

# Clients & Friends Memo

## Foreign Direct Investment UK Update

13 November 2020

Foreign investment has been ripe for legislative change in the United Kingdom. We have previously discussed this in our [Clients and Friends Memo](#) of 28 July 2020 and our [podcast](#). The latest development came on 11 November 2020, as Prime Minister Boris Johnson announced the National Security and Investment Bill 2020 (the Bill), which overhauls the current merger and acquisition rules in relation to foreign investment.

The Bill is aimed at broadening the scope of transactions that the Government may review for national security reasons, that are divorced from competition, media plurality or financial stability grounds. In June 2020, the Government legislated for a short term change through the Enterprise Act 2002, which included lowering the threshold for intervention in three specific sectors: artificial intelligence, cryptographic authentication technology and computing hardware. Even with these lower thresholds only a handful of transactions would be considered for review. The short-term measures will now be replaced by comprehensive reform that looks to provide transparency to the market of when transactions will be reviewed together with a timeframe for review<sup>1</sup>.

Where foreign investment is contemplated in a UK entity, the Government has introduced:

- a requirement for companies operating in sensitive sectors to seek authorisation for specific transactions (mandatory notification);
- a mechanism for voluntary notification to encourage parties to consider national security risks (voluntary notification); and
- a mechanism to enable the Secretary of State to “call in” statutorily defined transactions to undertake an independent national security assessment, even if no notification took place.

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<sup>1</sup> The Bill states that the new screening process of overseas takeovers of UK entities should be carried out within 30 working days.

**Mandatory Notification**

If a foreign entity is looking to invest in a target entity that is considered to be doing business in a “key sector”, a mandatory notification regime may be triggered if it is an acquisition of:

1. more than 25% of the votes or shares in that entity; or
2. voting rights that enable or prevent the passage of any class of resolution governing the affairs of the entity.

The Bill currently considers 17 sectors to fall within this category.<sup>2</sup> The party making an acquisition in any such transaction is required to notify the Secretary of State and receive clearance before the transaction can take place. Guidance indicates that it is likely that any legislation identifying key sectors will be dynamic in order to adapt to what the Government may identify as high-risk areas at the time.

The Bill also introduces mandatory notification for key sectors where there is an acquisition of over 15% of the votes or shares in the entity. This transaction is differentiated from the mandatory notification regime and is considered a “notifiable acquisition.” It is not considered to be a triggering event in and of itself. Instead, it requires notification to be provided and for the Secretary of State to decide whether the transaction could lead to a triggering event (i.e. if in that specific circumstance control of over 15% may lead to material influence over the entity<sup>3</sup>) and therefore require clearance. The mandatory regime only applies to investment in an entity, as opposed to the voluntary regime which is applicable to entities and assets.

**Voluntary Notification and Trigger Event**

Where transactions, in relation to assets (including intellectual property) or entities are not included in a mandated sector, yet may give rise to national security risks, parties to the transaction are encouraged to voluntarily notify the Government. Triggering events for such notifications include those in the mandatory regime, as noted above, as well as an acquisition of:

1. material influence over a qualifying entity's policy; or
2. right or interest in, or in relation to, a qualifying asset that provides the ability to use or control the asset, or use or control the asset to a greater degree than was possible pre-acquisition.

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<sup>2</sup> Key sectors currently include: Advanced Materials; Advanced Robotics; Artificial Intelligence; Civil Nuclear; Communications; Computing Hardware; Critical Suppliers to Government; Critical Suppliers to the Emergency Services; Cryptographic Authentication; Data Infrastructure; Defence; Energy; Engineering Biology; Military and Dual Use; Quantum Technologies; Satellite and Space Technologies; and Transport. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934326/mandatory-notification-sectors-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934326/mandatory-notification-sectors-consultation.pdf)

<sup>3</sup> This reflects the merger guidance published by the Competition and Markets Authority.

**Call-in**

The government may also “call in” a transaction if the Secretary of State reasonably suspects that:

- a trigger event has taken place, or is in the process of taking place in relation to a qualifying asset or entity; or
- the event has given rise, or may give rise to a national security risk.<sup>4</sup>

The issuance of a “call in” notice will allow the Government to intervene in the transaction including issuing interim notices requiring certain individuals or entities to engage, or refrain from engaging in, specific acts in relation to the acquisition.

Substantial penalties exist for non-compliance, including fines of up to £10 million for directors of overseas companies, or 5% of annual turnover for entities.

The Government has urged businesses to share information about potential trigger events<sup>5</sup>, as well as to engage them in informal discussions for business planning purposes, from 12 November 2020.<sup>6</sup>

**Effects of the Bill**

The new regime follows in the footsteps of an international trend to ensure stricter legislation in relation to foreign investment and seems to currently focus on Chinese investment in the UK. Over the last decade over 115 British companies have been wholly or partly owned by Chinese-owned companies mainly in the energy, defence, data and finance sectors. The Bill comes hot on the heels of guidance [published](#) in relation to how UK technology firms should engage with China due to the role of data in potential human rights violations, and corporate transactions that have been reversed this year due to Chinese involvement. The focus on identifying foreign influences in the UK and limiting certain foreign investment is also reflected in the UK’s current sanctions regime, and is likely to continue well into next year.

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<sup>4</sup> Guidance in relation to transactions that may be subject to a call in or national security assessment is issued in the Statement of policy intent. See <https://www.gov.uk/government/publications/national-security-and-investment-bill-2020/statement-of-policy-intent>

<sup>5</sup> Business may email [investment.screening@beis.gov.uk](mailto:investment.screening@beis.gov.uk) during this time.

<sup>6</sup> See process flowchart for more information [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934438/process-flow-chart-for-businesses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934438/process-flow-chart-for-businesses.pdf)

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