New Irish FDI Screening Regime: Key Points

The Screening of Third Country Transactions Act 2023 (the "**Act**") will establish a new FDI screening regime in Ireland. The Act was signed into law by the Minister for Enterprise, Trade and Employment (the "**Minister**") on 31 October 2023 and the current expectation is that it will come into force in Q2 2024. The Act is designed to implement the EU Investment Screening Regulation (2019/452) ("**the EU FDI Regulation**") and ensures that the Irish Government has the necessary legal powers to screen investments by 'third country' (ie, non-EU, EEA and Switzerland) undertakings and individuals in certain key infrastructure assets with an Irish nexus, eg, investments into critical utilities and infrastructure sectors, high-tech and personal data focussed businesses, and media businesses.

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 rules, 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, deal timelines will be impacted by relatively long clearance timeframes of up to 90 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. We expect that the 'call in' power will be used sparingly and for obvious cases.
- It remains to be seen how the regime will be administered in practice and although guidance has been issued by the Department of Enterprise, Trade and Employment (the "**Department**") this is not yet finalised and is expected to evolve over the coming months and before the Act comes into force.

New Mandatory Notification Requirement

Under the Act, a new mandatory notification requirement and screening procedure, undertaken by the Minister and his Department, will be required for certain transactions that involve third-country undertakings, if the following cumulative conditions are met:

- **Non-EU investor**: third-country undertaking or a connected person is a party to the transaction;
- **Relevant transaction**: the transaction involves a change of control of an asset in the State (ie, the Republic of Ireland) or a defined change in the percentage of shares or voting rights held in an undertaking in the State (where there is a presumption of a change of control from below 25% to above 25%, and from below 50% to above 50%);
- **Transaction value**: the value of the transaction is at least €2 million; and
- **Relevant matter/sector**: the transaction relates to, or impacts on, critical infrastructure, critical technologies or dual-use items, critical inputs including natural resources, access to sensitive data and/or the freedom and plurality of the media.

Informal queries / 'precautionary' notifications

Once the regime comes into force, it may be possible to raise informal queries in relation to a transaction on a no-names basis. It is hoped that the Minister and his Department might be able to revert on informal queries within two weeks, subject to liaising with stakeholders across other departments and government bodies. The Minister will accept notifications being made on a precautionary basis and will use the period until the issuance of the formal screening notice, which commences the formal Phase 1 review, to confirm whether the transaction meets the jurisdictional thresholds

What is the Effect of the Notification?

Similar to the existing Irish and EU merger control regime, the Act prescribes a 'stand-still' or suspensory obligation until clearance is received from the Minister which means that parties cannot complete a notifiable transaction until such clearance has been obtained.

What Transactions are Caught?

A 'transaction' includes any transaction that involves a change of control of an asset in the State or a change in the percentage of shares or voting rights held in an undertaking in the State.

The concept of 'control' is the same as that which applies under the EU and Irish merger control regimes and is focussed on the concept of 'decisive influence'. This may arise directly or indirectly through a number of means, eg, voting rights or securities, ownership of assets of the undertaking or rights and contracts providing influence over the decisions of the undertaking (eg, negative control rights / vetoes over key decisions involving the business plan, budget, appointment of key employees or a majority of the board) or even investment management agreements, where an investment manager or general partner controls the investment strategy of the portfolio companies or the fund.

Appendix 1 below sets out the decision tree in relation to the Irish FDI screening thresholds.

What Sectors are Affected?

The Act cross-refers to the categories set out in Article 4(1) of the EU FDI Regulation and focuses the notification obligation on transactions that relate to, or impact upon, the below sectors / businesses:

- Critical infrastructure including energy, transport, water, communications, aerospace, defence, data storage and processing, etc;
- Critical technologies or dual-use items including artificial intelligence, robotics, semiconductors, cybersecurity, etc;
- Critical inputs including energy, raw materials and food security;
- Access to sensitive information including personal data; and
- Freedom and plurality of the media.

