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UK Government Introduces New Standalone Foreign Screening Regime

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On 11 November 2020, the UK Government published its long-awaited National Security and Investment Bill (**NSI Bill**). The NSI Bill introduces for the first time a new standalone regime for the screening of foreign investments in the UK on national security grounds and grants the UK Government extensive powers to "call in" transactions across all sectors of the economy, with no turnover or market share thresholds required. The NSI Bill is currently making its way through Parliament and is not expected to enter into force until early 2021. However, any transaction that closes on or after **12 November 2020** and raising national security concerns, could be called in for review once the NSI Bill is enacted. Given these broad retrospective "call-in" powers, investors considering transactions in the UK should now carefully consider the application of the new NSI Bill to their deals.

Key takeaways from the proposed new regime include:

- **Mandatory notification**: Companies investing in sectors considered "sensitive" to national security will be required to notify their investments in advance of closing. The UK Government is consulting until 6 January 2021 on the precise scope of the sectors and which activities in each sector should be included in the mandatory regime, but it is anticipated to cover transactions in **17 sectors,** including artificial intelligence, data infrastructure, communications and engineering biology. Failure to notify will carry heavy sanctions and if parties complete without clearance, the transaction will be legally void.
- **Voluntary notification**: For deals not covered by the mandatory regime, parties are required to voluntarily notify transactions that may be of interest from a national security perspective.
- **"Call-in" power**: The Secretary of State will have a broad power to "call-in" non-notified transactions **up to five years post-transaction** in cases where the Secretary of State reasonably suspects that there is, or could be, a risk to national security; this period is reduced to **six months** if the Secretary of State becomes aware of the transaction (e.g., through media coverage).
- **Retrospective application**: Due to concerns that transactions may be brought forward or accelerated in order to take place prior to commencement of the NSI Bill, under the current terms of the NSI Bill, **any transaction raising national security concerns that closes on or after 12 November 2020 but before the official entry into force of the NSI Bill**, could be "**called in" for review after the NSI Bill becomes law**. In deciding whether to "call-in" transactions, the draft Statement of Intent provides that the Secretary of State will have regard to the following risk factors: (i) target risk; (ii) trigger event risk; and (iii) acquirer risk. Businesses contemplating investing in companies active in the UK should now consider the application of the new NSI Bill to any new investments, in addition to the existing public interest grounds for intervention (see below).

Existing regime

Under the current regime, the Secretary of State can only intervene in transactions on specified "**public interest**" grounds, namely: (i) national security; (ii) media plurality; (iii) stability of the UK financial system; or (iv) the need to combat a public health emergency.

The UK Government may intervene under any of these "public interest" grounds in the context of a merger review proceeding, i.e., when it is established that:

- The target's UK annual turnover exceeds £70 million (approximately US $89 million); or
- As a result of the merger, a combined share of 25% or more in the supply or consumption of goods or services of a particular description in the UK (or in a substantial part of the UK) is created or enhanced.

To address national security concerns, lower thresholds exist in the following sensitive sectors: military and dual-

use, multi-purpose computing hardware, quantum technology, artificial intelligence, cryptographic authentication technology and advanced materials.[1]

Proposed regime

The UK Government has been considering changes to the existing regime for some time. It published a Green Paper on national security and investment in October 2017 and a White Paper in July 2018. Previous Cooley alerts on these topics can be found here and here.

While the proposed NSI Bill brings the UK closer to the foreign screening mechanisms of the US, Australia and some European jurisdictions (in particular Germany, France and Italy), the reach of the new regime is broader than what has been discussed in previous policy documents. For example, the introduction of a mandatory notification regime in specified sectors goes well beyond the voluntary system proposed in the 2018 White Paper. According to its Impact Assessment, the UK Government expects around **1,000–1,830 notifications per year**, which is a significant increase from the 200 notifications anticipated in the 2018 White Paper. Of these notifications, the UK Government expects to carry out 70 to 95 detailed reviews per year, which again is a significant increase from the 12 national security investigations launched since the current legislation came into force in 2002.

Mandatory notification

The UK Government has decided to introduce mandatory notification for some transactions in specified sectors where national security risks are more likely to arise. Transactions subject to mandatory notification must be notified and receive clearance from the Secretary of State before they can take place.

