

New UK Rules for Reviewing Foreign Direct Investment

December 17, 2020

In November 2020, the UK Government introduced the National Security and Investment Bill (the “Bill”). Subject to the passing through UK Parliament, the Bill is expected to become law in early 2021, ushering in a Committee on Foreign Investment in the United States (CFIUS)-style regime for the UK Government to scrutinise foreign investment. The Bill gives the Secretary of State for Business, Energy and Industrial Strategy (BEIS) powers to screen business transactions where BEIS reasonably suspects there is, or could be, a risk to national security. The provisions of the Bill would cover the whole of the UK and will also apply to certain transactions that involve the UK. Once passed, the Bill would come into effect from 12 November 2020. As such, non-UK investors will need to be mindful of the proposed reforms given that the UK Government will have retroactive enforcement powers in respect of transactions that have occurred following the introduction of the Bill.

Trigger Events

BEIS will be able to scrutinise certain acquisitions of control by issuing a ‘call-in notice’, if such acquisitions constitute a ‘trigger event’ and that ‘trigger event’ has given rise to, or may give rise to, a national security risk. The Bill defines ‘trigger events’ as follows:

- 1) in respect of a ‘qualifying entity’,
 - (a) an acquisition of more than 25, 50 or 75 percent of the voting rights or shares in such entity (or where the acquirer would be able to pass or block any class of resolution governing the entity’s affairs);
 - (b) where a person increases their shareholding or voting rights from less than 15 percent to 15 percent or more in such entity; or
 - (c) where the acquisition results in a person being able to materially influence the policy of such entity, and
- 2) in respect of a ‘qualifying asset’, where a person is able to use, or direct the use of, the relevant asset (subject to certain exceptions).

The Bill broadly defines a ‘qualifying entity’ as any entity (whether or not incorporated) other than an individual. The definition of a ‘qualifying asset’ is equally broad, including assets such as land, tangible moveable property and intellectual property (such as trade secrets, databases, source code and software), which have industrial, commercial or other economic value.

Mandatory or Voluntary Notification?

The Bill imposes a mandatory notification regime for acquisitions of qualifying entities in specific sectors. The sectors will be confirmed by way of secondary legislation once the Bill becomes law; however, the UK Government’s ‘Statement of Policy Intent’ currently lists 17 proposed sectors, including advanced materials, advanced robotics, artificial intelligence, communications, data infrastructure, energy, satellite and space technologies and transport.

Acquisitions covered by the mandatory notification regime must be notified by the acquirer and receive clearance from BEIS before they can be completed. There is no time limit to BEIS's ability to call-in a transaction that was subject to the mandatory notification regime.

In the case of an auction process comprising of multiple potential acquirers, the UK Government currently envisages that a mandatory notification would be submitted at the point that a single acquirer is identified as the qualifying entity. However, the parties involved in an auction that could be caught by the regime should engage in informal discussions with BEIS early on in the process.

Where there is no mandatory requirement to notify, the Bill will create a voluntary notification system so that parties may notify BEIS upon the occurrence of a trigger event which could be of concern to national security. The voluntary regime applies to all economic sectors and has a lower threshold for determining whether a trigger event has occurred (such as simply whether an acquisition results in 'material influence'). Investors should also be mindful that BEIS may issue a call-in notice in respect of a trigger event, whether or not there has been a notification, up to five years after a trigger event took place (reduced to six months once BEIS has become aware of the transaction), so long as the relevant period does not reach back before the introduction of the Bill.

Asset acquisitions will not be subject to the mandatory notification regime but are likely to be called-in if, for example, the target land is proximate to a sensitive site or the relevant assets are integral to a 'core area' entity's activities.

National Security Assessment

Once a notification has been made to BEIS under the mandatory or voluntary regime, BEIS will have 30 working days to decide whether to issue a call-in notice. The UK Government's 'Statement of Policy Intent' details three risk factors that BEIS will have to consider when exercising the call-in power:

- 1) **the target risk:** the nature of the target and whether it is in an area of the economy where the government considers risks more likely to arise;
- 2) **the trigger event risk:** the type and level of control being acquired and how this could be used in practice; and
- 3) **the acquirer risk:** the extent to which the acquirer raises national security concerns, which will in turn be assessed, amongst other things, by considering the following factors:
 - (a) those in ultimate control of the acquiring entity;
 - (b) the track record of those people in relation to other acquisitions or holdings;
 - (c) whether the acquirer is in control of other entities within the sector or owns significant holdings within a "core" area of the economy; and
 - (d) any relevant criminal offences or known affiliations of any parties directly involved in the transaction.

When considering the *acquirer risk*, the UK Government has indicated that there will be no presumption that state-owned entities, sovereign wealth funds or other entities affiliated with foreign states are more likely to pose a national security risk than other entities.

Where a call-in notice is issued, an initial 30-working-day assessment period is triggered, during which BEIS will review the transaction and impose remedies if necessary. If there is a national security concern and further investigation is required, BEIS may unilaterally extend the initial period by an additional 45 working days (further extensions may be agreed between the parties if required).

BEIS will have wide information gathering powers, including a requirement for witnesses, if it deems this proportionate in making an assessment of the national security risks of the relevant transaction.

During its review, BEIS may issue an interim order to, amongst other things, prevent parties from completing a transaction.

Enforcement Powers

If, following an assessment, BEIS determines that a risk to national security has arisen, or would arise from a trigger event, it will impose necessary and proportionate remedies in a final order. A final order may:

- 1) prohibit the transaction from completing or unwind the transaction if it has already occurred (if, for example, the transaction was not notified under the voluntary regime and later called in);
- 2) require a person to do, or not to do, particular things;
- 3) insert certain structural and oversight features, such as step-in rights; or
- 4) limit access to certain information to persons with the requisite security clearances.

Sanctions for Non-Compliance

Failure to comply with the new regime (including any information requests), or a breach of any final order, may result in fines of up to 5 percent of worldwide turnover or £10 million (whichever is higher) and up to five years imprisonment.

Investors should be aware that transactions covered by the mandatory regime and which are concluded without clearance will be void and of no legal effect.

CONTACTS

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