

# Chambers Ireland submission to the Department of Business, Innovation and Enterprise on the implementation of an EU Regulation on Investment Screening

May 2020

Chambers Ireland represents the largest network of businesses in the State. With 41 Chambers, located in cities and towns in all parts of the country, we are uniquely positioned to understand the needs and concerns of Irish businesses and to represent their views. Drafted in consultation with our Chamber Network and associated policy fora, which represent the Chambers and their member organisations, Chambers Ireland is pleased to have the opportunity to make a submission to the Department of Business, Innovation and Enterprise on the implementation of an EU Regulation on Investment Screening.

## Introduction

The EU is the main destination for FDI in the world: more than 35% of total EU assets belong to foreign-owned companies, amounting to €6,295 billion at the end of 2017 and providing Europeans with an estimated 16 million direct jobs.<sup>1</sup> This has resulted in the EU being ranked as one of the world's most open investment regimes on the OECD's FDI Regulatory Restrictiveness Index.<sup>2</sup>

However, there is currently no comprehensive framework at the EU level for the screening of FDI on the grounds of security or public order, while the major trading partners of the Union have already developed such frameworks. The EU Regulation of the European Parliament and of the European Council establishing a framework for screening of foreign direct investments into the EU is attempting to change this.<sup>3</sup> The Regulation represents the EU's response to an evolving and increasingly complex investment landscape. It is an attempt to find a balance between security concerns and maintaining the EU's position as one of the world's most open investment regimes. In doing so, it specifically sets out an "Investment Screening Mechanism" in relation to inward investment into all Member States, including Ireland, from third countries outside of the EU on the grounds of security and public order.<sup>4</sup> For example, a case where a foreign investor seeks to acquire control of European businesses whose activities affect critical technologies, infrastructure, inputs or sensitive information. In some cases, the risk may be exacerbated by the fact that investors are owned or controlled by the state of a third country.<sup>5</sup>

Although the number of companies in the EU controlled by third country investors is still small, they have a significant economic impact because of their larger than average size and their focus on

<sup>1</sup> European Commission (2019), *EU foreign investment screening regulation enters into force*. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2088](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2088)

<sup>2</sup> FDI restrictiveness is an OECD index gauging the restrictiveness of a country's foreign direct investment (FDI) rules by looking at four main types of restrictions: foreign equity restrictions; discriminatory screening or approval mechanisms; restrictions on key foreign personnel and operational restrictions.

OECD (2020), *OECD International Direct Investment Statistics*. Available at: <https://data.oecd.org/fdi/fdi-restrictiveness.htm>

<sup>3</sup> The Regulation came into force on 11 April 2019, with its provisions set to apply from on 11 October 2020.

<sup>4</sup> 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. Available at: <https://eur-lex.europa.eu/eli/reg/2019/452/oj>

<sup>5</sup> European Commission (2019), *Screening of Foreign Direct Investment – An EU Framework*. Available at: [http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc\\_157683.pdf](http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157683.pdf)

high-technology sectors. As the world's largest recipient of FDI, the Regulation seeks to strike a balance between, on the one hand, a coordinated response to security and public order issues, and on the other, continuing to encourage investment in the EU.<sup>6</sup>

The following submission outlines the importance of FDI in Ireland, along with the concerns and opportunities that this EU Regulation presents for the Irish foreign direct investment landscape.

## Consultation Questions

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

Openness to foreign direct investment has been a key pillar of Irish economic and business success over the past several decades, creating jobs, providing critical support to GDP and generating revenue for the Exchequer. Research from IDA Ireland between 2015-2019 shows that IDA Ireland client companies have spent €1.4bn on research and development annually, contributed €2.8bn in corporation tax and over €22.4bn in direct expenditure in the Irish economy.<sup>7</sup> The Department of Business, Enterprise and Innovation have further estimated that 20% of all private sector employment in the State is directly or indirectly attributable to FDI.<sup>8</sup> The importance of FDI to the Irish economy is, therefore, very significant and essential to our future economic recovery and development, particularly post-COVID19.

Ireland does not currently have an investment screening mechanism, though the Regulation requires that we should. That being the case, this presents the opportunity to design and tailor a system appropriate to our foreign investment practices, while also meeting the obligations which the regulation brings. As such, given the important of FDI to our economy, the introduction of an Investment Screening mechanism in Ireland should be specifically limited in scope to protecting security and public order. The process should balance between safeguarding our national sovereignty and sectoral profile, while also upholding our commitment to the integrity of the European Union.

