup>20</sup> CSO, International Accounts Explained, What is FDI? Available [here](#).

<sup>21</sup> When expressed as a percentage of GDP at current prices. See Figure 1.2 and Figure 1.3 of the CSO's statistical release on [FDI in Ireland 2020](#).

The CSO further report that in terms of distribution, the top 25 firms<sup>22</sup> make up 68% of Ireland's inward FDI, showing "how highly concentrated Irish FDI is given there are thousands of firms that receive FDI investments in Ireland"<sup>23</sup>. Finally, the data shows that the US is the biggest investor in Ireland and accounts for over €830 billion (or 76%) of Irish inward FDI positions<sup>24</sup>.

In July 2022, the Department of Finance published the [Corporation Tax, Tax Strategy Group 22/03 report](#) which showed that foreign owned multinational corporations (MNCs) accounted for 80% of net Corporation Tax receipts in 2021, down from 82% in 2020. Net Corporation Tax receipts from Irish owned MNCs represented 9% of net Corporation Tax receipts in 2021 (7% in 2020). In total, the multinational sector accounted for 89% of net Corporation Tax receipts in 2021.

Foreign owned multinational corporations accounted for 80% of net Corporation Tax receipts in 2021.

## Contribution of FDI to employment in Ireland

FDI contributes significantly to the Irish economy and it is estimated that 20% of all private sector employment in the State is directly or indirectly attributable to FDI<sup>25</sup>. Recent data published in December 2021 by [IDA Ireland](#) provides an overview of current FDI employment in the State.

**Table 2: IDA Summary of Performance (2020, 2021)**

|                      | 2020*   | 2021    |
|----------------------|---------|---------|
| Total Employment     | 258,558 | 275,384 |
| New Jobs Created     | 20,123  | 29,057  |
| Net Jobs Increase    | 8,944   | 16,826  |
| Regional Investments | 128     | 133     |

\*Results announced in January 2020.

Source: [IDA Ireland, Performance 2021](#).

As shown in Table 2, total employment in IDA client companies in Ireland as of 2021 is now 275,384, which represents the highest FDI employment level ever. There were 29,057 new jobs created in 2021. They report that jobs losses were "relatively modest" relative to the size of the overall portfolio which resulted in strong net employment growth this year (16,826 increase)<sup>26</sup>.

<sup>22</sup> The CSO report that firms are sorted by the size of their inward FDI investments and then grouped.

<sup>23</sup> CSO's statistical release on [FDI in Ireland 2020](#). Figure 1.4, Distribution of FDI in Ireland, 2020.

