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FOREIGN INVESTMENT & NATIONAL SECURITY

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in foreign investment and national security.

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Q. What key issues are dominating the regulatory climate around foreign investment? To what extent have national security concerns – actual or perceived – increased in the UK in recent years?

A. Like many others around the world, the UK government has been alert to a perceived threat of hostile investors owning or controlling critical businesses or infrastructure in the UK, and introduced a new regime under the National Security and Investment Act 2021 (NSIA) in January 2022 to facilitate its review of transactions from a national security perspective. The NSIA has expanded the government's jurisdiction to review a broader set of transactions than under the predecessor regime. The NSIA gives the government powers to 'call in' and review a wide range of 'qualifying acquisitions', including investments in both entities and standalone assets such as land, machinery and intellectual property, on national security grounds and to impose remedies to address any concerns that are identified. A subset of these transactions involving a target entity with specified activities in one of 17 sensitive sectors are subject to mandatory notification and standstill obligations.

Q. What impact are political agendas and foreign investment policies having on foreign investment screening programmes, including national security assessments?

A. Given the nature of national security, the UK regime lacks transparency, including in respect of any political drivers behind decisions. The regime is administered by the Investment Security Unit in the Department for Business, Energy and Industrial Strategy (BEIS) and the decision maker is the secretary of state for BEIS. BEIS consults with other relevant UK government departments during the course of its review. The NSIA gives the government the power to create exemptions from mandatory notification for certain categories of acquirers based on their 'characteristics'; however, there is currently no such whitelist of investors and no firm plan for one to be implemented.

Q. Have there been any recent regulatory reforms in the UK worth highlighting? What are they likely to mean for foreign

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acquirers and domestic sellers going forward?

A. The NSIA regime came into full effect a year ago, in January 2022. It applies to UK and foreign investors alike; therefore, the NSIA needs to be considered in all acquisitions of entities and assets with a connection to the UK. The NSIA has introduced a mandatory notification regime with a standstill obligation which will need to be considered in M&A completion timetables. For all transactions subject to the NSIA, the secretary of state has broad powers to impose remedies to address any national security concerns, including a forced divestment or unwinding of the investment.

Q. Which transactions fall within the scope of the relevant regime?

A. The NSIA regime applies if there is a 'change of control' in relation to a wide range of entities or assets, including 'bare' assets that do not amount to a business. In addition, mandatory filing obligations apply to certain investments in entities with specified activities in 17 sensitive sectors: advanced materials,

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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 and transport. There are no quantitative jurisdictional thresholds for investments in legal entities or assets, so even the smallest deals can be called in for review.

Q. What is the impact of a national security review on the deal timetable?

A. If a transaction falls within the scope of the mandatory regime, the deal is subject to a standstill obligation and cannot legally complete until clearance is obtained, with criminal penalties for failure to comply. Clearance can take up to 30 working days from the date when the government accepts the filing as complete. If the government instead decides to 'call in' the transaction for an in-depth national security assessment, there will be an additional review period of 30-75 working days, subject to extension in certain circumstances.

Q. Could you outline the factors likely to trigger investigations and potentially result in blocks or conditions being placed on pending acquisitions? Which sectors and regions are more likely to give rise to national security reviews?

A. The UK government has indicated that transactions are unlikely to be called in unless they concern an entity that carries out activities in or closely linked to the 17 sensitive sectors or an asset that is used for such activities, or, for real estate, is proximate to a site that is used for such activities. Some trends have emerged over the past 12 months which may offer guidance going forward. First, certain sectors have attracted a higher level of scrutiny. Three out of five prohibited transactions concerned investments in the semiconductor industry. Other sectors of note were dual-use technology, defence and energy. Second, while the legislation is agnostic to the origin of the acquirer, it appears that deals by investors with connections to China in sensitive sectors attracted substantial attention from the UK government. Eight out of the 14 transactions which were prohibited or subject to conditions involved China.

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Q. What advice and practical insights would you offer to foreign acquirers on navigating regulatory requirements in the UK?

A. Given that the NSIA regime has only been in force for a year, there is still considerable uncertainty in respect of many aspects of its application. However, parties to transactions should bear in mind that the UK regime applies to all investors, not only foreign investors. Parties should also consider that early identification of issues is essential to avoid the risk of penalties and timetable delays and that there are limited opportunities to engage with BEIS in respect of the substance of the review and potential remedies, which can be very wide-ranging. ❑

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