

UK NATIONAL SECURITY REVIEWS: LOWER THRESHOLDS FOR MORE SECTORS

The UK government is lowering the thresholds at which it can carry out a national security review for acquisitions of targets with activities involving artificial intelligence (AI), advanced materials or cryptographic authentication. It has also clarified that it can intervene in investments on the basis of the need to maintain UK capabilities to deal with public health emergencies such as the coronavirus pandemic.

STOP-GAP STEPS

The UK government is due shortly to introduce the National Security and Investment Bill that will, when adopted, give it powers to intervene in a very wide range of transactions on national security grounds independently of the UK merger control regime. Pending the adoption of that legislation, the government has introduced two new 'stop-gap' measures.

Transactions affecting UK capabilities to combat public health emergencies

The government has amended the existing national security regime (under the Enterprise Act 2002) to make it clear that it has the power to review investments that could affect the capabilities in the UK to combat, and to mitigate the effects of, public health emergencies such as the coronavirus pandemic. It has done so because it considers that the economic disruption caused by the pandemic may mean that some businesses with critical capabilities are more susceptible to takeovers, either from "outwardly hostile approaches", or through financially distressed companies being sold to "malicious parties". Examples of transactions that might fall under the new ground of intervention include investments in businesses that are "directly involved in a pandemic response," such as vaccine research companies or makers of personal protective equipment.

The amendment, which came into force on 23 June 2020, will have little effect in practice, as the government could already intervene in such transactions on the basis that they affect the UK's national security. At most, they eliminate the very small risk that a court might have disagreed that transactions affecting capabilities to combat a public health crisis are a matter of national security. But sensible transacting parties will have assumed that anyway.

Transactions involving advanced artificial intelligence, advanced materials or cryptographic authentication

If the target of a transaction has activities, anywhere in the world, involving artificial intelligence, advanced materials or cryptographic authentication, lower thresholds will apply to determine whether the government can carry out a national security review:

- the target has UK turnover of £1 million or more, in any sector (not just AI, advanced materials or cryptographic authentication). The usual threshold is £70 million; or
- the target has a share of supply or purchases of 25% or more in the UK (or a part of the UK) of products or services relating to AI, advanced materials or cryptographic authentication. Unlike the usually-applicable share of supply test, this can be met even if the acquirer has no overlapping activities in those areas in the UK.

These thresholds are the same as those which already apply if the target has certain activities in the areas of quantum technology, military/dual use products or computer processing units.

The definitions of advanced materials, AI and cryptographic authentication are summarised in the box below. Depending on the sector, various activities of a target may be considered to be relevant. As well as the production, development or research of products or services in these areas, relevant activities also include: (i) developing or producing anything designed for use in AI, (ii) owning, creating or supplying certain IP relating to advanced materials; and (iii) developing or producing certain "enabler" materials or processes used in the manufacture of an advanced material, or providing know-how about the use of such enablers.

The lower thresholds are expected to enter into force in July.

"Advanced materials" means:

- (a) materials that are capable of modifying the appearance, detectability, traceability or identification of an object;
- (b) alloys formed by chemical or electrochemical reduction of feedstocks in the solid state;
- (c) any manufacturing processes that are involved in the solid state formation of alloys in or into crude or semi-fabricated forms, or powders for additive manufacturing; and
- (d) certain types of metamaterials, being certain composite materials in which the constituents change the manner in which electromagnetic, acoustic or vibrational energy interacts with the material, in order to achieve a property or performance that is not possible naturally.

"Artificial intelligence" means

technology enabling the programming or training of a device or software to use or process external data (independent of any further input or programming) to carry out or undertake (with a view to achieving complex, specific tasks): (a) automated data analysis or automated decision making; or (b) analogous processing and use of data or information.

"Cryptographic authentication"

means the method of verifying: (a) the identity of a person, user, process or device; or (b) the origin or content of a message, data or information, by means of electronic communication, where the method of verification has been encrypted or subject to other analogous application.

CONTACTS

Jenine Hulsmann
Partner

T +44 20 7006 8216
E jenine.hulsmann
@cliffordchance.com

Nelson Jung
Partner

T +44 20 7006 6675
E nelson.jung
@cliffordchance.com

Alex Nourry
Partner

T +44 20 7006 8001
E alex.nourry
@cliffordchance.com

Greg Olsen
Partner

T +44 20 7006 2327
E greg.olsen
@cliffordchance.com

Jennifer Storey
Partner

T +44 20 7006 8482
E jennifer.storey
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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