National Security and Investment Bill: a new frontier for scrutiny of investment in the UK - overview

On 11 November 2020 the UK Government published its ground-breaking **National Security and Investment Bill** (**Bill**). The Bill will drastically expand the Government's powers to scrutinise investment on national security grounds and will require advance notification and clearance of many transactions in numerous sectors. The far-reaching scope of the new regime and the resulting administrative burden and transaction risk will inevitably have a significant impact on acquirers looking to invest in the UK in these sectors.

Key features of the new regime are:

- **Mandatory notification**: transactions involving targets in 17 identified "sensitive" sectors will require UK Government approval prior to closing; otherwise they will be void. Notification must be made by the acquirer. Points to note are:
  - **sensitive sectors**: civil nuclear, communications, defence, data infrastructure, energy, transport, AI, autonomous robotics, computing hardware, cryptographic authentication, advanced materials, quantum technologies, engineering biology, military or dual-use technologies, satellite and space technologies and critical suppliers to the Government and emergency services. Precise definitions for the sectors/types of sector entity that could fall within the mandatory regime remain to be finalised: consultation is ongoing until 6 January.
  - **applicable transactions**: these are acquisitions of 15% or more of the votes/shares in a target (note that this threshold was removed from the final Act – see our **update alert**); or an increase in a holding of votes/shares to more than 25%, more than 50% or to 75% or above; or which allow the acquirer to enable or prevent passage of any class of resolution governing the affairs of the target.
  - **loans and security**: providing loans to entities in these sectors is not intended to require notification, but enforcement of share security is likely to require mandatory notification. Although the Government expects to intervene rarely in loans, namely when an actual acquisition of control is taking place, lenders will need to assess upfront, as well as prior to enforcement, the implications of the regime for their security package. The timeframe for enforcement may be impacted, and an intervention may result in unexpected remedies, with the make-up of the lender group potentially being critical to the outcome. The impact of the new regime may affect the availability of certain funding sources.
  - **asset acquisitions**: these will not require notification but may fall with the scope of the voluntary regime.

- **'Call-in' power** and **voluntary notifications** for an extremely wide range of transactions across all sectors of the economy. Notification may be submitted by the acquirer, the seller or the relevant entity. Points to note are:
  - **scope**: includes minority acquisitions, mere asset acquisitions, IP licences, loans, conditional acquisitions, future and options. While the Government only expects intervention when an actual acquisition of control will take place (eg when a lender seizes collateral), parties will need to consider both upfront and at the time of the relevant acquisition how the regime may impact relevant arrangements, particularly in the sensitive sectors.
  - **financing arrangements**: parties may need to consider whether financing arrangements, combined with the make-up of (and changes to) the lender group, could be a trigger event outside the security enforcement context. This will depend on the scope of the lenders' control/influence over their borrower

or its assets, with the nature of the borrower's activities influencing the risk of any potential trigger event being called in. This may need particular consideration in projects in the sensitive sectors.
  - **asset acquisitions**: if the assets are closely related to "core activities" (primarily within the sensitive areas) acquisitions are more likely to be called in.

- In a departure from the UK's existing national security regime, for both mandatory notification and the 'call-in' power there are no turnover or market share thresholds (the target need only carry on activities or supply customers in the UK).

- **Call in for events occurring after commencement:** Once the Government becomes aware of a trigger event it will have six months to call it in, subject to an overall five year limitation period from the trigger event occurring.

- **Call in for events occurring before commencement:** The call-in power will apply retrospectively to any relevant transaction that has not completed before 12 November 2020, subject to an overall five-year limitation period from the date of commencement of the relevant part of the Act. This period is reduced to six months from commencement where the Government has been made aware of the relevant transaction prior to that date. After commencement, once the Government becomes aware of a trigger event in that period, it will have six months to call it in (in line with events occurring after commencement).

- Although this retrospective call-in power cannot be exercised until the Bill has been enacted, the parties may need to consider whether to **engage with the Government** to understand the risk of a retrospective call-in from that date and to benefit from the reduced call-in period. In this context the Government has said that it welcomes informal representations about transactions which could be in scope of the new regime and that it "may" provide advice to assist in business planning. It also does not expect many transactions to be affected by this retrospective call-in power.

- On implementation of the new regime, **notifications** will be made via an online portal to a new **Investment Security Unit**, which will sit within the Department for Business, Energy and Industrial Strategy (**BEIS**). The Government's intention is that the review form will be relatively short, but the information to be provided is not yet clear, pending publication of notification regulations. The ultimate decision-maker will be the Secretary of State for BEIS. Decisions will be challengeable on judicial review grounds. The Secretary of State will have a maximum of 30 working days to decide whether to clear a transaction or to call it in for a more detailed review. If the Secretary of State reasonably suspects a risk to national security, BEIS will conduct a detailed review lasting a further 30 working days (with up to an additional 45 working days, or more if a 'voluntary period' is agreed with the acquirer).

- As is the case under the existing UK national security regime, the Government will be able to impose **remedies** and even **prohibit** transactions. It will also have the power to impose **interim orders** to halt or reverse any integration and, in anticipated transactions, to order that completion does not take place.

- The Bill sets out civil and criminal **sanctions** for non-compliance with the regime. Fines of up to 5% of global turnover or £10 million (whichever is greater) can be imposed on acquirers. Individuals face imprisonment of up to five years. And transactions subject to the mandatory notification requirement will be void if they take place without clearance.

- A transaction may undergo **parallel reviews** in the UK – on both competition grounds (by the CMA) and national security grounds (by the Government). The Bill gives the Secretary of State the power to direct the

CMA to take, or not take, action under the merger control regime in relation to the transaction. This effectively means that the national security issues can ‘trump’ competition concerns.

The **Impact Assessment** for the Bill estimates up to an enormous 2,200 ‘early engagements’ with government, resulting in 1,000-1,830 notifications each year. Of these, it expects 70-95 ‘call-ins’ for a detailed review, and around 10 remedies decisions. It remains to be seen how accurate these predictions are and if the resources allocated to the new screening regime will be sufficient to cope with actual numbers.

We are closely tracking progress of the Bill and will be providing further updates on developments.

Please get in touch with your usual Allen & Overy contact if you would like to discuss the implications of the new regime for your business.

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