UK BILL EXPANDS SCOPE FOR FOREIGN INVESTMENT INTERVENTION

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UK Competition Alert

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On 11 November 2020, the UK government announced the long-awaited and wide ranging reforms to the regulation and scrutiny of foreign direct investment. Introducing a mandatory notification system for affected transactions, the National Security and Investment Bill (Bill) will strengthen the UK's ability to investigate and intervene in mergers, acquisitions and other types of deals that could threaten the UK's national security. The government hopes the Bill strikes a suitable accord between protecting national security whilst ensuring the UK remains a "*champion of global free trade and an attractive place to invest*" by providing a more efficient clearance process in the hope of providing more certainty for businesses.

The Bill requires businesses to inform the government about proposed deals in a limited number of sensitive sectors (such as data infrastructure, artificial intelligence, quantum tech or engineering biology) and includes extended screening procedures to cover information on company assets and intellectual property. Deals in the designated sensitive sectors will require a mandatory notification and failure to comply with the new regime's requirements may lead to financial penalties and even criminal sanctions.

IS THE NEW REGIME ALREADY IN FORCE?

The new regime is yet to come into force. Current transactions that involve a public interest element are therefore still subject to the present voluntary regime under the Enterprise Act 2002. Under this current regime, the Secretary of State (SoS) has the power to intervene where (i) the UK merger control thresholds are met, and (ii) the transaction (whether a share or asset deal) involves public interest considerations such as national security, public health emergencies or the stability of the UK financial system. The present regime does not impose a legal obligation to obtain pre-closing clearance, which also means there are no penalties for failing to notify a transaction involving foreign investment.

However, although the new regime does not have legal effect yet, it will apply retrospectively in relation to some transactions (please see table below).

KEY FEATURES OF THE NEW REGIME

Feature of the Bill	Explanation
Mandatory Notification	Will be required for the acquisition of shareholdings (or equivalent voting rights) of or above 15 percent, 25 percent, 50 percent and 75 percent (with new notifications required each time a threshold

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Feature of the Bill	Explanation
	is crossed) in businesses active in the UK in 17 specified sectors of the economy. This is a major shift from the current regime where notification is completely voluntary.
Key Sectors of the Economy	For the mandatory notification requirement to kick in, the target of the transaction must be involved in a "key sector". The Bill does not define these sectors, which are to determined in accompanying secondary legislation, but a Consultation Paper released alongside the new Bill lists the 17 potential sectors as follows: Advanced Materials, Advanced Robotics, AI, Civil Nuclear, Communications, Computing Hardware, Critical Supplies to Government, Critical Supplies to the Emergency Services, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Engineering Biology, Military and Dual Use, Quantum Technologies, Satellite and Space Technologies and Transport. Further information can be found here.
Voluntary Notifications	The mandatory notification regime will also be accompanied by a voluntary system. In particular, where a transaction falls outside of the 17 sectors listed above, parties are encouraged to notify "trigger events" that may otherwise be of interest due to national security considerations.
What are the Filing Thresholds?	The SoS's ability to intervene in an acquisition/investment is not limited by the value of the assets or turnover concerned, or by market shares. The new regime rather looks at (i) acquisitions of control of (ii) qualifying entities or qualifying assets, regardless of their revenues or market shares.
Timeline	The SoS will have an initial review period of 30 working days, with a further 30 working days for a deeper review which is then extendable by another 45 days. Providing around 19 weeks of review time for the SoS and potential delay to a transaction. This is somewhat shorter than the current merger notification regime which foresees 40 working days for a Phase 1 decision.
Retroactive Ability to Call in Transactions	The SoS will have the power to retroactively call in for review transactions that (i) have completed after 12 November 2020, (ii) have not been notified, and (iii) would otherwise fall within the scope of the mandatory or voluntary regime. This power can be exercised for up to five years post-completion (or 6 months post-

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	completion if the UK government is “made aware” of the investment). This is aimed at preventing parties trying to push through transactions prior to the Bill coming into force that would fall within the regime.
Sanctions	In the event of non-compliance the government can impose criminal and civil sanctions; these include fines of up to 5 percent of worldwide turnover or £10 million - whichever is higher and imprisonment of up to 5 years for the individuals concerned.

IMPLICATIONS FOR BUSINESSES

The Business Energy Industrial Strategy Department's Impact Assessment of the new regime estimates that 1,000-1,830 notifications per year will need to be made which would be significantly more than the review system under the old regime by the Competition and Markets Authority which reviews around 60 cases per year. Such a high estimate is due to the wide range of transactions that could be subject to review and the absence of any threshold safe harbours under the new regime. Foreign investment rules look likely to be an increasingly important consideration for international investors and need to be considered in contemplated mergers and acquisitions with a UK threshold going forward. Of particular interest in the future will be the international expansion of Foreign Direct Investment regimes beyond defence and media to healthcare, critical infrastructure, data infrastructure, civil nuclear power, quantum technology and AI. Our global team is experienced in advising businesses on the implications of transactions with a UK nexus to ensure such transactions risk profile is managed and can proceed as smoothly as possible. Please get in touch if you'd like to discuss any of these issues.

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