DATE FOR THE DIARY: UK GOVERNMENT ANNOUNCES LAUNCH DATE OF THE NEW NATIONAL SECURITY SCREENING REGIME

On 20 July 2021, the UK Government announced that the long-expected National Security and Investment Act (the "Act"), which introduces a new national security screening regime in the UK, will fully come into force on 4 January 2022.

It also published four pieces of guidance on the new regime, a revised draft statement explaining when the Government intends to exercise its call in powers (the **"Draft Call In Statement"**) and a revised draft list of the seventeen sensitive sectors that will fall under the mandatory notification regime.

The various pieces of guidance cover: (i) how businesses should prepare for the Act (which largely builds on previous Government factsheets and publications), with additional guidance for the higher education and research-intensive sectors; (ii) the extra-territorial application of the Act; and (iii) how the new national security regime will interact with existing regulatory requirements.

For detail on the substance of the new national security regime please see our previous briefing and subsequent update on changes to the trigger events for the mandatory regime.

WHAT'S NEW AND WHAT'S BEEN MADE CLEARER?

Global ambitions - the extra-territorial application of the Act - and implications for third parties

The new guidance provides detail on when a foreign entity or asset will (and likely won't) be deemed to have a connection with the UK for the purposes of the Government's call in powers. For example, while a parent entity overseeing the activities of a subsidiary that carries on business in the UK would likely be caught, an entity that buys goods or services from UK-based suppliers (with no other UK nexus) likely wouldn't be.[1]

The examples provided in the guidance illustrate the very broad reach of the new regime – not just beyond the borders of the UK, but also beyond the immediate parties to the transactions being screened. Even a company that is not involved in a deal being screened could be subject to an interim or final order by the Government requiring it to take action to address perceived national security concerns. For example, the Government could call in an acquisition by overseas Company A (no UK operations) of a 75% stake in overseas Company B (no activities in the UK but exports critical components to Company C, a UK company working in a highly sensitive area). The guidance indicates that because Company C is located in the UK, the Government could order remedial actions to be taken by that company – such as requiring Company C to put in place additional security checks if it continues to purchase from Company B. Even businesses that aren't party to deals being screened therefore need to be alive to the possibility of being affected by the regime.

The Government can also use its powers under the Act to request information or gather evidence from foreign (and domestic) persons in certain circumstances by issuing information and attendance notices. Such powers may be exercised if a person carries on a business in the UK, even if they are not directly involved in a deal that's being screened.[2]

[1] While the guidance indicates that the UK nexus test for the mandatory regime will be narrower than the applicable test for the call in powers (such that an entity will not be sufficiently connected with the UK just by virtue of supplying goods or services to persons in the UK), it is not yet clear what the precise nexus test will be for transactions falling within the mandatory regime. It is expected however that a UK nexus will be present if an entity performs an activity in the UK listed in the definitions of the seventeen sensitive sectors (yet to be formally published).

[2] The Government can also request information and gather evidence from: (i) UK nationals; (ii) individuals ordinarily resident in the UK; (iii) bodies incorporated or constituted under the law of any part of the UK; and (iv) those that have acquired, or are in the process of or contemplating acquiring, a qualifying entity or qualifying asset.

Watch out for corporate restructurings

The guidance makes it clear that steps that are part of a corporate restructuring or reorganisation will fall within the scope of the new regime if the requirements of the Act are satisfied, despite the ultimate owner of the acquired entity remaining the same before and after the acquisition. This illustrates the very broad scope of the regime: businesses should be alert to the possibility of internal restructurings needing a mandatory notification (if a transferee entity is active in a sensitive sector) or (if not) being called in for review.

Material influence - the devil we know

The guidance clarifies that when assessing whether an acquirer has or will have material influence over the policy of a target entity,[3] the Government will look to the existing guidance under the UK merger control regime on the meaning of that term as far as is appropriate. This clarification will allow businesses to assess the likelihood of a transaction being called in by reference to existing and established principles that are familiar to UK competition practitioners, although those practitioners will caution that what amounts to material influence in the merger control context is not always particularly clear-cut. The guidance also makes it clear that the material influence trigger event will not apply where the acquirer already has material influence over the target.

