

A&L Goodbody

Competition & FDI Screening 2024

Your key considerations

algoodbody.com

01 Increased regulatory scrutiny of deals:

*An enhanced Merger Control Regime,
a new Third Country Screening Act/
FDI & Foreign Subsidies Regulation*

Merger Control

- Remember that the Competition and Consumer Protection Commission (CCPC) now has the power to “call-in” transactions for review that do not require a mandatory merger notification but that may have an effect on competition in markets for goods or services in Ireland.
- Further powers available to the CCPC since the commencement of the Competition (**Amendment**) Act 2022 (**2022 Act**) include:
 - » The ability to impose interim measures, including in respect of

deals which have already completed (these could encompass measures preventing the implementation or further implementation of a transaction or the taking of certain actions to mitigate the impact of any steps already taken towards implementation).

- » The power to unwind or dissolve transactions which have completed and which are prohibited following a Phase 2 merger investigation.
- » The power to compel information from third parties who may have information relevant to the CCPC’s consideration of the transaction concerned.

- An updated offence of “gun-jumping” now also provides for criminal fines of up to €250,000 on conviction on indictment (as well as daily fines for continuing breach) where a mandatorily notifiable deal, or a deal which has been voluntarily notified or “called in” prior to completion, is put into effect prior to CCPC clearance.
- Businesses should therefore carefully consider the competition implications of any proposed transaction at a preliminary stage so as to reduce the potential for a call-in post-completion, and the negative consequences that this could entail. In order to mitigate risk, businesses should also familiarise themselves with the procedural elements

of notifying and completing a transaction (including with the limitations of pre-completion engagement), having regard in particular to the increased powers and penalties now provided for under the 2022 Act.

- Business should also be aware of the possibility for increased complexity during merger investigations, including through the use of formal RFIs, the increased use of assessments during Phase 2 reviews and an enhanced focus on structural and/or hybrid remedies in cases which are considered likely to give rise to a substantial lessening of competition in Ireland.

Third Country Screening/FDI

- The new Irish FDI screening regime will commence in the first week of September 2024. It relates to transactions involving third country undertakings (i.e. from outside the EU, EEA and Switzerland). The new regime will require the prior notification to the Minister for Enterprise, Trade & Employment (**Minister**) of transactions meeting the following criteria:
 - » A third country undertaking (or a person connected with such an undertaking):
 - » acquires control of an asset or undertaking in Ireland, or
 - » changes the percentage of shares or voting rights it holds in an undertaking in Ireland from 25% or less to more than 25% or from 50% or less to more than 50%.
 - » The cumulative value of the transaction and each transaction between the parties to the transaction (or persons connected with third country undertakings that are parties to the transaction) in the 12 months before the date of the transaction is at least €2m.
 - » The same undertaking does not directly or indirectly control all the parties to the transaction.
 - » The transaction relates to or impacts upon at least one of a list of prescribed matters (these include, for example, critical infrastructure, critical technologies and dual use items, the supply of critical inputs, access to or the ability to control sensitive information or the freedom and pluralism of the media).

- The test to be applied by the Minister is whether or not the transaction affects, or would be likely to affect, the security or public order of Ireland. In reaching a decision on this issue, the Minister will be obliged to consider any comments submitted by other EU Member States/any opinion of the European Commission, as well as the views of a specially appointed advisory panel.
- The new regime envisages a screening timeline of 90 days from the date of the screening notice, which can be extended to 135 days on written notice by the Minister to the parties. Additional information can be requested from the parties, which will further extend the above timelines.
- As notification is mandatory and suspensory, parties to a qualifying transaction will need to factor these timings into their deal planning, consider the potential outcomes of an FDI screening process (which could include the imposition of an obligation on the parties to take or to refrain from taking certain actions), and calibrate their transaction documents accordingly.
- Parties will also need to consider the possibility of a call-in by the Minister (including for non-notifiable deals), which can occur even in respect of transactions which completed up to 15 months before the commencement of the Act i.e. back to June 2023.

