Report Time for National Security Screening in the UK

The UK Government has recently published its first full year report on how the National Security & Investment Act is performing. Here is our selection of noteworthy points from the report's 57 pages:

- 866 notifications were made in total, fewer than the 1,000-1,830 estimated by the Government's pre-regime impact assessment. The flood gates have not therefore opened;

- 47% of the 866 notifications related to the defence sector. This is partly to be expected, because the defence sector is a sensitive area for any investment screening regime. However, it is also likely to be because the regime catches not only direct suppliers to the Ministry of Defence, but also those within chains of sub-contractors. This differs from the less expansive definitions for the other mandatory notification sectors;

- 180 of the 866 notifications were voluntary. That seems like a high number. It could be that businesses are being particularly cautious about notifying transactions which don't require a mandatory notification. Perhaps this concerns acquisitions which are just beyond the boundaries of the mandatory sector definitions. It may also be due to mandatory notifications wrongly being notified down the voluntary route: the report notes that 23 of the 43 notifications which were rejected were due to the parties using the wrong form;

- 65 transactions were called-in for an in-depth review, i.e. where the Secretary of State reasonably expects the acquisition may give rise to a national security risk. This was below the annual number of 70-95 anticipated by the Government in its pre-regime impact assessment. In terms of which sectors are hot, 37% of call-ins engaged the military and dual-use sector and 29% engaged defence (bearing in mind multiple sectors can be engaged on the same transaction);

- As for origin of investment, 42% of call-ins involved acquirers associated with China, yet these represented less than 5% of notifications. 32% of call-ins involved UK acquirers, yet these represented 58% of notifications. Chinese

acquirers are therefore, unsurprisingly, raising the acquirer risk. When it comes to cases involving a final order (broadly, those which are prohibited or conditionally cleared), 8 of the 15 involved Chinese acquirers. However, this is still consistent with plenty of Chinese investments being approved in less sensitive sectors and falling outside the national security regime altogether;

- In terms of deal timing, it took on average 5 working days (with a median of 4) for the Government to accept notifications as complete. For those transactions which need notifying but are almost certainly expected to be cleared, parties therefore ought to add a week to the 30 working days when calculating the lead-time to clearance of their deals; and

- There were merely 10 call-ins of non-notified transactions. This suggests the Government is currently using this power sparingly to investigate transactions falling outside the mandatory regime. It also suggests parties are generally not overlooking the need to make mandatory and, on a cautious basis, voluntary notifications, where appropriate.

The Government gives itself a pat on the back in the report. The Deputy Prime Minister, the current decision-maker under the regime, says it "is working for the UK, and working for business". However, it is difficult to discern, at this early stage, what difference the regime is making to investment in the UK. Short-term changes in deal-making activity mean a longer-term perspective will be needed to benchmark the regime's effect. There will inevitably be at least some trade-offs between protecting national security and encouraging investment. Indeed, the various figures published in the report may hide some deals which have not gone ahead at all for fear of falling foul of the national security regime.

The report is essentially retrospective and mostly a compilation of statistics. It doesn't tell us whether the Government has any plans to reform the national security regime. That said, from our own experience and discussions, we understand the Government is sympathetic to business concerns, such as:

- Intra-group re-organisations triggering burdensome notifications which are unlikely to raise any national security concerns;

- The ability of businesses to renotify quickly, e.g. if officials deem something minor is missing from the notification or where they decide the notification should have been mandatory rather than voluntary (and *vice versa*);

- Certain of the mandatory sectors catching too many innocuous acquisitions through wide or unclear definitions. The definition of "sub-contractor" in the defence sector is, as noted above, a notable example; and

- Giving more of the "gist" of national security concerns when these are identified, which would better enable parties to address these.

The Government is expected to let the regime run for a longer period before making any substantial changes, which could require legislation. However, it has a statutory commitment to report by the end of 2024 on the functioning of the regime's regulations – the rules which define the mandatory notification sectors. The Government welcomes feedback to inform this report, which could in turn spur reform. Businesses should therefore take advantage of this opportunity, and we, at Euclid Law, are helping them to do this.

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Euclid Law

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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 as well as audit and compliance. We are recognised experts at navigating the UK and EU Foreign Direct Investment and UK National Security. 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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