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

With regard to establishing an Investment Screening Board to support the Minister in relation to decision making in the context of Investment Screening, Chambers Ireland recommends that its

<sup>6</sup> Organisation for Security and Co-operation in Europe (OSCE) (2017), *Best Practice Guide for a Positive Business and Investment Climate*. Available at: <https://www.osce.org/eea/19768?download=true>.

<sup>7</sup> This is made up of €11.3bn in Irish services, €2.6bn on Irish materials, and €8.5bn on payroll. IDA Ireland (2017), *Winning: Foreign Direct Investment 2015-2019*. Available at: [https://www.idaireland.com/docs/publications/ida\\_strategy\\_final](https://www.idaireland.com/docs/publications/ida_strategy_final).

<sup>8</sup> DBEI (2020), *Foreign Direct Investment (FDI)*. Available at: <https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Foreign-Direct-Investment-FDI>.

functions should be clearly defined, enabling determinations to be made through a fair and transparent process.

Concerning the role and powers that should be vested in the Minister to assess, investigate, authorise or prohibit investments, it is advisable that the Department consider implementing a defined time limit for decisions on investment screening once full disclosure of the required information is provided to the Minister and the Board (e.g. 21 days), along with a shorter timeframe for which appeals may be heard (e.g. 14 days).

In terms of the information that the Minister may request and receive from both the investor and the company being acquired, it will be of utmost importance that this sensitive information remains confidential (perhaps for a specified amount of time). For situations where there is a question with regard to the necessity of screening, we suggest that there should be an advance “No Names Basis” screening consultation procedure, so as to enable it to be determined if the screening will be required in advance. Speed in responding to any application for advance clearance would be equally important. Ireland maintains strong reputation globally as an attractive, open, competitive place to do business. It is essential that in creating an Investment Screening framework, that we prioritise efficiency and transparency. We do not want to risk damaging Ireland’s credibility as a place to invest and do business.

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

Under this regulation, Irish businesses and foreign investors in Ireland will have to provide information to the Department/Minister on proposed or completed transactions. It is thought that this is more likely to affect investments in areas of critical infrastructure (such as telecoms, energy, and water), technology (artificial intelligence and robotics), defence and food security.<sup>9</sup> It is possible that companies will be required to include the ownership structure and identity of the investor involved, the source, value and timing of the investment, and sectors and products/services involved. It is our view that the Minister should design a framework, that is narrow in scope, and only triggers screening in extreme circumstances that are clearly defined by law so as not to adversely impact on future FDI in Ireland.

We recommend that a future Screening Mechanism should be restricted to include only investments that are deemed to be credible threats to the security or public safety of Ireland, and/or the EU. The criteria to determine what is screened should, therefore, be defined as exhaustively and narrowly as possible so that it will be immediately apparent when a proposed investment needs to be considered. A system of mandatory notification of investments based on defined thresholds (including criteria such as the country of origin of the foreign investor and the financial value of the proposed investment) would be a more preferable system for the Department to establish as opposed to a system that relies on voluntary notification. In addition, the Minister and the Investment Screening Board should be empowered to screen any investment that they believe represents a

<sup>9</sup> European Parliament Press Release (2019), *EU to scrutinise foreign direct investment more closely*. Available at: <https://www.europarl.europa.eu/news/en/press-room/20190207IPR25209/eu-to-scrutinise-foreign-direct-investment-more-closely>.

threat to security and public order. This would help in ensuring that it would be less likely for a foreign investment, that represents a threat to public order and/or security, to be concealed through another company or entity that might not fall under the mandatory notification system.

*4. What types of investment should be screened on security and public order grounds, having regard to the provision of the EU Regulation?*

Not all FDI from outside of the EU will be of equal significance or concern. The priority of an investment screening mechanism should be to screen for third countries seeking to control key pieces of infrastructure that are nationally significant. For example, ports, airports, digital infrastructure and so forth. We agree that it would be appropriate for a screening mechanism to review such investments, so as to make a determination on threats to national security. However, a balance must be struck.