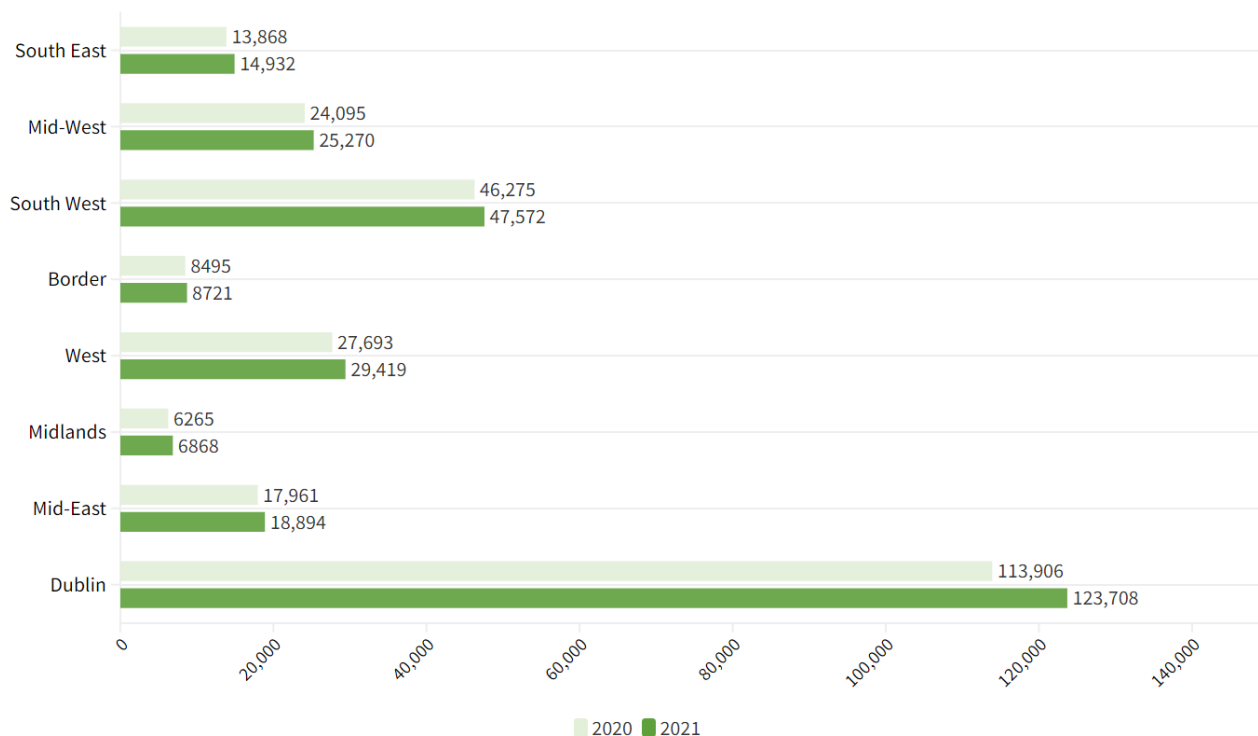
<sup>24</sup> See also Irish Times, 'Just 25 companies accounted for two-thirds of record €1.1tn FDI in 2020'. Published 27 June 2022. Available [here](#).

<sup>25</sup> Department of Enterprise, Trade and Employment, Foreign Direct Investment. Available [here](#).

<sup>26</sup> IDA Ireland report that there were 29,057 new jobs created and 12,231 job losses, resulting in a net gain of 16,826. See [IDA Ireland Performance Highlights \(2021\)](#) for more information.

Figure 4 shows the regional FDI employment breakdown for 2020 and 2021. Across every region, employment has increased. The largest increase in employment was found in the Midlands (up 9.6%), Dublin (up 8.6%), South East (up 7.7%) and West (up 6.2%).

**Figure 4: IDA Ireland, Regional Employment Breakdown (2020, 2021)**



Source: [IDA Ireland, Performance 2021](#).

Table 3 shows the distribution of FDI employment by sector for the 2020 and 2021 period. The data shows an increase across all sectors. The largest increase is observed in the services sectors, with Information & Communication Services<sup>27</sup> sector employment increasing 8.8%, and Business, Financial & Other Services<sup>28</sup> sector employment increasing 8.1%. In the manufacturing sector, modern manufacturing<sup>29</sup> employment increased 4.3% and traditional manufacturing<sup>30</sup> employment increased almost 2%.

<sup>27</sup> The Information & Communication sector includes Publishing, Broadcasting & Telecommunications, Computer Programming, Computer Consultancy, Computer Facilities Management, Other IT & Computer Services.

<sup>28</sup> The Business, Financial & Other Services sector includes Financial & Insurance Activities, Business Services and Other Services.

<sup>29</sup> The Modern Manufacturing sector includes Chemicals, Computer, Electronic & Optical Products, Electrical equipment, Medical Device Manufacturing.

<sup>30</sup> The Traditional Manufacturing sector includes Agriculture, Fishing, Forestry, Mining & Quarrying, Energy, Water, Waste & Construction, Food, Drink & Tobacco, Textiles, Clothing, Footwear & Leather, Wood & Wood Products, Paper & Printing, Rubber & Plastics, Non-Metallic Minerals, Basic & Fabricated Metal Products, Machinery & Equipment, Transport Equipment, Other Manufacturing.

