

FINAL COUNTDOWN UNTIL THE UK'S NEW NATIONAL SECURITY SCREENING REGIME COMES INTO FULL EFFECT – IMPLICATIONS FOR THE FINANCIAL MARKETS

A new national security screening regime comes into effect on 4 January 2022 which gives the Government the power to assess certain transactions for national security risks. The new rules apply if there is a "change of control" in relation to entities operating in certain specified areas of the economy that are deemed sensitive to national security and those closely linked. The rules also apply to a "change of control" in relation to certain types of assets.

This briefing provides a snapshot of the issues to consider for financing transactions or arrangements involving a "change of control" in one of the specified sensitive sectors or closely linked.

Key issues

- The UK's new national security screening regime comes into effect on 4 January 2022.
- The Government will have new powers to carry out a national security assessment of "changes of control" in certain specified sectors.
- Some "changes of control" in particularly sensitive sectors need to be notified before they take place otherwise they are void and can result in criminal liability and monetary penalties.
- Financing transactions in certain specified sectors which involve a "change of control" will be subject to the notification requirements but are generally expected to be cleared and not made subject to orders and remedies.

"Change of control" triggers for entities

A "change of control" arises if there is an acquisition of a right or interest in an entity which results in any of the following:-

- (i) the percentage of the shares held (whether direct or indirect) increases above certain thresholds - 25%, 50% and 75%; or
- (ii) the percentage of the voting rights held increases above the same thresholds; or
- (iii) voting rights are acquired sufficient to secure or prevent any resolution at shareholder meeting.

For call-in purposes, the acquisition of material influence over the policy of the entity is also a trigger.

"Change of control" trigger for assets

A "change of control" takes place in respect of an asset (only land, tangible moveable property and ideas, information and techniques which have industrial, commercial or other economic value are assets for the purposes of the regime) if a right or interest in the asset is acquired which enables use of the asset or the ability to direct or control its use or to do so to a greater extent.

The following areas are of particular note:-

- Certain "changes of control" in entities carrying out specified activities in specified sensitive sectors (see text box) must be notified to the Government and a clearance obtained before they can go ahead. Transactions involving a "change of control" in these circumstances are void if they go ahead without clearance. It is also a criminal offence, punishable by imprisonment for responsible directors, executives and other officers, as well as fines for the company.
- A "change of control" that is outside of the mandatory notification regime can be called in for review but that is unlikely to happen unless the entity concerned is carrying out activities in or closely linked to the specified sensitive sectors. If a transaction is called in, remedies can be imposed to address any national security concerns. A voluntary notification can be made to avoid a later call in.
- Helpfully the Government has issued guidance that broadly suggests it does not expect the regime to prevent or restrict the vast majority of financial markets transactions which fall within the broad ambit of the regime but does not rule it out completely.
- Transactions involving a "change of control" in the specified sensitive sectors and those closely linked will need to take account of the regime and obtain clearance from the Government before they go ahead. If a transaction requires clearance, it can take upwards of 30 working days and in some cases a further 30 – 75 working days. Clearances will therefore need to be factored into deal timetables.
- Taking share security in relevant sectors can be a "change of control" trigger and may therefore need to be cleared when taken, before voting rights are acquired and before enforcement.
- Share security in relevant sectors which is in place before 4 January 2022 may also require clearance for voting rights acquired after that date and also for any enforcement that takes place after that date. Share security in relevant sectors containing provisions which confer automatic voting rights when certain events occur are particularly problematic in this regard as the automatic acquisition of those rights could breach the prior notification requirements of the regime.
- Documentary changes may be required to ensure compliance with the new regime such as clearances being made a condition precedent or the obtaining of voting rights in share security being conditional on clearance.
- Taking security over certain assets may also trigger the call-in regime and may therefore need to be notified and cleared before the security is taken to avoid a later call in. Clearance may also be required before any enforcement process takes place.
- Intra group restructurings involving changes in the direct or indirect ownership of entities subject to the regime may also constitute a "change of control" for the purposes of mandatory notification or call in even if the only shares that are transferred are those of an intermediate holding company with no change in the ownership of the ultimate owner. If a group restructuring is part of a transaction, clearances will need to be considered and factored into the transaction timetable.

17 specified sectors

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Military and Dual-Use
- Quantum Technologies
- Satellite and Space Technology
- Suppliers to the Emergency Services
- Synthetic Biology
- Transport

IN SUMMARY

Much of the legislation is ground breaking in terms of approach and involves some grey areas. In consequence, we expect that the coming months will see new practices develop to adapt to the new regime and until this beds down we anticipate that the new regime will prove to be a discussion point on transactions.

Financial markets transactions in certain sectors of the economy will clearly be impacted by the notification requirements under the regime but once notified we expect that in the vast majority of cases they will be cleared based on statements to that effect by the Government and not made subject to a detailed national security assessment or the imposition of conditions or controls. However, the notification hoops will still need to be completed.

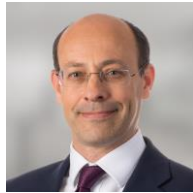
If you require more detailed advice on any aspect of the new national security screening regime please do not hesitate to reach out to your usual Clifford Chance contact.

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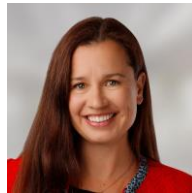
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