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The National Security and Investment Bill

Summary

In November, the UK Government announced a significant and wide-ranging package of reforms that, if adopted, will both recalibrate and expand its existing powers to assess and intervene in mergers and acquisitions on the grounds of national security.

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The proposed reforms are set out in the National Security and Investment Bill (the “Bill”) and contemplate the introduction of a new national security investment-screening regime that will operate alongside and in addition to the Competition and Markets Authority’s mergers framework under the Enterprise Act 2002.

A new Investment Security Unit (the “Unit”), which will sit within the Department for Business, Energy and Industrial Strategy, will be the point of contact for businesses with questions or wishing to notify the Government about transactions. The Unit will also coordinate cross-Government activity to identify, assess, and respond to national security risks arising through market activity, although decisions on exercising powers proposed under the Bill will ultimately be the responsibility of the Secretary of State.

It is not yet clear when the new regime will come into force. However, current indications are that it will be in the first six months of 2021. Whilst the Government will not seek to enforce its retroactive call-in power until the new regime is in force, certain transactions that took place from 12 November 2020 will be in scope of the retroactive reach of the regime, even though they took place prior to the regime coming into effect.

The Mandatory Notification Regime

Under the new regime, a mandatory pre-closing notification obligation will apply in respect of acquisitions of 15% or more of the voting rights or shares in an entity in certain sensitive key sectors (which are referred to as “notifiable acquisitions”). The entity does not need to be incorporated in the UK, but can fall within the regime if it carries on activities or supplies goods or services to persons in the UK.

The Government anticipates that the following 17 key sectors will be within scope of the mandatory notification regime: advanced materials; advanced robotics; artificial intelligence; civil nuclear; communications; computing hardware; critical suppliers to Government; critical suppliers to the emergency services; cryptographic authentication; data infrastructure; defence; energy; engineering biology; military and dual use; quantum technologies; satellite and space technologies; and transport.

A consultation is currently underway to determine which sectors and which parts of these sectors will be caught. In addition, there will be scope to amend and expand the categories of key sector in the future through secondary legislation, in response to new categories of risk arising.

After receiving a mandatory notification, the Unit will have 30 working days from receipt of the notice to decide whether to accept the notice. At the expiry of this period, the parties will be informed as to whether a call-in notice is to be issued or whether no further action will be taken.

The Bill contemplates that the Unit will prescribe the form and content that the mandatory notice must take in future regulation.

The Voluntary Notification Regime

A voluntary notification regime will run in parallel to the mandatory notification regime. It is designed to encourage those carrying out “trigger events” that fall outside of the mandatory regime to notify the Government, if the transaction could nonetheless give rise to national security concerns.

A trigger event is a transaction that falls within scope of the following prescribed categories:

- An acquisition of control which results in a holding of more than 25%, 50% or 75% retrospectively of the votes or shares in a qualifying entity (representing three different threshold categories of control);
- An acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the qualifying entity; and/or
- An acquisition of material influence over a qualifying entity's policy.

As well as the categories above, a trigger event will include the acquisition of a right or interest in, or in relation to, a qualifying asset, providing the ability to use the asset, or use it to a greater extent than prior to the acquisition; or to direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition.

The Unit will have 30 working days from when the voluntary notification was made either to reject the notice or to issue a call-in notice in relation to the trigger event. A notification may be rejected on the grounds that it does not meet the requirements of the Bill, in which case the parties will be asked to re-draft the notification. The Secretary of State may then decide not to issue a call-in notice, and the assessment will be complete and the transaction thus authorised.

The notification should state that a trigger event has taken place in relation to a qualifying entity or asset, or that arrangements are in progress which, if carried into effect, will result in a Trigger Event taking place in relation to a qualifying entity or asset. The Bill contemplates that the exact form and content of the notification will be set out by the Secretary of State in future regulation.

The Power to 'Call In' Acquisitions

Under the new regime, the Government will have the power to 'call in' acquisitions that are deemed to pose a threat to national security. The call-in mechanism will allow the Government to review non-notified transactions for a period of up to five years post-completion, which is reduced to six months, if the Government has become aware of the trigger event. Whilst separate from the CMA merger control regime, the Bill states that the Unit must consult the CMA before issuing any final orders.

In determining whether or not to call in a transaction, the Secretary of State will carry out a full assessment of the potential national security threat, taking account of:

- *The Target Risk*: including the target's activity and its exposure to trade secrets including databases, source codes, algorithms, and software
- *The Trigger Event Risk*: this will include an assessment of how the transaction would undermine national security
- *The Acquirer Risk*: this will include an assessment of the ultimate controlling entity

If the Government chooses to call in a transaction, it will then have 30 working days (with the possibility of an extension for an additional 45 working days) to undertake a national security assessment of the proposed transaction. Whilst the process is carried out, the Unit may issue an interim order which may include provisions dictating the actions which individuals involved in the transaction may take. The Secretary of State may choose to issue a final order either prohibiting or attaching conditions to a transaction.

The Government has provided some guidance on this in relation to transactions that are taking place now. From 12 November 2020, parties are invited to share information about a relevant Trigger Event with the Government by

messaging investment.screening@beis.gov.uk. An informal discussion on the matter may help with business planning with regards to the Government potentially exercising its call-in power in the future in respect of the transaction. This may provide some comfort to parties entering into transactions at this stage that could fall within scope of the call-in power before the new regime comes into effect and provide some steer as to the Government's attitude with respect to the proposed transaction. If relevant, specific advice should be sought as to the appropriate approach at this stage.

Sanctions for Non-Compliance

For mandatory notifications of share acquisitions, closing an acquisition without obtaining prior approval amounts to a civil and criminal offence, and carries fines of up to the higher of 5% of the party's global turnover or £10 million, imprisonment of individuals, and the non-notified transaction potentially being deemed to be void and therefore subject to remedies such as unwinding. In limited circumstances, the Government may choose to validate the closing of a non-notified mandatory notification transaction.

Government decisions under the regime will be subject to judicial review.