A&L Goodbody

A&L Goodbody
Suite 1730 The Shell Building
100 Bush Street
San Francisco CA 94104
T: +1 415 767 5260
www.algoodbody.com

Dublin
Belfast
London
New York
San Francisco
Palo Alto

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By Email: InvestmentScreening@dbei.gov.ie
Investment Screening Unit
Department of Business, Enterprise and Innovation (the **Department**)
23 Kildare Street
Dublin 2
D02 TD30

Response to Public Consultation on Investment Screening (the Consultation)
Transposition of the EU Regulation Establishing a Framework for Screening of Foreign Direct Investments into the EU (the EU Regulation)

Dear Sirs

Please see below our responses to the questions raised in the Consultation.

1. **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**

   As one of Ireland's leading corporate law firms, we regularly work on cross-border deals. We have seen first-hand over many years the impact that disproportionate, complex and over-broad screening and approval processes can have on international deal-making in terms of timeline, deal complexity and costs. In that context, we agree with the position outlined in the Consultation that it is of paramount importance that any foreign investment screening framework introduced pursuant to the EU Regulation should be proportionate and narrowly prescribed, and it should not lessen Ireland's attractiveness to foreign direct investment (**FDI**).

   If an FDI screening regime is introduced, it is also of utmost importance that the Minister is sufficiently resourced so that, where applicable, review and cooperation processes can be completed efficiently (particularly having regard to the timelines set out in the EU Regulation), independently and impartially, and with the appropriate level of scrutiny.

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, including:**

   As outlined above, our over-arching approach in relation to any screening framework would be to ensure that that it is proportionate and flexible and does not go further than is necessary to meet its purpose of protecting the state from FDI that could pose an actual threat to national security and public order. Any regime that goes further than this could introduce an unnecessary layer of procedural complexity in Irish transactional activity, which in turn could ultimately have a deterrent effect on desirable FDI. This comment also applies in relation to the powers granted to the Minister, which we would suggest should be proportionate and clearly prescribed.

We would suggest that the starting point in that context for drafting any Irish implementing legislation should be to track the language of the EU Regulation as closely as possible. Where there is a margin of discretion left in the EU Regulation to Member States, we would suggest that there may be some merit in drawing analogy with and guidance from the existing Irish merger control regime. We would be happy to make ourselves available to discuss some further thoughts we had in this regard with you, if it was helpful to you.

▪ Powers to assess/ investigate, authorise, apply conditions, prohibit or unwind investments

There are various approaches that might be taken in this context which we would be happy to discuss. As above, we would suggest that any powers granted are proportionate and clearly prescribed. In order to protect the State, the Minister, her officials, the potential foreign investors and all the interests involved, it is important that the procedure is impartial, independent and robust enough to withstand scrutiny.

▪ Powers to request and receive information from both the investor and the company being acquired

Under the information-sharing requirements under the EU Regulation, the designated Irish contact point may be required to provide information to the European Commission (**Commission**) and / or another Member State in relation to the following:

a) the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;

b) the approximate value of the FDI;

c) the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed;

d) the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations;

e) the funding of the investment and its source; and

f) the date when the FDI is planned to be completed or has been completed.

We would suggest that any Irish screening framework tracks, and goes no further than, these requirements.

We note that the information provided to the Minister and / or any review board may ultimately become public information in the context of the annual reports required to be provided to the Commission under Article 5 of the EU Regulation. As mandated in the EU Regulation, the implementing legislation should include appropriate provisions to ensure that any confidential or commercially sensitive information is adequately safeguarded.

▪ The establishment of an Investment Screening Board to support the Minister in relation to decision making in the context of Investment Screening

Recital 27 of the Regulation provides that "*the contact points established by the Member States and the Commission should be appropriately placed within the respective administration, and should have the qualified staff and the powers necessary to perform their functions under the coordination mechanism and to ensure a proper handling of confidential information*". Having regard to this recital, there is arguably an obligation under the EU Regulation to ensure that the Minister is supported by some form of review board. This may be a newly established board, formed specifically for the purpose of FDI screening or, subject to enacting appropriate legislation, it may be possible to expand the functions of an existing statutory body. There may be

some merit in forming a cross-functional government review board which would include representatives from bodies such as the Competition and Consumer Protection Commission (**CCPC**) (who would bring valuable experience around transactional review), as well as representatives from IDA Ireland and Enterprise Ireland (whose perspectives from both a domestic and international investment standpoint would also be important).

Regardless of the approach taken, the Minister should have adequate resources to allow for efficient and timely review (in particular, having regard to the mandatory timelines set out in the EU Regulation).

What types of investment should be screened on security and public order grounds, having regard to the provision of the EU Regulation? For example:

In relation to the categories of investment potentially subject to review, we would recommend staying as close as possible to the wording used by the EU Regulation, that is, foreign direct investments (as defined in the EU Regulation) that are in fact *likely to affect public order or security*.

