



An Bille um Scagadh Idirbheart Tríú Tíortha, 2022
Screening of Third Country Transactions Bill 2022

Meabhrán Miniúcháin
Explanatory Memorandum



AN BILLE UM SCAGADH IDIRBHEART TRÍÚ TÍORTHA, 2022
SCREENING OF THIRD COUNTRY TRANSACTIONS BILL 2022

EXPLANATORY MEMORANDUM

Purpose of the Bill

This Bill will provide Government with powers to protect security or public order from hostile actors using ownership of, or influence over, businesses and assets to harm the State. This Bill, if enacted, will put in place a process to allow certain transactions to be reviewed by the Minister for Enterprise, Trade and Employment.

It will empower the Minister to respond to threats to Ireland’s security or public order posed by particular types of foreign investment, and to prevent or mitigate such threats. It will allow the Minister to assess, investigate, authorise, condition, or prohibit third country investments based on a range of security and public order criteria

The Bill includes provisions to ensure that Ireland can, to the extent possible, fulfil its’ reporting and cooperating obligations as set out in Regulation (EU) 2019/452.

It defines the nature, scale and type of investments that will undergo investment screening and sets out the factors to be considered when applying screening to transactions.

The Bill will establish an Investment Screening Advisory Panel to inform and assist the Minister in relation to the screening of specific foreign transactions.

The Bill will also provide the necessary powers to the Minister to obtain the data from investors that is required to screen transactions.

It also sets out an appeals process to ensure transparency and certainty for investors, to the degree possible, whilst maintaining security and public order.

Finally, the Bill sets out the penalties that may apply to those investors/ investees failing to fulfil all of the criteria required for an investment undergoing screening, or investors that breach Ministerial orders arising as a result of the screening process.

PART 1 — PRELIMINARY AND GENERAL

Section 1: Short title and Commencement contains the short title and commencement provisions.

Section 2: Interpretation contains definitions of the key terms used in the Act, including definitions of “control”, “notifiable transactions”, “non-notifiable transactions”, “third countries”, and “transactions”.

Section 3: Connected Persons defines the concept of “connected persons”. This section is designed to prevent circumvention of the provisions of the Bill by investors using family members to acquire control over assets or undertakings. Subsection (1) defines the various relationships that comprise a “connected person”, while subsection (2) elaborates on the concept of connected persons in the context of their role in an undertaking.

Section 4: Reporting on Operation of the Act states that a report on screening activity will be laid before each House of the Oireachtas every 12 months. Subsection (2) provides details on the type of information to be included in the report, while subsection (3) outlines provisions to address the sensitivity of commercial material and personal data.

Section 5: Regulations states that the Minister may prescribe regulations in relation to the functioning of any part of the Bill. Subsection (3) confirms that such regulations would be laid before each House of the Oireachtas within 21 days.

Section 6: Offences and Penalties sets out the penalties that apply to the various offences contained in the Bill, both on summary conviction and on an indictment conviction. Time limits are set out in subsection (2) meaning that proceedings must commence within 2 years of an offence being committed. Where offences are committed by a body corporate, subsection (3) ensures that responsible individuals in the undertaking can be held accountable.

The offences relating to these penalties are set out at various points throughout the Bill and relate to the provision of false information, failure to notify, failure to comply with a Minister’s screening decision, and breaches of confidentiality relating to appeals process.

Section 7: Expenses confirms that expenses incurred in the administration of this Act shall be paid out of monies provided by the Oireachtas.

Section 8: Service of Documents sets out the conditions which must be adhered to when documents pertaining to the screening process are being served to individuals.

PART 2 — NOTIFICATION AND REVIEW OF CERTAIN TRANSACTIONS

Section 9: Notifiable Transactions outlines which transactions must be notified to the Minister of Enterprise, Trade and Employment.

Specifically, third-country transactions, in designated sectors or involving sensitive and strategic activities, where a change in control over an asset or undertaking occurs will need to be notified. Notification is further limited to transactions with a value equal to or greater than €2,000,000.

Subsection (2) elaborates on this, defining the nature of control of an undertaking that requires mandatory notification (i.e., when an investor acquires more than 25 percent or 50 percent of an undertaking).

Section 10: Requirement to Notify Minister of Transactions sets out the process for notification, with subsection (1) outlining the information that should be included by the transaction parties as part of the notification process. This information is required so that the Minister can properly assess the transaction to determine the associated risk, and potential impact on security and public order. Notification should occur at least 10 days prior to a transaction being completed.

