

November 12, 2020

## UK National Security and Investment Bill

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### UK Government Strengthens Powers to Intervene in Direct and Indirect Acquisitions of UK Companies, Assets and IP on National Security Grounds

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#### KEY TAKEAWAYS

The UK government has published a new National Security and Investment Bill (the “*Bill*”) that would implement a foreign investment regime comparable to CFIUS in the United States for the first time in the UK. The Bill is not yet law (it will not become law until it has been debated (and perhaps amended) and approved by the UK Parliament and received Royal Assent), but it nevertheless has immediate implications.

If the Bill is enacted without amendment, the Secretary of State for Business, Energy and Industrial Strategy (“*BEIS*”) will have the ability to retrospectively ‘call-in’ transactions completed on or after 12 November 2020 for up to 5 years (or up to 6 months after becoming aware of the transaction) and which the BEIS considers to have UK national security implications. The new regime will allow the BEIS to issue orders which could drastically impact the relevant transactions. Transactions which involve non-UK assets may be caught by the regime if those assets are used, for example, as part of a supply chain into the UK which has UK national security implications.

In addition, once it is enacted, the Bill will require mandatory notification to the BEIS of certain transactions involving acquirers in specified sectors (which are not yet specified but are expected to be more likely to have national security implications). If the transaction is completed without such notification, it will be void, and the relevant entity and directors risk criminal sanctions and civil fines of up to £10 million or 5% of worldwide turnover, whichever is greater. This is a significant change because the UK national security regime historically has not required mandatory reporting.

A voluntary notification regime will also apply for any transactions where a party considers that there might be a national security concern and does not want to run the risk of the transaction being ‘called-in’ subsequently by the BEIS.

Buyers, sellers, investment managers and their advisers will need to consider this new regime when planning the timetable and structure of transactions. There are no safe harbours, and no minimum revenue or turnover thresholds. Given the wide range of transactions that will be subject to review, the UK government will have broad jurisdiction to review covered investment transactions in the UK or with a UK nexus. If a transaction is proposed in a sensitive sector, then the transaction must be notified to the BEIS prior to completion, and even if the transaction is not in a sensitive sector (or if it is not clear if it is) the parties will need to consider whether to notify voluntarily, and the transaction documents and timetable will need to account for the notification process. For example, where a non-UK controlled group includes a UK company which operates in a sensitive sector, or indeed a non-UK company which controls any assets that serve sensitive sectors in the UK, any change of control of that group may require notification. It will be particularly important to consider the potential implications of the UK review process in the context of large multi-national transactions, where investors may need to navigate the overlapping jurisdiction of various different national security reviews.

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### SUMMARY

On 11 November 2020, the UK government published its long-awaited National Security and Investment Bill.<sup>1</sup> The Bill introduces measures which strengthen the UK government's powers to review and intervene in acquisitions of UK assets (companies, land, moveable assets and intellectual property) on national security grounds. Under the Bill, investors and businesses acquiring UK assets will be required to notify to a newly established dedicated government unit, the Investment Security Unit, all transactions in certain designated sensitive sectors, which are likely to include, among others, communications, defence, energy, technology, key suppliers to emergency services, and transport. It is expected that under the new regime, the review process for most transactions will take 30 working days or less. Transactions outside these sensitive sectors can be notified voluntarily. Any transaction which has not been notified and that the BEIS becomes aware of within 5 years of being completed (if completed on or after 12 November 2020) can be 'called-in' by the BEIS for review.

The new Bill also introduces significant civil and criminal sanctions for failing to notify a notifiable transaction, including fines of up to 5% of worldwide turnover or, if greater, £10 million, and imprisonment of up to 5 years.

The UK lags behind other governments in reviewing foreign investment for national security implications. The US created CFIUS by Executive Order of the US President in 1975, for example, and the UK's European neighbours have also brought in foreign investment regimes in recent years. The UK's current foreign investment regime can be found in the Enterprise Act 2002, but these authorities are limited and since the Enterprise Act 2002 has been in force, the government has intervened in only 12 transactions on national security grounds. A Green Paper<sup>2</sup> published in 2017 stated that the UK's existing regime was inadequate for the national security risks that the country was facing. In 2018, a White Paper<sup>3</sup> was issued setting out proposed reform. However, Brexit and the Covid-19 pandemic slowed the passage of this reform. The Bill expands on the ideas presented in the White Paper. It also borrows ideas used in other jurisdictions in recent years to expand investment screening processes,

such as in the United States, Australia, Canada, Germany, France and Italy. The new legislation, once passed into law, will apply to the whole of the UK.

