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National Security and Investment Bill update: UK Government refines definitions of high risk sectors that require notification and BEIS publishes new factsheet

On 2 March 2021 the UK Government published the results of its consultation for the National Security and Investment Bill (NS&I Bill). The NS&I Bill introduces a new regime for the screening of acquisitions for the purposes of national security. This function is currently dealt with under the Enterprise Act 2002, which allows the Secretary of State to review transactions on public interest grounds. The NS&I Bill was first published on 11 November 2020 and is discussed in more detail in a previous briefing.

On 3 March 2021 the Department for Business, Energy and Industrial Strategy (BEIS) also published an overview of its new Investment Security Unit (ISU) and a reminder of how businesses can prepare for the launch of the NS&I Bill.

BACKGROUND

The consultation on the NS&I Bill began on 11 November 2020 and concluded on 6 January 2021. The aim of the consultation was to survey whether the definitions of high risk sectors included in the mandatory regime in the NS&I Bill were sufficiently clear. Clarity is an important aspect of the Bill as purchasers will need to self-assess whether their acquisition falls within the list of sectors for which notification is mandatory. The Government also sought responses on whether the definitions were proportionate.

The consultation concerned the definitions of all 17 sectors included in the mandatory regime. These sectors are:

- Civil nuclear
- Communications
- Data infrastructure
- Defence
- Energy
- Transport
- Artificial intelligence

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- Advanced robotics
- Critical suppliers to the emergency services
- Computing hardware
- Cryptographic authentication
- Advanced materials
- Military / dual-use technology
- Satellite / space technology
- Critical suppliers to Government
- Quantum technologies
- Engineering biology (now renamed Synthetic biology)

RESULTS OF CONSULTATION

The Government report on the consultation states that most responses were concerned that the definitions of these sectors were too broad. The Government noted this was particularly the case for the definitions of Communications, Synthetic biology and advanced technology sectors.

The Government also noted that responses mentioned that sub-contractors may not always be aware that their goods or services are ultimately supplied to the Government, and that there was some interest in introducing exemptions to the regime.

A provision that an entity in these sectors must carry on activities in the UK for the regime to apply will be included in the final regulations (many respondents noted this was not included in the individual sector definitions).

Examples of the specific changes that the Government proposes to make as a result of the consultation for three of the 17 high risk sectors are set out below.

COMMUNICATIONS

Many respondents said the definition of Communications was too broad, so the Government has narrowed the definition to focus on three areas: public communication networks, services and associated facilities. Some categories of businesses that are captured by the definition (e.g. providers of submarine cable systems) are set out as examples to provide further clarity.

A threshold has been introduced to exclude smaller companies; the threshold is currently based on turnover but the Government is also considering adopting an end-user threshold in the final draft.

Respondents highlighted the previous definition of “associated facility” was too broad as it potentially included any supporting activities such as providing the land or building on which any network apparatus is located. Under the new definition, the manufacturers and suppliers of “passive infrastructure” (e.g. ducts and poles) will be exempted from the definition, but the list of infrastructure which will be classed as active or passive for these purposes remains under discussion. The Government has clarified that those persons who own land on which associated facilities are located will not be in scope by virtue of owning the land alone. However, if landowners make available associated facilities (e.g. masts, buildings housing communications apparatus) then they will be in scope.

ENERGY

Respondents sought further clarity on the scope of the definition of Energy, noting a particular concern over the definition of 'Petroleum Production Project'. Respondents also asked for more detail on how thresholds would be measured with reference to actual production/capacity and timeframes. The updated definitions provide greater detail of which activities are included and how thresholds would be measured and over what period.

The Government confirmed retail electricity suppliers would not be caught by this definition.

The oil infrastructure threshold included in the final definition will continue to be reviewed. The capacity threshold of a downstream facility will be changed from 20,000 tonnes to 50,000 tonnes following comments that the previous threshold was too low.

The Government has also committed to continuously review its definitions to account for developing energy technology and the UK's net zero target.

