Matheson

Competition and Regulation Briefing

Irish FDI Screening Regime – What You Need to Know

On 6 January 2025, the much-anticipated Irish foreign direct investment ("**FDI**") screening regime established under the Screening of Third Country Transactions Act 2023 (the "**Act**") came into force, following the commencement of the Act. The regime was introduced in light of Regulation 2019/452 and, while the regime will allow the Irish Government to assess the national security impact of transactions involving 'third country' (ie, non-EU / EFTA) investors for the first time, the Irish Government has emphasised the country's continued openness to FDI from outside the EU which remains central to Ireland's competitiveness.

While the scope and intensity of review of in-scope transactions will be revealed by the actual enforcement approach of the Department of Enterprise, Trade and Employment (the "**Department**"), the commencement of the new regime means that transactions involving 'third country' (ie, non-EU / EFTA) investors that meet the mandatory jurisdictional criteria require pre-completion approval by the Minister for Enterprise, Trade and Employment (the "**Minister**"), or may otherwise be called in by the Minister for review. Accordingly, parties and advisors need to ensure preparedness for transactions potentially within scope.

This Briefing provides an overview of the key elements of the new regime, and what parties and their advisors need to think about to identify notification requirements and manage timing impacts on transaction timelines.

Key takeaways:

- The new Irish regime needs to be considered in parallel with other foreign investment regimes, as well as Irish and international merger control regimes, in order to determine approval requirements and the impact on deal timelines.
- The very low jurisdictional thresholds and the wide range of sectors covered means that a large number of transactions with an Irish nexus could require pre-completion approval.
- In the case of mandatorily notifiable transactions, while the Department has indicated that it will endeavour to issue approvals as soon as possible, deal timelines will be impacted by relatively long clearance timeframes of up to 90 calendar days (which can be extended).
- Non-notifiable transactions may also be subject to a post-completion 'call-in' risk if they raise potential public order or national security concerns. However, we expect that the 'call in' power will be used sparingly and for obvious cases, at least during the initial phase of the regime.
- While the Department's final guidance document of December 2024 ("**FDI Guidance**") offers some clarifications on the various elements of the regime, as has always been the case, the Department's actual enforcement approach in its administration of the regime will ultimately determine, as well as set the tone for, the scope and intensity of review of in-scope transactions.

Review Powers

Mandatory notification thresholds

Under the Act, a transaction is mandatorily notifiable if the following criteria are met:

1. A 'third country' (ie, non-EU / EFTA) undertaking or a connected person as a result of the transaction: (i) acquires control of an asset in the State; or (ii) changes the percentage of shares or voting rights that it holds in an undertaking in the State from below 25% to above 25% and from below 50% to above 50%;
2. The value of the transaction is at least €2 million (taking into account all transactions between the parties in the last 12 months);
3. The same undertaking does not, directly or indirectly, control all the parties to the transaction; and
4. The transaction relates to, or impacts upon one or more of the sensitive matters / sectors set out in Article 4(1)(a)-(e) of Regulation 2019/452, namely:
    i. 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;
    ii. Critical technologies and dual-use items as (now) defined in Regulation 2021/821, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
    iii. Supply of critical inputs, including energy or raw materials, as well as food security;
    iv. Access to sensitive information, including personal data, or the ability to control such information; and / or
    v. The freedom and plurality of the media.

In relation to the interpretation and application of these mandatory criteria, the following may also be noted, in particular based on the FDI Guidance:

- The definition of 'third country' (ie, non-EU / EFTA) undertaking is stated to be satisfied where either the 'direct investor' (ie, the entity directly involved in the acquisition of the target entity or group) or the ultimate owner of the investor group is a 'third country' (ie, non-EU / EFTA) undertaking.
- The concept of 'control' is consistent with the similar concept under the Irish and EU merger control regimes. It is possible that the share and voting rights threshold may only be satisfied where a change occurs in the register of members of an Irish entity and so may be more limited.
- Joint ventures to which existing assets or businesses are contributed may be caught (including, potentially, non-full function joint ventures), but purely greenfield joint ventures are generally excluded.
- Intra-group restructuring transactions are generally excluded, although it is unclear if a notification may be required if the ultimate controlling entity of the group becomes a 'third country' (ie, non-EU / EFTA) undertaking as a result of the restructuring.
- The FDI Guidance notes that the "relates to, or impacts upon" concept is to be viewed broadly and provides some clarification on how the sensitive matters / sectors will be interpreted. For example:
    - As regards 'critical infrastructure', the FDI Guidance states that regard should be had to the criteria set out in Directive 2022/2557 on the resilience of critical entities (since the deadline on the Irish Government to publish a list of designated critical infrastructure pursuant to that Directive is not until mid-2026) and, in relation to cybersecurity issues, Directive 2022/2555 on measures for a high common level of cybersecurity across the Union (the so-called 'NIS2' Directive).

- As regards 'critical technologies and dual-use items', the FDI Guidance states that this category covers critical technologies within the specified sub-categories, in particular those designated as 'dual-use' pursuant to Regulation 2021/821 and equipment covered in the Council Common Position 2008/944/CFSP.
- As regards 'critical inputs', the FDI Guidance states these include (but are not limited to) energy, raw materials and food security. Other sectors and activities are also considered critical, for example, the resilience of industries relating to human health.
- As regards 'access to sensitive information', the FDI Guidance states that sensitive information is data that must be protected from unauthorised access to safeguard the privacy or security of an individual, organisation or the State and includes personal data in accordance with the relevant GDPR categories. Access to sensitive information includes the ability to process, license, sell or store such information. The relevant criteria for determining a mandatory notification requirement include whether the transaction involves sensitive data that is held as an essential or critical part of the business or asset (ie, not in relation to data held on employees of the target undertaking or asset, or not essential or critical to the operation of the business); whether the volume of such data is 'substantial'; and / or the transaction relates to a business model that depends on generating turnover from such sensitive data.
- As regards 'freedom and plurality of the media', the FDI Guidance states that regard should be had to the definitions of "*media plurality*" and "*media business*" under the Competition and Consumer Protection Act 2014.

See **Figure 1** below for a flowchart setting out the decision tree in respect of the FDI filing analysis.

Call-in power in respect of 'below threshold' transactions

Under the Act, the Minister may 'call in' a transaction for review where the following conditions are met:

1. Where the Minister has reasonable grounds for believing that the transaction affects, or is likely to affect, security or public order in the State; and
2. Where the transaction results in a third country undertaking acquiring control, legal rights or the ability to exercise effective participation in the management or control of an asset or undertaking in the State (ie, a lower threshold compared with the mandatory thresholds).

The Minister may exercise this power in the case of non-notifiable transactions for a period of 15 months post-completion, and in the case of non-notified transactions for a period of the later of 5 years post-completion or 6 months after the Minister becomes aware of the transaction.

Review Process

Decision maker

The Investment Screening Unit within the Department is responsible for administering the regime.

The Minister is the addressee of notifications and the decision-maker (subject to appeal mechanisms before the Irish courts – see below).

Review periods

After a notification has been made, if jurisdiction is accepted, the Minister will issue a screening notice as soon as practicable to the parties which will have suspensory effect (ie, the parties should not take any action for the purposes of completing or furthering the transaction).

The Minister will conclude the review within 90 calendar days of the date of the screening notice. This may be extended to 135 calendar days by notice in writing. Where the Minister issues a notice of information (ie, equivalent to an RFI), the

review period is suspended until the parties fully comply with the notice of information and the Minister certifies compliance.

At the end of the relevant period, the Minister must issue a screening decision providing reasons as to why the transaction was considered to affect or not to affect security or public order in the State. If the Minister fails to issue a screening notice by the end of the relevant period, the transaction shall be deemed to be subject to a screening decision that it does not affect security or public order in the State. The Minister may decline to give reasons where security or public order is affected.

See **Figure 2** below for a timeline in relation to the FDI review periods.

Appeals

Decisions taken by the Minister can be appealed either directly by way of judicial review or to adjudicator(s) appointed by the Minister. Decisions of an adjudicator(s) may, in turn, be appealed by way of judicial review or to the High Court on points of law.

Substantive test

The substantive test which the Minister must apply is whether the transaction affects, or would be likely to affect, the security or public order of the State.

The Act provides for a (relatively long) list of considerations to which the Minster must have regard, including whether or not a party to the transaction is controlled by a government of a third country and, where relevant, the extent such control is inconsistent with the policies and objectives of the State; the extent to which a party to the transaction is, at the time the transaction is being reviewed, already involved in activities relevant to the security and public order of the State; and whether or not a party to the transaction has previously taken actions affecting the security or public order of the State.

In carrying out its review, the Minister shall also consult the advisory panel made up of other relevant Government departments, as well as any other person the Minister considers appropriate.

If the Minister concludes that the transaction affects or is likely to affect security or public order in the State, the Minister can direct that certain other steps are undertaken by the parties (eg, divestment of assets, cessation or modification of certain practices, restrictions on the flow of competitively sensitive information, etc.), or otherwise prohibit the transaction.

Penalties

Any person or undertaking that fails to notify a mandatorily notifiable transaction, fails to comply with a notice of information or intentionally or recklessly provides information that is false in a material particular, shall be guilty of an offence.

The potential sanctions are: (i) on summary conviction, a maximum fine of €5,000 and / or a maximum sentence of 6 months imprisonment; or (ii) on conviction on indictment, a maximum fine of €4 million and / or a maximum sentence of 5 years imprisonment.

Looking Ahead

Transactions which meet the mandatory notification criteria may be notified to the Department from 6 January 2025. The notification form used by the Department replicates the form used by the European Commission to facilitate the exchange of information between Member States (where applicable, noting all Irish FDI cases may not be subject to EU FDI regime). The information requested by the form is to be uploaded via the Department's Case Management System portal.

It may be possible to notify a transaction on a precautionary basis, reserving one's position on the question of mandatory jurisdiction and asking the Department to take a position on jurisdiction (through the issuance of a screening notice or not).

Matheson's Competition and Regulation group stands ready to guide parties through the new FDI regime and potential notification requirements, drawing on our breadth of experience across various adjacent regulatory regimes.

Figure 1: Irish FDI Filing Analysis

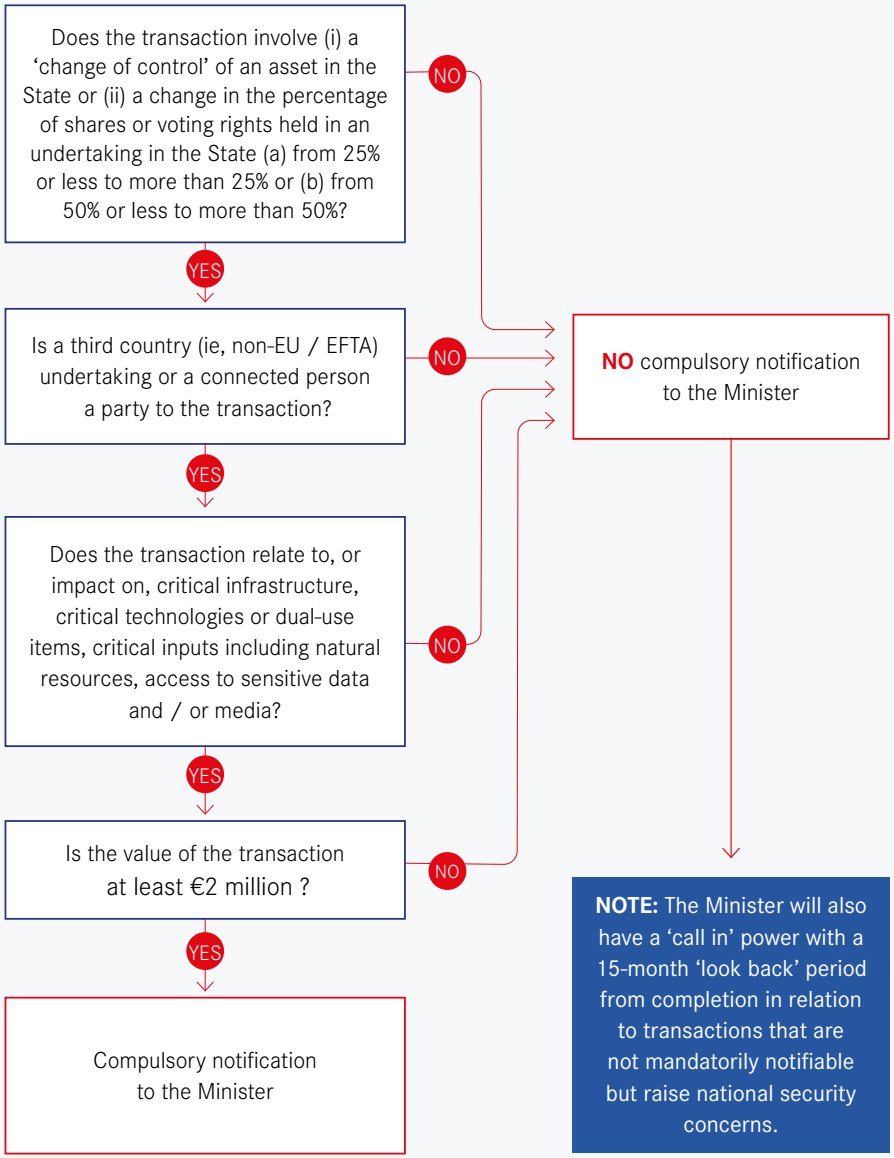
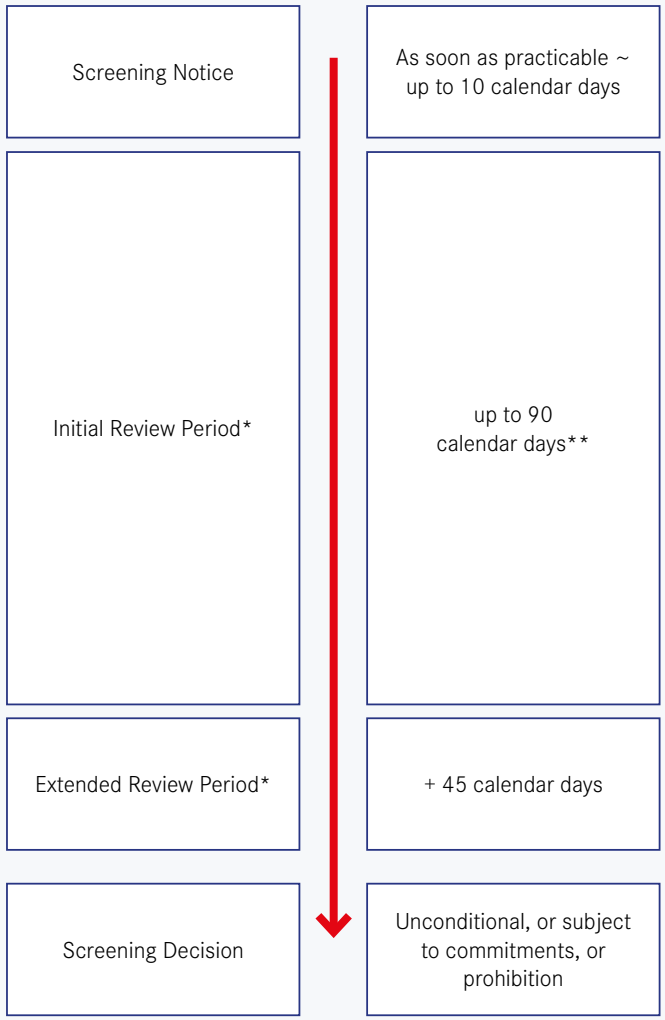


Figure 2: FDI Timeline



* The Minister may extend the initial review period by up to 45 calendar days by notice in writing to the parties. The review periods may be suspended if a notice of information is issued to the parties, and only recommence when the parties fully comply with the notice of information and the Minister certifies compliance.

** Engagement by the Department with other Member States and the European Commission through the EU co-operation mechanism and, in parallel, with national stakeholders occurs within the first half of the initial review period.

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