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## NATIONAL SECURITY AND INVESTMENT BILL: PROPOSED REGIME

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### I. MANDATORY NOTIFICATION

Under the new regime, investors will be required to notify the new Investment Security Unit (which will be a part of the BEIS), of certain proposed transactions involving UK entities (or, potentially, subject to regulations being passed, relevant assets) falling within certain sensitive sectors. The government expects that these sensitive sectors will include some or all of: (1) Civil Nuclear, (2) Communications, (3) Data Infrastructure, (4) Defence, (5) Energy, (6) Transport, (7) Artificial Intelligence, (8) Autonomous Robotics, (9) Computing Hardware, (10) Cryptographic Authentication, (11) Advanced Materials, (12) Quantum Technologies, (13) Engineering Biology, (14) Critical Suppliers to Government, (15) Critical Suppliers to the Emergency Services, (16) Military or Dual-Use Technologies, and (17) Satellite and Space Technologies.

The government is conducting a separate consultation<sup>4</sup> to determine which types of transactions within the 17 sensitive sectors will be covered by the new mandatory notification regime and which specific parts of these sectors will be affected. Under the Bill, a transaction will be notifiable where it concerns (1) the acquisition of 15% or more of the votes or shares in a qualifying entity (where the acquirer previously held less than 15%), (2) the acquisition of more than 25%, 50% or 75% or more of the votes or shares in a qualifying entity, and (3) the acquisition of voting rights that (alone or in combination with others) enable or prevent the passage of any class of resolution governing the affairs of the entity.

The Bill is very broad in the type of transactions covered by the regime. For example, where a non-UK controlled group includes a 15% holding in a UK company which operates in a sensitive sector, or indeed a non-UK company which controls any assets that serve sensitive sectors in the UK, any change of control of that group may be caught by the new regime under the Bill. The Bill will therefore have much broader application than simply to UK inbound M&A activity and will need to be considered carefully in relation to any cross-border transaction that has a connection to sensitive sectors in the UK, or could otherwise potentially impact the UK's national security.

Following the notification of a transaction, the BEIS will have a 30-working day (maximum) preliminary screening period to review the notification, though it will reject the notification if it does not comply with the relevant requirements or if it does not contain sufficient information. At the end of this period, the BEIS will decide whether to allow the transaction to proceed or 'call-in' the transaction, i.e., to conduct a further, in-depth investigation on national security grounds. The in-depth investigation may take a further 30 working days, extendable by another 45 working days if necessary (and potentially longer if such extension can be agreed between the BEIS and the acquirer). At the end of this review, the BEIS can either permit the transaction to go ahead (by issuing a 'final notification'), or issue a final order, which may contain any measures the BEIS believes to be required to protect UK national security. The

final order could include requirements to do or not to do particular things, appoint a specified person to supervise certain activities and any consequential or incidental provisions. The final order may also require parties not to disclose its contents.

Transactions covered by the mandatory notification regime which are carried out without clearance, or which are completed otherwise than in accordance with a final order, will be legally void in the UK. Any person who has effected such a transaction may be liable to criminal and/or civil sanctions including prison for up to 5 years and a fine of up to the greater of £10 million or 5% of worldwide turnover. However, such a void transaction can be retrospectively notified and, if approved, would no longer be void (though this would not remove the sanctions from those who breached the relevant notification or completion obligations in the first place).

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## II. 'CALL IN' & VOLUNTARY NOTIFICATIONS: TRIGGER EVENTS

The cornerstone of the Bill is the power given to the BEIS to 'call-in' transactions which have national security implications for review. This power can be exercised up to 5 years after a 'trigger event', or within 6 months of the BEIS becoming aware of the 'trigger event', whichever is earlier. For transactions which completed on or after 12 November 2020, the 5-year period begins on the date the Bill becomes law.

The mandatory notification regime is one way that the BEIS will become aware of these 'trigger events'. However, where transactions are not mandatorily notifiable, the Bill has an alternative, voluntary, notification regime where an acquirer, seller or even the entity concerned may notify the BEIS of a 'trigger event'. This could be done to obtain certainty that there will not be a subsequent 'call-in' of a particular transaction, for example, because once the relevant notification has been dealt with, the BEIS no longer has a 'call-in' right. Once notified, the procedure is the same as for a mandatory notification.

