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Further Guidance Published on UK National Security and Investment Regime

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The UK government recently published its second edition of Market Guidance Notes on the National Security and Investment (NSI) regime, which includes new additions and amendments to the previously published guidance of 19 July 2022 (see the Cooley alert on the first edition of Market Guidance Notes). Like its predecessor, the guidance is based on the government's analysis of notifications received since the NSI regime came into force on 4 January 2022, as well as feedback from stakeholders. It reflects the government's willingness to respond to criticism regarding its processes and provides further evidence of the government's desire to engage with parties.

In particular, the new guidance includes additional information on the stages of the NSI assessment process, when to notify and the steps that parties facing financial distress can take in notifying deals, as well as further practical guidance on the stages of the NSI process and completing the notification forms. The updates are helpfully incorporated into the first edition guidance document, meaning that all of the information is usefully contained in one place.

Overall, the new guidance offers greater clarity regarding the operation of the NSI regime, which is to be welcomed. Below we summarise the key updates.

Summary

Transactions involving parties suffering material financial distress

The initial review period for NSI notifications is 30 working days from acceptance of the notification as complete by the Investment Security Unit (ISU), the body responsible for administering the regime. This can cause significant issues for parties facing financial distress, as notifiable transactions cannot be completed prior to ISU clearance, or they risk being declared void and/or the parties facing criminal or civil penalties.

The Market Guidance Notes provide guidance on the government's approach to parties facing material financial distress and the evidence that should be provided to the ISU. In particular, parties subject to the regime who are facing financial distress should notify the ISU as soon as possible, especially where the statutory timelines of the regime could exacerbate financial problems. While the government will consider what evidence of 'material financial distress' is appropriate on a case-by-case basis, analyses by external legal, restructuring and insolvency advisers and auditors in relation to the position of the company will typically be considered.

The Market Guidance Notes further clarify that if the company in distress is part of a larger corporate group, the government also will consider the parent company's ability to provide continued financial support. Parties also can provide evidence that funding options other than a sale or merger are not feasible or available.

In exceptional circumstances, where evidence of material financial distress gives rise to genuine urgency, it may be possible to expedite the process. The guidance contains helpful direction regarding evidence of 'urgent financial distress'.

Timing of a notification

The new guidance also confirms that a deal does not have to be signed for the parties to submit a notification to the ISU, and that the regime provides some flexibility to the parties in this respect. Generally, notifications should be made at the point at which the terms of the transaction are sufficiently stable to enable the government to assess whether it could lead to national security risks. The government would generally consider it appropriate to notify when there is 'good faith intention to proceed' – e.g., when there are agreed financing arrangements, agreed heads of terms or when a transaction has been considered at the board level or publicly announced.

However, the same guidance stresses that if a transaction is notified too early and the terms of the transaction subsequently change after it has been reviewed, this could count as a separate 'trigger event' (i.e., a separate transaction within scope of the regime), which may not be covered by the previously obtained clearance. Parties can update the ISU on nonmaterial changes to their planned arrangements and ask if a new notification is needed; however, responses to such requests may take time and parties are reminded to factor in sufficient time in their commercial timeline in case another notification is necessary.

To avoid complications, the Market Guidance Notes recommend that if parties decide to notify, the notification forms should state the progress of negotiations or commercial dealings. Depending on the circumstances, the ISU may require confirmation that a counterparty to the the transaction (for example, the seller) has been engaged and agrees that the the transaction is in contemplation. This may be particularly relevant where the arrangements appear to be fluid or where there are unusual circumstances surrounding the notification.

Uncertainty about whether a transaction is notifiable

The Market Guidance Notes also confirm that the ISU will provide parties with guidance as to whether the target's activities fall into one or more of the 17 sensitive areas of the economy that require mandatory notification, where there is 'significant uncertainty'. In such circumstances, parties should include as much detail as possible (including the names of the parties and their activities), a clear explanation of the uncertainty and any timing considerations the government should be aware of.

The Market Guidance Notes further clarify that, while the government will endeavour to be as helpful as possible, there will be circumstances in which it may not be possible or appropriate for the government to give a substantive response. In particular, the government is unlikely to comment on hypothetical scenarios as they may be misapplied to similar but substantially different real scenarios.

Guidance on stages of NSI assessment process

The updated Market Guidance Notes provide further helpful explanation on the various aspects of the NSI assessment process, including the use of interim orders, the process of issuing final orders and withdrawing applications.

Interestingly, the Market Guidance Notes provide for the first time insights into the ISU's engagement with third parties and clarify that this is done both through information requests and attendance notices (i.e., meeting requests). The guidance provides that parties and third parties may be asked to attend meetings either in person or virtually as part of the transaction review. Where the transaction has been 'called-in' for an 'in-depth' assessment, both information requests and attendance notices 'stop the clock', even when issued to third parties – with the timeline only restarting when the government is satisfied that the information provided has appropriately answered the questions posed.

The Market Guidance Notes also provide further details on when the ISU will engage and seek representations from the parties directly, including when the government is considering imposing a final order and when the government is considering imposing remedies. Parties may proactively approach the government about potential remedies, if they believe that a remedy may mitigate any potential national security concerns.

Guidance for completing a notification form

Finally, the Market Guidance Notes provide additional guidance on completing the notification form to ensure that a transaction is assessed without delay. One key clarification concerns the submission of sensitive information in a notification. The guidance sets out that parties intending to submit information that is classified above the UK "OFFICIAL" category should contact the ISU directly for advice on secure submission, rather than using the notification forms.

Outlook

This is the second set of additional updates to the notes published since the NSI regime came into force on 4 January 2022. The additional guidance provides valuable updates that offer businesses greater clarity, understanding and assurance regarding the UK government's approach to NSI notifications and the functioning of the NSI regime. Further insight can be expected when the government publishes the 2023 Annual Report, due

in the coming months.

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