

New U.K. National Security Powers to Call in Investments and Other Transactions

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Key Points

- The U.K. Department for Business, Energy and Industrial Strategy published its *National Security and Investment* White Paper, which proposes a voluntary notification regime and a powerful “call-in” mechanism. The proposal would grant the U.K. government wide powers to review investments and other transactions, regardless of size, involving “trigger events” that may give rise to a risk to national security.
- As with the U.S. CFIUS regime, transactions giving rise to material national security concerns may need to be amended or approved subject to conditions, as well as potentially blocked or unwound.
- The U.K. government estimates that 200 transactions per year would be notified and that around 100 would be called in, with half of these resulting in conditions/remedies.
- Sanctions for breach include fines for businesses of up to 10 percent of worldwide turnover, and imprisonment of up to five years for individuals.

On Tuesday, July 24, 2018, the U.K. Department for Business, Energy and Industrial Strategy published its White Paper on [*National Security and Investment: A consultation on proposed legislative reform*](#) (the “White Paper”). The White Paper sets out the Government’s proposal for “upgraded national security investment powers” and includes a public consultation until October 16, 2018.

To meet the immediate threat posed by perceived hostile states/actors, the U.K. government recently lowered the U.K. merger control target turnover threshold to £1 million and removed the need for an increment to the share of supply test for transactions involving military and dual use, computing hardware and quantum technologies. The White Paper is the next step in implementing the government’s “long-term” vision for national security investment review, which will align the U.K. regime more closely with those of the United States, Germany, France, Japan, Australia and Canada. The proposal would require fresh primary legislation, and it

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promises a “proportionate,” “clear and predictable process” with a “tight focus” on national security and “not on wider public interest issues.”

Scope

The proposal adopts a voluntary notification model, similar to the current U.K. merger control and U.S. Committee on Foreign Investment in the United States regimes, accompanied by a “call-in” power to allow the designated “Senior Minister”¹ to review transactions raising national security concerns. The proposal applies to the whole of the U.K. economy, underlining the need for clear guidance from the government to avoid introducing unnecessary uncertainty into the U.K. investment environment at a crucial point in time. To allay such concerns, the government has also published a draft *Statement of Policy Intent* (SoPI). The SoPI designates “core areas” within which the government is more likely to exercise its call-in power, including in the energy, communications and technology (e.g., dual-use), civil nuclear, military and defense, transport and emergency services sectors.

Call-In Power

The U.K. government can call in an investment for review if it has a “reasonable suspicion” that a “trigger event” has occurred, or is in contemplation, that may give rise to a risk to national security. Trigger events include the acquisition of more than 25 percent of equity, or a stake of 25 percent or less where significant influence or control (e.g., through the appointment of directors) can still be exercised over a company, partnership or other entity; or more than a 50 percent stake in, or significant influence over, an asset (including land, personal and intellectual property, as well as contractual rights). Risks to national security can take three forms: (i) target risk, where the national security risk arises due to the activities of the entity or the nature of the asset involved (e.g., nuclear power plant owner, developer of cryptographic technology); (ii) trigger event risk, where the event itself gives the acquirer the means or ability to use the entity or asset to undermine national security (e.g., through sabotage or espionage); and (iii) acquirer risk, where the acquirer has the potential to undermine national security. These thresholds are intentionally wide in order to prevent parties from “gaming” the system to avoid scrutiny on a technicality. Investors are advised to focus on possible substantive risks to national security when assessing whether their transaction may be covered by the new regime.

Process and Timing

The proposal identifies a four-stage process:

- **Notification:** The government should be notified of covered transactions, with the possibility to engage in informal discussions first. Upon receipt, the government has 15 working days (WD) to review the notification (extendable by an additional 15 WD in complex cases, as a possible alternative to full call-in).
- **Screening:** The government will screen transactions (whether notified to it or not—the government will dedicate resources to “market monitoring” to catch non-notified transactions) to determine, including by use of information-gathering powers, whether the transaction qualifies for review, including whether there is a U.K. “nexus.” The government may then issue a call-in notice to the acquirer as soon as possible, and, in any case, within six months of the trigger event. A call-in notice

suspends the trigger event and may include additional requests for information, as well as imposing interim restrictions, most likely on information-sharing and access.

- **Assessment:** The government will then have 30 WD (extendable by 45 WD, with a possibility to agree an additional “voluntary” period) to assess called-in transactions to determine whether remedies, such as divestiture, contractual obligations, and blocking or unwinding orders, are required in order to address national security concerns.
- **Remedies:** If the government chooses to impose remedies (the parties will not have the opportunity to “offer” remedies to avoid call-in), it will have information-gathering powers to enable it to monitor compliance with the relevant conditions.

Decisions under the process would be subject to appeal by those with a “sufficient interest in the matter” on grounds of lawfulness only within 28 days of the relevant decision and would be heard by the High Court. Decisions imposing criminal sanctions would follow the normal criminal appeals route.

The White Paper notes that all proposed timings are subject to review on the basis of the consultation responses. We note that, under the proposed timetable, a review could last 21 weeks (not including any stop-the-clocks or “voluntary” extensions beyond 75 WD). The government proposes to publish high-level reasons for call-in decisions, including comments in relation to any interim restrictions.

Sanctions

The White Paper proposes a mix of criminal and civil sanctions, which would operate as alternatives. The maximum proposed criminal sanctions include unlimited fines and imprisonment ranging from five years for serious breaches (providing false information or breaching commitments) to two years for breaches relating to information requests. Civil financial penalties include 10 percent of annual worldwide turnover for businesses and 10 percent of worldwide income or £500,000 (whichever is higher) for individuals. The government would also have the power to disqualify directors for up to 15 years for breaches.

Relationship with Other Regulators and BREXIT

The Competition and Markets Authority (CMA) remains the independent authority in charge of the merger control review process, although the Senior Minister would have the power to overrule the CMA (most likely in respect of remedies) if the CMA’s assessment fails to address, or runs counter to, national security interests. A similar arrangement applies to Ofcom, Ofgem and other U.K. sector regulators, who (together with the CMA) would be under an obligation to share information with the government in relation to any “trigger events” of which they become aware. Up until the end of the BREXIT implementation period (currently expected to be December 31, 2020—see the [BREXIT Timeline](#)), the government would be unable to overrule the European Commission’s merger control decisions and would also be bound by the proposed EU Foreign Direct Investment regime (once this enters into force—see previous [Alert here](#)).

ⁱ The proposal notes that the term “Senior Minister” is a departure from “Secretary of State,” the usual collective term for Ministers in legislation, so as to include the Prime Minister and Chancellor, who are not Secretaries of State.