



New regime for UK national security screening takes one step closer

The UK Government's National Security and Investment White Paper (the *White Paper*), announced today by the Business Secretary Greg Clark, sets out plans for a significant increase in its powers to scrutinise investments on national security grounds. The proposals follow a consultation in 2017 and initial reforms which came into force in June 2018 lowering the thresholds for the UK's Competition and Markets Authority (CMA) and the UK Government to intervene in certain transactions involving military, dual-use or advanced technology sectors ([see our earlier briefing](#)).

The proposed new regime, which will require primary legislation, will result in a major overhaul and significant increase in the UK Government's national security screening powers. In a departure from many international regimes, the scope of the UK Government's review powers will not be sector specific, nor subject to any turnover or share of supply thresholds and will include criminal penalties for non-compliance. Moreover, minority investments and asset acquisitions are firmly within scope, and the regime is not specifically limited to foreign investors (indeed it could in theory apply to EU investors post-Brexit).

The UK Government expects there to be around 200 notifications made each year under the new regime, of which 100 will raise national security concerns and of which 50 will be subject to some kind of intervention. To illustrate the significance, this number of notifications would be significantly more (approximately three to four times greater) than the number of UK merger notifications made to the CMA currently (the CMA took 62 merger decisions in the year 2017/2018).

The proposals are now subject to public consultation until 16 October 2018. Please contact us if you would like assistance with submitting a response.

Key points to note:

- The White Paper sets out a voluntary notification system whereby parties are encouraged to notify "trigger events" if they may raise national security concerns. The definition of potential national security concerns is currently very vague. A "statement of policy intent" intended to provide further guidance as to how national security concerns may arise leaves many questions unanswered.
- "Trigger events" for the new review powers are more expansive than the types of transactions that could trigger a UK merger filing, and will include the acquisition of more than 25% of an entity's shares or votes; or significant influence or control over an entity; or further acquisitions of significant influence or control over an entity beyond the above thresholds. Additional trigger events include the acquisition of more than 50% of an asset; or of significant influence or control over an asset. The definition of "asset" is very broad and includes real and personal property,

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contractual rights and intellectual property, including the acquisition of property situated outside of the UK.

- Transactions which are not notified in advance to the UK Government will be subject to a “call-in” power which can be exercised by the UK Government either when it has reasonable grounds for suspecting the trigger event is in contemplation or progress, or within a prescribed period (potentially up to six months) after a trigger event has taken place.
- The grounds on which the UK Government will decide whether trigger events give rise to national security threats are set out in a draft statement of policy intent published on the [UK Government’s website](#). The grounds are very broad but the following risk areas are highlighted:
 - target risk: businesses involved in national infrastructure, certain advanced technologies, critical direct suppliers to the UK Government and emergency services, military and dual-use technologies and suppliers to those sectors; and
 - acquirer risk: investments by parties who may seek to use their acquisition to undermine the UK’s national security (‘hostile parties’) – which may be foreign or UK-based and are assessed on a case-by-case basis.
- A long list of “core” areas of the economy which will be presumptively within the regime identifies most significant activities in the energy, communications, transport and nuclear sectors as being covered. The White Paper makes clear that this is not an exhaustive list and that national security concerns could potentially arise in any sector of the economy.
- Process: following a notification, the UK Government will have up to 15 working days (extendable by a further 15 working days) to decide whether to call in a trigger event for national security assessment. Once a trigger event has been called in, the UK Government will have up to 30 working days to conduct its review (extendable by a further 45 working days with a further extension if the parties agree). These time periods can be suspended by the Senior Minister at any time if a party does not fully respond to information requests.
- There will be three potential outcomes of a review: confirmation to proceed, approval subject to conditions, and blocking or unwinding a transaction (where the transaction has already taken place).
- Sanctions for non-compliance are severe in order to incentivise compliance and punish breaches. The following sanctions may be applicable to the company itself and/or those individuals who authorised the breach, directors or senior officials who permitted the breach and failed to take action to prevent it, as well as those who ought to have known in their official capacity but failed to take action to prevent the breach:
 - a maximum custodial sentence of five years will be available for most offences (including breach of conditions imposed or failure to unwind a transaction) with lesser custodial sentences of up to two years available for less serious offences (specifically for failure to provide information, documents or to attend as a witness for the purposes of an investigation into a suspected breach of the regime; or knowingly providing false information or suppressing information whether for the purposes of an investigation or not); and/or
 - civil financial penalties for failure to provide information (maximum one-off fine for an individual or business of up to £30,000 or maximum daily fine for an individual or business of up to £15,000) and for all other breaches (up to 10% of a business’s worldwide turnover or for an individual up to 10% of the higher of their total income or £500,000); and/or
 - director disqualifications for up to 15 years.
- Decisions will be subject to challenge by way of an appeal to the High Court applying judicial review principles. The Government will be able to use Closed Material Proceedings (i.e. confidential information that is not disclosed to the companies involved) to protect information harmful to national security.

- The proposals also involve removing the existing national security considerations from the Enterprise Act 2002 and so from the CMA's remit. The CMA will remain the independent and expert competition authority (and its role in public interest interventions related to media plurality and financial stability will remain unchanged), while national security matters will be separately assessed by the UK Government.
- No indication is provided in the White Paper of when the UK Government expects the regime to come into force, but given that the White Paper is subject to a 12-week consultation period, following which new primary legislation will need to be put before the UK Parliament, entry into force looks very unlikely this year.

Implications for investors

- Given the large number of notifications the UK Government is expecting, many transactions involving UK businesses will come within the scope of the regime. While in most cases it should be straightforward to satisfy the Government that no national security concerns apply, the indication that there will be approximately 50 transactions per year in which the UK Government intervenes in some way shows that the intention is to establish a regime with "teeth". A comparison to the number of phase 2 references typically made by the CMA (9 references to phase 2 in 2017/18) demonstrates that UK Government intervention in an additional 50 transactions on national security grounds would represent a significant uplift in overall enforcement activity.
- Auction processes may now take into account the risks that a bidder may pose in terms of national security, as well as the traditional antitrust analysis that is conducted. Investors from countries with friendly relations with the UK (such as the US and OECD countries) are likely to have little cause for concern.

Broader context

The UK Government's proposals have not arisen in isolation. They form part of a broader international trend for governments to reinforce their national security screening powers in light of a perceived threat of sensitive assets and businesses being acquired by buyers linked to foreign governments (in particular Chinese buyers). All G7 members have strengthened their foreign direct investment or public interest screening regimes since 2015, while an EU-level foreign investment screening regulation is likely to come into effect around summer/autumn 2020.

Even while the UK has traditionally positioned itself as one of the most open economies in the world, the White Paper also forms part of a domestic trend towards a greater screening of foreign investment. In June 2018 the UK Government intervened in the proposed £44m acquisition of Northern Aerospace Limited by a subsidiary of China's Shaanxi Ligeance Mineral Resources on grounds of national security. The transaction was subsequently cleared but not before it had lapsed in the face of regulatory delay and uncertainty. It was reported that the deal has since been revived following receipt of government clearance.

In addition, the day before the release of the White Paper, the UK Government unveiled [draft laws](#) requiring foreign companies owning UK properties to reveal their ultimate owners on the world's first public register of overseas entities' beneficial ownership. While this is designed to tackle money laundering, it nevertheless represents a further tightening of the activities of foreign investors in the UK.

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