

CLIENT ALERT

# UK Government Publishes Draft Bill for New National Security and Investment Review Regime

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On 11 November 2020, the UK Government introduced the National Security and Investment Bill (the **NSI Bill**) to modernise and strengthen the UK's powers to investigate and intervene in investor activity that could impact the UK's national security (the **New NSI Regime**). The New NSI Regime significantly broadens the UK Government's powers to scrutinise investments with a potential impact on the UK's national security interests, by creating a regime similar to the U.S. Committee on Foreign Investment in the United States (**CFIUS**) regime; please see our client briefing [here](#) for an overview of the CFIUS regime for investments in U.S. business operations. Unlike CFIUS, importantly, the New NSI Regime is not limited to *foreign* investors but instead covers all investments in businesses and assets which may impact the national security of the UK.

The New NSI Regime will replace a number of temporary and more limited measures adopted by the UK Government in 2018 and 2020, which lowered the UK merger control thresholds in relation to six sensitive sectors from a national security perspective (see our client alert [here](#)). The New NSI Regime does not however affect the existing regime for special public interest reviews under the Enterprise Act 2002 in relation to media plurality, financial stability and public health emergency considerations, which will continue to apply.

Key points to note include the following:

- The NSI Bill is expected to become effective in early 2021 and has retrospective effect, i.e. it will apply to transactions entered into from 12 November 2020 onwards which have not completed by the commencement

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date of the NSI Bill. Companies therefore need to assess the potential application of the New NSI Regime to transactions with a UK dimension from now on.

- Once the NSI Bill has become effective, it will introduce a mandatory notification regime for investments which involve the acquisition of shareholdings (or equivalent voting rights) of 15% or more (with further mandatory notifications required for transactions which move the shareholding across different bands, i.e. above 25%, 50% and 75%) which fall into certain specified industry sectors. The current NSI Bill contains 17 specified sectors. This list may be amended from time to time.
- The current specified sectors, which remain subject to consultation until 6 January 2021, are advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, critical suppliers to emergency services, cryptographic authentication, data infrastructure, defence, energy, engineering biology, military and dual-use, quantum technologies, satellite and space technologies, and transport.
- There are no transaction size or turnover thresholds under the mandatory notification regime and a transaction subject to the mandatory notification regime must not be completed until it has been cleared. Failure to make a mandatory notification voids the transaction under UK law. In addition, breaches of the mandatory regime may lead to the imposition of civil and criminal penalties for companies and implicated individuals, including fines of up to 5% of worldwide turnover or £10 million – whichever is greater – and imprisonment of up to five years.
- The New NSI Regime applies to transactions involving a UK incorporated entity and transactions where a non-UK incorporated entity carries on activities in the UK or supplies goods or services to persons in the UK. Potential investors in international businesses will therefore need to consider the New NSI Regime even if the target does not have a UK-incorporated group company.
- The review timetable envisages an initial 30 working day screening period. At the end of the screening period, if the Secretary of State decides to issue a “call-in” notice, he will have a period of 30 working days to carry out an initial review, which can be extended by 45 working days for an in-depth review.
- The UK Government (acting through the Secretary of State of the Department for Business, Energy and Industrial Strategy) can approve or prohibit a relevant transaction, or approve the transaction subject to conditions.
- The New NSI Regime review may run in parallel with any merger control review that the UK’s Competition & Markets Authority (**CMA**) may be conducting under the UK Enterprise Act 2002 regime, where the transaction meets either the turnover or share of supply test (these general thresholds remain unaffected by the New NSI Regime).

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- In addition to the mandatory notification regime, the UK Government can call in for review any investments which may pose a national security risk. This power is not limited to the specified sectors and is not subject to a minimum shareholding threshold of 15%, provided that the acquisition confers “material influence” over the target business or assets. This call-in power expires five years after completion or, if the Secretary of State has been made aware of the transaction, six months after completion. To mitigate the risk of a late review, parties can make a voluntary notification of transactions falling outside the specified sectors under the mandatory regime where the parties consider there to be potential for a national security risk issue to arise.

The key takeaway for investors is that, from now on, when considering entering into transactions or investments with a UK nexus, parties should, in all cases, assess the possible application of the New NSI Regime to the contemplated transaction or investment and, more specifically, consider whether a mandatory notification is required or a voluntary notification is advisable.

Further details in relation to the New NSI Regime, including commercial considerations for investors, are set out in the full version of this client alert.

