The new Irish investment screening regime

What is the purpose of FDI screening and how will it work in practice?

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Headline summary

- A foreign direct investment (**FDI**) screening regime has been introduced in Ireland for the first time
- When the regime begins operation (expected Q2 2024), it will empower the Minister for Enterprise, Trade and Employment (the **Minister**) to scrutinise, attach conditions to and potentially prohibit FDI transactions in a range of scenarios, based on security and public order criteria
- The notification regime is mandatory for all in-scope transactions
- A FDI transaction may fall within scope where an investor from outside the EEA or Switzerland acquires a certain level of ownership or control in an Irish asset or undertaking that relates to or impacts a list of specified activities and sectors
- The list of notifiable transactions is broad, and the monetary threshold (€2 million) is relatively low. As a result, investment screening will join the default checklist for cross-border transactions involving Irish assets

1. The background

A new Irish foreign investment screening regime was enacted on 31 **October** 2023 via the Screening of Third Country Transactions Act 2023 (the **Act**). The Act was developed in response to the EU Investment Screening Regulation ((EU) 2019/452) (the **Regulation**) and reflects wider international concerns to address the security implications of cross-border investments.

The purpose of the Regulation was to create a cooperation mechanism for Member States and the EU Commission to exchange information, raise concerns and provide opinions on FDI transactions that have the potential to impact security and public order in the EU.

The Regulation did not mandate Member States to adopt screening measures. Nevertheless, since the Regulation came into effect in 2020 the Commission has repeatedly encouraged Member States to adopt their own screening measures.

Instead of prescribing convergence between national regimes – the typical pattern for EU legislation – the focus of the Regulation was to establish an EU-wide cooperation mechanism on a non-binding basis. Notwithstanding this non-prescriptive approach, the Act closely follows the Regulation and requires that opinions and comments issued under the cooperation mechanism are taken into account in reaching decisions.

While Ireland was relatively late in adopting investment screening, we are still in the early years of operation for screening regimes in most Member States. It remains to be seen whether regulatory convergence will emerge in time as a natural consequence of cross-border cooperation.

2. Affected sectors

The key feature of the Act is that it empowers the Minister for Enterprise, Trade and Employment (the **Minister**) to prohibit FDI transactions or impose conditions according to a range of security and public order criteria.

The Act applies to FDI transactions that relate to or impact the following areas:

- **critical infrastructure**, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- **critical technologies and dual use items** that can be used for both civil and military purposes, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- **supply of critical inputs**, including energy or raw materials, as well as food security;
- **access to sensitive information**, including personal data, or the ability to control such information; and
- **the freedom and pluralism of the media**.

3. Notifiable transactions

The Act prescribes a mandatory notification system for in-scope transactions (both share and asset transactions) – a transaction will be notifiable where:

- A third country undertaking (as described below) or a person connected with such an undertaking, as a result of the transaction:
  - acquires control of an asset or undertaking in the State; or
  - changes the percentage of shares or voting rights it holds in an undertaking in the State from:
    - 25 per cent or less to more than 25 per cent; or
    - 50 per cent or less to more than 50 per cent;
- The transaction relates to, or impacts upon, one or more of the relevant matters (as described in section 2 above);
- The same undertaking does not, directly or indirectly, control all the parties to the transaction (i.e., purely intra-group transactions will not trigger a mandatory filing); and
- The cumulative value of the transaction in question, as well as any other transaction between the relevant parties (or persons connected to them) in the 12 months prior to the signing of the transaction, is equal to or greater than **€2 million**.

For these purposes, a "third country" means a country other than a member of the EEA or Switzerland and a "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 (a); or
   ii. is a third country national; or

(c) a third country national.

A "third country national" is a natural person who is ordinarily resident in a third country – which means that residency, and not citizenship, is the relevant criterion. Foreign-resident Irish citizens should note this in particular.

From an Irish point of view, it is also important to note that the UK falls into the category of "third country".

Notification under the Act is mandatory. There is no provision for voluntary notification. However, the Minister can still decide to "call-in" for review an unnotified or non-notifiable transaction.