**Table 3: IDA Ireland, Employment by sector (2020, 2021)**

| Sector                               | 2020           | 2021           | % change      | % of sector in 2020 total | % of sector in the 2021 total |
|--------------------------------------|----------------|----------------|---------------|---------------------------|-------------------------------|
| <b>Manufacturing</b>                 |                |                |               |                           |                               |
| Traditional Manufacturing            | 20,907         | 21,292         | + 1.8%        | 8.1%                      | 7.7%                          |
| Modern Manufacturing                 | 92,371         | 96,319         | + 4.3%        | 35.7%                     | 35.0%                         |
| <b>Services</b>                      |                |                |               |                           |                               |
| Information & Communication Services | 98,062         | 106,728        | + 8.8%        | 37.9%                     | 38.8%                         |
| Business, Financial & Other Services | 47,218         | 51,045         | + 8.1%        | 18.3%                     | 18.5%                         |
| <b>Total</b>                         | <b>258,558</b> | <b>275,384</b> | <b>+ 6.5%</b> |                           |                               |

Source: [IDA Ireland, Performance 2021](#).

Finally, IDA Ireland report that 249 new investments were won in 2021. Of that, 160 (or 64%) were North American, 68 (or 27%) were European, and 21 (or 8%) were from countries classified as 'Growth Markets'.

In January 2021, IDA Ireland launched their new strategy '[Driving Recovery and Sustainable Growth, 2021 – 2024](#)'. One of the pillars of this strategy relates to 'Regions' and IDA Ireland set out a target of having half of all investments (400 of an 800 target) from 2021-2024 going to regional locations. Based on the most recent data, 53% (or 133) of the 249 new investments went to regional locations, with employment growth in every region of the country (as shown in Figure 4)<sup>31</sup>.

The latest EY European Attractiveness Survey 2022<sup>32 33</sup> reported that Ireland was one of Europe's Top 10 locations for FDI with a market share of 3% of all FDI investments in 2021 and attracts the highest number of projects per capita among the Top 10. Figure 5 (overleaf) shows the Top 10, the annual % change and the number of projects per million population.

A [2022 EY Attractiveness Survey](#) report that Ireland was one of Europe's Top locations for FDI

In terms of factors contributing to Ireland as an attractive FDI location, the survey found that 67% of respondents cited the quality of Ireland's education system as the most attractive factor when considering Ireland as an investment location. This was found to be the single most important

<sup>31</sup> Department of Enterprise, Trade and Employment, 'Highest increase in FDI employment in a single year – IDA Ireland'. Published 20 December 2021. Available [here](#).

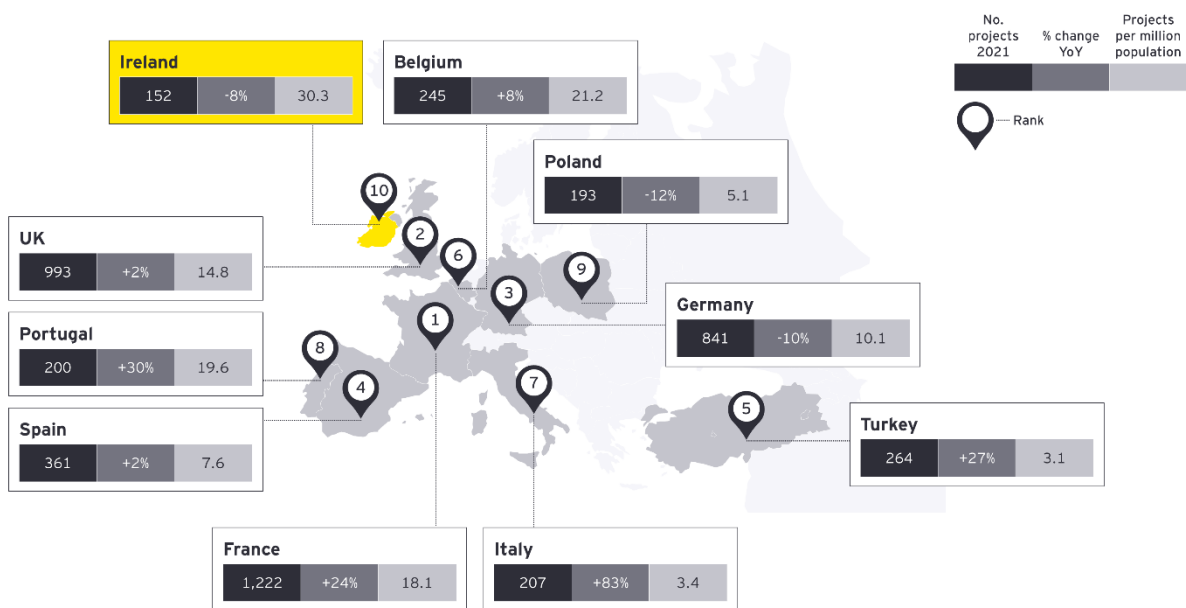
<sup>32</sup> EY Attractiveness Survey, Ireland, May 2022. Available [here](#).