Intra-Group Transactions

In our view, intra-group transactions that do not involve a change in the ultimate control of Irish assets or infrastructure should expressly fall outside the scope of any screening framework. While these transactions will generally fail the "*likely to affect*" test in any event (and indeed the control test – see further below), it would be useful to expressly exclude them in the legislation to avoid unnecessary analysis. This would be similar to the approach taken in a merger control context, which does not apply to intra-group transactions (in other words, there would have to be a change in ultimate control to trigger review).

Should additional particular sectors or financial/turnover thresholds be set out which would automatically trigger screening?

No. As above, we would recommend staying as close as possible to the wording used in the EU Regulation in order to avoid being over-inclusive.

In particular, we would not suggest adding specific additional sectors or financial / turnover thresholds which would automatically trigger screening. In our view, the question of whether the investment *is likely to affect public order or security* should always be a key gating question as it allows for some flexibility in determining whether there is an actual risk.

De Minimis Thresholds

While we would not recommend incorporating financial thresholds that would automatically trigger screening, we would suggest that there may be some merit in incorporating *de minimis* thresholds in the framework that could apply to automatically exclude screening where they do not meet certain financial thresholds. By analogy with the merger regime, these thresholds might be based on the turnover of the investor and target. Alternatively, the threshold might be based on deal value.

Should certain investments be obliged to be automatically notified to the Minister by the investor based, for example, on the country of origin of the investment?

No. In our view, a notification system based on country of origin would not be in line with the spirit of the EU Regulation, which provides in recital 15 that rules and procedures relating to screening mechanisms "*should not discriminate between third countries*".

An approach based on country of origin in our view is overly broad and risks "*throwing the baby out with the bathwater*" with respect to potentially beneficial investment opportunities from certain countries. As above, our

view is that investments should be objectively assessed on a case by case basis, having regard to the key gating question of whether the investment in question is in fact "*likely to affect security or public order*".

Would a system of mandatory notification of investments based on defined thresholds (or other criteria) be preferable to a system that either relies on voluntary notification or that empowers the Minister to screen any investment that he or she believes represents a threat to security and public order?

There are various approaches that might be taken in this context which we would be happy to discuss. For example, under the screening regime currently in proposal form in the UK, there will be a voluntary notification based on self-assessment, together with a "call in" option, whereby the UK government has an ancillary review power with respect to transactions that meet certain triggering events and are likely to affect public order and security. There may be some merit in looking at a similar model in an Irish context.

As above, in our view, the key factor will be to ensure that any regime is not over-inclusive. In our view, a mandatory reporting requirement based on defined thresholds (or similar inflexible criteria) could have potential to be over-inclusive – see further our response to the previous two questions.

3. **In assessing whether an investment from a 3rd country might represent a risk, what measure or definition of "control" or "significant influence" might be applied to the acquiring party vis-à-vis the entity being acquired?**

In our view, there may be some merit in drawing from the definition of "control" from the EU Merger Regulation, since this is based on tried and tested concepts that are well recognised by Irish practitioners. We would be happy to discuss this in further detail.

4. **What type of sanctions might be applied?**

There are various approaches that might be taken in relation to potential sanctions. In our view, the over-arching approach should be to ensure that any sanctions are proportionate and clearly prescribed.

5. **Any views or comments on any of the issues raised in Section 1 above.**

We had no other comments other than as outlined above. To summarise our key preliminary thoughts:

- Our key recommendation would be to ensure that any screening regime is proportionate, appropriate and flexible. It should not be so over-inclusive such that over time, it could render Ireland a less attractive destination for desirable investment and cross-border deal-making. To the extent possible, it should track the wording and requirements of the EU Regulation and go no further than this.

- The regime should involve the assessment and review of only what is needed and no more, otherwise it could lead to unnecessary complexities and inefficiencies in cross-border transactional activity, and a waste of valuable resources. In our view, the question of whether a particular investment is in fact *likely to affect security and public order* should be a key gating question in assessing whether an investment should be subject to review. By contrast, a system premised on mandatory notification triggered by country of origin, financial thresholds or other inflexible criteria could be over-inclusive.

- The Minister should be sufficiently resourced so that, where applicable, review and cooperation processes can be completed efficiently and expeditiously (particularly having regard to the timelines set out in the EU Regulation), and without undue or unnecessary complexity. As outlined above, we would recommend that the Minister is supported by a qualified review board (indeed in our view, there is an argument that this may be mandated by the EU Regulation). This might be a newly composed

board or you could potentially look at expanding the functions of an existing statutory body. We believe that it may be beneficial for this board to be cross-departmental and include members of the CCPC, IDA Ireland and Enterprise Ireland.

- Any sanctions should be proportionate and should be clearly prescribed.

We have provided our responses above based on a high level review of the EU Regulation and related materials. We would be happy to make ourselves available to the Department to discuss or carry a more detailed review in relation to any aspect of our response.

Please do not hesitate to contact Gina Conheady at gconheady@algoodbody.com or Emma Bermingham at ebermingham@algoodbody.com with any questions.

Yours faithfully

A&L Goodbody

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