The Minister can review a non-notified transaction up to: (i) 5 years from the date on which the transaction is completed or (ii) 6 months from the date on which the Minister first became aware of the transaction. The Minister's power to review a non-notifiable transaction is exercisable up to 15 months after the transaction is completed.

4. The screening decision

Once a transaction has been notified, the Minister must make a decision as to whether the transaction affects, or would be likely to affect, the security or public order of the State (a **Screening Decision**).

The Screening Decision must be issued within 90 days of the date of commencement of the Minister's review (which begins to run from the date of issue of a screening notice to the notifying party). The review timetable can be extended to 135 days.

A Screening Decision will either authorise the parties to complete the transaction (either with or without conditions) or prohibit it on security or public order grounds.

5. Appealing a screening decision

A party may appeal a Screening Decision to a statutory adjudicator within 30 days of the date of notification of the Screening Decision. The decision of an independent adjudicator may be appealed on a point of law to the High Court.

The Act specifically provides that a decision of the Minister or an adjudicator may also be challenged by way of judicial review.

6. Interaction with the EU cooperation mechanism

It is important to note that the EU cooperation mechanism under the Regulation is not a venue for appeals. The Commission has no binding authority or jurisdiction to review screening decisions issued by Member States – in this regard, the Regulation stops short of delegating veto or enforcement rights to the EU. This exclusion respects the fact that it is the sole responsibility of Member States under the EU Treaty to safeguard their national security.

The EU notification process obliges each national authority to notify the Commission directly of any FDI transaction in their territory that is undergoing screening. The process is bilateral between the Commission and the national authority (in the case of Ireland, the Minister), and there is generally no point of interaction between the Commission and the original notifying parties.

Other (non-reviewing) Member States may provide comments to the (reviewing) Member State. These comments can be made where the FDI transaction is likely to affect security or public order in the non-reviewing Member State, or it has information relevant for screening by the reviewing Member State.

The Commission's role under the cooperation mechanism is limited to issuing non-binding opinions. Nevertheless, the Irish Act provides that the Minister is obliged to have regard, among other things, to an opinion issued by the Commission (and is obliged to give it "due consideration" under the Regulation). Given this provision, it is plausible that opinions issued by the Commission (and the comments of other Member States) will have broad persuasive authority on the Minister in issuing final Screening Decisions.

The Commission has its own power of call-in for notified or non-notified transactions where it "considers that a foreign direct investment is likely to affect projects or programmes of Union interest on grounds of security or public order". As with the Minister's power under the Act, this power can be exercised with respect to both planned and completed transactions. The obligation of Member States with respect to opinions issued by the Commission in such circumstances is to "take utmost account" of them (versus giving them "due consideration" under the notification provisions).

7. How the EU cooperation mechanism has worked in practice

The Regulation entered into full force over three years ago. As a result, we now have three years of published data on how the cooperation mechanism has operated and developed in practice.

The Third Annual Report on the screening of foreign direct investments into the Union published on 19 October 2023 reported that 1,444 applications for screening were reviewed by Member State authorities in 2022. Of these, 55% were formally screened; compared to 29% in 2021 and 20% in 2020 – indicating a clear trend in favour of more formal screening.

Of the transactions formally screened in 2022 for which decisions were reported, the overwhelming majority (86%) were authorised without conditions. Only 1% were prohibited. In 4% of cases, the transaction was withdrawn by the parties. Conditions or remedial measures were imposed in 9% of transactions, (compared to 23% in 2021).

One interpretation of the high proportion of transactions unconditionally authorised is that a significant number of these reviews may have been unnecessary. This is supported by the fact that 45% of requests for authorisation were not screened at all – presumably because they were found to be outside scope for screening. In the case of Ireland, there may be grounds for concern that the expansive scope of notifiable transactions and the Minister's broad call-in powers may prompt similar unnecessary or precautionary notifications, with implications for deal timelines.

8. Conclusion

As an open economy that has enjoyed an extraordinary economic ascent via the attraction of FDI, Ireland has much to lose by imposing excessive restrictions on inbound investment. The new Act represents a major departure in this regard, and stakeholders will be looking with interest at how the new Irish regime is operated in practice once it comes into full effect in Q2 2024.

Similar to merger control analysis, it seems that investment screening will join the default checklist for cross-border transactions in future.

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