<sup>33</sup> EY report that they define attractiveness of a location as "a combination of image, investor confidence, and the perception of a country's or area's ability to provide the most competitive benefits for FDI." They report that field research was conducted by Euromoney between February and April 2022 via online surveys and based on a representative panel of 150 international decision-makers. See p. 21 of their [report](#).

factor for respondents with a European HQ. Other factors mentioned were Ireland’s “pro-business tax policies”, quality of life, and Ireland’s “business-friendly environment”. Survey respondents reported that in the years ahead, the digital economy, cleantech and renewables and energy were the sectors most likely to drive Ireland’s attractiveness<sup>34</sup>.

The survey also examined the least attractive factors when considering Ireland as an FDI location. These were found to be housing affordability, affordability, cost of real estate, global connectivity (in terms of ports and airports), and the cost and availability of electricity supply.

**Figure 5: EY Attractiveness Survey (2022), Europe’s Top 10 Locations**



Source: [EY European Attractiveness Survey \(2022\)](#)

<sup>34</sup> Ibid, p. 17

## Public consultation

In April 2020, the Department of Enterprise, Trade and Employment<sup>35</sup> sought submissions to a [public consultation](#)<sup>36</sup> on the transposition of the EU Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union. The aim of the consultation was:

“...to inform the policy position that Ireland adopts in implementing the EU Regulation and, specifically whether to introduce in Ireland an Investment Screening mechanism in relation to inward investment from third countries on the grounds of security and public order.”

The consultation ran for a period of four weeks between 24 April 2020 and 22 May 2020 and included a questionnaire which covered five topics:

- Views on a proposal to introduce a national level Investment Screening mechanism for FDI in Ireland on the grounds of protecting security and public order.
- Role and powers for the Minister of Enterprise, Trade and Employment.
- Types of investment that should be screened on security and public order grounds.
- Types of sanctions that might be applied.
- Views or comments on any of the issues raised.

In total, 10 submissions were received from a range of stakeholders:

- [A&L Goodbody](#)
- [American Chamber of Commerce](#)
- [CCPC](#)
- [Chambers Ireland](#)
- [Ibec](#)
- [\[Private individual\]](#)
- [IDA](#)
- [Law Society](#)
- [Matheson](#)
- [McCann FitzGerald](#)

The Department of Enterprise, Trade and Employment<sup>37</sup> note that the submissions highlighted the importance of maintaining Ireland’s attractiveness to FDI and balancing this with a need to efficiently and effectively implement the EU Regulation on Investment Screening and to develop an

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<sup>35</sup> This was previously the Department of Business, Enterprise and Innovation.

<sup>36</sup> Department of Business, Enterprise and Innovation. [Public Consultation on Investment Screening. Transposition of the EU Regulation Establishing a Framework for Screening of Foreign Direct Investments into the EU](#). Published April 2020.

