Navigating the UK National Security and Investment regime

Foreign direct investment (FDI) is firmly recognised as essential to the growth of the UK economy, and both the current and previous UK governments have emphasised that the UK is "open for business" and keen to attract international investment. However, despite a commitment to a pro-investment approach, the standalone investment screening regime introduced by the National Security and Investment Act 2021 has resulted in a sea-change in the regulatory environment in the UK. The Investment Security Unit (ISU) has quickly established itself as one of the most active authorities globally and receives around 900 notifications each year. In addition to mandatory notification obligations for certain transactions in 17 sensitive sectors, the Government also has broad powers to call in a wider range of transactions for review on national security grounds in any sector.

Our NSI experts have extensive experience advising clients on the potential application of the regime to a wide range of transactions and securing both unconditional and conditional clearances. We were closely involved in the passage of the legislation through the parliamentary process, and two of our partners gave evidence to the House of Commons. We deal regularly with the Investment Security Unit (ISU) and can offer valuable insights into the "black box" decision-making process, including consideration of remedies. We also work closely with our integrated global team to formulate and implement coordinated strategies to achieve clearance for transactions that trigger notification obligations under multiple FDI regimes.

Unusual features of the NSI regime to be aware of

- **Intra-group reorganisations:** any transaction in which an immediate controlling interest over an entity or asset changes hands may be reviewable under the NSI regime, or even trigger a mandatory filing requirement, even if the transaction is entirely intra-group and does not result in any change in the ultimate ownership of the entity or asset.
- **UK investors also covered:** in contrast to many other FDI regimes, the NSI regime applies equally – at least in principle - to both UK and non-UK investors. A significant proportion of both notifications and call-in notices so far have involved investment associated with the UK (albeit not all involving solely UK investment), and conditions were imposed on a wholly-UK deal in *Epiris/Sepura*.
- **Extra-territorial impact:** for the purposes of the call-in power, there is no requirement for the target company to carry out its activities in the UK. It is sufficient that the target supplies goods or services to persons in the UK, even if it is based outside the UK.
- **No bright line test for call-in powers:** the lowest threshold for exercise of the call-in power is the acquisition of "material influence". This does not correspond to any fixed level of shareholding: it has the same broad meaning as under the UK merger control regime and could in certain circumstances capture an acquisition of a shareholding below 15% (eg when combined with board representation).

Key current trends for investors

- **Most transactions are cleared within 30 working days:** around 95% of notified transactions are cleared unconditionally within the initial 30 working day review period, although the NSI notification and review process can still be a considerable additional burden for investors.
- **Clearance subject to conditions – or even outright prohibition – is nonetheless a real risk:** final orders imposing conditions on transactions are a regular feature of the NSI regime in practice, and a small number of prohibition/divestment orders have also been issued. The risk of intervention is real and must be taken seriously.
- **Chinese investment is heavily scrutinised – but not the only focus:** almost all prohibitions/divestments under the NSI regime so far have involved investment associated with China. However, in our experience, approval for Chinese investment is still possible, and this is also reflected in the latest data from the ISU. Investment from other jurisdictions is also coming under increased scrutiny, including the Middle East and the US.
- **Pro-active scrutiny of non-notified transactions:** the ISU proactively monitors market intelligence and regularly initiates investigations into non-notified transactions. In practice, this means that voluntary notification may be advisable in the interests of obtaining legal certainty before completion, even if mandatory notification obligations are not triggered.
- **Steps to improve transparency but still a relative "black box":** The Government has acknowledged concerns raised by businesses and advisors about the lack of transparency of decision-making under the NSI regime. It regularly publishes updated Market Guidance Notes for investors, but in practice the regime remains a relative "black box", and no reasoned decisions or full details of conditions imposed in final orders are made public.
- **Typical remedies:** remedies will be determined on a case-by-case basis to address national security concerns identified, with usually limited scope for negotiation. However, typical remedies seen so far include: oversight of relevant company policies/contracts, prior notification of further transactions, white list/black list approach to information provision, controls of visitors/staff/site security, requiring an HMG board observer, and conditions around strategic capabilities.
- **Proposals for reform:** amendments to the definitions of the mandatory notification sectors are currently under consideration. It is anticipated that these will include carving out semiconductors and critical minerals as standalone sectors, as well as some clarifications of the accompanying guidance. It remains unclear whether the Government will take forward previous proposals to introduce targeted exemptions from mandatory notification for certain transactions (including at least some intra-group reorganisations).

