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National Security and Investment Bill

What you need to know now about the UK's proposed new M&A screening powers

On 11 November 2020, the UK Government published its much-anticipated National Security and Investment Bill (NS&I Bill), creating new powers to scrutinise, impose remedies on, or even block, M&A transactions on the basis of national security considerations.

Given the balance that the UK must strike with staying open for global business in a post-Brexit world, the Bill may well face some opposition and modifications in its journey through Parliament before coming into force.

This briefing summarises the key implications of the NS&I Bill, and what it means for investors - starting from today.

Speed-read:

- Mandatory notification in certain sensitive sectors, and prohibition on closing before approval or else the deal is void
- £10 million fine and/or five years' imprisonment for breach of mandatory filing requirement
- Voluntary notification in all other sectors, but Government can "call in" deals for five years post-closing
- Extends to acquisitions of non-UK companies and assets if they carry on UK activities, and applies to all investors (not just foreign investors)
- Retrospective application: if passed, it will apply from today - 12 November 2020, although will not catch deals closed before this date

The NS&I Bill is the culmination of several years of an increasingly robust approach to foreign investment from successive Conservative governments. Proposals for a new national security screening regime were first published in mid-2018 (discussed in this briefing); the Bill as published yesterday goes beyond those initial proposals in some important respects.

Most notably, it creates a mandatory notification regime in specified sensitive "core" sectors - the precise list of which is subject to public consultation – in which the Government considers that national security concerns are most likely to arise. Investors in these sectors must receive Government approval before completing their deals. The penalties foreseen for closing a deal in one of these sectors without Government approval are severe: up to five years imprisonment, and fines of up to £10 million for individuals, or the higher of £10 million or 5% of global turnover for companies – and the deal itself will be legally void.

This is a major shift from the Government's position in 2018, when it envisaged a wholly voluntary regime – it has pointed to "sweeping technological, economic and geopolitical changes in recent years" to justify the new mandatory requirement.

All sectors of the economy are within scope of the regime, with no turnover or market share thresholds, although outside of the "core" sector list the notification requirement is voluntary. However, investors are encouraged to notify voluntarily if their deal raises national security considerations.

In a similar manner to the UK merger control regime, the Government will have the power to "call in" transactions that are not notified voluntarily but that it considers merit scrutiny – although unlike merger control, where the Competition and Markets Authority (CMA) can call in a deal up to four months from closing, the Government could intervene on national security grounds to examine a deal in a voluntary notification sector up to five years after it completes. Although at face value that five year deadline might appear to create a long shadow of uncertainty for investors, the Government's call in power can only be used for six months after it becomes aware of the deal. In the mandatory notification sectors, the five year deadline does not apply: if parties fail to notify a deal that is subject to mandatory notification, the Government can call it in whenever it is discovered (unless it completes between now and when the Bill is passed, in which case the call in deadline is five years, or six months from the Government becoming aware).

The types of transactions caught by the regime are wider than under most merger control regimes: the mandatory notification requirement captures acquisitions resulting in shareholdings of 15% or more (with the Government then

deciding whether the acquisition gives rise to "material influence" - the test mirroring that in the UK merger control regime), or shareholdings of 25% or more regardless of whether there is material influence, whereas the voluntary regime is triggered by acquisitions resulting in shareholdings of 25% or more, or of a right or interest in an asset that results in an ability to use or control that asset.

The Bill gives the Government the power to impose such remedies as it considers necessary to protect national security - including blocking a deal outright, as well as conditions such as limiting the amount of shares an investor is permitted to acquire, putting access controls on sensitive or commercial information, or limiting access to certain operational sites - and it can also issue interim orders during the course of its review, for example, to prevent any change to the status quo until its final decision.

Proposed mandatory notification sectors:	
Civil nuclear	Computing hardware
Communications	Cryptographic authentication
Data infrastructure	Advanced materials
Defence	Military or dual-use tech
Energy	Satellite and space tech
Transport	Critical suppliers to Govt
Artificial intelligence	Quantum technologies
Autonomous robotics	Engineering biology
Critical suppliers to the emergency services	

Beyond foreign investment alone

Importantly, the NS&I Bill does not create a blanket foreign direct investment screening regime for the UK. It allows the Government to intervene only in cases that pose a risk to national security; not, for example, in cases of foreign investment in the UK that pose other political or economic concerns, such as retention of UK jobs.

> // Hostile actors should be in no doubt – there is no back door into the UK //
>
> Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy

However, the regime set out in the NS&I Bill is not limited to investment by foreign investors (although the Government expects that will be its focus), and nor is it restricted to investments in UK companies or assets - it has global aspirations.