Subsection (2) addresses the responsibilities of the various parties to the transaction – in general, where a party is unaware of a transaction, no notification is required.

Subsection (3) confirms that where a party to a transaction fails to notify a transaction that requires mandatory notification, the transaction cannot legally be put into effect.

Subsection (4) states that failure to notify a transaction, or the submission of false information as part of a notification constitutes an offence.

Section 11: Deemed Compliance with Requirement to Notify Minister of Transaction deals with the notification responsibilities of all parties to a transaction in greater detail. Subsection (1) sets out a process for one party to a transaction to inform other relevant parties of their intent to notify the Minister, while subsection (2) requires the second party to confirm their satisfaction with the information being supplied as part of the notification process.

Instances where one party supplies information to the Minister that differs from that agreed to by the other parties to the transaction are also addressed in subsection (3).

Subsection (4) deals with the timelines for notification of transactions which are initiated before the legislation comes into effect, but which conclude after the commencement of the legislation.

Subsection (5) ensures that the second party cannot frustrate a transaction by refusing to engage with the notification process.

Section 12: Review of Transactions with Regard to Security and Public Order of State sets out the requirement for the Minister to review transactions - both notified and non-notifiable transactions - where the Minister believes that they might impact security or public order.

Subsection (1)(b) provides the Minister with the authority to review transactions other than those which are subject of a mandatory notification. This is a safety net allowing the Minister to review transactions which pose a threat to the security or public order of the State but which either did not require mandatory notification or which should have been notified but were not due to deliberate attempts to circumvent the provisions of the Bill.

Subsection (2) limits the retrospective period within which a Minister can review transactions: in relation to non-notified transactions, a 5-year time limit is provided; in relation to non-notifiable transactions, a 15-month time limit applies. The Minister may only utilise their screening authority within these defined time limits in order to provide as much certainty to the enterprise sector as possible, whilst simultaneously minimising the scope for circumvention.

Section 13: Review of Transactions sets out the factors that the Minister shall consider when reviewing the threat to security or public order posed by a particular transaction. The primary purpose of the Bill and main considerations for screening are outlined in subsection (1): the purpose is to consider the impact of an investment on security or public order.

Greater detail on the factors to be considered when reviewing a transaction is set out in subsection (2). In reviewing a transaction, 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 amongst the parties to the investment; the likelihood of the transaction resulting in actions that are disruptive or destructive to people, assets or undertakings in the State; the views of the European Commission and other EU Member States (as required under the EU Regulation); and the views of the Investment Screening Advisory Panel.

Subsection (3) sets out details on the screening process, providing the Minister with the power to consult with other Government Ministers or

with other relevant parties to inform the review process. The Minister is also provided with an option to enter into discussions with the parties to the transaction to mitigate any concerns about the impact of the transaction on security and public order, and the Minister may also consider certain relevant written submissions.

Section 14: Issuing of Screening Notice to Parties to Transactions being Reviewed by Minister sets out the requirement for the Minister to issue a formal “screening notice” to the parties to a notified transaction, ensuring that all parties are fully informed that screening has commenced. Further, this subsection (2) ensures that there is clarity around the screening timeline and sets out the types of information that may be included in the screening notice.

Section 15: Qualification of Obligation to Issue Screening Notice in Exceptional Circumstances provides the Minister with a degree of discretion to determine whether the issuing of a screening notice, or the inclusion of certain information in such a notice might pose a security risk.

Details on the calculation of the timeline within which a screening review must be conducted in the rare instances where the Minister determines that a screening notice should not be issued are set out in subsection (2).

Section 16: Screening Decision requires the Minister to inform the parties to a transaction of a screening decision. Subsection (2) requires that this be done in writing, and subsection (3) requires that this be done within 90 days of a screening notice being issued. This period can be extended by an additional 45 days if required, and it is envisaged that this would only occur in complex cases where risks to security or public order are perceived.

Subsection (4) notes that failure to make such a decision within 90 days results in the transaction automatically being permitted to proceed.

The information that must be provided by the Minister to the parties (i.e., reasons for a screening decision) is also defined; and subsection (5) outlines provisions to limit this right, if required on security and public order grounds.

Section 17: Limitation on Transaction Under Review ensures that a transaction subject to a screening notice cannot be put into effect until the screening review has been completed. Subsection (2) notes that a party who fails to comply with this provision and proceeds to complete a transaction under review will be guilty of an offence.