### ***Further Views- Concerns regarding Investment Screening***

#### **Administrative burden hindering investment**

The introduction of regulatory restrictions on inward FDI has the potential to become an irrelevant potential bureaucratic consideration that impedes conventional FDI. Policy measures such as Investment Screening, which can be a costly and very time-consuming process to convince authorities that FDI in a project will be in the national interest, has the potential to act as a very significant barrier to attracting FDI in the future.<sup>10</sup>

The requirement to go through a screening process at all may deter an investor completely from proceeding with the proposal. Therefore, it is our view that the Department must ensure that the screening process is administratively straightforward and user-friendly, so as not to deter foreign investors from investing here and moving their interests elsewhere. In addition, the speed of any process will be critical. As outlined above, we recommend that there would be a defined time limit for decisions on Investment Screening once full disclosure of the information required is provided.

#### **Information Sharing with other EU Member States**

Under the Regulation, Member States who consider themselves to be impacted by a third country investment in another Member State may request details from the FDI-recipient Member State and may give their views to that Member State. While the Regulation proposes to create a cooperation mechanism where concerns may be raised about specific investments, we are conscious of sharing sensitive investment information with other EU Member States given the marked importance of FDI in the Irish economy. Any screening framework introduced by the Department must endeavour to safeguard the information of both the investor and the company being acquired, in as much as is possible, so as to avoid adversely impacting future FDI into Ireland and risking losing such

<sup>10</sup> Productivity Commission of the Australian Government (2000), *Services, Trade and Foreign Direct Investment*. Available at: <https://www.pc.gov.au/research/supporting/service-trade-foreign-direct-investment/servtrad.pdf>.

investments to other Member States that could potentially offer more favourable conditions to the foreign investor.

## COVID-19

COVID-19, as a health emergency, is also having pervasive effects on the economy of the EU as a whole, as well as on each Member State. Among the possible consequences of the current economic shock is an increased potential risk to strategic industries, but by no means limited to, healthcare-related industries. In the context of COVID-19, there could be an increased risk of attempts by third countries to acquire healthcare capacities (for example, for the productions of medical or personal protective equipment) or related industries such as research establishments (for instance, developing vaccines) via foreign direct investment.

Therefore, the European Commission issued new guidance in April of this year on addressing foreign investment screening in the context of the current pandemic, citing that the “resilience of these industries and their capacity to continue to respond to the needs of EU citizens should be at the forefront of the combined efforts both at EU and at Member State level.”<sup>11</sup> The paper further underlined how strategic assets are crucial to Europe’s security, and are part of the backbone of its economy and, as a result, of its capability for a fast recovery.

In light of the current pandemic, France, Italy and Spain have introduced emergency legislative measures to broaden government powers to restrict investments by foreign entities in certain strategic sectors of the economy (see Appendix I). Both France and Italy have included sunset clauses in their respective decrees, whereby the provisions to limit investments by foreign entities is restricted only until the 31 December 2020.<sup>12</sup> Chambers Ireland recommends that any implementation of an investment screening mechanism in Ireland should likewise include a sunset clause that relates specifically to COVID-19 whereby a non-European Foreign Investor crossing a specific threshold (e.g. between 10-20%) in an Irish public company engaged in “Covered Activities” will be required to notify Irish authorities.<sup>13</sup> Following notification, the Minister/Department will have a specified number of days to decide whether or not the Foreign Investor must submit a complete filing for authorization pursuant to Irish foreign investment rules in order to conduct a more extensive review of the transaction. Having completed such review, the Minister may decide to withhold authorization for the Foreign Investor to hold more than a certain percentage of voting rights in the relevant Irish company.

## Concluding Remarks

Increasing globalisation, geopolitical influences and technological developments have resulted in a worldwide FDI portfolio that is in a constant state of transformation. This presents challenges and

<sup>11</sup> European Commission (2020), *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 (FDI Screening Regulation)*. Available at: [https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158676.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf).

<sup>12</sup> Spain has not included a sunset clause in their new legislation, instead stating that it shall apply on a “temporary basis”. UNCTAD Investment Policy Hub (2020), *Investment Policy Responses to the COVID-19 Pandemic*. Available at: [https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf).

<sup>13</sup> Such “Covered Activities” would be specifically related to healthcare-related industries or R&D activities related to biotechnology.

opportunities, which Ireland has proven adept at managing over many years. Ireland's future FDI success will require bolstering existing sectors, exploiting new opportunities and replacing declining activities. However, regardless of its exemplary track record, investments will be hard won in existing sectors and even more so in new ones in light of the current COVID-19 pandemic and the effects that this is set to have on Ireland's economic performance and GDP. Therefore, it is essential that an Irish Screening Mechanism does not become a bureaucratic barrier to investment and is designed so that screening is triggered in only the most extreme circumstances, clearly defined in law. Any approach to the introduction of an Investment Screening mechanism must be underlined by Ireland's continued attractiveness as a location for inward investment while taking into account national security considerations.