In contrast to many foreign investment screening regimes around the world, the Bill catches investment in both UK companies and non-UK companies, provided that the latter carry on activities in the UK or otherwise supply goods or services to people in the UK. The voluntary regime also captures investment in assets, including land, property, and even "ideas, information or techniques which have industrial, commercial or other economic value" - which the Bill envisages including algorithms, source code, formulae and software. Even land or property located outside of the UK may be caught, if it is used in connection with activities in the UK.

For example, a US investor purchasing 15% of a US company which has a subsidiary active in the energy sector in the UK, would, under the Bill, be required to submit a mandatory notification and refrain from completing until it had received clearance from the Government.

What does this mean for investors?

Although the Government is at pains to note that the regime is intended to be "slicker and quicker", in complex cases the review periods are potentially lengthy and uncertain. Once it has received a notification, the Government will have 30 working days to decide whether to call in the deal for a more detailed investigation. If it does, there is a further 30 working day review period, which can be extended by a further 45 working days, which can then be extended indefinitely if agreed with the investor – with the timetable automatically paused if the Government issues an information request or requests attendance by a witness. The NS&I Bill also allows the Government to override the UK merger control regime - it can direct the CMA to do, or not do, anything for the purpose of addressing a risk to national security.

However, now is not the time for prospective investors to seek to rush through deals before the Bill is passed by Parliament: unusually, if the Bill is passed, the new rules will have retrospective effect, applying to all transactions taking place from today - 12 November 2020.

That includes deals in the mandatory notification sectors - notwithstanding that the precise list of sectors is up for public consultation until 6 January 2021 and may change between now and the Bill passing. Investors in those sectors would be well advised to include an appropriate condition precedent in their deal documentation, starting from today. Deals in mandatory sectors that have already signed but not yet completed will be subject to a mandatory notification requirement once the Bill passes. Investors with live deals that are expected to complete in the period between today and the Bill passing could be faced with being called in up to five years after closing – so are encouraged to make the Government aware of their deals as early as possible to limit that call in period to six months.

For complete deal certainty, investors in voluntary notification sectors whose deals may pose national

security concerns should also consider making the Government aware of their deals - which would again limit its call in power to six months, rather than five years. The Department for Business, Energy and Industrial Strategy has already launched dedicated email and telephone contacts, to encourage investors to engage now.

Investors may be encouraged to approach the Government as early as possible given the fact that the Government intends to publish information only at the final decision stage, and usually only in relation to deals where final remedies (including blocking orders) are imposed - meaning that Government approval can be sought and granted without any publicity (unless the parties themselves have disclosure obligations).

What next?

Under the UK's pre-existing rules in the Enterprise Act 2002, the UK Government could only intervene in deals that fall within the UK or EU merger control rules, on certain specific public interest grounds - one of which was national security. Those powers will continue to apply while the NS&I Bill progresses through Parliament, although - once passed - the public interest intervention ground of national security will be removed, as will the lower turnover and share of supply intervention thresholds that were introduced for deals involving military or dual use goods, computing hardware, quantum technologies, artificial intelligence, cryptographic authentication technologies and advanced materials (see our briefing here). The other pre-existing intervention grounds of media plurality, financial stability and (recently introduced in response to the COVID-19 pandemic) public health, will remain.

The Government expects that between 1,000 and 1,800 deals each year will be reviewed under the NS&I Bill powers (up from its expectation of 200 per year at the time of the 2018 consultation) - of which 75 to 90 will be subject to a detailed review, and 10 will require remedies. Even that relatively small estimate of remedies cases per year is a stark contrast to the UK's current track record on intervening in deals on security grounds: in the 18 years since the Enterprise Act intervention regime was introduced in 2002, there have been just 12 interventions on the basis of national security.

> // Government will never stand in the way of genuine overseas investment //
>
> Government response to consultation on the proposed legislative reforms

The Government faces a difficult balancing act: with the impending end of the Brexit transition period and no trade deal yet agreed, it is essential that the UK is seen in the global marketplace as being open for business. Announcing the NS&I Bill, the Government was at pains to emphasise that it wants to keep the UK an attractive destination for foreign direct investment - pointing to similar moves towards tighter FDI screening regimes in the US and Australia, and the Prime Minister's recent announcement of the creation of the Office for Investment, which is tasked with landing high value investment opportunities. It seems inevitable, however, that, if passed without amendment, the NS&I Bill powers risk being seen as a significant hurdle for potential investors into the UK.

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