Section 18: Powers of Minister in Relation to Transactions sets out the various decisions that are available to the Minister in relation to the outcome of a screening review. Once it is determined that a transaction impacts upon security or public order, subsection (1) requires parties to the transaction to comply with the Minister’s direction.

Where a determination has been made, the parties cannot complete the transaction, other than in accordance with the Minister’s direction, as per subsection (2).

Subsection (3) states 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 fulfilled. Alternatively, where mitigation measures are insufficient, the Minister may prohibit the transaction. Examples of the types of mitigation conditions that might be imposed are provided in subsection (4).

Subsection (5) confirms that failure to comply with a Ministerial screening decision is an offence.

Section 19: Notice of Information describes 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 timeline (30 days) for compliance with this process is also defined in subsection (2), and measures to ensure that any information provided is submitted in a timely fashion are set out in subsection (3). The information submitted must be complete and accurate as per subsection (4).

Offences relating to the provision of false information or failure to comply with an information request are defined in subsection (5), while the issue of legal privilege is addressed in subsection (6).

Section 20: Calculation of Period Within Which Minister Shall Make Screening Decision elaborates on how and when the timeline is stopped and restarted in relation to a request for additional information. For instance, subsection (1) explains that a notice of information issued by the Minister, suspends the screening timeline. Subsection (2) confirms that the timeline restarts within 10 days of the Minister receiving the requested information, so long as they are satisfied with the response.

Subsection (3) outlines the process to certify that the Minister's request has been responded to in a satisfactory manner. Subsection (4) addresses the situation where a request is not fully satisfied.

Section 21: Written Submissions provides parties to a transaction which is being screened with the right to make written submissions to the Minister. Subsection (2) sets out the timeline within which this must occur.

PART 3 — APPEALS

Chapter 1 Adjudicators

Section 22: Appointment of Adjudicators outlines the process for the appointment of adjudicators to hear an initial appeal against a Minister's screening decision. Subsection (1) permits the Minister to appoint adjudicators to a panel, and subsection (2) outlines the qualification criteria for such appointments. Subsection (3) ensures that there will be no conflict of interest between the advisory panel and the adjudication panel.

The need to ensure gender balance to the extent possible is dealt with in subsection (4). The independence of adjudicators is set out in subsection (5).

Terms and conditions of appointment – including a process providing for removal from office - are elaborated upon in subsections (6)-(10).

Section 23: Revocation of Appointment as Adjudicators permits the Minister to revoke an adjudicators appointment. The terms under which such a revocation can occur (e.g., illness, misconduct) are outlined in subsection (2).

The process for revoking an appointment is provided via subsections (3)-(6). These include: the Minister is required to provide notice of their intent to the affected party; particular information must be included in such a notice, including the Minister's reasons for revoking the appointment; representations to the Minister are to be permitted; and a final notice setting out the Minister's decision must be issued.

Section 24: Liability of adjudicators ensures 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 concerned was done in bad faith.

Section 25: Rules Concerning Conduct of Appeals before Adjudicator confirms that the Minister will prescribe rules in relation to how appeals

shall operate. Examples of the types of rules that the Minister may prescribe are set out in subsection (2), and subsection (3) confirms that the Minister will also provide the necessary administrative support to ensure that adjudicators can fulfil their functions.

Chapter 2 Review of Decisions of Minister

Section 26: Jurisdiction to Review Decisions of the Minister provides for an avenue for parties to appeal against a decision of the Minister in relation to a transaction. Appeals must be made in line with Section 27 below.

Section 27: Procedure for Appeal of Screening Decision 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 in respect of a screening decision or in respect of a Minister's decision not to provide full disclosure of their reasons for making a screening decision. As per subsection (2), this notification must be made within 30 days of a party being informed of the Minister's screening decision.

Under subsection (3), the Minister, once they have been made aware that an appeal has been filed, 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 may make their appeal.

Thereafter, an appellant has a further 14 days to file their appeal. According to subsection (4), an appellant must state the grounds under which an appeal to the adjudicator is being made, and they must provide all of the documents and evidence on which they intend to rely.

Subsection (5) confirms 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.

Subsection (6) states 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 the appeal or relating to the evidence provided under previous sections.

Where appropriate, based on subsection (7), the adjudicator may permit written submissions, over and above the evidence referenced above. Subsection (8), however, notes that the adjudicator may also refuse to consider submissions, documents or evidence deemed irrelevant.

Subsection (9) confirms that an appeal to the adjudicator does not suspend the screening decision being appealed.

Section 28: Oral Hearings provides that appeals to the adjudicator may be determined without an oral hearing unless it is determined that such a hearing is necessary.