Competition & FDI Screening 2024

Foreign Subsidies Regulation

- Businesses should bear in mind that under the new regime introduced by Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market (**FSR**), a mandatory notification is required in the context of a concentration (i.e. a merger, acquisition of full-function JV) where:
 - » The acquired business, at least one of the merging parties or the JV is established in the EU and generates EU turnover of at least €500m.
 - » Where the parties to the transaction (i.e. the acquirer/s and the target in the case of an acquisition, the merging parties in the case of a merger and in the case of a JV, both the JV and the parties creating the JV) were granted combined aggregate financial contributions of at least €50m from third countries in the three years preceding the conclusion of an agreement, the announcement of a public bid or the acquisition of a controlling interest.
- They should also consider the possibility of the Commission “calling-in” a “below threshold” concentration at any time prior to its implementation where it suspects that foreign subsidies may have been granted to the businesses concerned in the three years prior to the concentration. Equally, the Commission may on its own initiative examine information from any source and carry out an investigation regarding alleged foreign subsidies distorting the internal market (which may conclude with redressive measures, commitments or a no-objection decision).
- The FSR also has implications for public procurement. In this regard, a mandatory notification (to the contracting authority/entity) is required where:
 - » The estimated value of the public procurement (or framework agreement) is at least €250m.
 - » The economic operator (including its subsidiary companies without commercial autonomy, holding companies, and, if applicable, main subcontractors and suppliers involved in the same tender in the public procurement procedure) was granted aggregate financial contributions in the 3 years prior to notification of at least €4m per third country.
- Where contracts are divided into different lots, an additional threshold of €125m applies to the aggregate value of all lots for which the company is applying. The notification obligation also applies to the main subcontractors and suppliers if the economic share of their contribution exceeds 20% of the value of the submitted tender.
- In addition, the Commission can require notifications of foreign financial contributions received by a company in a sub-threshold public procurement procedure. Ex officio investigations by the Commission are also possible (these are limited to awarded public contracts). The FSR does not apply to public contracts that have been awarded or procedures initiated before 12 July 2023.
- Businesses contemplating a transaction or bidding in a substantial public procurement will therefore need to assess whether there is need for a notification under the FSR and build any notification requirement into their deal/planning timelines, while also considering the possibility of a “call-in” or an ex officio investigation by the Commission.

02 New tougher competition enforcement regime

Civil Enforcement Regime

- Businesses should be aware of the fact that the 2022 Act provides for the first time for a civil enforcement regime capable of being applied by the CCPC, thereby departing from the previous system, which required a case to be proven to a criminal standard in court before a fine could be imposed for a breach of competition law.
- The new civil regime allows for a range of measures to be imposed on businesses for breaches of competition law (or certain other breaches), including remedies and administrative fines of up to the greater of €10m or 10% of total worldwide turnover. The maximum fine for breach of a procedural requirement is the greater of €1m or 1% of the total worldwide turnover

of the business concerned in the previous financial year. Such fines must be confirmed by the High Court before they can take effect, so the final word is still with the courts rather than the CCPC. Daily periodic penalty payments may also be imposed in certain cases.

- A prohibition notice may be issued by the CCPC where it suspects a risk of "serious and irreparable harm to competition" during an investigation because of an ongoing infringement. A prohibition notice prohibits the carrying on of the infringement for a specified period and may also direct the taking of certain measures (e.g. to remedy the suspected infringement).

New Mens Rea for Cartel and Abuse of Dominance Offences, New Offence of Bid-Rigging & Increased Criminal Fines

- In order for an offence to be established in respect of an anti-competitive arrangement or an abuse of dominance, the 2022 Act requires evidence of an intentional or reckless act or omission. Prosecution for an anti-competitive arrangement under the 2022 Act is only possible where it involves specific breaches which are considered to be particularly material (such as price fixing, bid-rigging etc.).

- The 2022 Act has also introduced a new cartel offence of "bid-rigging". This can encompass practices such as an agreement between businesses to submit a bid on certain terms, to refrain from submitting a bid or to withdraw a bid, as well as collusive tendering.
- The 2022 Act increases the fines for conviction on indictment of offences involving an anti-competitive arrangement or an abuse of dominance. For businesses, these can now amount to up to €50m or 20% of the turnover of the business in the preceding financial year (whichever is greater). For certain cartel offences, individuals can also be convicted on indictment of an equivalent fine and/or up to 10 years imprisonment.

Investigative Tools and Leniency

- Businesses should be aware of the fact that the information-gathering powers available to authorised officers of the CCPC, including in relation to competition law investigations, have been expanded. For example, the CCPC can now seal premises which it is dawn-raiding in order to preserve records for later inspection. The carrying out of surveillance and/or the use of tracking devices may also be authorised in certain circumstances. In addition, the 2022 Act allows for cooperation between the CCPC and other national competition agencies. In this regard, the CCPC may, for example, request the national competition agency of another Member State to carry out inspections, interviews or other fact-finding measures on its behalf.
- Businesses should also note that as a result of the 2022 Act, the CCPC has put in place a regime enabling leniency to be granted to businesses in exchange for disclosing their participation in a cartel, and voluntarily and independently cooperating with a related investigation. Where prescribed criteria are met, the CCPC may grant a business immunity from any administrative fine which would otherwise have been imposed or determine that a fine should be reduced by up to 50%. The CCPC has also put in place a policy allowing for leniency to be granted to participants in resale price maintenance. The leniency regime which has been put in place as a result of the 2022 Act is separate from, and in addition to, the Cartel Immunity Programme, which deals with applications for immunity from criminal prosecution for cartel offences.
- The enhanced powers available under the 2022 Act, which now include a wider array of investigative tools and the possibility of administrative fines, highlight the importance for businesses of having in place robust compliance programmes. This will help in ensuring that all employees are fully apprised of their competition law obligations and assist in managing risk in advance of an anticipated increase in competition enforcement activity in Ireland resulting from the 2022 Act.

Competition & FDI Screening 2024



Vincent Power
Partner
+353 1 649 2226
vpower@algoodbody.com



Alan McCarthy
Partner
+353 1 649 2228
amc@algoodbody.com



Anna-Marie Curran
Partner
+353 1 649 2227
amcurran@algoodbody.com