

FDI and Brexit: Shifting Sands

As Ireland **plots the next steps** on its FDI journey, it is caught in the crosswinds of both Brexit and COVID-19.

Before the COVID crisis hit, the grounds were already shifting on investment screening, with the EU Commission beginning to tilt towards a more protectionist approach. The pandemic resulted in a rush towards national self-sufficiency and brought into sharp focus the difficulties which countries encounter without control of the technology and manufacturing capabilities necessary to deal with a public health emergency.

When it comes to investment scrutiny, concepts of public order and security have traditionally been bound up with energy and communications infrastructure, defence and dual-use technologies. The Irish government's call for public submissions on a potential FDI screening regime comes at a time when other types of business, such as food distribution and pharmaceuticals, are being reclassified as essential to the life of a nation.

New EU FDI Screening Rules

It was against this backdrop that the EU Commission issued **Guidance to Member States** on 25 March. The guidance concerns foreign direct investment and free movement of capital from third countries, and the protection of the EU's strategic assets, ahead of the application of **Regulation (EU) 2019/452** (FDI Screening Regulation) on 11 October 2020. **The new regime** sets out rules through which investment ventures pursued within the EU by third countries (non-EU members) may be scrutinised with a view to maintaining public order and security.

Individual Member States retain discretion as to whether they implement a screening system but any such system must then meet basic criteria concerning confidentiality, transparency and the application of review timeframes. Thus far, 14 Member States have put in place a national FDI screening process. Currently, Ireland has no such screening regime but, along with member states in a similar position, is being urged by the Commission to establish one. In response, Ireland took its first steps in this direction by establishing a 'FDI Screening Unit' within the Department of Business alongside the **public consultation process** in April of this year. These first steps do not provide any great indication of what we will ultimately see as a new FDI regime in Ireland, and we will be watching the upcoming legislative process closely. A key practical point to watch will be whether the timeline for any new FDI regime will run in parallel or subsequently to the existing competition and media plurality timelines, where applicable. At present, the Irish 'media merger' review timeline only commences after conclusion of the Irish competition review timeline and this leads to considerable delay to affected transactions.

The FDI Screening Regulation enables the Commission to issue opinions and to screen investments targeting businesses supported by EU funding. It will be interesting to see how the Commission's own FDI-related opinions will influence screening policy in individual member states.

Post-Brexit divergence from UK?

There have been mixed signals from the UK as to the approach it will take to foreign investment post-Brexit. Until the transition period expires, the UK will continue to be bound by a framework of directives and regulations including EU Merger Regulations and FDI Screening Regulation.

While the British cabinet leans in favour of the free market, its government is pressing ahead with plans to introduce a new legal framework for future foreign investment in Britain's critical infrastructure. A 2018 'white paper' proposed to upgrade the UK government's powers "to scrutinise investments and address the risks that can arise from hostile parties acquiring ownership of, or control over, businesses or other entities and assets that have national security implications". The list of intended Bills published alongside the December 2019 Queen's Speech includes reference to the National Security and Investment Bill which will be the legal basis for these measures.

The UK's existing competition merger control regime, overseen by the Competition & Markets Authority, allows for public interest interventions on grounds consisting, broadly, of national security, plurality of the media and maintaining the stability of the UK financial system. The proposed new national security merger control regime would exist in parallel with, but separate to, that competition merger control regime. A 'Senior Minister' would be the key decision-maker. The measures will also target hostile parties attempting to circumvent the law by acquiring an asset that has national security implications, such as intellectual property, rather than acquiring the business itself.

So, for the time being at least, the EU and UK appear to be moving in a similar direction towards a more restrictive approach towards foreign direct investment.

Third Country Status

UK entities investing in EU businesses or assets which are deemed to be of strategic importance may, after the transition period expires and given its third party status, find after their investments subject to FDI review by the remaining EU member states and the Commission, in addition to pre-existing competition reviews.

Conversely, if the National Security and Investment Bill is enacted, UK industry involved in strategically important sectors, and seeking foreign investment, may face additional layers of governmental scrutiny applied to prospective investors.

Summary

The likely outcome of recent events will be an increased determination on the part of the EU and UK governments to guard strategic technological and manufacturing assets from acquisition or control by foreign countries, and a sharpening of their respective FDI review tools. Categories of industry classified as being of strategic importance will be expanded.

Future deals are likely to be assessed not only from a competition perspective, but also in terms of their potential consequences for national security. New review processes are likely to exist alongside, or overlapping with, existing merger review regimes. Experience demonstrates that new review processes tend to encounter 'teething problems' and to require refinement subsequently in order to avoid perceived 'under-regulation' or 'over-regulation'. For example, the Irish competition merger control thresholds were raised in 2019 from the level at which they were set in 2014 in order to address a concern of 'over-regulation'. Concerns about being seen as 'open for business' might give way to political pressure to protect vital sectors. New boundaries are being drawn under the shadow of COVID-19 and a changing world order.

Ireland's investor-friendly status has **long been recognised** and Brexit is likely to further enhance this position. The recently agreed draft programme for government pledges that the new administration will 'work to defend our existing foreign investment, attract new investment and increase our export capacity further.' This is very much an evolving situation which will continue to involve a delicate balancing act given the critical importance of FDI to Ireland and the related economic landscape.

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