<sup>37</sup> See the Department of Business, Enterprise and Innovation, Regulatory Impact Assessment, Investment Screening Bill, Appendix 1 – Public Consultation on Investment Screening: Summary of Submissions Received. July 2020. This author is grateful to the Department of Enterprise, Trade and Employment for supplying a copy of said document.

appropriate Investment Screening Mechanism for Ireland’s specific circumstances, thus recognising the interconnectedness of the Irish economy.

Submissions pointed out that Ireland should aim to develop a best-in-class solution addressing efficiency, proportionality, transparency, and flexibility, building on the scope provided within the Regulation.

Screening decisions need to be taken based on evidence, be impartial and should be as transparent as possible, in line with Recital 15 in the Regulation.

The impact of screening decisions on competition policy and consumer welfare was highlighted.

Most submissions emphasised the importance of confidentiality and safeguarding in relation to commercially sensitive data. In particular, it was highlighted that there was a need to establish a clear legal basis for the collection of only necessary data.

Finally, some submissions referred to the merits of reviewing other systems in order to identify best practice (e.g. the [proposed UK approach](#) to assessing security risks).

## Regulatory Impact Assessment

In March 2020, the Department undertook a regulatory impact assessment (RIA) of the ‘Screening of Investment into Ireland Bill 2020’, now known as the ‘Screening of Third Country Transactions Bill 2022’. The RIA considers two policy options:

1. Do nothing and rely on cooperation and coordination mechanisms provided for in Regulation (EU) 2019/452 Establishing a Framework for the Screening of Foreign Direct Investment into the Union.
2. Establish a formal investment screening mechanism in Ireland underpinned by a new comprehensive legislative base.

Policy option 2 is the preferred option. Table 4 sets out the associated costs, benefits, and impacts identified by the Department relating to their preferred option to legislate.

**Table 4: Summary of the costs, benefits and impacts as identified in the RIA**

| No Policy Change   |   |  |
|--|---|--|
| Costs  | Benefits  | Impacts  |
| <ul style="list-style-type: none"> <li>• Ongoing risk to security and public order through the vulnerability of critical sectors, assets, technology and data to third country acquisition.</li> <li>• No additional cost to the Exchequer.</li> </ul> | <ul style="list-style-type: none"> <li>• No additional administrative burden placed on the State, or enterprises.</li> <li>• Maintains current level of certainty for investors.</li> </ul> | <ul style="list-style-type: none"> <li>• Status quo would be maintained.</li> <li>• As a result, Ireland would be unable to protect sensitive companies’ assets, technology or data from third country acquisition on security and public order grounds.</li> <li>• Ireland would find it hard to respond to requests or queries from other Member States and/or the Commission</li> </ul> |

|  |   | <p>in relation to specific investments (as required under the EU Investment Screening Regulation).</p> <ul style="list-style-type: none"> <li>• A decision not to introduce a screening mechanism could also result in reputational damage amongst key trading partners who are advocates for such a mechanism, and downstream on future investment decisions by investors.</li> </ul>  |
|--|---|---|
| Introduce Legislation  |   |   |
| Costs  | Benefits  | Impacts   |
| <ul style="list-style-type: none"> <li>• The Exchequer will face some additional administrative costs to support the work of the Investment Screening Board. It is expected that these would be absorbed within the existing budgetary parameters.</li> <li>• An additional time and administrative burden will be imposed on the (expected) small number of firms' subject to screening.</li> </ul> | <ul style="list-style-type: none"> <li>• Minister will be empowered to assess, investigate, authorise, condition, prohibit or unwind foreign investments based on a range of security and public order criteria.</li> <li>• Ireland would also be better positioned to fulfil its obligations under the EU Regulation (in relation to information sharing and responding to Member States' queries and Commission opinions).</li> </ul> | <ul style="list-style-type: none"> <li>• The ability of the State to regulate certain types of foreign investment would be enhanced in order to protect Ireland's security and public order interests.</li> <li>• These reforms will bring Ireland closer in line with other countries' regimes providing reassurance to key trading partners and allies.</li> <li>• The introduction of a formal investment screening mechanism may act as a deterrent, pre-emptively discouraging certain hostile third country asset-seeking or State backed investments.</li> </ul> |

Source: Department of Business, Enterprise and Innovation, Regulatory Impact Assessment, Investment Screening Bill, July 2020.