Under the NSI Bill, a transaction will be notifiable where it concerns the acquisition of votes or shares of 15% or more, or more than 25%, 50% or 75% in an entity, or where the acquisition of voting rights enables a person to secure or prevent the passing of any class of resolution governing the affairs of the company. The UK Government is currently consulting on the scope of sectors that will be subject to mandatory notification. The consultation will run for eight weeks (ending on 6 January 2021), but it is anticipated that it will cover the followings 17 sectors:

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Satellite and Space Technologies
- Computing Hardware
- Critical Suppliers to Government
- Critical Suppliers to the Emergency Services
- Cryptographic Authentication
- Data Infrastructure
- Transport
- Defence
- Energy
- Engineering Biology
- Military and Dual Use
- Quantum Technologies

As the UK Government is keen to ensure that mandatory notification requirements remain targeted on the areas where there is most risk, the NSI Bill includes a power to allow the UK Government to vary the acquisitions that are subject to the mandatory notification and/or exempt certain types of acquisitions. This will include the ability to add or remove sectors from the regime in response to changing risks.

Voluntary notifications and call-in powers

For all other sectors which fall outside the mandatory notification regime, there exists the possibility to voluntarily notify transactions that may be of interest from a national security perspective and which qualify as "trigger events". This includes the acquisition of:

- 25% or more, 50% or more, 75% or more of the votes or shares in a company;
- voting rights that enable a person to secure or prevent the passing of any class of resolution governing the affairs of the company;
- material influence over a company's policy; or
- a right or an interest in an asset giving the ability to use the asset or direct/control how the asset is used. Assets include land or moveable property, as well as intellectual property e.g., ideas, information or techniques that have an economic value (trade secrets, databases, etc.)

Under the NSI Bill, the UK Government will also have the power to "call-in" transactions that have not been notified and which have given rise, or may give rise, to a risk to national security. This power will apply up to **five years** post-completion (a period equivalent to the Italian, French and German regimes), which is reduced to **six months** if the UK Government becomes aware of the transaction (e.g., by way of media coverage).

In deciding whether to "call-in" transactions, the draft Statement of Intent provides that the Secretary of State will have regard to the following risk factors: (i) target risk; (ii) trigger event risk; and (iii) acquirer risk.

Due to concerns that transactions may be brought forward or accelerated in order to take place prior to commencement of the NSI Bill, this power will apply from 12 November 2020. Therefore, **any transaction raising national security concerns that closes on or after 12 November 2020 but before the official entry into force of the NSI Bill**, could be **"called in" for review after the NSI Bill becomes law**. In case the UK Government becomes aware of the deal prior to the NSI Bill's entry into force, the six months deadline will start running from the date of the NSI Bill's entry into force. Otherwise, if the UK Government becomes aware after the entry into force of the NSI Bill, the six months clock will start on the day it became aware, while the five years clock will start from the NSI Bill's commencement date. The UK Government has indicated that it is already willing to informally discuss deals that may raise national security concerns with companies.

Procedure

Once the NSI Bill is enacted, notifications should be made to a new **Investment Security Unit**, which will provide a single point of contact for businesses wishing to understand the NSI Bill and notify the UK Government about transactions. The UK Government will have **30 working days** from the date of acceptance of the notification to decide whether to clear a transaction or to call it in for more detailed review. If called in for a detailed review, the UK Government will then have a further **30 working days** (extendable by an additional 45 working days in exceptional circumstances). At the end of a detailed assessment, there will be three potential outcomes: (i) approval, (ii) approval subject to conditions mitigating the national security risks, and (iii) prohibition (including the unwinding of an already implemented merger). The UK Government will have a wide range of remedies at its disposal.

Sanctions for non-compliance

The NSI Bill provides for both civil and criminal sanctions for non-compliance. This includes fines of up to 5% of worldwide turnover or £10 million (approximately US $12 million), whichever is greater, and individuals could face up to five years' imprisonment. Transactions covered by the mandatory notification regime will be void if they complete without clearance.

The UK Government will also be able to impose a daily penalty to ensure compliance for breach of interim and final orders. Misleading information in a notification or in a response to a request for information will be sanctioned too.

Comment

While the NSI Bill is still subject to parliamentary approval and is not expected to enter into force until early 2021, given the UK Government's broad retrospective "call-in" powers once the NSI Bill is enacted, investors contemplating transactions in the UK should now carefully consider the application of the NSI Bill to their transactions. The "call-in" powers extend to all sectors of the economy, with no safe harbours or minimum turnover or share of supply thresholds, capturing a wide range of investments with a UK nexus.

Please get in touch if you would like to discuss any of these issues.

Notes

1. In those sectors, the UK Government would have public interest grounds to intervene if the target's annual UK turnover exceeds £1 million (approximately US $1.3 million), as opposed to £70 million (approximately US $89 million), or the 25% share of supply of test is met by the target alone, without the need to show an increment.

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