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Ireland's new FDI Screening Regime

2024

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Ireland will shortly introduce a pivotal legislative change regarding the review and scrutiny of foreign direct investments into the State coming from entities ultimately controlled outside of the EU, the EEA or Switzerland.

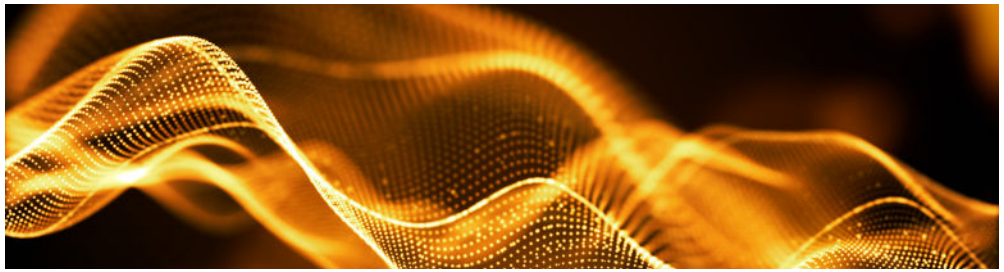
The Screening of Third Country Transactions Act 2023 (the **"Act"**) was signed into law on 31 October 2023. The Act is designed to give further effect to the EU's Investment Screening Regulation (2019/452) and seeks to ensure that the Government has the necessary legal powers to review foreign direct investment in order to reduce the risks that such transactions may pose to the security or public order of the State. It follows the increasing trend of the implementation of numerous FDI systems worldwide, including in the US (*Committee on Foreign Investment in the United States*), China (*Foreign Investment Law of the People's Republic of China*) and the UK (*National Security and Investment Act 2021*).

Upon commencement of the Act, which is currently anticipated for the first week of September 2024, a new procedure will be in place for the screening of foreign direct investment into Ireland. The regime will introduce for the first time:

- A mandatory notification requirement for certain investments in Irish businesses (including for an Irish subsidiary of an international company, and/or Irish-held assets),
- A risk of criminal liability for individuals and companies who fail to notify, and
- Delays to closing timelines for affected deals due to the nature of the notification system being implemented.

This note gives an outline of how the legislation is expected to operate once commenced and the possible consequences for stakeholders and prospective investors. This note considers the following areas:

1. Mandatory Notifiable Transactions
2. Sectors Affected
3. Who must notify, how and when?
4. Screening and Appeal Process
5. The Factors the Minister will Consider During the Screening Process
6. Appeal
7. "Call-in Power"
8. Key Takeaways



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1. Mandatory Notifiable Transactions

Mandatory notification to the Minister for Enterprise, Trade and Employment (the **"Minister"**) shall apply to investments where all of the following questions are answered in the affirmative as per Section 9(1)(a)-(d) of the Act:

a. Does the proposed transaction involve (i) a change of control of an asset (whether tangible or intangible) in the State, or (ii) a change in the percentage of shares or voting rights held in an undertaking in the State (a) from 25% or less to more than 25% or (b) from 50% or less to more than 50%?

b. Is a *"third-country undertaking"* (i.e., a non-EU, EEA or Switzerland undertaking) or a connected person a party to the transaction?

c. Does the transaction relate to, or impact on, critical infrastructure, critical technologies or dual-use items, critical inputs including natural resources, access to sensitive data and/or media?

d. Is the value of the transaction at least €2 million?

2. Sectors Affected

The activity of the target business or asset is one of the key determinants in deciding whether a notification needs to be made. Due diligence may therefore be required to determine whether an asset or undertaking falls within the scope of the regime.

The new regime takes a wide view, specifying that transactions *"relating to, or impacting upon"* one or more of the following five identified sectors will fall within its scope:

i. **Critical infrastructure** including energy, transport, water, communications, aerospace, defence, and data storage and processing, 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** or **dual-use items** including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum, nuclear, nanotechnologies and biotechnologies;

iii. **Critical inputs** including energy, raw materials and food security,

iv. Access to **sensitive information** including personal data, and

v. **Freedom and plurality of the media**.

Each sector is considered in depth below.

(i) Critical Infrastructure

The Department of Enterprise, Trade and Employment (the **"Department"**) in its guidance relating to the new regime, the "Inward Investment Screening Guidance for Stakeholders and Investors" , defines "Critical infrastructure" as it is in EU Directive 2022/2557 on the resilience of critical entities as:

> *"An asset, a facility, equipment, a network or a system, or a part of an asset, a facility, equipment, a network or a system, which is necessary for the provision of an essential service."*

Critical infrastructure falls under the new regime because it is essential in maintaining vital societal functions, health, safety, security, economic or social wellbeing of the people and the disruption or destruction of which would significantly impact the State. The Department considers critical infrastructure to include water, energy, transport, 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.

Ireland is yet to publish a list of critical infrastructures, however, the Department states that Directive 2022/2557 should be considered in determining whether a transaction meets the notification threshold under Ireland's new FDI regime.

Article 6 of Directive 2022/2557 is particularly relevant and in this context and should be considered where the target:

> a. *"Provides one or more essential services,*
>
> b. *Operates, and its critical infrastructure is located, on the territory of that Member State, and*
>
> c. *An incident would have significant disruptive effects, as determined in accordance with Article 7(1), on the provision by the entity [target] of one or more essential services or on the provision of other essential services in the sectors set out in the Annex that depend on that or those essential services."*

Infrastructure within these categories, and target entities or undertakings who operate such infrastructure, will be subject to the requirements of the Act.

(ii) Critical Technologies and Dual-Use Items

The Act considers technology as critical, and within scope of the Act, if it is listed as either a dual-use item, or as military technology or equipment.

Article 2 of Council Regulation (EC) No 2021/821 defines "dual-use items" as:

"Items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items which can be used for both nonexplosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices."

The Department's guidance considers this to include technologies relating to artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum, nuclear, nanotechnologies and biotechnologies.

A dual-use item can be a product and component. Controls also apply to ancillary items necessary for the development, production, testing, deployment of controlled items; brokering of controlled items, and providing technical assistance (including data and information) related to controlled items.

Council Regulation (EC) No 2021/821 contains a definitive list of over 1,800 dual use items. The list is updated annually, based on the work of technical experts who consider technological advancements and geo-political developments in their determinations.

Equipment covered in the Council Common Position 2008/944/CFSP which governs the export of military technology and equipment also falls under the mandatory scope of the Act.

(iii) Critical Inputs

The critical inputs sector includes energy, raw materials and food security. The European Commission has created a list of critical raw materials (**"CRMs"**) which combine materials that are economically important for the EU, and which have high supply risk. The list is reviewed every three years. Economic importance and supply risk are the two main parameters used to determine criticality for EU in the following terms:

- Economic importance looks in detail at the allocation of raw materials to end-uses based on industrial applications; and
- Supply risk looks at the country-level concentration of global production of primary raw materials and sourcing to the EU, the governance of supplier countries, substitution, EU import reliance and trade restrictions in third countries.

If a third-country undertaking seeks to acquire an Irish target which is involved in the extraction, production or supply of an identified critical material, that transaction will qualify for notification, assuming the other factors for notification set out in Section 9 of the Act are met. The fact that a given material is classed as non-critical, however, does not imply that availability and importance to EU economy can be ignored and the Department's guidance on the new FDI regime highlights how a case-by-case analysis is required in such circumstances.

(iv) Sensitive Information

Sensitive information is data that must be protected from unauthorised access to safeguard the privacy or security of an individual, organisation or the State. It may relate to personal, business and government data. Access to "sensitive information" includes the ability to process, license, sell or store such information.

Sensitive information includes personal data that is considered "sensitive", namely:

- Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs,
- Trade-union membership,
- Genetic data, biometric data processed solely to identify a human being,
- Health-related data, and
- Data concerning a person's sex life or sexual orientation.

The Department's guidance states that a transaction is notifiable if it involves sensitive data that is held as an essential or critical part of a target business or asset. That guidance further states that:

a. the volume of such data should be "substantial"; and/or
b. the transaction should relate to a business model that depends on generating turnover from such sensitive data.

Sensitive information may also relate to a government body, where access by a third country undertaking to such information could be used to undermine security or public order.

(v) Freedom and Plurality of the Media

In determining whether a transaction relates to media plurality, parties must take account of the definition of a "media business" set out in the Competition and Consumer Protection Act 2014 (**"the 2014 Act"**). Under the 2014 Act, a *"media business"* means an undertaking involved in:

a. The publication of newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the internet;
b. Transmitting, re-transmitting or relaying a broadcasting service;
c. Providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service; or
d. Making available on an electronic communications network any written, audio-visual, or photographic material, consisting substantially of news and comment on current affairs,

that is under the editorial control of the undertaking making available such material.

Assuming a proposed transaction relates to a media business, the Department's guidance highlights how media plurality under the new FDI regime will be considered by reference to two broad headings:

- *Diversity of Content* – i.e. the extent to which the broad diversity of views (including diversity of views on news and current affairs and diversity of cultural interests prevalent in Irish society) is reflected through the activities of media businesses in the State, including their editorial ethos, content, and sources; and
- *Diversity of Ownership* – i.e. the spread of ownership and control of media businesses in the State linked to the market share of those media businesses as measured by listenership, readership, reach or other appropriate measures.

It is important to note that any analysis regarding media plurality by the Minister will be in addition to the analysis of the Competition and Consumer Protection Commission from a merger control perspective and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media regarding media plurality where those separate regimes are triggered.

3. Who must notify, how and when?

Who must notify?

While the Act does not specify which of the parties to a notifiable transaction must notify, the Department's guidance sets out that, in practice, the acquiring party is expected to take responsibility for submitting the notification. All parties to a transaction have an obligation, however, to ensure that the information being submitted is accurate, to the extent that they are aware. Only one notification per transaction is required and parties should coordinate their actions to avoid duplication.

The notification must be accompanied by certain information, such as the identities and ownership structure of the parties, the value and funding of the transaction and details about the parties' businesses. The Minister may require that further information be provided by the parties upon review of the parties' notification.

If a transaction is deemed to fall within the scope of the Act and parties decide not to file, the legislation provides that this is a criminal offence. Penalties for such an offence include fines and/or imprisonment.

How does a party notify?

The Department has published a draft notification form available on the Department's website. This notification form will also be made available through the Department's Case Management System (**"CMS"**). CMS is the Department's online tool to facilitate communication and interaction with notifying parties. It will be used to manage all communication between the Department and the parties to the transaction throughout the notification and screening process.

A notifying party is required to register for an account to access the CMS. Thereafter, all steps required throughout the notification process and the entire screening process, will be undertaken using this system.

Once a notification form is submitted, the Department must provide the parties to the transaction with a screening notice as soon as practicable thereafter, and the clock then starts on the screening review. Once a Screening Notice is issued, a transaction may not close until the screening review has been completed.

The Act provides for a 90 calendar-day screening process. In exceptional circumstances, the time period may be extended by up to 45 calendar days, where further time is required to assess and/or mitigate risk. In addition, the clock can be stopped if further information is formally requested from the parties.

When must a party notify?

The Act does not specify which of the parties to a notifiable transaction must notify the Minister of the transaction. As per section 10.1 of the Act, all that is required is that one of the parties

does so, at least 10 days before the transaction is completed.

A standstill obligation will apply, meaning that a deal that is caught by the mandatory notification rules under the Act will have to be notified and cleared before deal completion. It is an offence under the Act to complete, or take steps to complete, a non-notified transaction (where the notification thresholds are met) or a notified transaction under review by the Minister prior to a decision being issued by the Minister on the relevant transaction.

4. Screening and Appeal Process

Screening

The Act provides significant detail on the notification process. Individual screening details or decisions regarding transactions will not, however, be published. The timelines and responsibilities, and the screening process itself, are summarised in high level below.

- *Submission* of notifications by the parties to the transaction, and verification of the notification (i.e., that the form is complete) shall be completed by the Inward Investment Screening ("IIS") Unit of the Department;
- Issuing a *Screening Notice* – the IIS Unit will determine whether a notification proceeds to screening (i.e., whether it meets the criteria set out in the Act and is, therefore, subject to the mandatory screening regime), or whether the transaction is able to proceed without any screening;
- Sharing with the *Screening Advisory Panel and EU Commission* – once a Screening Notice has been issued, the notification will be shared with the European Commission and other Member States, as required under the EU's cooperation mechanism. Relevant information will also be shared with other Government Departments to support the screening process;
- *Screening* a transaction – this will be undertaken by the IIS Unit utilising a range of internal and external resources;
- If required, *a notice of information* will be issued to the parties to the transaction, seeking further information. The subsequent response will be reviewed by the IIS Unit to determine whether the response is satisfactory, and a confirmation (or otherwise) will be issued. The issue of a statutory information requests suspends the 90 (or 135) calendar days review timeframe. The 90 (or 135) calendar days resumes upon compliant submission of the information;
- Meetings of the *Screening Advisory Panel* – the panel will be convened, as required, by the IIS Unit to consider transactions under review. Sections 39 to 42 of the Act provides for the establishment and functions of this panel as well as the appointments and meetings relating to the panel. It is intended to consist of a chairperson (an officer nominated by the Minister) and no fewer than 7 ordinary members who are officers nominated by the following Ministers for Defence, Finance, Foreign Affairs, Justice, Environment, Climate and Communications, and Transport, and the Taoiseach shall nominate an officer of the Taoiseach not below the rank of principal officer for appointment by the Minister. The panel may also, with the consent of the Minister, engage such consultants or advisers as it considers necessary for the performance of its functions; and
- The decision – the decision in relation to a transaction will be communicated via a .

Outcome of the Screening Decision

The Minister can make any of the following decisions regarding the notified transaction:

- Allow the transaction to proceed,
- Prohibit the transaction, or
- Allow the transaction to proceed conditionally.

5. The Factors the Minister will Consider During the Screening Process

The Act outlines the factors which the Minister will consider when examining a transaction. The following are relevant examples in this regard:

- Is the relevant investor controlled by a third-party government;
- The extent the parties to the transaction are involved in activities that relate to the security or public order of the State;
- Whether there is evidence of criminality or illegal activities which involves the parties to the investment;
- How likely will the transaction result in actions that are disruptive or destructive to people, assets, or undertakings in the State;
- How likely will the transaction improve an individual's access to sensitive undertakings, assets, people, or data in the State;
- Does the transaction provide likely opportunities to undertake espionage that affects or is relevant to interests of the State;
- How likely is the negative impact of the transaction on the stability, reliability, continuity, or safety of one or more of the matters referred to in (a) to (e) in Article 4(1) of EU Regulation 2019/452;
- Whether the transaction will result in persons gaining access to data systems, information, technologies, or assets that are of general importance to the security or public order of the State;

- The views of the EU Commission and other EU Member States and the extent to which the transaction affects, or its likelihood of affecting, projects or programmes that are of interest to the European Union; and
- The views of the Screening Advisory Panel.

6. Appeal

The EU's Investment Screening Regulation states that *"Foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities."* In line with this requirement, and OECD guidance, the Act provides for appeals to be taken in relation to the Minister's Screening Decisions as well as in relation to a Minister's decision not to provide detailed reasons for a screening decision.

Should the parties to a transaction wish to challenge a Screening Decision, they must first submit an "Intent to Appeal" notice within 30 days of the relevant Screening Decision being issued. (If no "Intent to Appeal" is submitted, the screening case is considered closed once this 30-day period has elapsed.)

Having received an Intent to Appeal, the Minister will assign an adjudicator and issue an "Adjudication Notice" setting out the various requirements which must be fulfilled in order to proceed to an appeal. Thereafter, the relevant parties must formally submit their appeal, along with relevant supporting documentation, within 14 days of the "Adjudication Notice" being received. This is called a "Notice of Appeal". If no Notice of Appeal is submitted within the required 14-day period, then the case is closed.

The Department's guidance notes that the appeals process will be handled separately from the screening review itself and more detailed information in this regard will be published by the Department on its website (www.enterprise.gov.ie) in due course.

7. "Call-in Power"

A notable feature of the Act is the discretionary "call in" power provided to the Minister under section 12 of the Act to review transactions which do not meet the mandatory notification requirement. This arises in circumstances where the Minister has grounds to believe risks to security or public order may arise as a result of the investment. The Department's guidance highlights how this is particularly aimed at new or emerging technologies or sectors that are not captured by the mandatory criteria set out in Section 9(1) of the Act.

To exercise this power, the Minister must:

- Have reasonable grounds for believing that the transaction affects, or would be likely to affect, the security or public order of the State, and
- Be sure that the transaction would result in a third country undertaking, or a person connected with such an undertaking, acquiring, or changing the extent to which it has control of an asset in the State, control of or an interest in an undertaking in the State, legal rights in relation to a person, asset or undertaking in the State, the ability to exercise effective participation in the management or control of an undertaking in the State, or the ability to exercise control over an undertaking in the State.

The foregoing power shall apply for a 15-month "look back" period in relation to transactions that are not mandatorily notifiable. Notably, this 15 month "look back" period shall also apply to transactions completed in advance of the implementation of the new screening regime in Ireland this September.

In addition, and similar to the UK's National Security and Investment Act 2021 which came into force in early 2022, where a notifiable transactions is not notified for any reason (i.e., by accident or design), the Minister can call in such a transaction for up to 5 years post-completion, or 6 months from the date the Minister became aware of the transaction.

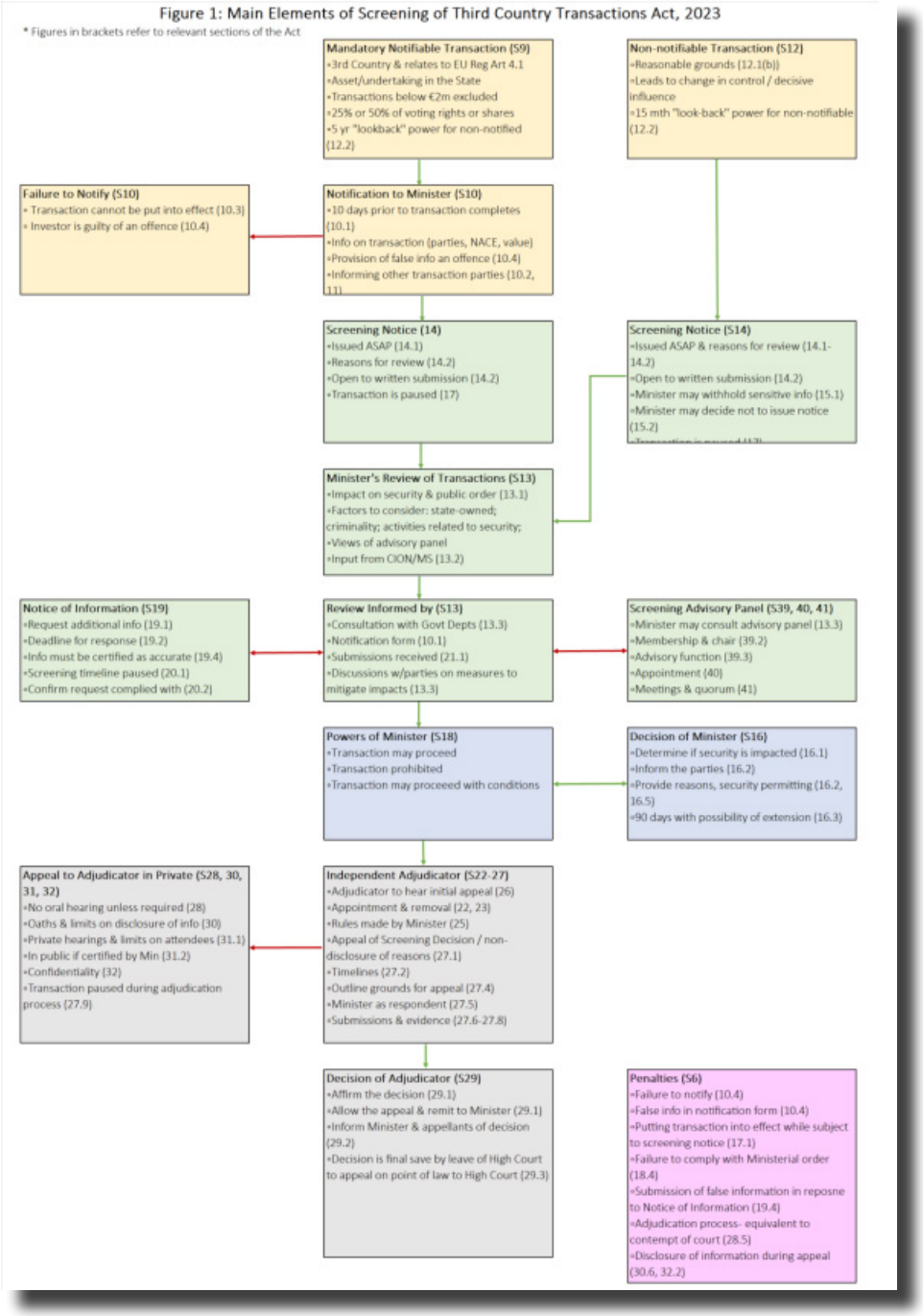
8. Key Takeaways

- The lengthy standstill period of up to 90 or 135 calendar days under the Act will introduce elements of deal uncertainty that go significantly beyond the timing currently applicable to reviews of transaction under Ireland's separate merger control regime. While the Department's guidance speaks to ensuring "screening reviews are completed in as short a time frame as possible" where "no risks are identified", deal advisors will need to be cognisant of the limitations placed by the Act's timeframes.
- The low transaction value threshold of €2 million, as well as general uncertainty regarding the application of the notification criteria once the regime commences, will likely see a large number of transactions being notifiable or, at least, notifying on a precautionary basis due to the potential for criminal liability to arise for failure to notify. Offences under the Act are not confined to body corporate, and may extend to "a director, manager, secretary or other officer of the body corporate or undertaking, or a person who was purporting to act in any such capacity" where an offence is committed by a body corporate "with the consent or connivance of, or to be attributable to any wilful neglect on the part of any person" holding such a management function.
- The Irish screening regime will need to be considered in parallel with other jurisdictions' foreign investment processes, as well as the application of Irish and international merger control regimes, in order to determine the relevant approval requirements for any transaction and the impact of those regimes on deal timelines.

Appendix 1

Main Elements of Screening of Third Country Transactions (as set out in the Department's guidance).

Source: *Inward Investment Screening: Guidance for Stakeholders and Investors*



Appendix 2

Main Elements of Notification and Screening Process (as set out in the Department's guidance)

Source: *Inward Investment Screening: Guidance for Stakeholders and Investors*