

EU, COMPETITION AND PROCUREMENT

Foreign Direct Investment in Ireland *Screening of Third Country Transactions Act 2023 – Q&A*

Ireland has enacted its foreign direct investment (FDI) legislation entitled the **Screening of Third Country Transactions Act 2023 (Act)**.

The Act reflects the wider international focus on FDI controls across the EU, the UK, the US and elsewhere. The Act is also partly in response to the EU Investment Screening Regulation (EU) 2019/452 (Regulation) which addresses concerns by Member States regarding the purchase of strategic EU companies and interests by third country businesses and individuals (as well as, in certain cases, State-owned enterprises).

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The Act represents a tough and very wide-ranging system for scrutiny by the Irish Government of a range of investments (Transactions) by parties established in third countries in critical technology and infrastructure businesses and assets in Ireland. Notably, the UK will be a third country for the purposes of the Act which is significant given the level of investment by UK investors in Ireland.

There are strict obligations under the Act for parties to such Transactions to notify the Minister for Enterprise, Trade and Employment (Minister) for prior approval by the Minister. There are also significant sanctions for failure to comply with obligations under the Act (i.e. fines of up to €4 million and imprisonment for up to 5 years).

When will the Act commence operation?

It is anticipated that the Act will commence operation in Q2 2024.

How will the Act affect FDI in Ireland?

The Act obliges parties to notify the Minister for prior approval of certain Ireland-related Transactions in a range of technology and infrastructure sectors involving parties established in countries outside the EEA and Switzerland (i.e. third countries). The Minister will decide if the Transaction poses a risk to Ireland's security or public order. The Act is also designed to result in better information sharing and co-operation with other Member States of the EU in light of the Regulation.

What sectors in Ireland will be affected?

The Act reflects the Regulation and will apply to a Transaction that relates to (or impacts on), any of the following (Critical Sectors):

- 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 (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), or
- v. the freedom and pluralism of the media.

Is the notification system mandatory or voluntary (or both)?

It is a mandatory notification system under the Act. There is no "voluntary" notification system. However, the Minister can still decide to review an unnotified or non-notifiable Transaction (whether or not completed).

What Transactions fall within the scope of the Act?

A Transaction under the Act means any acquisition, agreement or other economic activity resulting in:

- a. a change in control of an asset in Ireland, or
- b. the acquisition of all or part of, or an interest in, an undertaking in Ireland.

An “asset in Ireland” includes where it is physically located in Ireland (and for an intangible asset (e.g. intellectual property), where it is owned, controlled or otherwise in the possession of an undertaking in Ireland).

An “undertaking in Ireland” is where (a) it is constituted or otherwise governed by the laws of Ireland, or (b) has its principal place of business in Ireland.

The Act therefore applies to a potentially wide range of Transactions including investments in a range of goods and services in Ireland.

When must a Transaction be notified to the Minister?

A Transaction must be notified to the Minister under the Act where:

- a. a third country undertaking (or a person connected with the third country undertaking) as a result of the Transaction:
 - i. acquires control of an asset in Ireland or undertaking in Ireland, or
 - ii. 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%;
- b. 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 period of 12 months before the date of the Transaction) is at least €2 million;

- c. the same undertaking does not, directly or indirectly, control all the parties to the Transaction; and
- d. the Transaction relates to, or impacts upon, one or more of the Critical Sectors.

A person will be “connected” with the third country undertaking if the person is: (a) a spouse, civil partner, parent, sibling or child of a relevant person (e.g. a third country national who exercises control over the undertaking), (b) certain trustees, or (c) in partnership with a relevant person.

What is a “Third Country”?

A “third country” means any state or territory other than Ireland, a Member State, the remaining parties to the EEA (i.e. Norway, Liechtenstein and Iceland) and Switzerland. This means, for example, that UK investors acquiring assets or undertakings in Ireland will potentially be caught by the Act.

What is a “Third Country Undertaking”?

A third country undertaking is an undertaking that is:

- a. constituted or governed by the laws of a third country; or
- b. controlled by at least one director, partner, member or other person, that (i) is a person referred to in (a), or (ii) is a third country national; or
- c. a third country national.

A body corporate is connected with a third country undertaking if it is controlled by the third country undertaking or by another undertaking that is controlled by that third country undertaking – this would capture situations where an Irish subsidiary, controlled by a third country undertaking, was the party formally acquiring an interest in Ireland.

To whom must a notification be made under the Act?

A notification must be made to the Minister. A range of information on the Transaction must be provided including on the parties to the Transaction, corporate information and information on the economic activities carried out by the parties. Failure to notify and to provide this information is an offence.

