CLEARY GOTTLIEB

ALERT MEMORANDUM

UK National Security Regime: Enforcement Practice and Updated Guidance

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On 27 April 2023, the UK Government published updated guidance on its recently introduced national security and investment screening regime.

Since the National Security and Investment Act came into force in January 2022, the UK Government has reviewed more than 800 transactions for possible national security concerns. Five transactions have been prohibited, of which four involve Chinese investors and one involves Russian investment (according to the Government). At least two of the prohibitions (Nexperia/Newport Wafer Fab and LetterOne/Upp) are reportedly under appeal.

10 transactions have been cleared subject to remedies, including conditions requiring:

- Government approval for certain decisions made by the acquired entity;
- Restrictions on the sharing of sensitive information by the target with the acquirer;
- Appointment of certain personnel in the acquired entity, such as board members or key staff members;
- Board observers to be appointed by the Government;
- The continued provision of services to the Government; and
- Maintenance of R&D and other capabilities in the UK.

The process has largely been smooth for acquisitions by trusted investors of assets that are not highly sensitive. The prohibitions and remedies to date have been consistent with recent global trends adopted by other FDI agencies in the approach to national security issues. The principal concerns with the regime are around transparency and predictability.

The new guidance includes the following additions, several of which seek to address these concerns.

Accelerated review for acquisitions involving parties "*suffering material financial distress*." The updated guidance explains that "*in exceptional situations, where evidence of material financial distress gives rise to genuine urgency, it may be possible to expedite the assessment process*." The new guidance sets out the type of evidence that might

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need to be submitted to the Investment Security Unit, including financial information, confirmation of the engagement of insolvency advisors, and evidence that no support is available from lenders, shareholders, suppliers or creditors.

Timing of notification. There is a new section stating that the Government would "*generally consider it appropriate to notify when there is a good faith intention to proceed. This might be evidenced by: the existence of heads of terms; board level consideration of the acquisition; or if it is a public bid, a public announcement of a firm intention to make an offer or the announcement of a possible offer*." The guidance explains the consequences of notifying too early, in particular that the "*updated acquisition might count as a separate trigger event*." In certain circumstances, the Government might require confirmation that the seller "*has been engaged and agrees that the acquisition is in contemplation*," including where more than one notification has been received in relation to the same target. The Government is also legally required to notify the target if the acquisition is called in for full review.

Withdrawing from an acquisition. A question often raised by clients is whether it is possible, if the Government is leaning towards an adverse finding, to withdraw from an acquisition without any published decision. The new guidance indicates that in such circumstances parties should provide evidence that they have withdrawn from the transaction and "*if the government is satisfied that parties to an acquisition have withdrawn from it and no longer intend to complete an acquisition, no final order will be issued by the government*."

Voluntary extension of the review period. The Act provides for an initial review period of 30 working days after notification, then a 30-working-day "assessment period" for transactions that are called in for full review, then a further 45 working days for an "additional period" if required by the Government, and finally the possibility for the review period to be further extended "voluntarily" by agreement with the parties. The new guidance provides more information on the circumstances in which this voluntary period might be required, in particular that "*this is often used to further develop remedies to mitigate national security risk and/or to allow acquirers to make further representations on proposed remedies*."

Mandatory or voluntary filing. On a more administrative point, though one which can have important consequences for review timing, the guidance also clarifies that "*a notifiable acquisition can only be notified using the mandatory notification form. If you do submit a notification using the wrong form, the NSI Act requires the government to reject the notification*." We understand this is a response to practice over the past year where certain acquirers used the "voluntary" notification form in cases where they considered it unclear whether the transaction was caught by the 17 mandatory notification sectors. We understand that, in some instances, the Government wrote back to these acquirers indicating that it considered the activities of the target fell in the mandatory sectors, so the filing would instead need to be made on a mandatory form before the review clock could be started.

Relatedly, the Government has added further information to its guidance on the 17 mandatory sectors explaining how parties should engage with the Investment Security Unit in the event that they are unsure whether a mandatory filing is required.

The Government has also published additional guidance on completing the notification form, details on the acquirer and target entities that should be included, and submission of classified information.

Finally, the Government announced on 23 March 2023 a Memorandum of Understanding that sets out the terms on which Parliament will scrutinise the actions of the Investment Security Unit in operating and managing the NSIA regime.

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