## Principal Provisions of the Bill

This section of the Digest provides further information on some of the main provisions of the Bill, specifically Parts 1 and 2. Part 3 of the Bill deals with the appeals process and Part 4 deals with the advisory panel. A short synopsis of each section is given in Table 1 above.

### Part 1: Preliminary and General

Part 1 comprises eight sections. Here, further information on section 2 (interpretation), section 4 (reporting on operation of Act), and section 6 (offences and penalties) are provided.

#### Section 2: Interpretation

Section 2 defines key words and terms used in the Bill. These include:

“acquire” in relation to control of an undertaking, shall be construed in accordance with subsection (3);

“adjudicator” has the meaning given to it by section 22;

“advisory panel” has the meaning given to it by section 39;

“connected”, in relation to a person, shall be construed in accordance with section 3;

“control”, in relation to an undertaking, shall be construed in accordance with subsection (2);

“Minister” means the Minister for Enterprise, Trade and Employment;

“non-notified transaction” means a notifiable transaction of which the Minister is not notified in accordance with section 10;

“notice of information” has the meaning given to it by section 19;

“notifiable”, in relation to a transaction, shall be construed in accordance with section 9;

“notified transaction” means a transaction of which the Minister is notified in accordance with section 10;

“prescribed” means prescribed by regulations made by the Minister under this Act;

“Regulation” means [Regulation \(EU\) 2019/452](#) of the European Parliament and of the Council of 19 March 2019<sup>2</sup> establishing a framework for the screening of foreign direct investments into the Union;

“relevant material” means any decision, evidence, document, material or any other matter that

- a. is relevant to an appeal under section 27 or 34, any further appeal following such an appeal or an application under section 35 relating to such an appeal,
- b. is not publicly available, and
- c. relates to the security or public order of the State;

“screening decision” has the meaning given to it by section 16;

“screening notice” has the meaning given to it by section 14;

“third country” means a state or territory other than

- a. the State,
- b. a Member State,

- c. a state or territory, not being a Member State, that is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993, and
- d. Switzerland;

“third country national” means

- a. a natural person who is ordinarily resident in a third country, or
- b. an unincorporated group or partnership of natural persons at least one of whom is ordinarily resident in a third country;

“third country undertaking” means an undertaking that is

- a. constituted or otherwise governed by the laws of a third country,
- b. controlled by at least one director, partner, member or other person, that
  - (i) is a person referred to in paragraph (a), or
  - (ii) is a third country national,

or

- c. a third country national;

“transaction” includes

- a. any transaction, acquisition, agreement or other economic activity relating to
  - (i) a change in control of an asset in the State, or
  - (ii) the acquisition of all or part of, or of any interest in, an undertaking in the State,

and

- b. any proposal to effect a transaction, acquisition, agreement or other economic activity referred to in paragraph (a);

“undertaking” includes any person (including an individual, a body corporate, a partnership or any other unincorporated body of persons) engaged for gain in the production, supply or distribution of goods, the provision of services, the making or holding of investments or the carrying out of any other economic activity, but does not include a natural person whose role in such activities is limited to working under a contract of employment or a contract for services for an undertaking.

#### **Section 4: Reporting on operation Act**

Section 4 provides for the reporting on screening activity.

Subsection (1) provides that the Minister shall

- (a) cause a report to be prepared on the operation of this Act not more than 15 months after this section comes into operation, and not less than once every 12 months thereafter, and
- (b) cause a copy of such report to be laid before each House of the Oireachtas as soon as practicable after it has been prepared.