Who must make the notification to the Minister?

All parties to a notifiable Transaction must make the notification.

When must a notification be made to the Minister?

Notification to the Minister must be made at least 10 days before a Transaction is completed.

What does the Minister do on receipt of a notification?

The Minister issues a Screening Notice to the parties to the Transaction. The Minister can require further information. Parties can then make submissions on their views as to the effect of the Transaction on security and public order in Ireland.

Can the Minister review a Transaction even if it has not been notified or does not require to be notified?

Yes, if the Minister has reasonable grounds for believing that the Transaction affects, or would be likely to affect, the security or public order of Ireland. This applies whether or not the Transaction has been completed.

What decision does the Minister make?

The Minister decides if the Transaction affects, or would be likely to affect, the security or public order of Ireland (i.e. a Screening Decision). The Minister is assisted by an Advisory Panel.



Can a Transaction that has been notified (or which should have been notified) be completed (or furthered) prior to a Minister's approval?

No. A Transaction that has been notified (or which should have been notified) cannot be completed (or furthered) after the Minister issues a Screening Notice to review the Transaction unless and until it is approved by the Minister. Completing (or furthering) the Transaction before a Screening Decision of the Minister approving the Transaction is an offence.

How long will it take for the Minister to make a Screening Decision?

The Minister must make a Screening Decision on a notified Transaction within 90 days from notification (or up to 135 days from the date of the notification if the Minister decides to extend the review period). If the Minister reviews an unnotified Transaction, the Minister has up to 90 days from the date a Screening Notice was issued (or up to 135 days if the Minister decides to extend the review period).

What Screening Decisions can the Minister make after reviewing a notification?

After having assessed a notification, the Minister issues a Screening Decision

- a. authorising,
 - b. authorising subject to conditions (e.g. with divestments), or
 - c. prohibiting,
- the Transaction.

The Screening Decision is made on the basis of a range of security and public order criteria. These criteria include whether a party to the Transaction is controlled by a third country government and the extent to which such control “is inconsistent with the policies and objectives” of Ireland.

What are the penalties for non-compliance with the Act?

A breach of applicable provisions under the Act can lead to fines of up to €4 million and imprisonment for up to 5 years.

Can the Minister “call in” Transactions which have not been notified (or were not notifiable)?

Yes. There are “look-back” periods. The Minister can review a non-notified Transaction in up to the later of: (i) 5 years from the date on which the Transaction is completed, or (ii) 6 months from the date on which the Minister first became aware of the Transaction.

The Minister can also review a non-notifiable Transaction in up to 15 months after the Transaction is completed.

Either way, regardless of whether or not the Transaction is notified or notifiable, the Minister can only review a Transaction where it was completed in up to 15 months before the Act comes into operation (likely Q2 2024).

Does the Act apply to Transactions involving parties from the EU?

No, the Act applies where there is a third country party (i.e. outside the EU, the EEA and Switzerland) or the party from the EU is connected with a third country undertaking.

In cases of doubt, can parties to a Transaction seek informal guidance from the Minister?

There is no system as yet to seek informal guidance from the Minister regarding the application of the Act to Transactions.

Can a Screening Decision be appealed?

Yes. A party to a Transaction may appeal a Screening Decision by notifying the Minister within 30 days that it is appealing the decision. The Minister is obliged to designate an adjudicator(s) to hear the appeal. A party to a Transaction may appeal an adjudicator’s decision to the High Court within 30 days from the date on which the adjudicator’s decision was notified. The appeal can only be made on points of law. The decision of the High Court is final and no appeal lies to the Court of Appeal except with the leave of the High Court which must certify that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal is taken.



Is the Act separate from merger control rules?

Yes. The notification of a Transaction is made to the Minister and addresses security and public order matters in Ireland (although the Minister is also required to have regard to the extent to which the Transaction affects, or would be likely to affect, the security or public order of another Member State). Any parallel notification of a Transaction on merger control grounds would be made either to the European Commission under the EU merger control rules or, if not, to the Competition and Consumer Protection Commission under the Irish merger rules (as well as potentially to other merger control authorities). Some of the merger control issues regarding a Transaction may overlap with the assessment criteria under the Act (e.g. regarding details of economic activities and general market features).



