Public Consultation on Investment Screening

22 May 2020

1. Introduction

1.1 The Competition and Consumer Protection Commission (CCPC) welcomes the opportunity to respond to the Department of Business, Enterprise and Innovation (BEI) 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 (FDI) into the European Union.

1.2 The CCPC is aware that Regulation (EU) 2019/452 (The Regulation) came into effect on 11 April 2019, and that its provisions will apply from 11 October 2020. 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[1].

1.3 The CCPC notes the questions in the consultation relating to:

- Whether an Investment Screening Mechanism should be introduced in Ireland
- The types of investment that should be screened
- The role and powers that should be vested in the Minister for Business, Enterprise and Innovation.

1.4 While matters of security and public order are outside the remit of the CCPC, a policy decision by Government to introduce an Investment Screening Mechanism may impact upon competition and/or consumer welfare. The CCPC's views are offered in this context generally and specifically, this submission will offer observations on the basis of the CCPC's experience of examining Mergers and Acquisitions (M&A) under the merger review regime, as contained in the Competition Act 2002, as amended.

1.5 The CCPC would welcome further engagement with BEI on any of the points made in this submission, should that be useful. The CCPC will also continue to engage with BEI as appropriate as the policy response for Investment Screening is being developed.

[1] The common framework set put in the Regulation is without prejudice to the sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests in accordance with Article 346 TFEU.

2. Introducing a Screening Mechanism on a statutory basis

2.1 The CCPC notes that the intention of the framework as set out in the Regulation is to screen foreign direct investments (FDI) to maintain or address risks to "security or public order" in a comprehensive manner. Recital (8) of the Regulation sets out that "the decision to set up a screening mechanism or screen a particular FDI remains the sole responsibility of the Member State concerned". Recital (8) also specifies that where a framework is implemented each Member State has "the flexibility to take into account their individual situations and national specificities".

2.2 The CCPC welcomes that a public consultation is being undertaken to obtain views on the most appropriate policy approach to give effect to the Regulation. The CCPC is of the view that any decision to introduce a national Investment Screening Mechanism (ISM) for FDI into Ireland should be evidence based and transparent. The current consultation is an important step in this regard.

2.3 The CCPC notes the policy context where Ireland has a highly globalised economy with foreign investment having a significant role in Irish business activity. Attracting and maintaining FDI represents a vital part of Ireland's economic strategy and it significantly contributes to commercial activity across the whole country[2]. It will be important that the risks to this strategy are carefully considered in considering the overall benefits of introducing an ISM.

2.4 As part of any appraisal on whether or not to introduce an ISM, it is important to also consider the potential impact its introduction could have on competition across the Irish economy. For example, if the introduction of a screening mechanism resulted in a reduction in FDI into the country this may have a knock on negative impact on competition and consumer welfare. For this reason, the CCPC is of the view that it is important that any statutory screening mechanism, if introduced, is designed in a manner that supports competition and maintains Ireland's position as an attractive destination for FDI.

[2] The latest CSO publication on FDI shows that in 2018 there were 383,000 people in FDI associated employment across Ireland. Figures accessed here: https://www.cso.ie/en/releasesandpublications/ep/p-fdi/foreigndirectinvestmentinireland2018/

3. Types of Investment included in an ISM

3.1 The CCPC notes and welcomes that views are being sought on what types of investment should be screened on "security and public order" grounds, having regard to the provisions of the Regulation. As above, this will allow for any subsequent decisions to be evidence based.

3.2 The CCPC notes Recital (8) of the Regulation, which states that the EU-wide framework envisaged for screening is intended to apply where an acquisition or control of a particular business, infrastructure or technology would create a risk to "security or public order".

3.3 Article 3 of the Regulation sets out minimum criteria for assessing FDI's effects on "security or public order" by way of a screening mechanism. Any screening mechanism must be transparent and non-discriminatory, and include timeframes, protections for commercially sensitive information and provision for "recourse" against decisions.

3.4 Article 4 of the Regulation provides for factors that may be taken into consideration in determining whether FDI is likely to affect "security or public order". The CCPC notes that it explicitly refers to areas of critical infrastructure (e.g. telecoms, energy, and water), technology (e.g. AI, robotics, semiconductors), defence and food security, as well as supply of critical inputs, amongst the factors to be considered when screening FDI.

3.5 This broad list above highlights the potential that the level of FDI falling under the definition of 'security and public order' could become significant. If an ISM is introduced in Ireland it will be important to avoid situations where that mechanism could be invoked to slow down or prevent a transaction for reasons that are not related to security or public order.

3.6 In addition, there has been much discussion about a more protectionist approach to industrial policy at a global and European level and FDI screening could be used as a vehicle to pursue this. Given the key role of FDI in Government strategy it will be important to carefully craft any screening mechanism to avoid unintended consequences.