Who must Notify and When?

The notification obligation rests on all parties to a transaction (although practically we envisage that the purchaser will lead on notifications to the Minister). 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 for the parties involved (and potentially also for directors, managers or other officers of the relevant companies).

The potential sanctions / penalties are as follows:

(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 (however, seeking remedial action, accepting late filings etc., rather than imposing criminal sanctions, may be preferred in the nascent stage of the new regime).

The transaction must be notified to the Minister at least 10 days before the date the transaction is completed (noting, however, that completion cannot occur until Ministerial clearance has been given).

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.

'Call-in' Powers and Scope for Minister to Review Completed Transactions

The Act provides the Minister with a retrospective 'call-in' power to review non-notifiable transactions for a period of 15 months post-completion, and non-notified transactions for a period of up to 5 years, where there is public order and / or national security concerns.

The Minister may exercise this 'call-in' power where there are reasonable grounds for believing that the transaction may affect security or public order in the State, and where the transaction results in a third country undertaking acquiring control or influence of an asset or undertaking in the State (ie, a seemingly lower threshold of control or influence than in the case of mandatorily notifiable transactions).

If a transaction is called in, parties would be obliged to provide certain information to assuage any concerns that the Minister may have and to obtain clearance.

What is the New Review Process and Timelines?

Once the review has commenced, the Minister will issue a screening notice to the parties and will conclude the review within 90 days (extendable to 135 days) of the date of the screening notice.

The Minister will then make a screening decision providing reasons as to why the transaction was considered to affect or not affect public order or security in the State. If a screening decision concludes that public order or security may be affected by a transaction, the Minister can direct that the transaction not be completed, or that certain other steps are undertaken by the parties.

Can Parties Appeal a Decision?

A judicial review can be taken against a decision of the Minister under the Act, or a screening decision deemed by the Act to have been made. The parties to a transaction may appeal a screening decision to an adjudicator within 30 days. Adjudicators' decisions may be appealed within 30 days to the High Court on points of law only. Such appeals proceedings will not be held in public due to the sensitivity of issues involved.

What is the Timing of the New Regime?

Based on our latest interactions with the relevant Government department, the new regime is expected to come into force in Q2 2024.

New Deal Consideration Following Recent UK Legislation

The Act has similar effects to the UK's National Security and Investment Act 2021 ("**NSIA**") which came into force in early 2022. The NSIA has retrospective effect for deals closed since 12 November 2020, meaning that transactions in connection with sensitive business sectors must be pre-notified to the UK government and cleared pre-completion. Similar to the Act, non-sensitive transactions under the NSIA can be voluntarily notified and the UK government retains a 5-year 'call-in' power to investigate non-notifiable transactions that may give rise to national security concerns.

Updated Guidance

The Department issued updated guidance in February 2024 and continues to work on finalising its guidance and notification form. The current draft notification form resembles the model EU form, so is unlikely to change extensively. This is also likely to be the case with the revised guidance (ie, no extensive changes to the current draft guidance are anticipated).

How Matheson Can Help

Our market-leading Competition and Regulation group continue to closely monitor legislative and policy developments in this area and to identify emerging themes. We also continue to liaise with the relevant Government department and would be happy to share insights on the scope of the regime and the expected enforcement priorities based on our latest interactions.

If you wish to discuss any issue in relation to the above, please get in touch with any member of the Competition and Regulation Group.