Subsection (2) provides that a report prepared under this section shall, subject to subsection (3), include

- (a) aggregated details on the number of transactions notified to the Minister under this Act,

- (b) aggregated details on the number of non-notified transactions reviewed by the Minister under this Act,
- (c) aggregated details on the actions taken by the Minister in respect of transactions in relation to which a screening decision has been made
- (d) information on sectoral trends of, and third countries involved in, transactions reviewed by the Minister under this Act, and
- (e) all other matters relating to the operation of the Act that the Minister considers to be relevant.

Subsection (3) provides that a report prepared under this section shall not include:

- (a) commercially sensitive information,
- (b) personal data (within the meaning of [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing [Directive 95/46/EC](#) (General Data Protection Regulation)), or
- (c) information the disclosure of which could create a risk to the security or public order of the State.

## Section 6: Offences and penalties

Subsection (1) provides that a person who is guilty of an offence under this Act, other than under section 28(5), shall be liable

- (a) on summary conviction, to a class C fine or to imprisonment for a term not exceeding 6 months, or to both, or
- (b) on conviction on indictment, to a fine not exceeding €4,000,000 or to imprisonment for a term not exceeding 5 years, or to both

## Part 2: Notification and Review of Transactions

Part 2 comprises 11 sections. Here, further information on section 9 (notifiable transactions), section 12 (review of transactions with regard to security or public order of the State), section 13 (considerations when reviewing transactions) and section 16 (screening decision) are provided.

### Section 9: Notifiable Transactions

Section 9 provides for details on transactions that must be notified to the Minister.

Subsection (1) provides that subject to subsection (2), 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, is a party to the transaction;
- (b) the value of the transaction is equal to or greater than
  - (i) where no amount stands prescribed under subsection (3), €2,000,000, or
  - (ii) the amount that stands prescribed under subsection (3);

- (c) the transaction directly or indirectly relates to, or impacts upon, one or more of the matters referred to in points (a) to (e) of [Article 4\(1\) of the Regulation](#)<sup>38</sup>;
- (d) the transaction relates, directly or indirectly, to an asset or undertaking in the State.

Subsection (2) provides that a transaction that results in the acquisition, by any person, of shares or voting rights in an undertaking in the State shall not be notifiable unless:

- (a) the criteria in subsection (1) are satisfied, and
- (b) the percentage of shares or voting rights held by the person in the undertaking as a result of the transaction changes:
  - (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.

Subsection (3) provides that the Minister may, where it is necessary to do so in order to:

- (a) provide for the more effective review of transactions under this Act;
- (b) respond to variations in economic, political or social conditions affecting transactions that, but for subsection (1)(b), would be notifiable, or
- (c) improve the security or public order of the State,

prescribe an amount for the purposes of subsection (1) (b).

## **Section 12: Review of transactions with regard to security or public order of the State**

Section 12 provides for the requirement for the Minister to review both notified and non-notifiable transactions where the Minister believes that they may impact security or public order.

Subsection (1) provides that the Minister

- (a) shall, as soon as practicable after being notified of a transaction under section 10, review the transaction in accordance with section 13, and
- (b) may, subject to subsection (2), review a transaction in accordance with section 13, regardless of whether or not the transaction is notified or notifiable, where:
  - (i) 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, and
  - (ii) the transaction has resulted in, or would if completed result in, a third country undertaking, or a person connected with such an undertaking, acquiring, or changing the extent to which it has
    - i. control of an asset in the State,
    - ii. control of or an interest in an undertaking in the State,
    - iii. legal rights in relation to a person, asset or undertaking in the State,
    - iv. the ability to exercise effective participation in the management or control of an undertaking in the State, or

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<sup>38</sup> See Box 2 of this Bill Digest for information on the contents of Article 4(1).

- v. the ability to exercise control over an undertaking in the State through a change in ownership or legal structure of that undertaking.

