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CLIENT ALERT

CFIUS Has Definitively Crossed the Atlantic, but Is Yet to Complete Its U.K. Landing

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The U.K.'s National Security and Investment Bill was enacted into law as the National Security and Investment Act (the "**NSI Act**") on 29 April 2021, with the new regime expected to come into force towards the end of this year. Over the coming months the U.K. government is to enact secondary legislation and provide further detail and guidance on the framework created by the NSI Act, including guidance on the regime's extraterritorial scope and finalised definitions of the 17 sensitive sectors.

As stated in our previous alert, *Is CFIUS One of the Few Things Crossing the Atlantic?*, the new regime substantially reforms the U.K.'s foreign investment rules, introducing a hybrid system of mandatory and voluntary notifications on grounds of national security similar to reviews by the Committee on Foreign Investment in the U.S. ("**CFIUS**").

During the NSI Act's legislative review through the U.K. parliament, it was not fundamentally amended despite concerns raised by various stakeholders about the extensiveness of its scope. The regime under the NSI Act will broadly consist of the following:

- Acquisitions of certain levels of shares or voting rights – with the lowest level being 25% – of target companies active in 17 sensitive sectors are subject to mandatory notification to the Investment Security Unit (the "**ISU**"), which sits within the Department of Business, Energy and Industrial Strategy. A mandatory notification will also be required where there is an acquisition of voting rights in such a company which enables the acquirer to pass or prevent any class of resolution governing the company's affairs. The 17 sectors include defence, energy, communications, AI and various other advanced technologies which are likely to be relevant to the activities of many tech and healthcare companies.
- Even below this 25% threshold, although not subject to the mandatory notification rule, the U.K. government will still have the power to review transactions if (at least) "material influence" is acquired in a target company where the Secretary of State reasonably suspects that the transaction may give rise to a risk to U.K. national security. Material influence is a concept taken from the regular competition merger control regime. Certain acquisitions of assets (e.g. land, moveable property and intellectual property) may also fall under this regime. This "call-in" power is not limited to the 17 identified sectors and transactions outside the mandatory regime which may pose a risk to national security can be retrospectively called in for review up to five years after closing, reduced to 6 months once the U.K. government becomes aware of the transaction (although what would amount to awareness here is subject to uncertainty). Parties will need to consider carefully the merits of making a voluntary notification in such cases to avoid the ongoing risk of being called in. Inevitably, many will conclude that it is preferable to make precautionary notifications in order to mitigate this risk.
- There are criminal and civil sanctions for breaches of the mandatory notification obligations and other non-compliance, with fines of up to 5% of worldwide turnover or £10 million (whichever is greater) and up to 5 years imprisonment for directors.
- Transactions falling under the mandatory regime are subject to a standstill obligation – where they complete without clearance they will be void, unless subsequently validated by the U.K. government. Therefore, the need for any notification must be factored into the deal timetable in the same way as for regular merger control. Transactions which

should have been notified and are not will be subject to review by the U.K. government for an indefinite period, but the U.K. government will only have 6 months to intervene once it becomes aware of the transaction.

- There will be no turnover or market share thresholds below which transactions will fall outside the regime. So, transactions will not benefit from any de minimis thresholds, if they otherwise meet the criteria for notification and/or review.

Until the new regime comes into force, there is currently no formal mechanism for parties to submit notifications to the U.K. government. However, given that the NSI Act allows for the retrospective review of acquisitions completed after 12 November 2020, parties are advised to consider their M&A and FDI transactions in light of the new regime. Parties to any transaction which may fall within the mandatory notification regime would be wise to consider voluntarily engaging with the ISU in order to mitigate any uncertainty. For transactions outside the mandatory notification regime which may cause national security concerns, parties may also wish to consider such voluntary engagement with the ISU to mitigate transaction risk.

Despite putting in place these broad-ranging review powers, the U. K. Government has been at pains to emphasise its belief that the U.K. remains one of the world's most open, attractive and welcoming destinations for foreign investment. Time and the practical application of these new powers will prove whether this belief is well founded. But there are strong grounds for optimism; the U.K. looks set to remain very much open for business.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Peter Broadhurst
Partner – Brussels, London
Phone: +44.20.7154.4864
Email: pbroadhurst@crowell.com

Simon Evers
Partner – London
Phone: +44.20.7413.1328
Email: severs@crowell.com

Michelle J. Linderman
Partner – London
Phone: +44.20.7413.1353
Email: mlinderman@crowell.com

Amanda Kwagala
Associate – London
Phone: +44.20.7413.1359
Email: akwagala@crowell.com