### ***Mandatory pre-closing notifications in specific sectors***

The NSI Bill introduces a mandatory pre-closing notification obligation in relation to the acquisition of interests of 15% or more (including non-controlling interests) over a business, assets, or intellectual property in specified sectors (**Notifiable Acquisitions**). The sectors which require mandatory notification (see above) have been published for [consultation](#) until 6 January 2021 and will be kept under review to reflect changes in the risks facing the UK.

The mandatory notification obligation is supplemented by a voluntary notification mechanism for acquisitions of certain control rights, including minority shareholdings, that give rise to national security concerns in the wider economy (**Trigger Events**).<sup>1</sup> Unless exceptional circumstances exist, the UK Government has [indicated](#) that it does not expect to call in transactions outside of the specified sectors.<sup>2</sup>

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<sup>1</sup> Trigger Events are defined as (1) the acquisition of more than 25% of the votes or shares in a qualifying entity; (2) the acquisition of more than 50% of the votes or shares in a qualifying entity; (3) the acquisition of 75% or more of the votes or shares in a qualifying entity; (4) the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the qualifying entity; (5) the acquisition of material influence over a qualifying entity’s policy; (6) the acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to use the asset, or use it to a greater extent than prior to the acquisition; or direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition.

<sup>2</sup> Exceptional circumstances may exist if the acquirer has affiliations to hostile parties or states. See the current draft Statement of policy intent [here](#).

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### ***Application to current transactions***

Though still subject to Parliament's approval and Royal Assent, the NSI Bill introduces provisions which apply to transactions as early as 12 November 2020. Under its provisions, the Secretary of State would be empowered to "call in" Trigger Events (***Call-in Power***) before the date on which the NSI Bill enters into force (***Commencement Date***):

- up to 6 months after the Commencement Date if the Secretary of State becomes aware of the Trigger Event before Commencement Date; and
- otherwise, up to 6 months after the date on which the Secretary of State becomes aware of the Trigger Event, but not exceeding 5 years after the Commencement Date.

The Call-in Power is subject to a duty on the Secretary of State to publish, from time to time, a statement setting out how she expects to exercise the Call-in Power (***Statement of Policy Intent***).<sup>3</sup> However, either Houses of Parliament can reject the Statement of Policy Intent by a resolution. If rejected, the UK Secretary of State must withdraw the Statement of Policy Intent and must publish a revised Statement of Policy Intent before she may call in any transactions.

The UK Government has stated that it does not expect many acquisitions made before the Commencement Date to be affected by the Call-in Power. However, there is little guidance as to how the UK Government anticipates that the power will be exercised, in particular whether the UK Government will seek to impose interim orders on transactions that have completed before the Commencement Date. The UK Government is encouraging businesses to seek informal advice about potentially reviewable transactions.<sup>4</sup>

We set out below further details regarding the UK Government's main proposals for the New NSI Regime.

#### **A. The NSI Bill establishes a two-pronged notification regime requiring mandatory notification in high-risk sectors and voluntary notification in lower-risk sectors.**

- Acquisitions are notifiable under the mandatory regime if they involve the acquisition of at least 15%<sup>5</sup> of the votes or shares in an entity<sup>6</sup> in a specified sector.

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<sup>3</sup> Ibid.

<sup>4</sup> See the NSI Regime: process for businesses factsheet dated 11 November 2020, available [here](#).

<sup>5</sup> There is no presumption of material influence below 25%, however, the UK Government proposes to require mandatory notification of all acquisitions of 15% or more in specified sectors so that it can consider whether a national security review is required based on all the facts of the case.

<sup>6</sup> The Secretary of State may make regulations to include provision about the circumstances in which the gaining of control of a qualifying asset of a specified description is a notifiable description.

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- The voluntary notification regime applies to transactions that do not involve a specified sector, but may give rise to a risk to national security. Examples provided by the UK Government include security software code and blueprints for sensitive equipment. Parties are required to self-assess as to whether a voluntary notification may be appropriate. Parties are required to self-assess whether the transaction may be reviewable, having regard to the Secretary of State's Statement of Policy Intent. Transactions that are not notified may be "called in" for review by the Secretary of State up to 6 months from the date the Secretary of State became aware of the Trigger Event, up to 5 years after the day on which the Trigger Event took place.

**B. Sanctions for non-compliance with the mandatory regime are significant.** A notifiable acquisition that is completed without the approval of the UK Secretary of State is void. In addition, the UK Government proposes the following **civil and criminal sanctions** for failure to file a mandatory notification:

- For businesses, civil fines of up to 5% of worldwide turnover or £10 million, whichever is greater.
- For individuals, civil fines of up to £10 million and criminal sanctions of up to five years of imprisonment on indictment.