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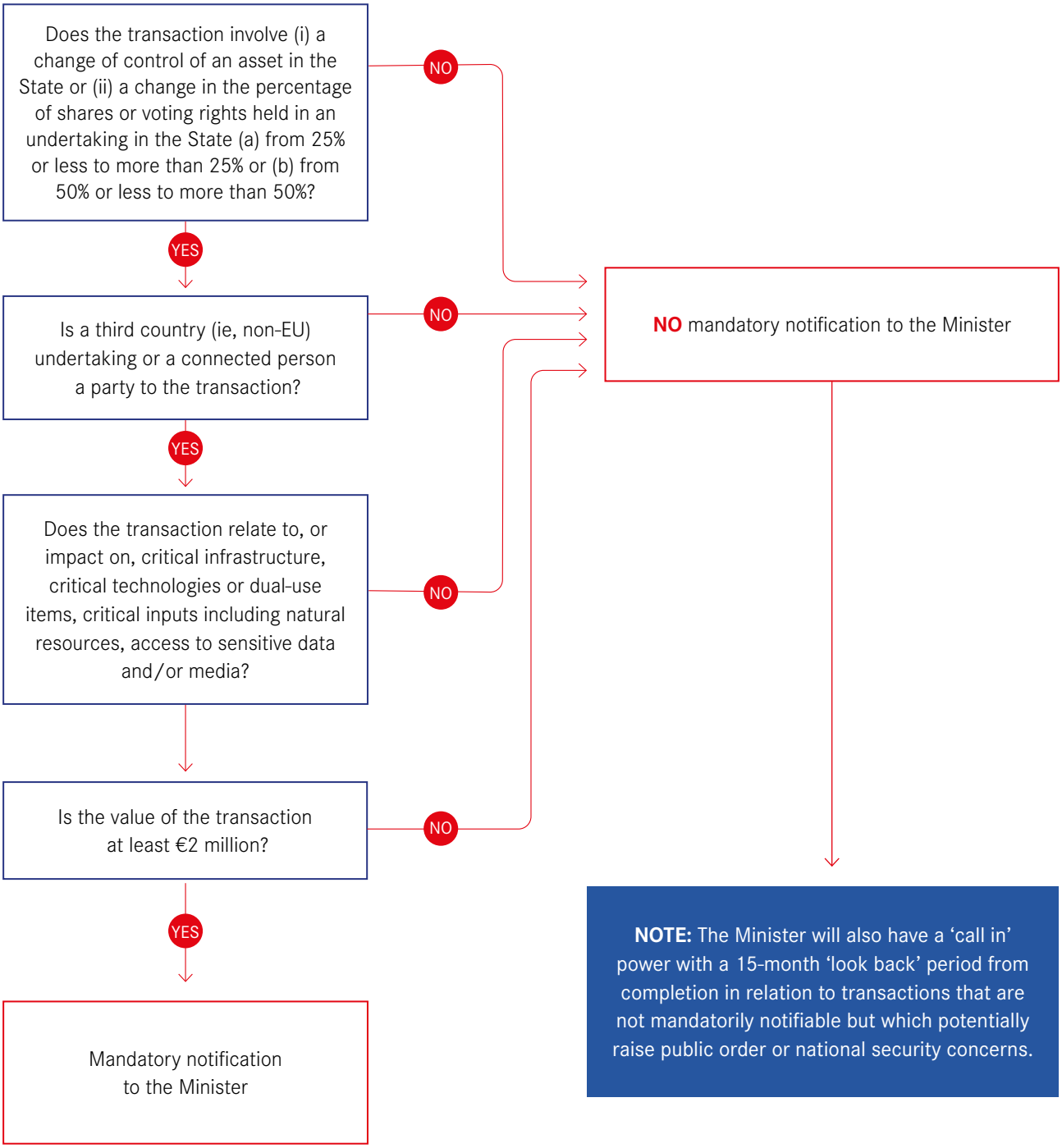
Appendix 1


Does the transaction involve (i) a change of control of an asset 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%?
NO
YES
Is a third country (ie, non-EU) undertaking or a connected person a party to the transaction?
NO
YES
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?
NO
Is the value of the transaction at least €2 million?
NO
YES
Mandatory notification to the Minister
NO mandatory notification to the Minister
NOTE: The Minister will also have a 'call in' power with a 15-month 'look back' period from completion in relation to transactions that are not mandatorily notifiable but which potentially raise public order or national security concerns.