Subsection (2) outlines the rules requiring attendance, while subsection (3) provides for cross-examination under oath.

Subsection (4) sets out the time limits within which submissions may be made. Failure to comply with the direction of an adjudicator is an offence according to subsection (5).

Section 29: Decisions of the Adjudicator outlines the powers of the adjudicator vis-à-vis the Minister's initial screening decision. Under subsection (1), the adjudicator may allow the appeal and remit it to the Minister to reconsider within a defined period, or they may affirm the Minister's decision. Subsection (2) requires that this decision must be

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).

Chapter 3 Exceptional Provisions Regarding Sensitive Material and Evidence

Section 30: Treatment of Certain Material of Relevance to Security or Public Order of State in Appeal Against Decisions of Minister deals with the ability of the Minister (or an official of the Minister) to provide sensitive evidence to the adjudicator in a manner that protects national security.

Subsections (1), (3) and (4), provide for the sharing of redacted or summarised information with the parties to the 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.

A process to facilitate the provision of information on oath or affirmation is outlined, and such evidence is not to be disclosed publicly according to subsection (2).

Section 31: Appeals to be Held Otherwise than in Public states 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.

Subsection (1) outlines those than may attend a hearing held otherwise than in public – this includes the parties to the transaction, legal representatives, and witnesses.

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. The process to inform the impacted parties of this decision is set out in subsection (3).

Subsection (4) confirms that the decision to hold an appeal otherwise than in public extends to subsequent appeals against the decision of the adjudicator (Section 34), and applications to suspend the effect of a screening decision (Section 35), unless the Minister determines that such treatment is no longer required, as per subsection (5).

Section 32: Confidentiality of Proceedings addresses the need to maintain confidentiality around certain types of information obtained by a party via the appeal process. Subsection (1) outlines who certain information may be shared with. Subsection (2) sets out certain criminal offences relating to the disclosure of such information.

Section 33: Designation of Legal Representatives in Respect of Certain Matters sets out grounds for the Minister to approve or designate certain legal representatives in sensitive cases. Subsection (1) sets out the definition of “approved legal representatives” and subsection (2) outlines the types of qualifying conditions that apply to such persons.

Subsection (3) describes the conditions under which such a designation can be used, while 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 public a list of approved persons on a website maintained on behalf of the Minister.

Chapter 4 Appeal Against Decision of Adjudicator

Section 34: Appeals Against Decision of Adjudicator provides parties to a transaction with a right of appeal against a finding of the adjudicator.

Subsection (1) states that this may be made, by leave of the High Court, 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 an outcome from the adjudication process.

Subsections (2) and (3) required that such an appeal should be determined as expeditiously as possible. Subsection (5) notes that the decision of the High Court is final.

Section 35: Application to Suspend Effect of Screening Decision permits an appellant to ask the High Court to suspend a screening decision until such time as the appeal is determined. Otherwise, the lodging of an appeal does not suspend the initial effect of a screening decision.

Section 36: Treatment of Evidence in Relation to Appeals against Decision of Adjudicator deals with the issue of sensitive material in an appeal to the High Court.

Subsection (1) provides for limitations on the sharing of evidence (i.e., summaries or redacted material may be provided where it is affirmed that a threat to security or public order could otherwise be compromised).

The provision of evidence under oath and rules of non-disclosure are set out in subsections (3) and (4).

Section 37: Hearing of Matters Other than in Public 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.

Section 38: Proceedings Before Court other than High Court ensures 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).

PART 4 — The Advisory Panel

Section 39: Establishment of a Screening Advisory Panel sets out the process for appointment of members to a Screening Advisory Panel.

Subsection (2) provides rules on the number of members of the Panel.

Subsection (3) sets out the functions of the Screening Advisory Panel, while subsection (4) permits the Advisory Panel to request assistance from experts as appropriate. Subsection (5) allows the Minister to dissolve the panel at any time.

Section 40: Appointment to Advisory Panel outlines the level of officer to be appointed, and the Government Departments to be represented, as well as other rules relating to membership and terms of appointment.

Section 41: Meetings of the Advisory Panel sets out the various rules relating to the frequency of meetings in subsection (1), quorums in subsection (2) and meeting procedures that will apply in subsection (4).

Section 42: Consultants and advisers permits the panel to engage such consultants or advisers as it considers necessary for the performance of its functions.

*An Roinn Fiontar, Trádála agus Fostaíochta,
Lúnasa, 2022.*