



HOW A NEW GOVERNMENT BILL COULD IMPACT FOREIGN INVESTMENT AND M&A ACTIVITY

The Government has proposed a National Security and Investment Bill (NSIB) to control foreign investment in the sectors and infrastructure critical to Britain's national security.

Although the Bill was expected, its scope and thresholds are much broader than anticipated, and it has the potential to impact many future and ongoing mergers and investments. In addition there are proposed controls which may be applied retrospectively to any deal that closes on or after the date the Bill was published – 11 November 2020.

01 WHY DO I NEED TO KNOW ABOUT THIS?

The Bill is based around mandatory and voluntary pre-closing notifications on deals. Mandatory notifications apply to transactions in the 17 sectors that the Government deems are security-sensitive (see below).

Voluntary notifications are for trigger events, e.g. mergers and acquisitions, which parties may consider are security sensitive. There's also a 'call-in' system where the Government can review transactions that have not been notified, but which it believes could be security-sensitive, up to five years after completion.

02 WHICH ARE THE SECURITY-SENSITIVE SECTORS?

The 17 key sectors affected are:

- advanced materials
- advanced robotics
- artificial intelligence
- civil nuclear
- communications
- computing hardware
- critical suppliers to Government
- critical suppliers to the emergency services
- cryptographic authentication
- data infrastructure
- defence
- energy
- engineering biology
- military and dual use technologies
- quantum technologies
- satellite and space technologies
- transport.

03 WHICH COUNTRIES AND TRANSACTIONS ARE AFFECTED?

In theory, any deal that falls into one of the 17 sectors above can be reviewed, irrespective of its size, the identity or nationality of the acquirer, and whether the acquirer has gained its stake by investment or acquisition. In practice, it will concern acquirers that are thought most likely to pose risks to UK national security (irrespective of their country of origin) or owe allegiance to hostile states or organisations.

04

WHICH TRANSACTIONS WILL REQUIRE MANDATORY NOTIFICATION?

There will be no minimum turnover level or value in relation to the target business. Nor does the target need to have a UK subsidiary or assets – just to be undertaking what the Government deems are relevant activities in the UK.

Notification will be determined by these ‘trigger events’:

- the acquirer gains control of the entity if they hold voting rights or shares that increase from: 25% or less to more than 25%; 50% or less to more than 50%; or less than 75% to 75% or more;

- the acquirer obtains a right or interest in the entity, and the percentage of shares or voting rights they hold increases from less than 15% to 15% or more; or
- the acquirer obtains voting rights that allow it to secure or veto any corporate resolution governing the entity.

Even acquiring as little as 15% of minority shares or a small transaction that takes an investor over one of the above thresholds, could trigger mandatory notification. The thresholds are arranged so that phased acquisition using several transactions will still be a trigger event.

05

WHAT DOES THE VOLUNTARY NOTIFICATION SYSTEM ENTAIL?

The Bill also proposes a voluntary notification system for parties to notify a transaction or acquisition that might impact national security. In this instance, the acquirer only needs to have gained ‘material influence’ over the entity, which could occur after a relatively modest acquisition.

It appears voluntary notification will not just apply to the 17 key sectors, but to any sector – meaning notification may be needed for almost all transactions involving foreign investment.

06

HOW DOES THE RETROSPECTIVE ASPECT WORK?

The Bill would allow the Government to review or ‘call-in’ any transaction which could have been voluntarily notifiable, up to five years after it took place. This is a considerably longer period than required by many other countries and the EU.

However, the call-in cannot be issued more than six months after the Secretary of State was made aware of the trigger event.

There is no limit set on retrospectively reviewing transactions which would have required mandatory notification under the new Bill, and the Government can take action at any time.

07

WHAT ABOUT TRANSACTIONS IN PROGRESS NOW?

Clearly deals can’t be notified now, but once the Bill is passed the Government can choose to review any transaction from the date the Bill was published. The Government can be approached for informal guidance until the Bill comes into force; once it has, a new Investment Security Unit (within the BEIS) will provide a single point of contact.

08

WHAT HAPPENS WHEN YOU NOTIFY A TRANSACTION?

If a transaction is notified or the Government decides to review it, they will have 30 working days (possibly extended to 45) to assess whether or not it can be cleared.

09

WHAT ARE THE CONTROLS AND PENALTIES?

A transaction will either be approved subject to conditions to prevent or mitigate a national security risk; or prohibited – which means unravelling it, if it has already completed.

While a notifiable acquisition or trigger event is being assessed, the Secretary of State can use a wide range of powers to gather evidence and impose interim measures to prevent activities which might pose a perceived national security risk.

As well as prohibition, there will be other remedial powers, such as access conditions relating to use of technology or a physical site; restricting confidential information or operational management roles to people with UK security clearance; and requiring UK staff in key roles at sensitive sites.

Failing to comply with a mandatory notification requirement could result in imprisonment for up to five years, a fine up to 5% of worldwide turnover or £10m, whichever is the greater, and the transaction will become legally void.

Appeals regarding civil penalties and costs will be through the High Court (of the Court of Session in Scotland), while other decisions will be subject to judicial review.

10

WHAT IS THE TIMELINE?

Responses to consultation on the definition of affected activities will close on 6 January 2021. The Bill is expected to be passed early in 2021.

11

WHAT IS THE ANTICIPATED IMPACT?

It is likely to be considerable, given the broad range of transactions that could fall within the 17 key sectors, and the Government's new five year retrospective ability to review and act on transactions not requiring mandatory notification.

Investors are now likely to err on the side of caution, opting for voluntary notification to prevent potential future penalties. Despite the Government's apparent commitment to a quick 30 day turnaround, the sheer volume of work compared to current levels may well lead to delays. It anticipates up to 1,800 transactions may need to be notified each year; currently the CMA reviews about 60.

12

WILL THIS BILL DETER FOREIGN INVESTMENT?

The Government emphasises that isn't the intention; its aim is to address foreign investments that may not be in the interests of national security.

13

WHAT SHOULD YOU DO?

Review ongoing and impending transactions involving foreign investment, and check whether they fall into the Government's 17 security-sensitive sectors requiring mandatory notification.

Also consider, if the foreign investment is outside these key sectors, whether it might still meet the criteria for

voluntary notification as described above. There could be a benefit in opting for voluntary notification in order to avoid future potential problems – although there's a risk that might delay the deal or deter your investors.

Your foreign investors should be made aware of the legislation if it's likely to affect them, so they have the opportunity to apply for clearance now.

If you would like further advice on the NSIB and how it could affect you, please get in touch.