



Unbundling Competition

Episode 5: Screening of Asian investment in Europe – The UK’s proposed new National Security and Investment regime

In this episode, Veronica Roberts, a partner in our London office and the head of our global Foreign Direct Investment group, joins Joel Rheuben, a senior associate in our Tokyo office, to discuss the new National Security and Investment Bill that was introduced to the UK Parliament on 11 November 2020 (Bill), and its potential impact on Asian businesses looking to invest in the UK.

Currently, transactions involving parties that meet certain thresholds can be reviewed by the UK’s Competition and Markets Authority (CMA) under the UK’s general merger control regime, which considers transactions from a competition law perspective, and, in certain limited circumstances, from a public interest

perspective. The Bill, which is expected to be enacted shortly and to come into full force in Spring 2021, would introduce a dual merger review system in the UK for certain types of transaction, with a new government body set up to undertake national security and investment reviews.

Current regime

Under the existing regime, the Secretary of State has the power to intervene in transactions that meet the applicable competition merger control thresholds, and request the CMA to consider them from a public interest perspective, including with respect to national security. Over the past two years, the applicable thresholds have been significantly reduced for transactions in six critical technology sectors (covering military dual-use products and certain types of technology and computing hardware).

One criticism of the current regime is that there is no certainty as to when the Secretary of State will step in to review a transaction. Moreover, while the CMA is

the authority that conducts the public interest review, it engages in wide-ranging consultation with other specialist government departments due to a lack of specialist knowledge. It is hoped that the new regime will go some way to addressing these concerns so far as national security-related interventions are concerned.

New regime

The new regime, which the UK Government has been considering for a number of years, brings the UK in line with many other jurisdictions in the world with their own dedicated security and foreign investment controls. The government has been keen to introduce these changes now for a range of reasons, including the pandemic and the advent of Brexit.

The Bill will implement a mandatory notification obligation for investments of 15% or more in UK companies engaged in one or more of the 17 sectors listed below:





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Mandatory notification will also be triggered for existing investments that cross the thresholds of a 25%, 50% or 75% shareholding in a company in these specified sectors. Below 15%, the government may still exercise its power to “call in” a transaction for a review, if the acquirer obtains a material influence over the target – including up to five years after closing. Importantly, there will not be any materiality thresholds, e.g. based on turnover, for either mandatory notification or the government’s “call in” power under this new regime.

For transactions that fall outside of these criteria, for example acquisitions of assets or intellectual property in these sectors, or investments outside of these sectors, parties will be able to avoid uncertainty by making voluntary filings.

In terms of sanctions, a transaction that should have been notified, but was not, will be void. Other potential penalties include fines, imprisonment and director disqualification.

Importantly, the new regime applies to all investors, including UK investors. While the government is keen to encourage investment, it is concerned with protecting the UK’s national security interests and has said that it will be particularly focused on entities that have links to “hostile actors”, which will be more likely where an investor is a non-UK company and associated with a foreign government.

Notification will be made to a new body to be established under the Department for Business, Energy & Industrial Strategy. The process of notification will involve submitting what the government has described as a relatively short-form filing form (potentially a 10-page questionnaire), after which the government will have 30 working days to either clear the deal or, if it has national security concerns, initiate a more detailed review (lasting a further 30 working days, with a possible extension of 45 working days).

Remedies can be required as a condition of clearance, and in the worst case scenario this can involve a prohibition/unwinding order.

Considerations for businesses looking to invest in the UK

Businesses looking to invest in the UK should:

- Carry out appropriate due diligence on a target’s UK activities;
- Consider whether a mandatory notification will likely be required under the new regime;
- Be aware that, even where a transaction does not trigger a mandatory filing, once the new legislation comes into force, the government will have the power to “call in” a transaction at any time up to six months after it becomes aware of

the transaction and up to five years after the deal completes. This applies to all deals completing from 12 November 2020 (even before the Bill is enacted);

- In the case of transactions that may be notified voluntarily, and that may be “called in”, assess the likelihood of the government being interested in transaction. This may involve seeking informal guidance from the government; and
- Consider whether transaction documents need to contain a condition precedent covering these new rules, and factor in an appropriate long-stop date.

The review of a transaction under this new regime may occur in parallel with a CMA review of the deal from a competition law perspective, so the timing of both reviews will need to be taken into account. The government has made it clear that remedies imposed under the national security regime will trump any remedies imposed under the competition law rules (although this is currently the case, even under the existing regime).

For more information on these new rules, please see our more detail briefing [here](#).

