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CFIUS-UK? UK Government Announces New Foreign Investment Measures

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On 11 November 2020, the UK Government announced its long-awaited and far-reaching proposed reforms to its existing powers to scrutinise foreign investment in the UK, especially in relation to sectors deemed to be particularly sensitive from a national security perspective. In summary, the National Security and Investment Bill ("NSIB") increases significantly the Government's existing enforcement powers, by essentially introducing a standalone, CFIUS-style[1], foreign investment regime.[2]

Whilst NSIB is not limited to transactions involving foreign investors, the Government's press release makes clear that the measures are targeted at "*potentially hostile foreign direct investment*". This new regime is especially important for foreign investors considering transactions in the sectors covered by the measures and will require a case-by-case analysis to determine whether a filing is triggered and/or the likelihood of the transaction otherwise being called in for review.

Overview of New Measures

A standalone foreign investment regime, akin the U.S.'s CFIUS regime, has been publicly considered by the Government for some time, including the Government's July 2018 White Paper. However, on their face, the measures contained in the NSIB are much more wide-ranging than those previously discussed by the Government. Key features of the NSIB are set out below:

- *A mandatory filing regime for certain sectors:* The NSIB provides for a mandatory notification obligation for certain transactions involving sectors perceived to be of highest national security risk. According to the Government, this new mandatory regime will ensure it is automatically informed of potential transactions in high risk sectors, enabling it to take appropriate intervention measures as quickly as possible. The NSIB does not specify which sectors will be subject to the mandatory notification, but in any event the Government will have the power to redefine the

scope of sectors subject to the regime.[3] Investors acquiring shareholdings (or equivalent voting rights) of or above 15%, or above 25%, 50%, and of 75% or more will be required to make notifications.

- *An accompanying voluntary regime and "call in" powers where "trigger events" arise:* Outside of the high risk sectors covered by the mandatory filing regime, a voluntary notification is possible for investors to notify relevant transactions to the Government for review. For non-notified investments, the UK's Secretary of State ("SoS") can "call in" for review such non-notified investments up to five years post-completion (or six months if the UK Government is "made aware" of the investment). The SoS's call-in power extends to: (i) acquisitions of shareholdings (or equivalent voting rights) of less than 15% if they constitute "material influence" (as well as to investments crossing the 15%, 25%, 50%, and 75% thresholds); and (ii) acquisitions of a "qualifying asset", including land, tangible moveable property and, with respect to IP, any idea, information, or technique with industrial, commercial or other economic value.
- *Scope of measures:* Whilst details of the Government's assessment criteria are not presently available, the NSIB contains a legal safeguard that a transaction may only be assessed on "national security" grounds, and not for reasons of broader economic interest. The Government will, however, have wide-ranging information gathering powers to obtain all information it considers necessary for its review.
- *No jurisdictional thresholds*: the SoS's ability to "call in" or otherwise intervene in an UK investment is not limited by any turnover or asset value thresholds. There is also no requirement for a target to have a UK subsidiary or UK based assets for the regime to apply; the target simply needs to carry on relevant activities in the UK (which impacts UK's national security issues).
- *No safe harbour provisions:* There will be no turnover or market share safe harbours below which investments will fall outside the remit of the relevant measures.
- *Retroactive application*: to deter investors from seeking to push through sensitive transactions prior to the NSIB coming into force, the SoS will have the power to call in for review all investments that completed after the publication of the draft NSI Bill (i.e., from 11 November 2020) if the investment would otherwise have fallen within scope of the mandatory or voluntary notification regimes. However, the NSI Bill will not have retrospective effect on investments that completed prior to 11 November 2020.
- *Timing Implications:* the Secretary of State will have an initial review period of 30 working days, with an additional 30 working days for a more in-depth review, which is extendable by another 45 working days. The SoS may issue interim orders to prevent parties from taking pre-emptive action, such as completing a transaction,

where this might prejudice the imposition of remedies. These interim orders may have extra-territorial effect. Further extensions beyond 75 working days may be agreed between the notifying party and the SoS.

- *Possible outcomes:* The SoS will have the power to clear or prohibit an investment, or clear an investment subject to conditions. Decisions may be appealed to the UK courts. Details of investments reviewed by the SoS will be published only if the investment is prohibited or if clearance is subject to conditions. To address confidentiality concerns, the Government may apply "closed material procedures" (where all or part of a claim can be heard in private) to protect information sensitive from a national security perspective.
- *Sanctions for non-compliance*: Non-compliance with statutory obligations may result in fines of up to 5% of worldwide turnover or £10 million (whichever is higher) and up to 5 years imprisonment.[4]

Key implications for investors

Together with a very broad jurisdictional scope and no safe harbours, the measures contained in the NSIB will capture a very wide range of transactions.[5] Acquisitions of minority interests and asset acquisitions are also within the remit of the new regime. Given the wide range of sectors impacted by the new regime and the lack of any jurisdictional safe harbours, notwithstanding its assurance that the new measures will be targeted and proportionate, the Government will in practice have a broad jurisdiction to review a significant number of transactions with a UK nexus. As a result and given the retroactive nature of the measures, where a transaction has any UK nexus this new regime will need to be factored into deal viability issues, contractual conditionality and transactional timetabling at an early stage.

[1] CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.

[2] The NSIB will be subject to Parliamentary debate and amendment before being passed into law. In the interim period, foreign investors considering investments in the UK will need to be mindful of the planned reforms, given that the Government will have the ability to "call in" transactions for review where a transaction has occurred following the introduction of the Bill (i.e., any transaction entered into after 11 November 2020). Notwithstanding any subsequent amendments as the NSIB passes through Parliament, the measures contained in the NSIB brings the UK into line with its international peers with respect to foreign investment regimes.

[3] At this stage, it is understood that the Government expects some transactions in the following 17 key sectors will face mandatory notification: civil nuclear; communications; data infrastructure; defence; energy; transport; artificial intelligence; autonomous robotics; computing hardware; cryptographic authentication; advanced materials; quantum technologies; engineering biology; critical suppliers to government; critical suppliers to the emergency services; military or dual-use technologies; and satellite and space technologies.

[4] These sanctions will apply to breaches of the mandatory notification obligation and also instances of non-compliance with interim orders and information requests relating to transactions subject to the voluntary notification regime.

[5] The Government's Impact Assessment estimates that the new regime would result in 1,000-1,830 transactions being notified per year. To put this in context, only 12 transactions have been reviewed prior to the introduction of the NSIB on national security grounds since the pre-NSIB regime was introduced in 2003. A new Investment Security Unit within the UK's BEIS will be set up to review relevant transactions.