3.7 However, the CCPC notes the requirement for any screening mechanism to clearly identify the areas that will be screened. In order to avoid uncertainty in the application and operation of an ISM, it will be important to set out clear parameters for what type of investment falls within notification requirements, the applicable timeframes for screening, and the ability to seek recourse against decisions[3]. It is likely to be the case that applying a more narrow definition of the types of investment to be included within the ISM will reduce the risks of unintended consequences.

3.8 In this regard the CCPC notes Recital (12) of the Regulation which directs Member States to establish a non-exhaustive "list of factors" that can be taken into consideration when determining whether a foreign direct investment is likely to affect "security or public order". Such a list could be used to maximise the transparency of a prospective screening mechanisms for investors who are considering making or have made foreign direct investments into Ireland[4].

[3] In this regard the CCPC notes in particular the content of Recital 15: 'It is appropriate to lay down the essential elements of the framework for the screening of foreign direct investments by a Member State to allow investors, the Commission and other Member States to understand how such investments are likely to be screened. Those elements should at least include timeframes for the screening and the possibility for foreign investors to seek recourse against screening decisions. Rules and procedures relating to screening mechanisms should be transparent and should not discriminate between third countries.'

[4] The CCPC notes in this regard that the Regulation will be retrospective to 10 April 2019.

4. Ministerial Powers

4.1 The CCPC notes that views are requested on what role and powers should be vested in the Minister for Business, Enterprise and Innovation in the event of introducing a Screening Mechanism on a statutory basis and what the process for screening should be.

4.2 Article 2 of the Regulation defines a screening mechanism to mean "an instrument of general application, such as a law or regulation, and accompanying administrative requirements". As above, if a decision is taken to introduce an ISM in Ireland it will be important that clear guidelines are provided to assist investors in comprehending the scope of the mechanism as well as the relevant powers to be vested in the Minister for Business, Enterprise and Innovation. In this regard Article 3 of the Regulation states that where an ISM is introduced, the rules and procedures related to the mechanism "shall set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules".

4.3 In this regard, the CCPC is of the view that to ensure the administrative burden is kept to a minimum, only information deemed necessary to facilitate a screening decision should be included. In addition, a clear legal basis for data collection, review and action will allow for the collection of the necessary information and also mitigate the risk of any subsequent legal challenge from economic operators.

4.4 While it is welcome that BEI has mentioned the existing regulatory regimes in the State, the CCPC suggests that consideration should be given to the interaction with, and sequencing between, any potential screening mechanism and the CCPC merger review process, as issues of uncertainty and confusion will otherwise arise. In this regard, the CCPC notes that Recital (36) of the Regulation states that the application of the Regulation should be without prejudice to the application of Article 21(4) of Regulation 139/2004 ('the Merger Regulation')[5]. Further, the CCPC notes that Article 6 of the Regulation,

[5] Recital 36 further states that the Regulation and Article 21(4) of Regulation (EC) No 139/2004 should be applied in a consistent manner. To the extent that the respective scope of application of those two regulations overlap, the grounds for screening set out in Article 1 of this Regulation and the notion of legitimate interests within the meaning of the third paragraph of Article 21(4) of Regulation (EC) No 139/2004 should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of Union law.

relating to the notification requirements of the cooperation mechanism, requires a Member State to endeavour to indicate to the European Commission and, where applicable, other Member States, whether it considers that FDI undergoing screening is likely to fall within the scope of the Merger Regulation.

4. 5 The CCPC also suggests that aspects of the media mergers regime may be worth considering as offering a template for any potential screening mechanism to be introduced in the State.

4. 6 In that context, it may be helpful to briefly outline the process and interaction between the competition and media plurality reviews. The media merger regime reflects the content of Article 21(4) of the Merger Regulation in that it allows for the legitimate interest of the plurality of the media to be invoked when assessing a merger or acquisition involving two or more undertakings where at least one of the undertakings carries on a media business in the State.

4. 7 Section 28B of the Competition Act 2002 (as inserted by section 74 of the Competition and Consumer Protection Act 2014) requires that a media merger must be notified to and approved by the CCPC regardless of whether the turnover thresholds for M&A are exceeded. In addition, a media merger must also be notified to the Minister of Communications, Climate Action and Environment for assessment of the proposed media merger's impact on the plurality of media in the State. The review processes do not run concurrently with the Ministerial review process commencing within 10 working days after the CCPC determination.

4. 8 Where a media merger cannot be approved by the Ministerial review process, following an Initial Investigation, it moves to a Full Investigation. The Broadcasting Authority of Ireland (BAI) then has 80 working days to review the media plurality issues arising from the merger and report to the Minister. Once the BAI report issues, the Minister has a further 20 working days to determine whether to approve the media merger or to prohibit the media merger.