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Cooley Responds to Call for Evidence on Operation of the UK's National Security and Investment Regime

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On 13 November 2023, the UK government published a call for evidence on the scope and operation of the UK's National Security and Investment (NSI) regime, with the aim of making it as 'pro business' and 'pro investment' as possible. In this November 2023 Cooley alert, we summarised the key aspects of the consultation, which considers potential exemptions to the mandatory notification requirement and clarifications to the sectors in scope, as well as suggestions on how to increase communications and transparency throughout the process.

Based on our experience of advising on the application of the NSI regime, we recently submitted our response to the call for evidence. Below are some of our key observations and recommendations on how the regime could be improved.

Narrowing the regime – small garden, high fence approach

The current NSI regime casts a very wide net and captures a high volume of deals which raise no genuine national security concerns. In 2022 – 2023, for example, there were 866 notified transactions. Of these, more than 90% received clearance within 30 working days, and less than 2% resulted in final orders – i.e., prohibitions or remedial decisions (see our July 2023 alert on the NSI Annual Report 2022 – 2023).

In light of the expansive nature of the regime, we have suggested changes to scope to address the minority of deals that raise national security concerns, notably:

Exemption for internal reorganisations

We have recommended that internal reorganisations should be exempt from the mandatory notification requirement where the ultimate controlling entity remains the same. Internal reorganisations are generally carried out in order to achieve a specific purpose (unconnected to national security considerations) – such as preparing for the sale of part of a business, expanding into new product or geographic markets, or achieving certain tax objectives. In such instances, the ultimate controlling entity will typically remain the same, and so the restructuring should not present any national security concerns.

Clarify and narrow the sectors

In a mandatory filing regime, it is paramount that filing criteria are clear and unambiguous, especially where a failure to file can result in civil and criminal penalties. To avoid precautionary filings, which result in unnecessary costs to businesses and the government, we have recommended clarifying and narrowing the definitions in a number of sectors – notably, Advanced Materials, Artificial Intelligence, Synthetic Biology and Defence.

Pre-screening mechanism

Where significant uncertainty remains as to whether a transaction is notifiable, we have recommended that the government considers a new fast-track pre-screening mechanism similar to those which exist in foreign direct investment (FDI) regimes in other jurisdictions. Parties could present a short submission, which explains why a transaction is not caught by the NSI mandatory regime. Following a short review period, the Investment Screening Unit (ISU) could either confirm that the investment does not fall within scope or that a mandatory NSI filing is required.

More guidance on investor structures

In our experience, any follow-up questions from the government are often in connection with investor structure charts that are submitted as part of the notification. In order to minimise the back-and-forth – and therefore any potential delay to the clearance process – we would welcome more specific guidance from the government on the presentation of investor structures, particularly as it relates unincorporated entities (i.e., those without shareholders), such as funds and partnerships.

Increase transparency and operation of the regime

While we understand that the government has to balance transparency considerations with the need to protect UK national security, we believe that the following improvements could be made to make the review process smoother and more efficient for all involved parties:

More detailed reasoning in final orders

The NSI annual reports are a helpful source of information, yet they do not give clear insights into case-by-case decision-making – in particular, on how the government has assessed acquirer, target and control risk. We would therefore welcome more detailed justifications in final orders for the government's reasoning.

Better communication between the ISU and the parties

To allow parties to address potential concerns identified by the government, we would welcome more early engagement in the event that the government is considering either 'calling in' a case for further review and/or publishing a final order.

Fast-track procedure for certain deals

Additionally, or alternatively, to the above, we would recommend a fast-track procedure for low-value deals and/or pre-approved investors, whereby parties would not have to submit a full notification. We would recommend that such transactions are expedited and reviewed within a shorter time frame (e.g., 10 working days).

Improve the online portal

On several occasions, we have experienced technical issues within the government portal, particularly in relation to the firewall. This has made the process of uploading supporting documents and submitting notifications less than straightforward and significantly more time-consuming. We would therefore welcome a permanent solution to this recurring issue.

Next steps

The call for evidence closed on 15 January 2024. The government will now be reviewing the responses and may hold follow-up meetings with stakeholders who are willing to discuss their views in more detail. While the government is not currently considering any reforms to the regime that would require primary legislation, it is anticipated that a more detailed consultation on some of the amendments will likely follow later in the year.

Cooley trainee Olivia Anderson also contributed to this alert.

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