Subsection (2) provides that the Minister shall not commence a review of a transaction under subsection (1)(b)

- (a) in the case of a non-notified transaction, subject to paragraph (c), after the later of
  - (i) 5 years from the date on which the transaction is completed, or
  - (ii) 6 months from the date on which the Minister first becomes aware of the transaction,
- (b) in the case of a transaction that is not notifiable, subject to paragraph (c), more than 15 months after the transaction is completed, or
- (c) where the transaction, regardless of whether or not the transaction is notified or notifiable, is completed more than 15 months before this section comes into operation.

### Section 13: Considerations when reviewing transactions

Section 13 sets out the factors that the Minister will consider when reviewing the threat to security or public order of the State. Subsection (2) provides that, in considering whether or not a transaction affects, or would be likely to affect, the security or public order of the State, the Minister shall have regard to the following:

- (a) whether or not a party to the transaction is controlled (whether through ownership structures or by other funding) by a government (which reference to government shall include, for the purposes of this paragraph, the state bodies or armed forces of the third country concerned) of a third country and, where relevant, the extent to which such control is inconsistent with the policies and objectives of the State;
- (b) the extent to which a party to the transaction is, at the time the transaction is being reviewed, already involved in activities relevant to the security or public order of the State;
- (c) whether or not a party to the transaction has previously taken actions affecting the security or public order of the State;
- (d) whether or not there is a serious risk of a party to the transaction engaging in illegal or criminal activities;
- (e) whether or not the transaction presents, or is likely to present, a person with an opportunity to
  - (i) undertake actions that are disruptive or destructive to persons in the State, or to enhance the impact of any such action
  - (ii) ) improve the person's access to sensitive undertakings, assets, people or data in the State, or
  - (iii) undertake espionage affecting or relevant to the interests of the State

- (f) whether or not the transaction is likely to have a negative impact in the State on the stability, reliability, continuity or safety of one or more of the matters referred to in points (a) to (e) of [Article 4\(1\) of the Regulation](#)<sup>39</sup>;
- (g) whether or not 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;
- (h) where applicable, comments of Member States and the opinion of the European Commission referred to in [Article 6\(9\) of the Regulation](#)<sup>40</sup>;
- (i) the extent to which the transaction affects, or would be likely to affect, the security or public order of a Member State other than the State or of the European Union

Subsection 3 provides details on the screening process, providing the Minister with the power to consult with the advisory panel; information (if any) provides under section 10(1); written submissions by the parties to the transaction under section 21; consult with other Government Ministers or with other relevant parties to inform the review process.

### Section 16: Screening decision

Section 16 provides that the Minister is required to inform the parties to a transaction of a screening decision.

Subsection (3) provides that subject to section 20, the Minister shall make a screening decision

- (a) in the case of a notified transaction, on or before the later of
  - (i) 90 days from the date on which the Minister was notified of the transaction under section 10, or
  - (ii) such date, not being more than 135 days from the date on which the Minister was notified of the transaction under section 10, as the Minister may specify in a notice in writing to the parties to the transaction within the period referred to in subparagraph (i),

or

- (b) in the case of a transaction other than a notified transaction, on or before the later of
  - (i) 90 days from the date on which the screening notice in relation to the transaction was issued, or
  - (ii) such date, not being more than 135 days from the date on which the screening notice in relation to the transaction was issued, as the Minister may specify in a

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<sup>39</sup> See Box 2 of this Bill Digest for information on the contents of Article 4(1).

<sup>40</sup> Article 6 of the Regulation relates to the cooperation mechanism in relation to foreign direct investments undergoing screening. Article 6(9) states “The Member State undertaking the screening shall give due consideration to the comments of the other Member States referred to in paragraph 2 and to the opinion of the Commission referred to in paragraph 3. The final screening decision shall be taken by the Member State undertaking the screening.” For more information, see the Regulation [here](#).

notice in writing to the parties to the transaction within the period referred to in subparagraph (i).

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