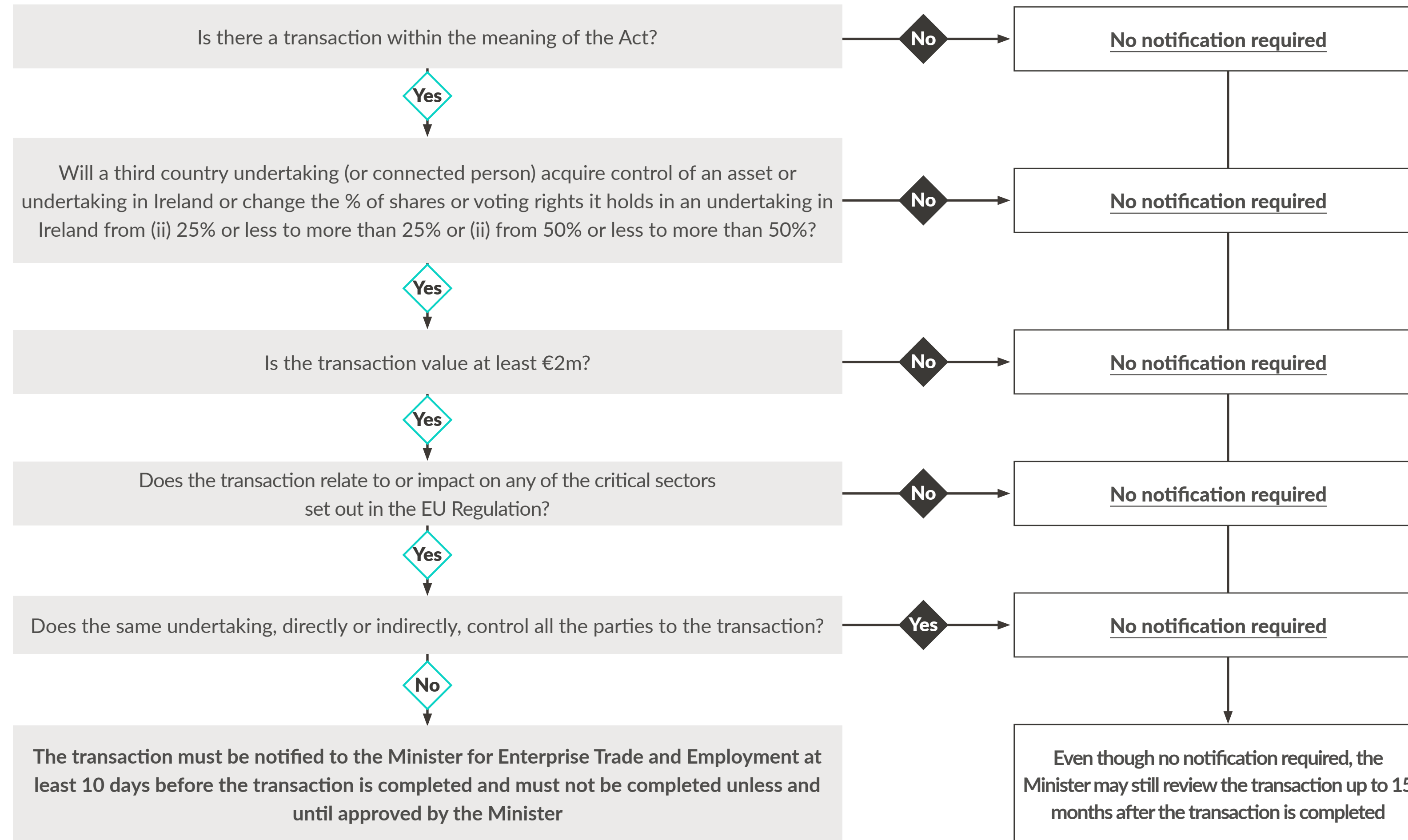
Concluding comments

The Act is a very material addition to the regulatory requirements to complete M&A deals in Ireland – for example, the wide-range of Transactions involved, the extensive number of affected sectors, the extremely low Transaction value and the ability of the Minister to look at unnotifiable Transactions. While significant questions remain about how it will be applied in practice by the Minister, it deserves to be treated with the same seriousness as the merger control rules. Practical experience across the EU and elsewhere is showing how important FDI rules have become – particularly to the timescale for completion of M&A deals. Anyone investing in Ireland from a third country (including the UK) will need to have the Act on its radar.

If you have any queries, please contact any member of the EU, Competition and Procurement team.

Foreign Direct Investment in Ireland

Screening of Third Country Transactions Act 2023: *Is the transaction notifiable?*



Minister has up to 90 days (extendable to 135 days) to decide whether the transaction affects or would be likely to affect the security or public order of Ireland

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