We remind policymakers and legislators that constructive engagement with the business community is instrumental in facilitating representative discussions on future pathways and actions. We emphasise the value of public consultations and welcome future opportunities to engage on this and associated topics.

## Appendix I

### *Investment Screening in France*

Under French foreign investment rules, investors qualifying as foreign investors are required to file a request with, and obtain authorization from, the Minister prior to making certain investments (“Covered Investments”) in business activities in France deemed to be sensitive (“Covered Activities”). Under current rules, the prior authorization regime applies to the following Covered Investments:

- the acquisition of control over a French company (the Control Test);
- the acquisition, in whole or in part, of a branch of business of a French company (the Asset Test); and
- for non-European Union (EU) or non-European Economic Area (EEA) Foreign Investors, the acquisition (directly or indirectly) of more than 25% of voting rights in a French company (the Threshold Test).

In light of the current coronavirus pandemic, the French Minister of the Economy announced that the above rules would change to protect French strategic assets in the context of COVID-19. The forthcoming decree is expected to lower the applicable threshold under the Threshold Test to 10% of voting rights if the relevant French company is publicly listed. The Minister believes that, in the context of the significant fall in stock prices caused by the COVID-19 pandemic, an unfriendly minority investment in a French publicly listed company with a widely spread share capital may have a destabilizing effect.

With the intention of not adversely affecting the ability of French public issuers to access equity capital markets, this reinforced control will be implemented as follows:

- It will not apply to European Foreign Investors;
- It is expected to be implemented only until December 31, 2020, pursuant to a fast-track procedure. Until that date, a non-European Foreign Investor crossing the 10% threshold in a French public company engaged in Covered Activities will be required to notify French competent authorities. Following notification, the Minister will have 10 days to decide whether or not the Foreign Investor must submit a complete filing for authorization pursuant to French foreign investment rules in order to conduct a more extensive review of the transaction. Having completed such review, the Minister may decide to withhold authorization for the Foreign Investor to hold more than 10% of voting rights in the relevant French company.

This amended rule is expected to apply during the second half of the year. The Control Test and Asset Test remain unchanged.<sup>14</sup>

### *Investment Screening in Italy*

Italy was the first country in Europe to be severely hit by the COVID-19 outbreak. The Italian response to the crisis includes measures to safeguard strategic sectors of the Italian economy, in particular through the so-

<sup>14</sup> UNCTAD Investment Policy Hub (2020), *Investment Policy Responses to the COVID-19 Pandemic*. Available at: [https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf).

called “Liquidity Decree”,<sup>15</sup> which amended the existing Italian foreign investment regime, broadening the government’s powers to restrict investments by foreign entities in certain strategic sectors.

Under the existing Italian foreign investment regime,<sup>16</sup> the Italian government has the power to impose conditions on, or even veto, investments by foreign persons in Italian companies and assets in strategic sectors when such investment may jeopardize the national security or other public interests. In addition, certain actions by companies in strategic sectors require notification before they can be implemented.

Before the adoption of the Liquidity Decree, the list of strategic sectors included defence and national security, energy, transport and communication, 5G technologies and other high-tech activities. The Liquidity Decree expands the government’s powers by:<sup>17</sup>

- Extending the regime to new sectors, including the financial, credit and insurance sectors.<sup>18</sup>
- Enabling the government to review transactions on its own initiative if the parties fail to notify the transaction.
- Until December 31, 2020, extending the scope of transactions subject to government scrutiny to:
  - (i) any acquisition by EU entities of controlling interests in any strategic sector (screening of acquisitions by EU entities was previously limited to the defence and national security sectors) and
  - (ii) with respect to any strategic sector, acquisitions by non-EU entities of voting rights in excess of certain thresholds (10%, 15%, 20%, 25% and 50%) with a value in excess of €1 million.

<sup>15</sup> [Law Decree No. 23 of 8 April 2020](#)

<sup>16</sup> [Law Decree No. 21 of 15 March 2012](#)

<sup>17</sup> UNCTAD Investment Policy Hub (2020), *Investment Policy Responses to the COVID-19 Pandemic*. Available at: [https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf).

<sup>18</sup> The government is already entitled to exercise its powers in these new sectors, but it is required to adopt new regulations to identify in greater detail the specific assets and activities falling within these categories.