HOW THE CALL IN POWER WILL BE USED: THE "SENSITIVE SEVENTEEN"

The Government has also launched a public consultation relating to the updated Draft Call In Statement.[4] Comments on the Draft Call In Statement are being sought until 30 August 2021.

The key change is that the Draft Call in Statement now states that the call in power is most likely to be used for transactions in, or related to, the seventeen sensitive sectors (i.e. sectors in which acquisitions of entities would require mandatory notification). This would include asset transactions, which aren't subject to mandatory notification (although the guidance notes that asset transactions are expected to be rarely called in). This welcome update simplifies the Government's previously proposed approach of dividing the economy into three broad areas, each with a different likelihood of being called in.[5] The Draft Call in Statement also reaffirms the Government's position that it will look at the target risk, acquirer risk and control risk (previously called the "*trigger event risk*") of a transaction when deciding whether to call in a transaction for review – meaning the degree of risk to national security posed by each of the target, the acquirer, and the nature of the deal.

WHAT'S NEXT?

The announcement of the Act's commencement date has been long awaited since it was introduced into and then adopted by Parliament in November 2020 and April 2021 respectively. It finally introduces a degree of certainty to ongoing transactions: any deals in a mandatory sector that are expected to complete on or after 4 January 2022 will need to be notified and receive clearance before closing.

The guidance, the first published since the Act received Royal Assent, forms part of a broader package of guidance to be released before the new regime commences. Next in line, it is expected that guidance on the mandatory notification sectors will be released this autumn, which will supplement the definitions of the mandatory sectors (the revised draft version of which was recently published following targeted engagement with stakeholders to refine the activities in scope). The Draft Call in Statement on when the Government intends to exercise its call in powers will be finalised following the end of the consultation period in August.

> *"This government has been clear all along: we are open to foreign investment, but we will not tolerate those who wish to threaten our national security."*
>
> Business Minister Lord Callanan, 20 July 2021

[3] The acquisition of material influence over the policy of a target entity is a trigger event for the purposes of the Government's call in power. It is not however a trigger event for asset-only transactions or transactions engaging the mandatory regime.

[4] Previous versions of the Draft Call in Statement have been referred to as the "Statement of Policy Intent" or the "Statement on the use of the call-in power".

[5] In the previous Statement of Policy Intent, the economy was divided up into: (i) core areas; (ii) core activities; and (iii) the wider economy. National security concerns were likely to arise in the core areas and core activities within the core areas. Trigger events in the remaining areas of the economy were considered less likely to pose national security concerns.

While the new guidance may confirm investors' concerns about how far-reaching the Act is in its application, the Government has been at pains to emphasise that it considers the new regime to be proportionate to the risks, and that it will in fact be more efficient and provide more certainty than the Government's existing public interest intervention powers. The Government's message is that the UK is open for business, with the new regime giving investors "*additional certainty and clarity as the UK enshrines its status as a global champion of free trade and investment*". Whether that "additional certainty and clarity" will outweigh the undeniable additional administrative burden brought by the new regime will be seen in the months and years to come after 4 January 2022.

CONTACT

LISA WRIGHT
PARTNER
T:+44 (0) 207 090 3548
T: +32 (0)2 737 9453
E: lisa.wright@slaughterandmay.com

CHRISTIAN BONEY
PARTNER
T: +44 (0) 207 090 5329
E: christian.boney@slaughterandmay.com

TINA ZHUO
SENIOR COUNSEL
T:+44 (0) 207 090 4312
E: tina.zhuo@slaughterandmay.com

POPPY SMITH
ASSOCIATE
T:+44 (0) 207 090 4263
E: poppy.smith@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650