SYNTHETIC BIOLOGY

This sector was previously known as 'Engineering biology'. The definition has been changed to refer to synthetic biology to reflect the narrower focus of the revised sector. Respondents suggested some areas to be excluded from the definition and expressed concern that there could be unintended consequences of an over-inclusive definition. The Government notes it has consulted stakeholders to achieve a balance that captures areas of national security concern (including activities that may be of dual-use) whilst avoiding overburdening businesses. For example, cell therapy used to treat disease is now excluded from the requirement to notify.

Some respondents suggested that a voluntary regime and call-in powers would be sufficient for this sector. However, the Government disagreed as it considered that it would not be able to effectively monitor this sector without a mandatory regime, due to the rapid pace of developments and complex nature of the sector (particularly for technologies which are dual-use).

The Government noted that it has sought to safeguard national security while maintaining the UK's position as a global biotechnology "*partner of choice*".

THE BEIS FACTSHEET:

BEIS has previously published two factsheets: an overview of the NS&I Bill and a process guide for businesses. A third factsheet was published on 3 March 2021 and provides an overview of how the ISU will work.

The ISU is a new unit that will sit inside BEIS and be responsible for identifying and assessing national security risks in the UK arising from transactions caught by the NS&I Bill. The factsheet states that the ISU is currently being set up and is expected to be operational by the end of 2021. However, the factsheet also notes that businesses are already able to email BEIS should they require advice or information on the new regime.

When assessing the notifications it will receive under the NS&I Bill, the ISU will screen the transaction using cross-government expertise to determine the risk to national security. It is anticipated that fewer than 10 per cent of the transactions notified will require a detailed assessment, and that only a small proportion of those assessed should require intervention. The ISU expects most transactions will be cleared quickly and plans to have processes in place before the launch of NS&I Bill to enable swift assessment.

Businesses may contact the ISU already for an initial view on whether a transaction is likely to be within the scope of NS&I Bill based on current criteria (noting that the Bill has not yet been passed and is subject to change). The ISU is reported to have provided advice of this nature to a number of businesses. As the Government can call-in transactions that closed after 12 November 2020 retrospectively once the NS&I Bill is passed, an indicative assessment may be valuable for businesses considering transactions that would fall within the legislation as currently drafted.

OTHER DEVELOPMENTS

MERGER CONTROL

SAMR CONTINUES FOCUS ON GUN-JUMPING WITH WAVE OF PENALTIES AND FASTER ENFORCEMENT PROCESS

Over the course of one week, the State Administration for Market Regulation (SAMR) fined 16 companies a total of approximately RMB 7 million (approximately £775,000) for failing to notify transactions that met the People's Republic of China (PRC) merger control thresholds. In ten of these cases (primarily involving variable interest entity (VIE) structures), SAMR's investigation took less than two months. This demonstrates SAMR's continued focus on gun-jumping, especially in the platform economy sector, and may continue encouraging companies to come forward with transactions that were not notified.

On 11 March 2021 SAMR fined four companies RMB 950,000 (approximately £105,000) in total for completing transactions without SAMR's clearance. None of these transactions were in the platform economy sector and none were fined the maximum amount. These investigations also took much longer to complete (ranging from 8 to 22 months). The transactions were:

- the formation of a 60/40 joint venture (JV) by Wuhan Jinyu Free Trade Development and Fenghao Logistics (Beijing) (each party was fined RMB 150,000 (approximately £16,500));
- the acquisition of an 18.66 per cent interest in Shenzhen Soling Industrial by Zhongshan Lexing Enterprise Management Consulting (Lexing was fined RMB 300,000 (approximately £33,000)); and
- Baoneng Motor Group's acquisition of 51 per cent of Qoros Automotive (Baoneng was fined RMB 350,000 (approximately £38,750)).

The next day (12 March 2021) SAMR announced 10 further gun-jumping penalties against 12 internet companies, most of which involved VIE structures. In each case the maximum penalty of RMB 500,000 (approximately £55,000) was imposed. This was despite the fact none of the transactions were deemed to have the effect of eliminating or restricting competition. The transactions were:

- the formation of a 50/50 JV between Didi Mobility and SoftBank;
- the formation of a 51/49 JV between Shanghai Dongfang Newspaper and Beijing Liangzi Yuedong Technology;
- Intime Retail (Group)'s acquisition of Kaiyuan Commercial;
- Tencent Holdings Limited's acquisition of a 15.41 per cent stake in YUAN INC;
- Chengdu Meigengmei Information Technology's acquisition of an 11.9 per cent stake in Wangjiahuan Agricultural Products Group;
- Suqian Hanbang Investment Management's acquisition of Jiangsu Five Star Appliance;
- Baidu Holdings Limited's acquisition of a 52.76 per cent stake in Ainemo Inc.;

- Suning Rundong Equity Investment's acquisition of a 14.08 per cent stake in Shanghai Pateo Electronic Equipment Manufacturing;
- TAL Education Group's acquisition of a 70.52 per cent stake in DaDa Education Group; and
- Beijing Nucarf Network Technology's acquisition of Baoduitong.com.

Significantly, four of these transactions involved acquisitions of an interest below 20 per cent, sending a strong signal that minority investors must be mindful of compliance with the PRC merger control regime.

Reforms to Chinese competition law that are widely expected to be introduced later this year would increase the maximum fine for gun-jumping. Current drafting suggests fines of up to 10 per cent of turnover could be imposed, which is a significant increase from the current RMB 500,000.

ANTITRUST

CMA LAUNCHES APPLE APP STORE INVESTIGATION

On 4 March 2021 the Competition and Markets Authority (CMA) announced that it has opened an abuse of dominance investigation into Apple following complaints that the terms and conditions for app developers are unfair and anti-competitive.

The Apple App Store (App Store) is the only means by which app developers are able to distribute their apps on Apple products such as the iPhone or iPad. All apps distributed via the App Store must first be approved by Apple, with such approval requiring the developer to agree to Apple's terms and conditions. Developers have recently alleged that such terms and conditions are unfair and anti-competitive. In particular, the complaints focus on the fact that the App Store is the exclusive means for developers to distribute their apps to Apple product users and that app sales and in-app purchases must be made through Apple's payment system, for which Apple charges up to 30 per cent commission.

The CMA's investigation will firstly consider whether Apple has a dominant position in connection with the distribution of apps on Apple devices in the UK and secondly, whether Apple imposes unfair and anti-competitive terms on its developers, resulting in end-users having less choice or suffering higher prices. The CMA has indicated that it will take until September to gather evidence and request information.

There are currently also three open antitrust investigations into Apple's App Store before the European Commission.

STATE AID

EUROPEAN COURT OF JUSTICE SETS ASIDE GENERAL COURT JUDGMENT IN STATE AID CASE INVOLVING FOUR SPANISH PROFESSIONAL FOOTBALL CLUBS

In its judgment of 4 March 2021 the European Court of Justice (CJ) annulled the judgment of the General Court (GC) which had quashed a European Commission decision that found a Spanish aid scheme providing tax privileges to four Spanish football clubs (including FC Barcelona) to be in breach of the EU State aid rules.

A Spanish tax law adopted in 1990 required all professional Spanish sports clubs to convert into public limited sports companies unless such clubs had a positive financial balance in the years preceding the law. FC Barcelona, Real Madrid, Athletic Bilbao and Atlético Osasuna were four clubs that benefitted from the exception and chose to remain 'non-profit organisations'. Until 2016, this gave the four clubs the benefit of a tax rate on profits that was 5 per cent lower than the rate applied to other clubs, which were treated as limited liability companies. In July 2016 the Commission decided that the preferential tax rate amounted to unlawful State aid and ordered Spain to recover the unpaid taxes from the relevant clubs. In an appeal brought by FC Barcelona in 2019, the GC quashed the Commission decision on the grounds that the Commission had not demonstrated, to the necessary standard, that the non-profit football clubs had received an economic advantage.

On appeal to the CJ, the CJ concluded that the Commission's decision should be upheld and the GC's judgment be set aside. The CJ found that the Commission had in fact shown that the aid scheme conferred an advantage on the football clubs, which was capable of falling within Article 107 of the Treaty on the Functioning of the European Union. In reaching its conclusion, the CJ highlighted that the Commission was not required to consider whether the benefit conferred by the aid scheme would be offset by other measures when assessing whether there was an advantage. In particular, the Commission did not need to examine whether the less favourable deduction rate for the reinvestment of extraordinary profits that applied to non-profits neutralised the benefit provided by the preferential tax treatment.

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