

Ibec submission to the public consultation on investment screening - the transposition of the EU Regulation Establishing a Framework for Screening of Foreign Direct Investments into the EU

22 May 2020

Ibec welcomes the opportunity to comment on this consultation. Please find below our initial response on the topic. We look forward to further engagement and consultation with the Department of Business, Enterprise and Innovation on this very important strategic issue for Irish business.

[Question 1: 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.](#)

Ibec notes there are two primary elements to the Regulation:

- A. The mandatory establishment of a national contact point to represent Ireland in all aspects of the implementation of the Regulation and mandatory annual reporting on FDI into the country
- B. The option to introduce a national FDI screening mechanism

In this section we consider these elements.

A. The mandatory establishment of a national contact point to represent Ireland in all aspects of the implementation of the Regulation and mandatory annual reporting on FDI into the country

Ibec welcomes the designation of the Department of Business, Enterprise and Innovation as the national contact point for this Regulation. It is important that the government responsible for any investment screening mechanism works closely with business. In relation to the preparation of the mandatory annual report, the Regulation states that this report will be made ‘on the basis of information available to [the state]’. If an information gap is identified, Ibec is ready to support the Department in addressing this.

B. The option to introduce a national FDI screening mechanism

Ibec recalls that the Regulation was designed to address the specific concerns of a small group of EU member states. Ibec recognises the legitimate concerns expressed by these states in the context of their national experience.

Ibec recognises that investment screening is used by many governments around the world, including the USA, and increasingly in EU member states.

Investment screening is increasingly a feature of global trade policy. Nevertheless, Ibec believes that the introduction of FDI screening in Ireland must be given careful consideration.

Foreign direct investment has been a key driver of economic development in Ireland. It brings high skilled jobs to Ireland and creates conditions for the growth of indigenous eco-systems that support and compete with FDI companies. FDI comes from all over the world to a range of different sectors and industries in Ireland. The introduction of a screening mechanism will impact the investment decision process from the company perspective. It is critical that any national screening mechanism is carefully designed to maintain Ireland’s reputation as a location of choice for FDI.

Ibec supports openness, free trade and investment. We have concerns about the introduction of a screening mechanism in Ireland. Any FDI screening mechanism introduced must be ‘best in class’ and built on the below key principles so that it does not become a barrier to investment:

Efficiency: The Regulation sets down timelines for other member states and the Commission to comment on the proposed investment. These timelines must be met and streamlined to prevent unnecessary delays. An efficient appeals mechanism must also be allowed for in the timelines. Delays in decision making will endanger the flow of investment into Ireland, which has been a critical component of our business model.

Proportionality: The mechanism must be targeted, and all elements clearly defined. Any mechanism introduced in Ireland should be careful not to disrupt normal investment decision processes by businesses.

Transparency: The process should be transparent for the parties involved and decisions where an investment has been denied should be made publicly available. This will help to ensure trust and predictability in the system, avoiding the perception of randomness/arbitrariness.

Made to measure: There is enough flexibility in the Regulation to enable member states to design their own screening mechanism if they decide to. Therefore, it is vital that Ireland uses this flexibility and designs its screening mechanism in a manner that is appropriate to the Irish economic and security context.

Other factors to consider when designing the screening:

- A thorough review of screening mechanisms in place in other countries should be carried out to identify best practice.
- Screening is not needed to support the annual reporting requirement. Based on carefully designed and appropriate criteria, only a small number of investments should be caught by any screening mechanism.
- Globally there is a trend towards protectionism and the creation of restrictions/barriers to trade. For example, as a result of the Covid-19 pandemic there is focus on shortening supply chains. The introduction of a screening mechanism at this time may compound a difficult time for these sectors e.g. MedTech, food etc. Therefore, the introduction and operation of FDI screening must be balanced with the perception it creates of a move away from openness.

Question 2: 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.

In considering what powers should be vested in the Minister, consideration in the first instance should be made to the below:

- Screening of completed FDI should be avoided unless there is reason to believe that the FDI was completed on the basis of erroneous information or maladministration, following specific criteria.
- Companies submit a range of information to government in the context of transactions which might be useful in the screening process without the need to introduce a further reporting requirement on companies e.g. procurement rules, statistical contexts, securities legislation etc. A full assessment of this should be carried out across all government departments and agencies.
- The composition of an Investment Screening Board should include expertise relevant to the investment under review and national security and public order. It should include business expertise and knowledge of foreign investment processes. It must be a facilitator, ensuring timelines are met, with clear communication channels to the relevant stakeholders of the investment.
- Protection of commercially sensitive information must be ensured by the Department.
- An annual report on FDI screened should be published excluding commercially sensitive information.

Question 3: What types of investment should be screened on security and public order grounds, having regard to the provision of the EU Regulation?

A. Clear definitions for key concepts to avoid a negative impact on investment

Clarity for all stakeholders on the applicable definitions is critical to the smooth operation of a screening mechanism.ⁱ In transposition of the Regulation the Irish context must be clearly defined:

- Irish security and public order: Under the OECD Guidelines for Recipient Country Investment Policies Relating to National Securityⁱⁱ, each country has the right to determine what is necessary to protect its national security. The Guidelines state that this determination should be made through *rigorous risk assessment and that the relationship between the investment restrictions and the national security risk identified should be clear*. A clear definition of security and public order will prevent abuse of the screening mechanism and bring investor certainty.
- Defining what impact makes the investment a reviewable investment: For example, the Regulation suggests investments with an impact on critical infrastructure should be screened. Some sectors are already deemed critical infrastructure under sectoral legislation. The primary legislation must explicitly set out what kinds of investment trigger the screening mechanism.

B. Clear criteria for investment in scope:

As per the OECD Guidelines, investment in scope must be clearly and justifiably connected to the definition of security and public order in Ireland. In setting the criteria, the Government should consider the below:

- The Regulation sets out a non-exhaustive list of sectors that might be covered by a screening mechanism. This will vary by member state. What investments, in what sectors should be covered by an Irish screening mechanism is directly related to the definition of security and public order.
- Mandatory notification of investments from named countries would contravene WTO rules and could create the perception of protectionism and discrimination.
- The criteria for reviewing investments, per the Regulation, should be linked to the potential impact on security and public order not on financial or turnover thresholds.
- With regard to ownership and acquisition related policies, the Government should consider in full the recent [OECD report](#) on this, published in May 2020. This report concludes that if a government is considering the introduction of acquisition-and ownership-related mechanisms, an assessment of the risk exposure that needs to be managed is warranted. It also concludes that the design of such a feature would depend on a thorough risk assessment.
- Ibec would be happy to explore mandatory notification based on best practice and clear well-defined criteria.

Question 4: 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.

The efficient functioning of any screening mechanism will depend on the timely and constructive participation of all stakeholders; public and private. Ibec looks forward to further consultation on the sanctions matter once the role of all stakeholders is clearly defined.

ⁱ The Regulation grounds the definition of security and public order in Union law and the WTO GATS, in particular, Article XIV(a) and Article XIV bis.

ⁱⁱ 2009, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, 25/05/09 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372>, accessed on 22 May 2020