

Foreign Investment Screening

United Kingdom

The UK is in the process of introducing a new more extensive national security regime. The National Security and Investment Bill, published on November 11, 2020, became the National Security and Investment Act on April 29, 2021 after receiving Royal Assent and will enter into force on January 4, 2022. This will replace the UK's existing national security regime under which "relevant merger situations" subject to antitrust review by the Competition and Markets Authority (CMA) can be reviewed for national security concerns.

A much greater number of transactions will be reviewed for national security concerns under the new regime given this captures a broader range of types of transactions than the current regime, and includes a new mandatory notification requirement for certain transactions. Relevant transactions that complete on or after November 12, 2020 can also be called in for a retrospective review when the new regime commences. Parties should therefore already be considering the potential application of the new regime to their transactions, as well as the current regime it replaces.

Current Regime

Under the current regime, 17 transactions have been reviewed or notified for review on national security grounds since 2003. Five of those 17 reviews have been during 2021, indicating the increased sensitivity in this area which appears to have led to the introduction of the new regime, despite historically low levels of reviews.

A number of short-term reforms have been implemented in recent years to make national security reviews easier for transactions in certain sectors pending the longer-term reforms introduced by the new regime. Changes effective from July 21, 2020 reduced the thresholds for a national security review for mergers involving parties active in artificial intelligence, cryptographic authentication technology and advanced materials, replicating changes implemented in 2018 regarding military and dual-use items, computing hardware and quantum technology. A national security review is possible if the target is active in the relevant sector and has UK turnover exceeding £1 million or a UK "share of supply" of at least 25 percent – considerably lower than the thresholds that generally apply (£70 million UK turnover or a 25 percent share of supply with an increment).

Effective from June 23, 2020, an additional public interest consideration was also added to the UK merger control regime, enabling mergers to be reviewed and possibly remedied or even blocked if there are serious concerns that the deal threatens the UK's ability to combat or mitigate a

public health emergency. This reflected the Government's concern that its ability to deal with a public health emergency may be undermined if businesses with critical capabilities become subject to foreign control during the COVID-19 pandemic. Examples included vaccine research companies, personal protective equipment manufacturers, internet service providers and food supply chain companies.

New Regime

Under the new regime, certain acquisitions of entities active in 17 "sensitive" sectors will require mandatory notification and clearance before being implemented. Other types of transactions (including acquisitions of assets and IP) will also be subject to voluntary notification and could be called in for review if not notified.

Notification Requirements

Mandatory notification will be required for certain "trigger events" – the acquisition of more than 25 percent, more than 50 percent, or 75 percent or more of votes or shares in a qualifying entity active in one of 17 specified sectors¹, or the acquisition of voting rights enabling or preventing the passage of any class of resolution governing the affairs of such an entity.

It had also been proposed that an acquisition of 15 percent or more of voting rights or shares in a relevant entity would require mandatory notification – not amounting to a trigger event in itself but requiring notification to assess whether a trigger event would take place. However, the proposed 15 percent threshold was removed before the Act became law, so such transactions will no longer fall within the mandatory regime.

¹ The sectors are: (a) Advanced Materials; (b) Advanced Robotics; (c) Artificial Intelligence; (d) Civil Nuclear; (e) Communications; (f) Computing Hardware; (g) Critical Suppliers to Government; (h) Critical Suppliers to the Emergency Services; (i) Cryptographic Authentication; (j) Data Infrastructure; (k) Defence; (l) Energy; (m) Military and Dual Use; (n) Quantum Technologies; (o) Satellite and Space Technologies; (p) Synthetic Biology (formerly Engineering Biology); and (q) Transport.

Other trigger events subject to voluntary notification (and which could be called in for review even if not notified) are the acquisition of material influence over a qualifying entity or the acquisition of a right or interest in, or in relation to, a qualifying asset (e.g. land, ideas, IP, algorithms) providing the ability to use or control the asset (either entirely or to a greater extent).

Review Procedures

Notified transactions will be subject to an initial assessment lasting up to 30 working days, and then either cleared or called in for a full national security assessment. A full assessment will take another 30 working days, extendable by a further 45 working days and any additional period the parties agree.

Problematic transactions may be subject to conditions, or blocked as a last resort. There will also be significant sanctions for non-compliance with the new regime, including turnover-based fines, criminal liability and the risk of transactions subject to mandatory notification being void.

Entry into Force

Although the new regime will not be fully in force until January 4, 2022, trigger events occurring on or after November 12, 2020 may be called in for a retrospective review once the new regime commences. It may therefore already be appropriate to contact the Department for Business, Energy and Industrial Strategy (BEIS) regarding relevant transactions.

Parties currently planning or entering into relevant transactions where a trigger event will occur on or after January 4, 2022 should also assess whether a mandatory notification will be required or a voluntary notification may be advisable under the new regime before their transaction completes.

Comment

Much of the benefit of the new regime may rest in the greater deterrent effect of a more prominent, standalone regime – plus the ability to scrutinize acquisitions of assets/entities falling short of a business (which the current regime does not allow). The new regime will also give the UK Government much greater visibility over transactions raising potential concerns – BEIS believes around 1,000 to 1,830 transactions will be notified each year (although we think the number could be even higher given the broad scope).

For further information on the National Security and Investment Act, including a decision tree to help identify transactions falling within the new regime, see [here](#).

By Ian Giles, Caroline Thomas, and Mark Daniels.