Failure to comply with an interim or final order of the Secretary of State could also attract a daily fine of up to 0.1% of worldwide turnover or £200,000 for businesses, and £200,000 for individuals. Directors and other officers of companies can also be held personally liable, together with the company in breach of the rules.

**C. The proposed timetable** for national security reviews is as follows:

- **Assessment of notification:** the Secretary of State has up to **30 working days** following receipt of a complete notification<sup>7</sup> to decide whether to call in a transaction for national security review.
- **National security review period:** if the transaction is "called in" (including in relation to non-notified transactions), the Secretary of State then has **30 working days** in which to determine whether to impose remedies or to take no further action. The draft Statement of Policy Intent indicates that the Secretary of State will consider on a case-by-case basis risks to national security arising from, e.g. control of a crucial supply chain, access to sensitive sites or information, or the ability to exploit an investment to influence the UK.
- **Extension of review period:** the Secretary of State may extend the national security review period by **45 working days** if she reasonably considers that the additional period is required to assess the transaction.

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<sup>7</sup> The Secretary of State may reject a notification which does not contain sufficient information or which does not meet the notification requirements to be prescribed in secondary legislation.

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**Further voluntary extensions** of the review period may be agreed in writing between the Secretary of State and the acquirer.

- D. Under the NSI Bill, the Secretary of State will have power to issue **compulsory information notices** to require relevant information along with attendance as a witness. Failure to provide information or attend as a witness without reasonable excuse may attract civil fines and criminal sanctions.
- E. Where a transaction is subject to review by the CMA on competition grounds, a **national security review will run in parallel to the CMA's review**. A memorandum of understanding will be established between the Government department undertaking the national security review and the CMA in relation to the imposition of remedies.

### ***Cross-government coordination and parallel competition review***

The New NSI Regime will be administered by a dedicated Investment Security Unit (**ISU**), within the Department for Business, Energy and Industrial Strategy. The ISU will coordinate cross-government activity to identify national security risks arising through market activity, and is intended to provide a single point of contact for notifications. The Government has noted in its impact assessment that the New NSI Regime is expected to result in 1,000-1,830 notifications of transactions each year.<sup>8</sup>

The New NSI Regime will be separate from the processes and practice of the CMA's mergers framework under the Enterprise Act 2002. The CMA's mergers framework will operate in parallel, but will apply only to competition issues (and, where relevant, media plurality, financial stability and public health emergency considerations). The CMA review will be independent of the national security review, which will be administered by the ISU.

However, until the NSI Bill has been adopted, the CMA will continue to administer portions of the national security reviews of transactions called in by the UK Secretary of State on public interest grounds. This includes acquisitions of business which supply artificial intelligence, cryptographic authentication technology, advanced materials, military and dual-use technologies, quantum technology, and computing hardware in the UK. Pursuant to legislative amendments adopted in 2018 and in June 2020 (see our [client alert](#)), the CMA's jurisdiction to review such transactions has been expanded in respect of these sectors.

### ***Key considerations for investors***

As a result of the potentially broad application of the rules, both with respect to the scope of the specified sectors and the meaning of "national security risk", the New NSI Regime should now be considered as a matter of course when evaluating any potential transactions and investments with a UK nexus. Indeed, investments in companies with operations in the UK

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<sup>8</sup> Impact Assessment, National Security and Investment Bill (09 November 2020), page 22, available [here](#).

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and the United States may require an assessment under both the New NSI Regime and the CFIUS regulations, and a potential filing in both jurisdictions.

Potential transactions and investments currently under discussion or negotiation, to the extent not already assessed, will need to be considered under the New NSI Regime rules as a priority.

On auction processes, in the absence of a transaction clearly falling within the mandatory regime, consideration will need to be given by the parties and their advisors to the timing of any informal discussions with the Government as to whether the transaction is notifiable.

From a sell-side perspective, the New NSI Regime may impact the pool of eligible investors in assets and businesses with a UK nexus. This may call for increased due diligence on the affiliations of investors to rule out national security concerns.

The outcome of the Government's consultation on further defining the specified sectors will be a particular area of scrutiny in order to better understand whether target businesses fall within the mandatory notification regime.

In light of the wide-ranging powers and penalties, in particular the UK Government's Call-In Power, parties are likely to take a cautious approach in deciding whether to make voluntary notifications and the Government's impact assessment reflects this view, predicting 1,000 - 1,830 notifications per year which illustrates the likely scale of the new regime.

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