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Public Consultation on Investment Screening

1. Introduction

1.1 McCann FitzGerald makes this submission in response to the Department of Business, Enterprise and Innovation's (the "**Department**") public consultation on investment screening and the implementation of Regulation (EU) 2019/452[1] (the "**Consultation**").

1.2 Following recent guidance from the European Commission calling on Member States to screen FDI in response to the risk that the outbreak of Covid-19 could lead to attempts to acquire key healthcare capacities,[2] we consider the Department's decision to launch a consultation on FDI screening at this juncture to be a sensible one.

1.3 McCann FitzGerald welcomes Minister Heather Humphreys' comments that the FDI Regulation should be implemented in a way that "*balances Ireland's continued attractiveness as a location for inward investment, with a robust, but proportionate Investment Screening Mechanism that protects security and public order*." As a general observation, McCann FitzGerald considers that if an investment screening regime is introduced, it should be structured to provide maximum certainty for businesses, while protecting against risks to public security and public order. We also welcome the Minister's commitment "*to tailor a system of*

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union OJ L 79I (the "**FDI Regulation**").

[2] Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 25.3.2020 C(2020) 1981 final, available at https://trade.ec.europa.eu/doclib/html/158676.htm.

investment screening relevant to Ireland's needs while also meeting the obligations under the EU Regulation." Given the administrative burden, added cost and delay to investments that FDI screening may involve, the structure of the regime should be carefully tailored to cover only transactions capable of posing a risk to public order and public security.

1.4 In response to the Consultation, we make the following specific observations regarding the introduction of an FDI screening regime in Ireland.

2. **Mandatory notification**

2.1 In our view, notification under an FDI screening regime should be mandatory, as is the case in jurisdictions such as Australia, France and Canada. While a voluntary regime would avoid unnecessary notification for merging parties in the majority of cases, we consider that there are several arguments in favour of a mandatory notification procedure which allows *ex ante* review of notifiable investments, pending which the transaction may not be implemented:

- Key considerations for investors are the predictability, certainty and transparency of an investment screening regime. A clearly defined mandatory regime allows potential investors to ascertain with certainty whether a screening notification is required, and to plan accordingly.

- A mandatory regime will ensure that all transactions deemed by the Department to be capable of posing a risk to public order and public security are notified, whereas a voluntary regime carries that risk that certain transactions may "slip through the net."

- Voluntary regimes typically provide regulators with the power to compel notification or to conduct an *ex post* review of an investment. While in most cases this risk would be remote, this would create considerable uncertainty for investors. The possibility that the Department may seek to review and condition, or prohibit, a transaction post-closing is a significant one, which may impact on the decision to undertake a particular investment.

- An *ex post* review of an investment may result in an order to divest assets or to "unwind" the investment. Unwinding a transaction can be an extremely difficult process, in particular where businesses have integrated. A mandatory regime which suspends implementation of an investment until the Department has issued its approval would remove the requirement for complex *ex post* review and potential divestment/unwinding of transactions. This would also give the Department the opportunity to impose *ex ante* conditions on the investment to address any concerns before the investment proceeds.

- An additional risk created by a voluntary regime is that it may prompt conscientious investors to "err on the side of caution" by submitting a notification under the screening regime even where the transaction is highly unlikely to create a security risk. This would result in an unnecessary administrative burden for Government and investors.

2.2 If a mandatory notification is introduced, the Department should not have the ability to conduct an *ex post* review of transactions reviewed under the regime. Once an investment has been reviewed, we consider that it should be considered immune from further review, except in cases where false or misleading information was provided to the Department during the review process.

2.3 We note that the mandatory notification approach has worked well in the context of the notification of mergers to the Competition and Consumer Protection Commission ("**CCPC**") under the Competition Act 2002 (the "**Competition Act**"). Under this regime, a limited number of transactions are caught by the specific jurisdictional thresholds set out in the Competition Act, providing certainty for businesses and allowing regulators to focus resources where they are needed most.[3]

2.4 We note, however, that a mandatory regime will only succeed in providing certainty for investors where its application is appropriately limited and where the scope of the regime is precisely defined (see **Section 3** immediately below).

