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The UK's National Security & Investment Act Regime: Emerging Themes in Practice

For a law which does not fully come into force until 4 January 2022, its approaching footsteps have been making plenty of noise before it walks through the door. The Euclid Law team has been advising many clients on whether their transactions are caught, assessing substantive risk, liaising with the Department for Business, Energy & Industrial Strategy (BEIS) and submitting filings. Some themes are already emerging from our experience which we are sharing here. We welcome views and reactions from others.

The Christmas rush

As well as the mad dash to buy a turkey before supply chains crash, some deal-makers have been rushing to complete transactions before 4 January 2022. This makes a lot of sense when all other aspects of the deal point to simultaneous exchange and completion. Complete on or after 4 January 2022, by contrast, and this deal timetable is out of the question if the target business happens to fall into one of the 17 mandatory filing sectors. And where the deal obviously raises no substantive national security concerns, the extra time and cost of a mere technical filing is best avoided. So, if it's not too late, it's worth completing certain transactions during the first days of the New Year.

Between no filing and filing: the briefing paper

For UK merger control practitioners, the briefing paper has emerged as a useful tool between making no filing and a full merger filing – a short-form filing in all but name.

Perhaps as a result of many competition practitioners voyaging into the realm of NS&I, the briefing paper has been a welcome stowaway. The idea is to engage with BEIS upfront on issues relating to the jurisdictional scope of the NS&I Act or even substantive issues before deciding whether to make a filing. There is no prescribed format for such an approach, but clearly a concise, focused and transparent submission is more likely to result in prompt and meaningful feedback from BEIS.

A briefing paper is a key consideration for transactions which may require a mandatory filing but where this is borderline and BEIS's view is sought before the full filing route is followed. This has been arising frequently in relation to mandatory sectors whose scope is unclear (see more below). Given the NS&I regime is a mandatory one with criminal sanctions, it is all the more important to make the correct assessment in advance.

A briefing paper is also an option for those deals which fall outside the mandatory filing regime, but may or may not warrant a voluntary filing. Rather than face six months of post-completion uncertainty about whether BEIS will call in the transaction, it will often be prudent to sound this out upfront, and make a voluntary filing if BEIS expresses an interest in investigating.

In our experience, the BEIS officials have been helpful and responsive. We hope they will distil the learning from all the queries they are fielding into published guidance later next year, and indeed on a regular basis.

When drafting conditions precedent for transactions which may (or may just not) require a mandatory filing or commend a voluntary filing, we have been preparing conditions in the alternative: either a briefing paper is submitted to BEIS and comes back with non-binding comfort that a filing is not required; or a formal filing is made and clearance given.

Some mandatory sectors are baggier than others

Some mandatory sectors have relatively straightforward perimeters. Others are worlds of definitions, sub-definitions and exceptions to exceptions.

On the simpler side, for example, certain pharma clients have relatively easily identified whether their products fall within the "synthetic biology" sector. By contrast, firms providing data networking services have proven more challenging, as assessments in the "data infrastructure" sector involve making fine distinctions between different types of activities. Intuition or common sense are not necessarily reliable guides. Such target businesses have also prompted forays into other sectors such as "communications", "artificial intelligence" and "suppliers to the emergency services".

This type of assessment requires a close exchange of views with technical experts within a business. When a transaction is still at the confidential stage, it has occasionally been difficult to speak transparently to technical specialists who are not yet in the know. We have therefore, for instance, brainstormed hypothetical targets, or used the acquirer's activities by analogy, in order to make the NS&I assessment.

Export controls: the continuing reach of EU law

The "military and dual-use" sector cross-refers to targets supplying products subject to the UK's export control legislation. This in turn cross-refers, amongst other lists, to the one annexed to the EU's dual-use regulation. The "advanced materials" sector also

refers, amongst other things, to the EU list. This will not be to the taste of those who like their Brexit hard.

What falls on the EU list changes from time to time, as decided by the EU. This means practitioners need to keep a close eye on this list and any accompanying interpretative guidance. For example, we recently advised on whether or not a target involved in exporting the SARS-CoV-2 virus for medical research would be caught by the "dual-use" sector. This required a careful construction of the relevant EU legislation and guidance, together with a brief consultation of BEIS.

The longer view

When faced with the immediate prospect of a new transaction, there is often little choice but to determine whether it may trigger an NS&I filing and, if so, go ahead and make the filing. With some important exceptions, most deal timetables and structures are unlikely to be crafted around NS&I.

We are, however, starting to take a longer-term view of how clients structure themselves in order to minimise or circumscribe the NS&I risk. This is a particularly worthwhile exercise for investment businesses which are concerned not only about investment risk but also about sensitive disclosure requirements: when a transaction requires a mandatory NS&I notification, then, broadly, any non-UK government-related investors (such as sovereign wealth funds) need to be disclosed in the filing, as well as any investors with at least a 5% stake in the acquirer.

Strategies for minimising the NS&I risk could include the following:

- For funds investing in sensitive UK sectors, investors' holdings could be kept below 5% and and government-related investors from politically sensitive countries steered away entirely in favour of other funds;
- Funds with government-related investors from politically sensitive countries could have investment strategies which avoid sensitive UK sectors or make non-triggering investments, i.e. shareholdings below 25% without "material influence".

Meanwhile, clients making regular investments liable to trigger the NS&I regime (as well as similar regimes in other countries) ought to keep up to date information on 5% and government-related investors readily to hand. This will enable the acquirer parts of the filing to be prepared relatively quickly.

Next steps

The next milestone will be 4 January 2022, the "go live" date for the BEIS online notification portal. We know that many parties are planning to file that very day. We therefore wish the BEIS officials the best of luck unwrapping all those filings and a very happy, but not too indulgent, New Year.

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About Euclid

Euclid Law was created by experienced competition lawyers with a common desire to build a new competition law and foreign direct investment firm that is agile, collaborative, highly commercial in its thinking, innovative in its approach to delivering results and free from the constraints of larger law firms.

Our core expertise covers all aspects of competition law, including cartels and anti-competitive agreements, merger control, abuse of dominance, state aid, competition litigation, market investigations, audit and compliance, as well as the expanding field of foreign direct investment controls. With offices in both London and Brussels, in-depth experience and a network of contacts in key jurisdictions around the world built up over many years of practice, we have the ability to advise clients across Europe and worldwide. We represent clients before EU, UK, German and Belgian authorities and courts.

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