A 'trigger event' occurs in relation to an entity or an asset (including land, tangible moveable property and (covering intellectual property) any idea, information, or technique with industrial, commercial or other economic value), where an acquirer has acquired, or will acquire, (1) more than 25% or 50%, or 75% or more, of the votes or shares in a qualifying entity, (2) voting rights that enable or prevent the passage of any class of resolution governing the affairs of a qualifying entity, (3) a material influence over a qualifying entity's policy, or (4) in respect of an asset, the use or control of a qualifying asset, or a greater right to direct such use or control. The 'trigger events' apply to direct and indirect holdings, for example where a relevant threshold is reached by virtue of an entity in which a person has a majority shareholding (or other form of control). The Bill further specifies that where two or more persons hold interests or rights jointly, each of them will be treated as holding the full interest, rather than a proportion each. This also applies to joint arrangements, where holders of interests or rights agree to exercise all or substantially all rights conferred by their respective rights or interests in a way that is pre-determined. Further, connected persons, including a group of undertakings, and persons who share a common purpose in relation to an asset, will be treated as each holding the combined interests or rights on an aggregated basis.

Entering into an agreement or arrangement that enables a person to do something in the future that would result in a 'trigger event', may also be caught by the new regime. This will depend on the circumstances and how likely it is in practice that the relevant person will do something, such as taking control over an asset, that would result in a 'trigger event'. Taking security over shares or assets in the ordinary course is specifically excluded from the regime and will not constitute a 'trigger event', unless the rights attached to the shares or assets held by way of security (other than the right to exercise the security to preserve its value, or to realise it), are exercisable only in accordance with the security holder's instructions. However, should that security need to be enforced, the situation may be different and, depending on the relevant circumstances and identity of the security holder or any subsequent acquirer, could lead to a 'trigger event', and thus the potential need to notify the relevant acquisition of control at that point, or give rise to a call-in' right for the BEIS. Further, rights exercisable by an administrator or by creditors while an entity is in relevant insolvency proceedings (including administration and proceedings under insolvency laws of another country) are specifically excluded from constituting a 'trigger event' under the Bill.

Under the new regime, non-UK assets are treated as qualifying assets if they are used in connection with activities carried on in the UK or in connection with the supply of goods and services to persons in the UK. Therefore, transactions involving assets situated outside the UK and, for example, used as part of the supply of goods into the UK, may be caught by the regime and 'called in' by the BEIS on national security grounds. Further, non-UK entities are qualifying entities if they either carry on activities in the UK or supply goods or services to persons in the UK.

In contrast to the government's current national security review powers under the Enterprise Act 2002, the new regime does not include any minimum turnover or share of supply thresholds.

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### III. CHANGES FROM THE CURRENT REGIME AND TRANSITIONAL PERIOD

The government's existing national security regime under the Enterprise Act 2002 will continue to apply while the Bill remains subject to Parliamentary approval. As such, while the 'call-in' powers described above refer back to 12 November 2020, the new regime, including the actual use of 'call-in' powers and the associated notification regimes and sanctions, will not become effective until the Bill is passed into law.

Through the establishment of the Investment Security Unit, the new regime separates the national security assessment from the UK's merger control analysis, such that the UK Competition and Markets Authority ("CMA") will no longer be involved in the assessment of national security risk. Relevant transactions can be effectively scrutinised by the CMA in parallel to security assessments under the new regime in accordance with the Bill. The Bill amends section 243 of Part 9 of the Enterprise Act 2002 to remove the restriction on UK public authorities, including the CMA, from disclosing to overseas public authorities information obtained through exercising merger control functions and the Bill also gives the BEIS the power to direct the CMA to take certain steps when necessary on the grounds of national security.

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The government has advised that until the new regime comes into force, it will offer informal advice and encourages businesses to contact the BEIS concerning relevant transactions and possible 'trigger events'.

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### ENDNOTES

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- 1 See <https://services.parliament.uk/Bills/2019-21/nationalsecurityandinvestment.html>.
- 2 See <https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review>.
- 3 See <https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms>.
- 4 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934326/nsi-mandatory-notification-sectors-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934326/nsi-mandatory-notification-sectors-consultation.pdf).

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