

EU, COMPETITION AND PROCUREMENT

# Foreign Direct Investment in Ireland *Screening of Third Country Transactions Bill 2022 - Q&A*

Ireland has published its draft Foreign Direct Investment (FDI) legislation entitled the **Screening of Third Country Transactions Bill 2022 (Bill)**.

The Bill reflects the wider international focus on FDI controls across the EU as well as in the UK, the US and elsewhere.

7 MIN READ





The Bill is partly in response to the EU Investment Screening Regulation (EU) 2019/452 (**Regulation**) which is in turn, a response to concerns by Member States regarding the purchase of strategic EU companies and interests by non-EEA owned businesses and individuals (as well as, in certain cases, by state-owned enterprises).

Once enacted, the Bill will represent a tough and very wide-ranging system for scrutiny by the Irish Government of a range of investments by parties established in third countries (**Transactions**) in critical technology and infrastructure businesses and assets in Ireland. Notably, the UK will be a third country for the purposes of the Bill which is significant given the level of investment by UK investors in Ireland. There are strict obligations under the Bill 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 Bill (i.e. fines of up to €4m and imprisonment for up to 5 years).

**When will the Bill come into force?**

The Bill is priority legislation for the Irish Government so we expect it to be enacted and to come into force later in 2022 without significant amendment.

**How will the Bill affect FDI in Ireland?**

The Bill obliges parties to notify the Minister for prior approval of certain Ireland-related Transactions (and proposals for 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 Bill 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 Bill reflects the Regulation and will apply to a Transaction that directly (or indirectly) relates to (or impacts on), any of the following:

- 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 Bill. 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 Bill?**

A transaction under the Bill includes any transaction, acquisition, agreement or other economic activity relating to:

- 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” includes (a) where it is constituted or governed by the laws of Ireland, and (b) where it is controlled by a person: (i) that is an undertaking constituted or governed by the laws of Ireland, or (ii) which is ordinarily resident in Ireland.

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

**Are group reorganisations notifiable under the Bill?**

The current drafting of the Bill does not exclude group reorganisations from being notifiable under the Bill.

**When must a Transaction be notified to the Minister?**

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

- a. a third country undertaking (or a person connected with the third country undertaking) is a party (whether or not a purchaser) to the Transaction, and
- b. the Transaction value is at least €2m, and

- c. the Transaction directly (or indirectly) relates to or impacts any of the sectors listed in (i) - (v) above, and
- d. the Transaction relates, directly or indirectly, to an asset or undertaking in Ireland, or
- e. where the Transaction involves the acquisition of shares or voting rights in an undertaking in Ireland, the percentage of share or voting rights changes from (i) 25% or less to more than 25% or (ii) from 50% or less to more than 50%.

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. A body corporate will also be 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.

**What is a “Third Country”?**

A “third country” means anywhere other than Ireland, the EU Member States, the EEA Member States (i.e. Norway, Liechtenstein and Iceland) and Switzerland. This means that investors from the UK will potentially be caught by the Bill if all other thresholds are met.

**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.

**To whom must a notification be made under the Bill?**

A notification must be made to the Minister. A range of information on the Transaction must be provided for screening purposes including on the parties to the Transaction and corporate information. 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 approved by the Minister. Completing (or furthering) the Transaction before a Screening Decision by 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 is reviewing 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 (including on the basis of remedies)
- b. imposing conditions on (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 Bill?**

A breach of provisions under the Bill can lead to fines of up to €4m and imprisonment for up to 5 years.

**Can the Minister review Transactions which have not been notified?**

Yes. There are “look-back” periods. The Minister can review a non-notified Transaction up to: (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 up to 15 months after the Transaction is completed.

Regardless of whether or not the Transaction is notified or notifiable, the Minister can review a Transaction where it was completed up to 15 months before the Bill comes into operation.

**Does the Bill only apply to Transactions involving parties from the EU?**

No, the Bill 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 seek informal guidance from the Minister?**

There is no system as yet to seek informal guidance from the Minister regarding the application of the Bill 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 Bill separate from merger control rules?**

Yes. The notification of a Transaction is made to the Minister and addresses security and public order matters. 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 Bill.