Expertise

Proactive approach

- The NSI regime can potentially apply to a very wide range of transactions, in sectors extending well beyond traditional military/defence matters. We can help to identify right at the outset of a proposed transaction whether the regime is likely to be engaged and advise on how this may impact deal deliverability, as well as how to ensure appropriate risk allocation in deal documentation.
- Where an NSI notification is made, this involves more than "form-filling" or "tick the box" exercises. Our deep experience means that we can help to identify the pertinent issues in advance and ensure that filings include the relevant context to navigate the process as smoothly as possible.

Extensive experience with the ISU and insights into remedies

- We regularly deal with the ISU and have an excellent track record securing NSI clearances. We understand how the ISU approaches key issues under the regime in practice and can "open the black box" of what can often be a very non-transparent regime.
- Unconditional clearance is always the goal, but if the ISU raises national security concerns, pro-actively offering up appropriate remedies can assist with securing clearance.
- We have secured conditional clearances in a number of transactions and can draw on our practical insights to advise on navigating the remedies process.

Part of an integrated global team

- For transactions which may trigger filing obligations in multiple jurisdictions, a consistent global approach and strategy is required.
- Our NSI experts are part of an integrated global FDI team drawn from our Competition, Regulation and Trade, Mergers & Acquisitions and Dispute Resolution practices.
- We work seamlessly on cases involving multiple filings to secure global clearances and successful completion, factoring in regional nuances in FDI regimes and the impact on the overall deal timetable.

Highlights from our experience

- **InterGen** on the competition and FDI aspects of the disposal of its electricity generation business including securing NSI clearance.
- **Engie** on the competition and FDI aspects of the disposal of the Equans business including securing NSI clearance.
- **CNIC** on the NSI conditional clearance of the acquisition of Electricity North West Limited by Redrock Investment Limited.
- **Reaction Engines** on the NSI conditional clearance for an investment by SDF.
- **Sichuan Development Holding Co Limited** on the NSI conditional clearance of its acquisition of Ligeance Aerospace Technology Co. Ltd.
- **Altice** on its acquisition of an increased shareholding in BT and its subsequent sale.
- **OneWeb** in relation to the merger control, foreign direct investment and regulatory aspects of its proposed combination with Eutelsat Communications, and Bharti Group in respect of its stake in the combined entity.
- **Altra Industrial Motion Corp**. on its acquisition by Regal Rexnord, advising on the FDI aspects of the transaction and securing FDI clearances in six countries, including the UK.
- **Certares** on international merger control issues and FDI aspects associated with its €300m equity investment in Avia Solutions Group.
- **Amentum** on certain merger control and FDI aspects of its proposed agreement to merge with Jacobs' Critical Mission Solutions and Cyber and Intelligence Businesses.
- **Stonepeak** on the merger control and FDI aspects of its acquisition of an interest in Cellnex subsidiaries in Sweden and Denmark.
- **A UK power generation company** in connection with the competition and FDI aspects of its sale to institutional investors, including obtaining unconditional NSI clearance.
- **Renewable Power Capital** on the merger control and FDI aspects of their joint-ventures with Eelpower (2022) and Greenfield (2023) to develop UK BESS projects at all stages of development and with Elmya Energy (2023) to develop UK BESS projects with co-located solar PV projects.
- **Kin and Carta plc** on its takeover by Valtech.

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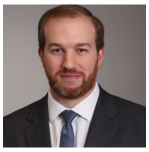

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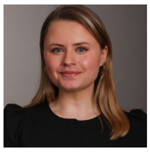

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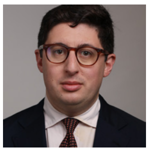

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