

NARROWER DEFINITIONS FOR MANDATORY FILING SECTORS ANNOUNCED FOR THE UK NATIONAL SECURITY SCREENING REGIME

The UK Government has narrowed the definitions of sectors that will be subject to mandatory filing obligations for investors under the National Security and Investment Bill. The draft definitions are of practical importance to deals that are being done now, because they indicate how, when the new regime is in place, the Government is likely to use its retroactive power to call in transactions that have already closed by that time.

The Government has also indicated that after the Bill is enacted it intends to put in place various other pieces of secondary legislation with a view to commencing the new regime by the end of the year.

Narrower definitions for mandatory filing

The National Security and Investment Bill will create new powers for the Government to review a wide range of investments on national security grounds. It will impose mandatory filing obligations for investments in targets that have certain "specified" activities in one or more of 17 sensitive sectors. Penalties for failure to respect these obligations will include imprisonment of up to 5 years for individuals and/or fines of up to 5% of the investor's group worldwide turnover or £10 million (whichever is higher). See our [November 2020 briefing](#) for more information.

The Government published a consultation last year on the list of definitions of specified activities that it considers most likely to give rise to national security risks, and which will therefore be subject to mandatory filing. Various stakeholders, including Clifford Chance, responded to the consultation with suggestions for refinements and clarifications of the proposed definitions. On 2 March 2021, the Government published its response to that consultation, indicating that it intends to narrow down the definitions of the 17 specified sectors, but that none will be eliminated. Some of the most significant changes are as follows:

- **Artificial Intelligence (AI)** is now defined by reference to specific applications, i.e. those involving: (i) the identification or tracking of objects, people or events; (ii) advanced robotics; or (iii) cyber security. The scope of these applications remains, however, very broad. The

Key issues

- The UK Government has published its response to the consultation on mandatory notification under the proposed regime for 17 specific sectors under the National Security and Investment Bill.
- It has refined the definitions of the 17 sector-specific activities that will be subject to mandatory notification.
- The Government has also published policy statements for the various statutory instruments required for the filing regime's commencement.
- The Government intends to commence the filing regime by the end of 2021, although informal indications have been given by BEIS that the regime might commence between July and September 2021.

consultation response also sets out the Government's view that "those who purchase products or licenses in relation to AI (for use but not for further development) are not covered by this definition".

- **Advanced robotics** is no longer limited to robotics that use AI, but now expressly carves out a number of activities including the production or development of systems that are readily available for purchase by consumers and basic industrial automation systems.
- **Communications** now covers electronic communications networks or services only if they are public and they generate at least £50 million of annual turnover. The definition of an "associated facility" has also been tightened, in particular to clarify that it excludes landowners whose land merely hosts associated facilities or communications facilities.
- The definition of **Critical Suppliers to Government** now focuses on contracts which relate to the handling of classified information or estates and their protection. A number of types of contractor have therefore been stripped out of the definition, including sub-contractors, landowners with access rights to government buildings and holders of personal information about Government employees.
- **Data Infrastructure** is now defined by reference to a qualifying entity having a direct contractual relationship with an entity falling within the scope of 7 of the specified sector definitions, rather than all 17 as originally drafted. Landowners and leaseholders are now excluded.
- **Energy:** retail electricity suppliers will not fall within the scope of the definition, and the threshold for the capacity of downstream oil facilities that fall within scope has been increased from 20,000 to 50,000 tonnes.
- A number of limbs to the definition of qualifying **Satellite and Space Technologies** entities have been removed, including space science and exploration activities, specialised telecommunications applications, and the provision of Internet access by satellite infrastructure.

The revised definitions do not address all of the concerns that were raised in response to the consultation. However, they remain in draft and the Government intends to engage directly with relevant stakeholders to further develop and refine the definitions. It will also take into account proposals that are raised in Parliament during the remaining passage of the Bill.

The Bill will create retroactive powers for the Government to call in transactions that close before the regime commences (but after 12 November 2020). While such deals will not be subject to mandatory filing, the definitions of specified activities will be an important indicator of whether the Government is likely to call them in. Consequently, the draft definitions are already of practical importance to deals that are being done now, or that have recently been done.

Timing and process of legislation

The National Security and Bill is currently at the Committee stage of the House of Lords, which will require a line by line examination of the Bill. Following the report stage and the third reading by the Lords, the Bill will be sent to the House of Commons to consider the Lords' amendments. Once all amendments have been agreed, the Bill will be sent to the Queen for Royal Assent.

On 2 March 2021 the Government also published policy statements for each of the statutory instruments that must be passed before the NSI regime can

commence. These indicate that, as soon as possible after the Bill has received Royal Assent, the Government will launch a series of consultations on:

- the statement of statutory policy intent, to which the Secretary of State for Business, Energy and Industrial Strategy (BEIS) must have regard when exercising the power to call in transactions for a national security review;
- the "notifiable acquisitions" regulations, which will specify the activities subject to mandatory notification, based on the definitions referred to above;
- three sets of regulations containing the forms for mandatory filings, voluntary filings and applications for retrospective validation of a transaction that has been voided due to a failure to file;
- regulations setting out the mechanisms for calculating group turnover for the purposes of imposing penalties, which are expected to be based on similar regulations under the UK merger control regime);
- regulations governing how requests for information and documents should be served; and
- regulations that specify when the regime will commence.

The policy statements confirm that, subject to Parliamentary scrutiny and debate on the Bill's proposed statutory instruments, the Government intends to commence the regime by the end of 2021, although informal indications have been given by BEIS that the regime could commence between July and September.

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