



An Roinn Gnó,  
Fiontar agus Nuálaíochta  
Department of Business,  
Enterprise and Innovation

# Public Consultation on Investment Screening

Transposition of the EU Regulation Establishing a  
Framework for Screening of Foreign Direct Investments  
into the EU

April 2020



# 1. Overview

## Introduction

The Department of Business, Enterprise and Innovation invites submissions to a public consultation on the transposition of the EU Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union<sup>1</sup>. The Regulation comes into effect on 11th October, 2020.

This consultation is intended to inform the policy position that Ireland adopts in implementing the EU Regulation and, specifically whether to introduce in Ireland an Investment Screening mechanism in relation to inward investment from third countries on the grounds of security and public order.

## Objective of the Regulation

Foreign direct investment is essential for the economic and social development of the Member States, and the EU maintains an open investment environment and welcomes foreign investment. The European Commission is committed to a policy of openness to foreign direct investment into the EU.

At EU level, the Regulation to establish a framework for the screening of FDI is a response to growing concerns amongst Member States regarding the purchase of, and investment in, a number of strategic European companies by foreign-owned firms (and in certain cases, state-owned firms) that may undermine a Member State's security or public order. The primary source of concern arising from this type of investment relates to third-country corporations, who are engaging in asset-seeking strategies, with a focus on:

- The purchase of cutting-edge European technology companies with the view of potentially transferring the technology or intellectual property rights (IPR) back to the investor's home country;
- Access key EU citizen and business data sets; and
- Control of key infrastructure or public utilities

The Regulation creates a European framework for screening foreign investment where there are concerns that an investment may pose a risk to security or public order in the host Member State, or to other Member States.

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<sup>1</sup> Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union. Regulations have binding legal force throughout every Member State and enter into force in all Member States simultaneously.

This framework is intended as a cooperation mechanism through which Member States and the European Commission can exchange information and raise specific concerns about a potential foreign investment.

Important issues of national sovereignty, including the right for individual Member States to make final decisions as regards inward investments, are preserved in the Regulation. This is an important provision as each Member State is likely to have concerns particular to their own individual circumstances and sectoral profile.

The Regulation does not require Member States to adopt or maintain a screening mechanism for foreign direct investment<sup>2</sup>. It also takes into account the diversity between Member States regarding the existence and type of investment screening mechanism already in place. Currently 14 Member States have an Investment Screening mechanism for foreign investments in place with almost all others considering the introduction of same.

Member States that do not conduct investment screening – such as Ireland – will still be subject to the Regulation’s cooperation and reporting requirements. In terms of the obligations created as a result of the Regulation, Member States are obliged to have a national contact point to enhance communication and cooperation, and to receive and respond to queries from the Commission or other Member States. A number of annual reporting obligations are also set out.

To comply with the mandatory aspects of the Regulation, the Department of Business, Enterprise and Innovation has been confirmed as the “National Contact Point” for Investment Screening, and as such will be responsible for undertaking and fulfilling the various cooperation and reporting obligations set out in the Regulation.

## Key aspects of the EU Regulation

- Cooperation between Member States, and between Member States and the European Commission, is required in relation to inward investments on the grounds of security and public order.
- Cooperation extends also in the context of foreign direct investment affecting projects or programmes of European Union interest in the areas of research (Horizon 2020), space (Galileo), and transport and energy and telecommunication networks (Trans-European Networks – Ten).
- The proposed cooperation mechanisms will allow a Member State to raise concerns as regards a foreign direct investment in another Member State and to provide comments. The Commission may also issue a non-binding opinion on foreign direct investments where there are concerns for issues of security and public order.
- The Regulation requires that screening mechanisms meet the basic requirements of transparency, non-discrimination and have the possibility of a judicial redress of decisions.

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<sup>2</sup> “Investment screening” is defined in the Regulation as the ability of Government to intervene in relation to the ownership and control of businesses and/or other entities which could be used to undermine security and public order.

- Member States, regardless of whether an Investment Screening mechanism is in place, must comply with the requirement to cooperate with other Member States and with the EU Commission in terms of responding to requests in relation to foreign investments and to submit to the annual reporting requirements set out in the Regulation.
- The Regulation is consistent with, and does not affect other Union policies and initiatives, in particular: free movement of capital and freedom of establishment; the EU Merger Regulation; Energy; Raw materials; Cybersecurity and electronic communications; Air transport; Prudential assessment of acquisitions in the financial sector; Dual-use export control; and European space policy.

### **Ireland's current legal framework**

Ireland does not screen foreign investment at present, nor is the State currently legally empowered to do so. The power already exists to intervene to guard against anti-competitive behaviour e.g. merger and acquisitions controls, and to ensure media plurality. Ireland would need to introduce primary legislation to fully implement a formal screening mechanism.

### **Purpose of the consultation**

As stated, there is currently no formal Investment Screening Mechanism in Ireland for foreign investment. To enable Ireland to respond fully and effectively to requests from other Member States or from the Commission, the Department of Business, Enterprise and Innovation is examining the policy options to best fulfil these requirements.

Establishing a formal Investment Screening Mechanism represents an opportunity to design and tailor a system appropriate to Ireland's needs while also meeting the obligations which the new Regulation brings. An approach that balances Ireland's continued attractiveness as a location for inward investment, with a robust, but proportionate Investment Screening Mechanism that protects security and public order is required.

