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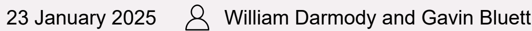
Ireland’s inward investment screening mechanism commences



23 January 2025 William Darmody and Gavin Bluett

Ireland has introduced a new investment screening mechanism aimed at inward Foreign Direct Investment ('FDI') from outside the EEA and Switzerland region.

Specifically, the Screening of Third Country Transactions Act 2023 (the 'FDI Screening Act'), commenced in Ireland on 6 January 2025 and implements the EU’s FDI Screening Regulation 2019/452 (the ‘Regulation’) within Ireland.

This screening mechanism has been introduced to address concerns that such investments, especially in strategic sectors, could pose a threat to national security or public order. The FDI Screening Act empowers the Minister for Enterprise, Trade and Employment (the 'Minister') to investigate, authorise, mitigate against, or prohibit relevant transactions.

We have set out below a brief summary of the scope of the new screening mechanism, the process for notifications, and the potential outcomes. The Department of Enterprise, Trade, and Employment (the 'Department') has also produced a guidance document titled 'Inward Investment Screening Guidance for Stakeholders and Investors' (‘the 'Guidance'), which was recently updated in December 2024.

Scope of the screening mechanism

The key points to note are:

- Under the FDI Screening Act certain transactions require mandatory notification and cannot be completed until the screening process has concluded.
- Transactions reviewed may be subject negative determinations.
- Failure to notify can result in significant criminal penalties.
- Other transactions may be ‘called in’ by the Minister, with a 15-month retrospective look-back period.

Criteria for mandatory notification

The FDI Screening Act applies on a mandatory notification basis to investments which meet all four of the cumulative requirements set out in Section 9(1)(a) to 9(1)(d) of the FDI Screening Act (a 'Notifiable Transaction'), summarised below:

a) Control

Where a third-country investor or a person connected, as a result of a transaction; (i) acquires control of an asset or undertaking in the State or; (ii) changes the percentage of shares or voting rights it holds in an undertaking in the State from (I) 25 per cent or less to more than 25 per cent or; (II) from 50 per cent or less to more than 50 per cent.

For this purpose, a ‘third country’ is defined as a country other than an EU Member State, an EEA state or Switzerland. As a result, jurisdictions like the UK and US will be deemed third countries.

Importantly, the Guidance highlights that notification will be required even in circumstances where the ultimate owner of a third county investing entity is not a third country person. Accordingly, using third country acquisition vehicles can trigger a notification requirement.

This may be particularly relevant for groups that for structuring reasons use holding companies in third countries, such as the Isle of Man, etc.

b) Transaction value

The cumulative transaction value (including related transactions between the parties) must be equal to or greater than €2,000,000 (in the period of 12 months prior to the date of the transaction). This figure may be changed in the future by Ministerial order.

c) Undertaking

The same undertaking does not, directly or indirectly, control all the parties to the transaction. Therefore, the FDI Screening Act will not be applicable to intra group transactions.

d) Sensitive or critical assets

The transaction relates to, or impacts upon, one or more of the sectors / activities referred to in Article 4(1)(a) to 4(1)(e) of the Regulation:

> *(a). **Critical infrastructure, physical or virtual:** such as those included in Annex 1 to the EU Critical Entities Resilience Directive (2022/2557) e.g., electricity, gas, transport, water, healthcare and digital infrastructure along with critical financial, defence, aerospace, and electoral infrastructure.*
>
> *(b). **Critical technologies and Dual Use items:** such as advanced technologies that are essential for national security, economic competitiveness and public safety e.g., AI, quantum computing, biotechnology, cybersecurity technologies, advanced manufacturing and semiconductors.*
>
> *(c). **Supply of critical inputs:** such as essential raw materials and energy resources necessary for the production and functioning of critical infrastructure and technologies, as well as food security and medicines for human use such as those included within the 'Union list for critical medicines'.*
>
> *(d). **Access to sensitive information:** including personal data, or the ability to control such information.*
>
> *(e). **Freedom and pluralism of media.***

The Guidance emphasises that consideration of the relevant sector / activity is the primary focus for the purposes of the FDI Screening Act. This reflects the overarching objective of the Regulation, and the association of risk, which will primarily emanate from the activity or sector.

'Call-in' powers and retrospective element

Separately, the Minister has a discretionary 'call-in' power to facilitate the review of transactions which don't meet the mandatory notification requirements but nonetheless may have the potential to impact public order and security in Ireland. This power is exercisable for a period of 15 months from the date of completion of the relevant transaction.

The Guidance states the primary function of this 'call-in' power is to act as a safeguard for activities originating from new or emerging technologies or sectors that may not meet the current mandatory requirements.

Additionally, the Minister will have the power to 'call-in' transactions which completed in the 15 months prior to the commencement of the FDI Screening Act (i.e., since October 2023).

Where a transaction has already completed, the Minister may direct the parties to the transaction to take such actions as the Minister may specify for the purpose of protecting the security or public order of Ireland, e.g. divestment.

The notification process

The Department has developed an online Case Management System ('CMS') to streamline the notification process. The Department will use the CMS to communicate with the notifying parties involved.

Notably, no specific timeframes for submitting notifications are detailed in the FDI Screening Act or Guidance apart from the requirement for the submission to have taken place at least 10 days before completion or the transaction.

No voluntary notifications

The FDI Screening Act will not facilitate the submission of voluntary notifications falling outside of its scope. This contrasts with Ireland’s merger control regime overseen by the Competition and Consumer Protection Commission ('CCPC'), which allows notifications on a voluntary basis.

Who is responsible for notification

Only one party to a transaction is required to make a notification. The Guidance notes an expectation that the responsibility for submission of the notification form will generally be assumed by an acquiring party or their representative.

The notifying party will also enjoy a ‘right to be heard’ and will be free to make an additional submission to the Minister to supplement the information contained within the prescribed notification form.

Timelines for review of notified transactions

A screening notice will be issued to confirm receipt of a notification form. The Minister is then required to make a screening decision within 90 days of such notice. This review window may be extended to 135 days at the Minister’s discretion and where an extension notice is issued. If the Minister formally requests additional information, this will temporarily ‘stop the clock’ until the notice is deemed to have been complied with.

In practice, the Department have expressed an intention to endeavour to clear notified transactions in as short a time as possible and expect that many will be cleared well in advance of these timelines.

Failure to notify, criminal offences and consequences of gun-jumping

If a transaction is subject to mandatory notification, but not notified:

- the Minister may ‘call-in’ the transaction for a five-year post completion period or, if later, a period of six months after the Minister’s knowledge of the transaction.
- the transaction is automatically deemed to pose a risk to security or public order which may lead to the transaction being deemed void.

It is a criminal offence to complete or take associated steps to complete a non-notified transaction or a notified transaction which is under review.

The stated penalty for offences under the FDI Screening Act can be potentially severe, including for any person convicted on indictment a fine of up to €4,000,000, imprisonment for up to five years, or both.

Appeals

A mechanism for appeals against screening decisions of the Minister has been provided for and notably appeals are permitted against both (a) a screening decision itself and (b) a Minister’s decision not to provide detailed reasons for their screening decision.

Conclusion

It is anticipated that the FDI Screening Act will accentuate the importance of advance transaction planning and strategic structuring. The FDI Screening Act is also likely to have a significant impact on transaction timing and on the terms of any agreement, which may now require conditionality. Accordingly, the utilisation of gap in time between signing of an agreement and completion thereunder, may become increasingly common. It is essential that all parties to transactions understand the implications of the FDI Screening Act and take the necessary actions.

Please contact our Dublin corporate team for any queries you may have.

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