

## On 11 November 2020, the UK government announced a new NSI regime.

Under the new regime, certain direct foreign investments in the UK will require mandatory notification to, and prior approval by, the Department for Business, Energy & Industrial Strategy (BEIS) before completion. In addition, BEIS will be able to “call in” retroactively deals (within six months of becoming aware of them) that fall outside the mandatory notification requirements, but which it deems still to raise potential national security risks. BEIS will be able to look backwards at deals that closed within 5 years, so long as they closed on or after 12 November 2020.

Secondary legislation will define the sectors subject to this new regime, the thresholds for the new mandatory notification requirement and the risk factors that BEIS will take into account when determining whether to exercise its new “call-in” powers. For example, the government is proposing that even involuntary or incremental acquisitions of control<sup>1</sup> of a sensitive UK entity or asset<sup>2</sup> may be caught by the new regime, with only limited exceptions.<sup>3</sup> The full list of sectors in scope (likely to include defence and energy, amongst others) is subject to a public consultation open until 11:45 p.m. on 6 January 2021. Whilst observers might assume measures such as this to be aimed at infrastructure ownership, by including ‘critical suppliers to Government’ the outsourcing community, which provides a wide range of services to the public sector, could also be caught.

In announcing the NSI Bill, UK Business Minister Alok Sharma said: “Hostile actors should be in no doubt – there is no back door into the UK. This bill will mean that we can continue to welcome job-creating investment to our shores, while shutting out those who could threaten the safety of the British people.” He added: “We are also taking a five-year retrospective power to call in transactions in the wider economy which were not notified to us but may raise national security concerns, both of which are similar to the powers under the French, German and Italian regimes. However, these powers will not apply to transactions which took place prior to the Bill’s introduction to Parliament, so businesses and investors have certainty about historical deals.”

- 1 In all cases of incremental acquisitions of control, the government would need to demonstrate that the further acquisition provided further significant influence or control and that the further acquisition gave rise to a new or additional risk to national security linked to that trigger event. Similarly, any remedy would need to apply to the further acquisition only.
- 2 Assets in scope of the bill are land, tangible moveable property and (covering intellectual property) any idea, information or technique with industrial, commercial or other economic value.
- 3 Transactions that are not in scope include: (1) transactions involving stakes of below 15% in entities unless such a holding (alone or in combination with other rights or interests) amounts to the acquisition of “material influence over the policy of the entity”; (2) transactions involving an existing holding in an entity of over 25% moving to a new level of 26-50%; (3) transactions involving an existing holding in an entity of over 50% moving to a new level of 51-74%; (4) transactions involving an existing holding in an entity of 75% or more, moving to a new level of 76-100%; and (5) assets bought by consumers – e.g. personal computer software, mobile phones, GPS.

Certain complex international transactions may trigger national security screening in various jurisdictions. For instance, if a UK-based target has subsidiaries in third countries (e.g. in the US or other EU member states), such a transaction may be subject to national security screening not only under a new NSI regime, but also under relevant regimes in all countries where the target has some interests or businesses. The US has a robust system of screening foreign investment run by the Committee on Foreign Investment in the United States (CFIUS). If US companies are being acquired by foreign entities, CFIUS can be a critical hurdle to clear. Similarly, the analogous screening mechanisms are enhanced in some EU member states. The EU has introduced a coordination framework for the screening of foreign investment between its member states, allowing other member states to seek to play a role in scrutiny of foreign investment by the member state in which the investment is found (under EU Regulation 2019/452). We successfully help our clients navigate the complexities of national security screening mechanisms of foreign investments throughout the globe.

This development is particularly noteworthy given that for some years the UK has been open to (and in certain sectors encouraging of) foreign ownership of infrastructure assets, as can be seen for example in the ownership of UK airports and utilities, as well as some energy assets. The UK has been seen by infrastructure investors in particular as a stable and safe haven, something the Government was keen to stress it wishes to continue.

The new UK NSI regime follows a trend of raising national protectionism across Europe, the US and Australia, which have recently upgraded oversight powers.

Under the Enterprise Act 2002 regime, BEIS could intervene in deals raising national security concerns by issuing a public interest intervention notice (PIIN) and referring the matter to the Competition and Markets Authority (CMA). However, PIINs are only allowed if a deal also meets the CMA’s jurisdictional thresholds based on the target’s UK turnover or the parties’ UK shares of supply. As a result, only 12 transactions in total have been subject to a PIIN on national security grounds, to date. The NSI Bill replaces the PIIN voluntary regime with a mandatory notification regime and extends BEIS’ “call in” powers to instances where a deal does not meet the CMA’s jurisdictional thresholds. As a result, the government estimates that the new regime would be likely to lead to between 290 and 860 notifications of trigger events per year, and between 70 and 95 call ins per year. Of these, around 10 per year are thought likely to require remedies.

Firms that fail to comply with the new regime could be fined, and executives could be jailed. Any transaction where notification is deemed mandatory would be declared legally void if procedures are not followed. Businesses involved in international transactions will, therefore, need to factor in deal planning and transaction documents the potential need for additional mandatory notification and clearance requirements in the UK.

**Please [click on the link](#) to view the NSI Bill Procedure Flowchart for Businesses.**

In advance of the NSI legislation being implemented, BEIS welcomes informal representations from businesses about transactions that may be in scope of the NSI regime and offered advice on what to expect from the regime to assist in business planning. We understand a number of international infrastructure operators and investors have already responded and we expect more to do so.

It is expected that the Bill could be presented to Parliament later this month, but that timetable could slip.<sup>4</sup>

### At a Glance Overview of the Key Features of the NSI Bill

- A separate national security screening regime, divorced from competition regulation
- Broadening of the range of investments in scope by removing the turnover and share of supply thresholds, including a new definition of “entities” and including acquisitions of assets
- A statutory requirement for parties to notify relevant transactions in the most sensitive areas of the economy
- The new regime provides a clear process for businesses and investors, which is supported by a “call-in” power that enables the government to assess deals that may give rise to national security risks
- Statutory process, which includes a Statement of Policy clarifying the parts of the economy in which the government considers national security risks are most likely to arise (this will be updated regularly); time limits for the government to assess cases and make decisions; and appeal routes.

For an additional summary of New National Security and Investment Regime see attached [presentation](#).

### List of Target Sectors

1. Civil Nuclear
2. Communications
3. Data Infrastructure
4. Defence
5. Energy
6. Transport
7. Artificial Intelligence
8. Autonomous Robotics
9. Computing Hardware
10. Cryptographic Authentication
11. Advanced Materials
12. Quantum Technologies
13. Engineering Biology
14. Critical Suppliers to Government
15. Critical Suppliers to the Emergency Services
16. Military or Dual-Use Technologies
17. Satellite and Space Technologies

### Contacts



**Jane Haxby**  
Partner, London  
T +44 20 7655 1277  
E jane.haxby@squirepb.com



**Francesco Liberatore**  
Partner, London  
T +44 20 7655 1505  
E francesco.liberatore@squirepb.com



**Matthew Kirk**  
International Affairs Advisor, London  
T +44 20 7655 1389  
E matthew.kirk@squirepb.com



**George N. Grammas**  
Partner, Washington DC  
T +1 202 626 6234  
E george.grammas@squirepb.com



**Robert MacLean**  
Partner, Brussels  
T +32 2 6277 619  
E robert.maclean@squirepb.com

<sup>4</sup> More information is available at [www.gov.uk/government/collections/national-security-and-investment-bill#consultations](http://www.gov.uk/government/collections/national-security-and-investment-bill#consultations).