3. Scope

3.1 Considering the additional burden FDI screening creates for investors, the screening regime should be focused on transactions that may pose a risk to public security or public order. In our view, the regime should be limited in the following respects:

- **Sector-specific/cross-sectoral**: In our view, there are merits and drawbacks to both a cross-sectoral and a sector-specific approach to FDI screening. As noted by the United Nations Conference on Trade and Development,[4] an approach that requires screening only for specific identified sectors provides more predictability for foreign investors, as investors active in sectors falling outside of the regime will have certainty that a transaction may not be subject to review. On the other hand, a cross-sectoral regime focused on identifying specific risks, rather than targeting specific sectors, may allow the Department to ensure that transactions posing risks are reviewed. We would note that there may be merit in aligning our approach with that of other EU Member States in this respect. In both Germany and France, for example, the FDI screening regimes apply to specific, identified sectors. Where a risk is identified in a sector that is not covered by the regime, the legislation could be amended to cover this sector.

- **Sectors covered**: If a sector-by-sector approach is adopted, the Department will be in the best position to identify sensitive and critical sectors of the economy that require investment screening, having regard to the factors listed in Article 4 of the FDI Regulation. In light of the necessity of critical healthcare capacity amid the outbreak of Covid-19, we would expect this sector to be covered by the notification regime. We would advise against general screening of foreign real estate investments, as employed by the United States (CFIUS) and Australia, which have the potential to discourage investment in this sector. We would also note that it would be helpful if the Department clarified the extent to which businesses involved in industries that are ancillary or related to sectors covered, or in the supply chain, could be subject to the screening regime. As provided in the FDI

[3] We understand that, for example, Australia and Canada operate financial thresholds for FDI review, which provide clarity *ex ante* as to whether a transaction will be subject to review.

[4] UNCTAD Investment Policy Monitor, National Security-Related Screening Mechanisms for Foreign Investment, December 2019, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d7_en.pdf, page 7.

Regulation,[5] the regime could be tailored to apply also where the investor is controlled by a third country government.

- **Control/shareholding test**: The level of control or influence over a business required to trigger notification should be appropriately limited. We expect that a screening regime would require notification where there is an acquisition of control or decisive influence over an undertaking. In this regard, we see no reason why an FDI screening regime could not incorporate the concept of "acquisition of control" as defined in the Competition Act. This would provide certainty for businesses, as this concept is used to determine jurisdiction under the Competition Act and the EU Merger Regulation,[6] and there is a wealth of guidance on the concept at Irish and EU level. We note that several EU jurisdictions (such as Germany, France and Spain) have introduced screening of acquisitions of minority shareholdings, or minority voting rights. In Germany and Spain, acquisitions of a 10% share of an entity in certain sectors are subject to screening, while in France, acquisitions of 25% or greater of an entity's shares or voting rights are screened. We note also that the definition of "foreign direct investment" in the FDI Regulation includes investments that "*enable effective participation in the management or control of a company*."[7] As such, Ireland may wish to follow the approach of other EU Member States in screening acquisitions of minority interests, given that such interests may allow the acquirer to participate in the management of the relevant entity or gain access to sensitive information regarding the entity or industry involved. The Department may also wish to consider applying a lower threshold for acquisitions by State-owned entities than by privately-owned entities, given that intervention is more likely in the case of a State-owned investor.

- We note that the Consultation queries whether screening should be based on the country of origin of the investment (section 4(iii)). While we would expect the country of origin of the investor to be accounted for by the Department in the substantive review of an investment, we note that Article 3(2) of the FDI Regulation requires that rules and procedures relating to screening mechanisms shall not discriminate between third countries.

4. **Clarity**

4.1 It is critical that a screening regime is defined with utmost clarity, to ensure that investors and their advisors can easily identify whether a notification is required, and what the cost and timing implications for the transaction will be.

Jurisdiction for review

4.2 Key jurisdictional parameters, such as those discussed in Section 3 above, should be defined as precisely as possible. The publication of guidelines explaining the application of jurisdictional rules would be particularly helpful in this regard.

4.3 Ambiguous jurisdictional tests may result in unnecessary notification, creating an unnecessary administrative burden for business and Government, or in the failure to notify,

[5] Article 4(2)(a) and Recital 13 to the FDI Regulation.
[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[7] Article 2(1) of the FDI Regulation.

undermining the effectiveness of the screening regime. Conversely, clear and unambiguous thresholds will ensure that only transactions that pose a security risk are reviewed, allowing the Department to focus its resources on transactions that require its attention and providing maximum certainty to businesses.

