BRIEFING NOTE:

# THE UK'S NATIONAL SECURITY AND INVESTMENT BILL

The Bill creates a significant new source of political risk for foreign direct investment in the UK.


## SUMMARY

- The UK Government's new National Security and Investment Bill is the biggest overhaul of policy relating to merger control and related transactions for two decades.
- Media focus has largely been on Sino-British relations, but the sweeping new powers will apply across the board.
- Seventeen sectors will be required to provide mandatory notifications of qualifying transactions, with other sectors expected to provide voluntary notifications.
- The new regime removes turnover thresholds and applies to acquisitions of minority interests as low as 15%.
- Ministers will be able to intervene retrospectively for up to five years after a transaction has been completed.
- The Government expects the administrative impact on businesses to mount to £43m a year, though a broader cooling effect on transactions may be the true risk.
- Helmsley Partners considers this new regulatory regime to be a significant new source of political risk for foreign direct investment in the UK.


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The UK Government has launched its plans for the biggest shake-up of merger control policy for almost twenty years. The new National Security and Investment (NSI) Bill received its first reading in the House of Commons on Wednesday 11th November 2020 and is set to give the Government far-reaching powers to intervene in any takeover or investment bids deemed to be a possible threat to national security. This regime represents a significant new layer of scrutiny and powers, rather than simply an extension of competition law, which has been the traditional territory of merger control in the UK.

The NSI Bill has been a long time coming, with its high-level framework having been explored in a White Paper published in July 2018. Small updates were made to existing legislation in both 2018 and 2020 but both of these were seen as interim measures before a later wide-ranging bill. The perceived need for action from government on takeover issues has grown during the coronavirus pandemic, with a notable political trend towards increased suspicion of foreign actors, especially concerning high-value technology. The exclusion of Huawei from the UK's future 5G networks and the intervention of the Government to block an attempted boardroom coup within Imagination Technologies both demonstrate the prevailing political wind. The UK regime appears to be moving into line with the USA's *Committee on Foreign Investment in the United States* (CFIUS), which has escalated its activities under the Trump Administration, especially in relation to China. Many key elements of the NSI Bill resemble those of CFIUS.

The Bill is widely seen as targeting Chinese companies, though perhaps the highest-profile deal that may yet be scrutinised by regulators is the attempted takeover of the UK semiconductor company Arm by the American tech giant NVIDIA. Suspicion of Chinese interests, increased vulnerability to takeovers due to Brexit and the economic downturn, and the growing recognition of the importance of new technologies to national security have all contributed to growing pressure on this issue. The Johnson Government's taste for strategic technologies (N.B. its intention to build a UK version of DARPA) and active industrial strategy in the name of 'Levelling Up' have also played a part.

## KEY ELEMENTS OF THE BILL

The NSI Bill will be, in the words of the Government, "a significant upgrade on [the Government's] current powers."[1] