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Navigating Ireland’s New Investment Screening Regime – what you need to know

18 July 2024

Over four years since Ireland’s Department of Enterprise, Trade and Employment held a public consultation on the country’s implementation of the EU Investment Screening Regulation, Ireland’s long-awaited investment screening regime is finally set to commence in late September 2024. Under the new regime, transactions which satisfy certain criteria will need to be notified to, and approved by, Ireland’s Minister for Enterprise, Trade and Employment before completion. Additionally, certain transactions that do not need to be notified may nonetheless be called in for review, even if closing has already occurred. The Minister will assess relevant transactions for risks to Ireland’s security or public order.

The new regime will be implemented alongside the EU’s Investment Screening Regulation. Set out below are the key features that investors should consider for transactions which may have a nexus to Ireland.

Key Features

What is an in scope transaction?

Ireland’s investment screening regime applies to transactions involving an acquirer from a “third country” (i.e. outside the EEA and Switzerland), or a person closely connected with a third country, and target interests or assets in the Republic of Ireland.

When is a transaction notifiable?

Where a transaction meets the following four criteria, all parties are responsible for notifying it to the Minister for approval:

1. As a result of the transaction, a third country acquirer or connected person directly or indirectly:

a. Acquires control of an asset or an undertaking in Ireland; or

b. Changes the percentage of shares or voting rights in an undertaking in Ireland above 25% or 50%;

2. The “value of the transaction”, referring to the total consideration paid by the acquirer, and other transactions between the parties, is at least €2 million in the 12 months preceding the transaction;

3. The transaction is not a purely internal re-organisation; **and**

4. The transaction relates to, or impacts on, one or more of the following broadly defined matters: critical infrastructure; critical technologies and dual use items; supply of critical inputs; access to sensitive information; or freedom and pluralism of the media.

To assist with interpreting the mandatory notification requirements, the Department has published draft *Guidance for Stakeholders and Investors* (here). The Department plans to issue finalised guidance before commencement.

It is estimated that up to - and potentially more than - 300 notifications will be made in the first year. This reflects the wide net cast by the mandatory notification criteria listed above.

Lengthy review period

A challenge for investors is that the Minister's review may take several months, even for relatively straightforward transactions from a security or public order perspective. The Minister has 90 days to make a screening decision and has the discretion to extend the deadline to 135 days. Further, the Minister may issue a "notice for information", which stops the clock on the review period until the relevant information is provided.

Significant powers of the Minister

Where substantive concerns arise, the Minister has extensive powers.

The Minister may "call in" transactions which are not notifiable where the Minister has reasonable grounds to believe that the transaction affects, or is likely to affect, the security or public order of Ireland. This includes transactions that closed within 15 months prior to the regime coming into force (i.e. potentially capturing transactions that completed from the second half of 2023 onwards).

Further, the Minister may prohibit transactions or permit completion only subject to certain conditions being satisfied. Such conditions may include divestments, behavioural requirements, ring-fencing arrangements and compliance reporting obligations.

Therefore, third country investors should swiftly consider whether their transaction could raise substantive concerns in Ireland, regardless of whether the mandatory notification criteria appear to be satisfied.

Criminal penalties for offences under the regime

The regime introduces a range of criminal offences, punishable by fines. For example, it is an offence to fail to notify, or to complete or take steps to complete a transaction (whether notified or not) under review prior to the Minister issuing a screening decision. The potential penalties include substantial fines of up to €4 million and/or up to 5 years imprisonment.

Key Takeaways

Notwithstanding the lengthy statutory review period, the Department's draft guidance suggests that the new regime will be operated efficiently and proportionately to minimise the burden on investors and maintain Ireland's attractiveness to foreign investment.

However, it is hard to ignore the potential impact of a 90+ day review process on transaction timelines. Therefore, UK and other non-EEA investors thinking of investing in Ireland should consider the implications of Ireland's new investment screening regime as early as possible in the transaction process. Relevant points to consider include:

- Assessing whether a notification is required;
- What information may need to be provided to the Minister;
- How soon the parties will be able to notify;
- Whether there may be potential concerns related to the security or public order of Ireland or indeed another EU Member State;
- Whether the transaction documents adequately allocate the regulatory risks between the parties; and
- The potential impact of notification and review on the overall transaction timeline.

Investors will need to proactively engage with Ireland's new regime and ensure that they receive timely legal advice. Low financial thresholds coupled with broadly defined relevant sectors and activities are likely to catch a large number of transactions. Therefore, our advice to all would-be dealmakers is to thoroughly examine investments for a potential nexus to Ireland and to then consider seeking legal advice early in the process.