Timelines for review

4.4 It is also important that the screening regime provides for strict, limited, and legally binding timelines.[8] This will provide maximum certainty for investors, will facilitate planning and would be consistent with best-practice jurisdictions such as the United States, Australia, Canada and France. In this regard, the Department could implement a procedure similar to that which applies to mergers under the Competition Act, which provides for an initial period of review, described as a "Phase 1" assessment, during which investments that do not pose any issues could be processed.[9] In the event that the investment requires further, more detailed, review, the Department could provide the opportunity for a lengthier investigation, similar to the "Phase 2" review conducted by the CCPC.

4.5 We would also note that where a transaction is required to be notified to the CCPC under the Competition Act and to the Department under an FDI screening regime, we see no reason why the processes should not run concurrently, provided that the transaction may not be put into effect until approval is granted by both the CCPC and the Department. Under the Competition Act, where the same transaction is required to be notified to both the CCPC under Part 3 of the Competition Act and the Minister for Communications, Climate Action and Environment under Part 3A of the Competition Act, the latter notification may be made only when the CCPC has completed its review. Given that consecutive review periods may result in months-long delays to transactions, we recommend that this approach is not followed in relation to an FDI regime. We would also note that while review under an FDI screening regime and the CCPC's review under the Competition Act would constitute separate and distinct processes with different functions, we see no reason why the Department and the CCPC could not cooperate and share information when reviewing a single investment, in particular where this could reduce the administrative burden for investors required to notify under both regimes.

Transparency

4.6 A balance should be struck between, on the one hand, the need for transparency (to give businesses clarity around review practice, timeframes, theories of harm etc.) and, on the other hand, the commercial sensitivity of information likely to be provided to the Department during a review, as well as the potential for reputational damage for investors to be publicly identified as giving rise to national security concerns.

- In the interests of protecting confidential information, like under the CCPC's competition regime, it should be a criminal offence to leak any confidential information supplied by the parties to a proposed investment transaction.[10]

[8] We note in this regard that Article 3(3) of the FDI Regulation requires Member States to "*apply timeframes under their screening mechanisms*."

[9] We note that this initial period would have to allow at least 15 calendar days for other Member States and the European Commission, having been informed of the notification by the Department, to notify the Department whether they intend to provide comments on the notification, as permitted under Article 6(6) of the FDI Regulation.

[10] See section 25 of the Competition Act 2014. This is also consistent with, for example, the CFIUS process in the United States.

Similarly, to the extent information is published about review processes, the party to whom information relates should be given an opportunity to request appropriate redactions.

- In the interests of transparency and clarity around how FDI reviews are conducted, certain minimum information could be published about reviews. This could include: (a) the number of days for which the transaction was under review; (b) the sector involved; (c) the theory of harm investigated by the Department; (d) any amendments to the transaction required for clearance; (e) the review outcome. The Department could, for example, publish redacted forms of its decision (as the CCPC does in competition reviews and as the Department for Communications, Climate Action and Environment does in media mergers) or publish an annual report (as the CCPC does) analysing the trends in review that year. These published documents in other transaction review processes are a valuable resource, providing businesses great clarity around the relevant processes, timelines and likely outcomes. As in the case of the competition regime, the requirement to publish information about reviews is enshrined in legislation and this would be advisable in the FDI context also. Similar to jurisdictional rules, it would also be of great value for the Department to publish guidelines on the review process itself.

Substantive test for review

4.7 The substantive test to which investment may be subjected should also strike a balance. The balance should be between being as clear as possible and providing necessary flexibility to the Department in the event novel risks are identified. Some national tests focus on broad and somewhat subjective concepts such as "national interest" (e.g. Australia). Others are more specific and objectively definable, such as the German test, which we understand to be whether an investment poses a threat to "public order or security" and the United States' test of "national security". Experience in those countries suggests that more objectively definable terms give greater clarity to potential investors and would, therefore, be more likely to accord with the stated intention to continue to protect Ireland's attractiveness as a location for inward investment.

Yours sincerely

McCann FitzGerald

Sent by email and accordingly bears no signature