Moalem
Weitemeyer

Moalem Weitemeyer
Advokatpartnerselskab
Amaliegade 3
DK-1256 Copenhagen

Tel. +45 7070 1505
moalemweitemeyer.com

CVR 3162 7885

UK INTRODUCES A NEW REGIME FOR SCREENING OF FOREIGN INVESTMENT

8 November 2021

On 4 January 2022 a new regime for screening of foreign investments will come into force in the UK (National Security and Investment Act 2021 ("NS&I Act")). Although political discussions have been going on during the past decade, currently no specific regime applies in the UK. Until now, there has only been limited screening of foreign investments based on Part 3 of the Enterprise Act 2002, which is the legislation setting out the conditions for merger control in the UK.

The new regime establishes a standalone regime and gives more clarity and transparency to what types of deals the ISU could examine and the process for such screenings and introduces the government's powers to investigate and intervene in mergers, acquisitions and other deals which could imply a threat to the UK national security.

Acquisitions covered by the NS&I Act

The NS&I Act will be administered by a new Security Unit ("ISU") within the Department for Business, Energy, and Industrial Strategy ("BEIS"). The final decision-maker is the Secretary of State for BEIS ("SoS").

The regime applies to the following acquisitions:

1. An increase in existing shareholding whereby the investor's shareholding or voting rights crosses 25 %, 50 % or 75 % stake.

2. Acquisition of voting rights in an entity that enables the investor to secure or prevent the passage of any resolution governing the affairs of the entity.

3. Any acquisition of a "material influence" on a company if it gives rise to national security concerns (normally 15 % or more of the shares or votes, but in some circumstances even less).

4. Acquisition of control over assets (including land and intellectual property).

The NS&I Act has no financial thresholds for notification, nor any de minimis exemptions.

Regardless of the thresholds above, the SoS will be able to intervene in any transaction that potentially could be a threat to national security.

Both share and assets (including intellectual property and land) acquisitions are subject to the new regime. Any acquisition that takes part in a corporate restructure or reorganisation could also be covered.

The regime will apply to acquisitions where the target carries out specified activities within the UK within 17 different sectors, including energy, transport, communications defence, artificial intelligence, and other tech-related sectors.

The new regime will focus on non-UK investors; however, it will equally apply to UK investors. Albeit the regulation is extensive as it covers both UK- and non-UK investors, the nationality of the investor may be relevant, and UK investors will likely have a lesser impact on national security than non-UK investors. The focus is on whether the activities of the company acquired could be a risk to national security.

Another important extensive element of the regulation is, that acquisitions of non-UK companies with essential activities in the UK, e.g., non-UK companies supplying goods or services to entities in the UK, may also be subject to review by the SoS.

Mandatory and Voluntary Filing

Under the regime, a mandatory filing is required for non-UK investors if the acquisition falls within the specific sectors (as set out above). Further, the SoS has been granted a call-in option for acquisitions that the SoS finds can be a possible threat to national security (see below for a description). The SoS may call in the acquisition within 6 months after the SoS becomes aware of the transaction, provided it is within 5 years of the triggering event (e.g., acquisition of material influence). However, if a mandatory filing was required, and such has not been made, the 5-year deadline does not apply.

The mandatory filing obligation only applies to companies carrying out specified activities in the UK. However, it is worth noting that the call-in power will also apply in relation to acquisitions of non-UK companies or assets, e.g., non-UK companies supplying goods or services to persons in the UK.

The SoS have the possibility to impose certain conditions to the acquisition (e.g., altering the number of shares or restricting access to commercial information), unwind or prohibit it.

Approval is to be obtained before closing and obtaining approval is the responsibility of the purchaser. (“Standstill Obligation”). If the Standstill Obligation is breached the acquisition could be treated as automatically void.

It is expected that also a voluntary filing system will be established allowing parties to apply in order to avoid any risk of a later call-in. The voluntary system has not yet been established but is expected that such will cover transactions that are not covered by the mandatory notification thresholds but regardless could give rise to national security concerns.

Timing

From the time a filing is declared complete, the SoS will have an initial 30 working days to decide whether it can be approved, or the notification requires a call-in option if a more in-depth review is required (see below).

If a call-in notice is given, the SoS must issue a final decision within further 30 working days, which can be extended to 45 working days if the SoS has a reasonable suspicion that the acquisition could imply a threat to national security. The deadline can potentially be extended further if the party agrees. The deadlines can be "stopped" by the ISU if, e.g., the SoS requests further information.

The same deadlines will apply to acquisitions that fall without the mandatory filing process.

The regime will apply for all transactions closed after the 4th of January 2022. However, the SoS has a retroactive power to call-in an acquisition for review as of the date of the qualifying condition completed between 12 November 2020 and the closing date.

An investor closing an acquisition without prior approval may be fined, and the size of such will depend on whether it is a business or individual:

1. For business: Fixed penalty of up to 5 per cent of the worldwide turnover (including turnover for subsidiaries and/or other companies controlled by such) or GBP 10,000,000 (whichever is greater).

2. For individuals: Fixed penalty of up to GBP 10,000,000 and imprisonment for up to 5 years depending on the country in the UK.

Our Comments

The new regime comes with material changes which will have a significant impact on the way investors and businesses currently have arranged. Especially, filing requirements should be taken into consideration in the overall planning of the deal timetable.

It is important to take notice of the fact that the new UK regime is extensive in its application as the regime applies to both foreign and national investors and even to non-UK targets if the non-UK target has activities in the UK.

Consequently, for any future acquisitions with any UK element, this regulation should be duly taken into consideration.

This is especially important for current acquisitions which have not yet been signed, which should already take this regime into consideration, especially the risk of a call-in from the ISU afterwards.

This means for example that the possible FDI screening under the UK regime should be duly taken into consideration in the transaction documents. A more in-depth due diligence and analysis will be necessary also.

In addition, as the SoS has a retro-active call-in option for all investors who have closed an acquisition from 12 November 2020 and onwards will have to assess whether such acquisition could fall within the regime, and thereby could require a filing and approval from the SoS. It is likely that the retrospective power will be exercised cautiously and only in relation to acquisitions with a more serious national security concern. This risk should be addressed and considered carefully for transactions closed later than 12 November 2020, where the target has activities within the scope of the new regime.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:

Pernille Nørkær
Partner
Pernille.noerkaer@moalemweitemeyer.com

Jeanette Kjeldgaard Rasmussen
Associate
Jeanette.rasmussen@moalemweitemeyer.com

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