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New UK foreign investment review regime goes live

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Today, the UK's new National Security and Investment filing regime becomes fully operational. A wide range of deals will be scrutinized for national security concerns requiring further investigation. The UK government expects to review up to 1,800 cases annually – a dramatic contrast with the handful of deals reviewed on public interest grounds in the last 20 years.

To ensure a smooth pathway to closing a notifiable deal, it will be critically important for the parties to develop clear engagement strategies with the newly established Investment Security Unit (ISU) within the Department for Business, Energy & Industrial Strategy (BEIS). Key aspects of the NSI regime include:

- **Mandatory notification**: A filing will be required where there is an acquisition of a significant interest in a company carrying out activities in the UK in one or more of 17 sensitive sectors. Where a deal is subject to mandatory filing, parties must not take any steps to close the deal, pending clearance.
- **17 sensitive sectors**: Transactions in the following strategically "sensitive sectors" will require notification: Civil Nuclear; Communications; Data Infrastructure; Defence; Energy; Transport; Artificial Intelligence; Autonomous Robotics; Computing Hardware; Cryptographic Authentication; Advanced Materials; Quantum Technologies; Engineering Biology; Critical Supplier to government; Critical Supplier to the Emergency Services; Military or Dual-Use Technologies; and Satellite and Space Technologies.
- **Voluntary regime "call-in" risk**: Notification is voluntary for potentially sensitive transactions in all other sectors, although the ISU will monitor the press and has the discretion to "call-in" deals for review. This call-in power is exercisable within five years of closing, at any time up to six months after the ISU becomes aware of the transaction. The ISU may also look back at any deals closed after 12 November 2020. The five-year time limit does not apply to any deals subject to the mandatory notification regime.
- **Minority investments and stake building within scope**: Any acquisition of "material influence" or 25%+ equity or voting rights is potentially notifiable. Notifications may also be required when an existing shareholder increases its stake above 50% or 75% ownership thresholds.
- **Limited UK nexus required**: There are no UK revenue or asset-based thresholds. The ISU will be able to assert jurisdiction even if the deal involves a non-UK target (as long as the target supplies goods or services to persons in the UK, or the target assets are used in connection with activities carried on in the UK).
- **Intra-group deals are not exempt**: A corporate restructure may trigger a filing requirement, even if the deal is intra-group, with no change to ultimate ownership.
- **Review timelines**: Most reviews will complete within 30 working days of formal notification. Where the Secretary of State issues a "call-in" notice, the government has a further 30 working days to complete the review, extendable by 45 working days and potentially longer where warranted.
- **Powers to impose remedies**: Clearance may be subject to conditions such as restrictions on access to sensitive data or limits on the amount of shares an investor is permitted to acquire. Ultimately, the government may prohibit the deal or, if already closed, require that it be unwound. The government estimates around 10 reviews a year will require some form of remedy.

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- **Potential sanctions**: Non-compliance may result in fines of up to 5% of the annual global turnover of the acquirer or £10 million, whichever is greater, and up to five years' imprisonment for responsible directors. Notifiable transactions that proceed without clearance will be legally void.
- **Information sharing with other regulators**: The NSI Act permits information sharing with other UK agencies, including the Competition and Markets Authority (CMA), and potentially with overseas regulators conducting parallel reviews.

The NSI regime adds to an already complex and rapidly evolving foreign direct investment (FDI) screening landscape globally. An increasing number of FDI regulators across the G20 have broad discretion to scrutinize a wide range of transactions. They will often cooperate closely with antitrust regulators conducting parallel reviews.

To navigate adverse timing and other execution risks posed by this increasingly complex regulatory landscape, deal teams should focus on potential FDI and competition merger control filing requirements in the UK and elsewhere at an early stage in deal planning. In this regard, BEIS has published a one page flowchart summary[1] of the regime that includes links to the rules and guidance summarised above. Knowing and planning for these risks from the outset increases the chances that reviews can be avoided or, if notification is required, that its burdens can be minimized.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034815/nsi-process-flowchart.pdf.

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