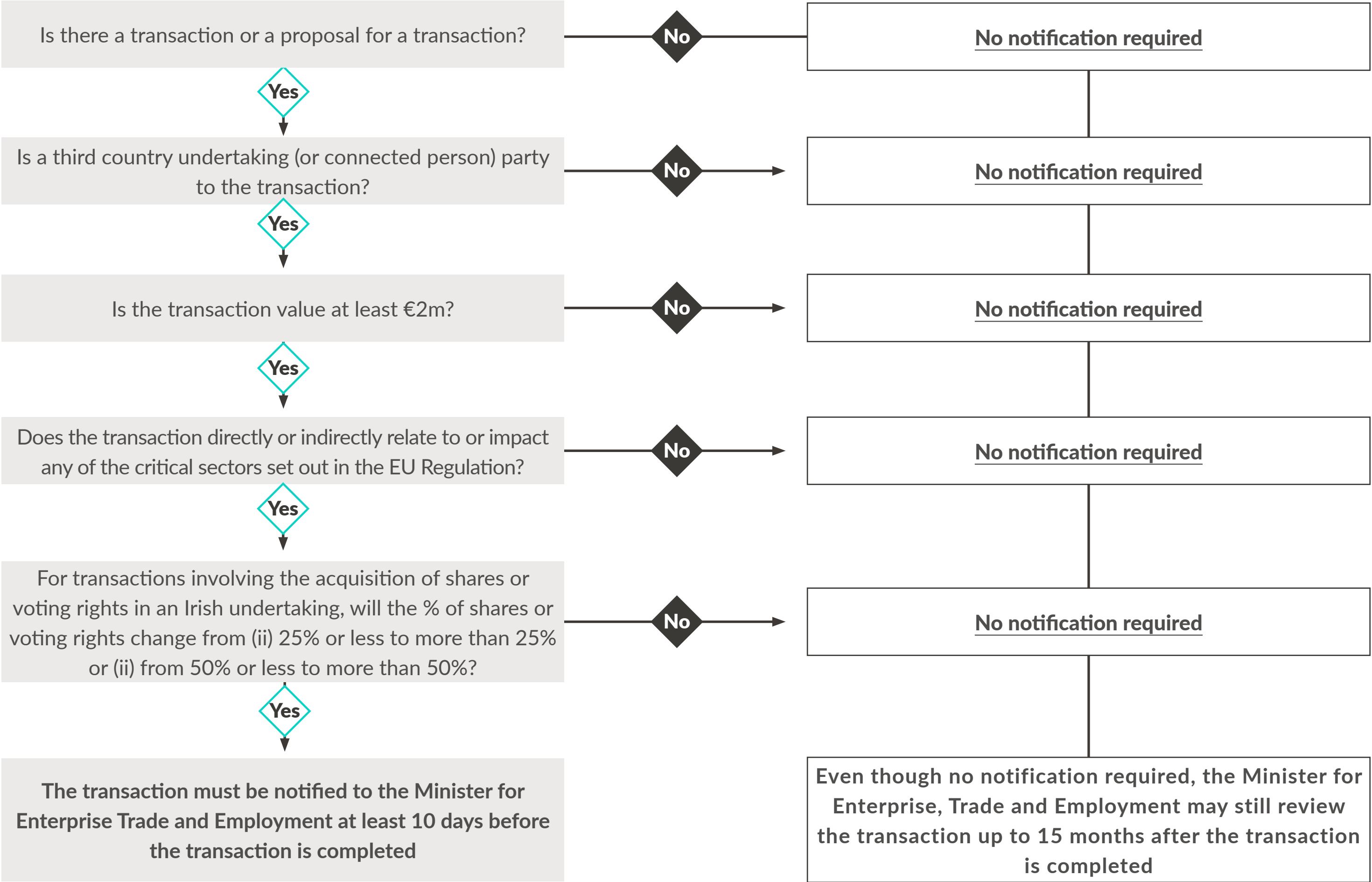


**Concluding comments**

The Bill is a very material addition to the regulatory requirements for implementing a wide-range of potential transactions relating to Ireland (including M&A) – for example, the wide range of Transactions, the 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 (as practical experience across the EU and elsewhere (such as in France, Germany, Italy and the UK) is showing with FDI). Anyone investing from a third country (including the United Kingdom) will need the Bill on its radar.

If you have any queries, please contact any member of the [EU, Competition and Procurement team](#).

Screening of Third Country Transactions Bill 2022: 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





Key contacts



**Anna-Marie Curran**  
*Partner, EU & Competition*  
+353 1 649 2227  
amcurran@algoodbody.com



**Alan McCarthy**  
*Partner, EU & Competition*  
+353 1 649 2228  
amccarthy@algoodbody.com



**Richard Grey**  
*Partner, Corporate*  
+353 1 649 2358  
rgrey@algoodbody.com



**Mark Ward**  
*Partner, Corporate*  
+353 1 649 2208  
mward@algoodbody.com