In line with the experience of Member States that operate Investment Screening mechanisms, it is anticipated that only a small number of investments, mergers or transactions could potentially pose a risk to our security and public order. In that sense, any proposal to introduce an Investment Screening mechanism would have to be proportionate to these risks. A Screening mechanism could not lessen Ireland's attractiveness to inward foreign direct investment which has been a hugely important part of the growth of the Irish economy over many years. Equally, it is important that Ireland's choices in relation to screening are seen to reflect the highest standards of corporate governance and regulatory probity and the active management of potential security risks.

The Department of Business is currently investigating the policy options in this regard and consideration will include the following factors:

- Ensuring that Ireland can, to the fullest extent possible, fulfil its obligations as set out in Regulation (EU) 2019/452 in relation to reporting on FDI trends, and responding to queries and opinions issued by EU Member States or the European Commission, within the timelines prescribed therein.
- Defining the nature, scale and type of investments that might undergo investment screening (e.g. sensitive technologies or data sets, key sectors, strategic locations).
- Setting out the factors that would be considered when applying screening to particular foreign investments (i.e. the threat posed to security and public order as a result of the investee being acquired, the means of control being applied, or the risk associated with the acquiring party).
- How to empower the Minister to assess, investigate, authorise, condition, prohibit or unwind foreign investments based on a range of security and public order criteria.
- The need to establish an Investment Screening Board to inform and advise the Minister in relation to the screening of specific foreign investments.
- The powers needed for the collection of necessary data from potential investors/investees to support any screening deemed necessary.
- The nature of any appeals mechanism to ensure transparency and certainty for investors, to the degree possible, whilst maintaining security and public order.
- The appropriate timelines for each stage of any screening process.
- Setting out any sanctions that may apply to those investors/investees failing to cooperate with the procedures required for an investment undergoing screening, or investors that breach or seek to circumvent determinations arising as a result of the screening or the conditions under which any screened investment might be approved.

## 2. Submissions

The Department of Business, Enterprise and Innovation welcomes submissions in general on this issue and, in particular, respondents are requested to address the specific questions at Section 4.

Respondents are requested to make their submissions in writing or by email. Submissions should be sent by email to [InvestmentScreening@dbei.gov.ie](mailto:InvestmentScreening@dbei.gov.ie) or posted to:

Investment Screening Unit  
 Department of Business, Enterprise and Innovation  
 23 Kildare Street  
 Dublin 2  
 D02 TD30

The deadline for receipt of submissions is **5pm on Friday, 22<sup>nd</sup> May 2020**.

### 3. Publication of Submissions

Respondents should be aware that all submissions will be placed in the public domain and published on the Department's website after the conclusion of the consultation process.

#### General Data Protection Regulation

The Department of Business, Enterprise and Innovation is subject to the provisions of the Regulation in relation to personal data collected by it.

Any personal information which you volunteer to this Department will be treated with the highest standards of security and confidentiality, in accordance with the Data Protection Act 2018.

Responses to the consultation may be made publicly available by the Department of Business, Enterprise and Innovation. Any material contained in your submission to the consultation which respondents do not wish to be made public should be clearly identified as confidential in their submission.

#### Freedom of Information Act 2014

Respondents should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on such a request.

### 4. Consultation Questions

- (i) Views on a proposal to introduce a national level Investment Screening mechanism for foreign direct investment in Ireland on the grounds of protecting security and public order.
- (ii) In the event of introducing a Screening Mechanism on a statutory basis, what role and powers should be vested in the Minister for Business, Enterprise and Innovation, including:
  - to assess/ investigate, authorise, apply conditions, prohibit or unwind investments;
  - to request and receive information from both the investor and the company being acquired.
  - to establish an Investment Screening Board to support the Minister in relation to decision making in the context of Investment Screening.

- (iii) What types of investment should be screened on security and public order grounds, having regard to the provision of the EU Regulation? For example:
- Should additional particular sectors or financial/turnover thresholds be set out which would automatically trigger screening?
  - Should certain investments be obliged to be automatically notified to the Minister by the investor based, for example, on the country of origin of the investment?
  - Would a system of mandatory notification of investments based on defined thresholds (or other criteria) be preferable to a system that either relies on voluntary notification or that empowers the Minister to screen any investment that he or she believes represents a threat to security and public order?<sup>3</sup>
  - In assessing whether an investment from a 3<sup>rd</sup> country might represent a risk, what measure or definition of “control” or “significant influence” might be applied to the acquiring party vis-à-vis the entity being acquired?
- (iv) What type of sanctions might be applied in relation to:
- Investors failing to provide the information necessary to conduct an adequate screening of a particular investment;
  - Investors failing to adhere to any conditions the Minister may impose in order to permit an investment to proceed;
  - Investors who attempt to circumvent or ignore a Ministerial order prohibiting a particular investment.
- (v) Any views or comments on any of the issues raised in Section 1 above.

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<sup>3</sup> For instance, a reliance on voluntary notification carries the risk that the Government may be unaware of transactions that could raise national security concerns; such a system might also create uncertainty for businesses in that they could not be certain about which transactions the Government may or may not be interested in. On the other hand, a voluntary regime could help to minimise deadweight loss and administrative burdens and could ensure that the majority of transactions that do not raise security or public order concerns are not held up unnecessarily by a notification process.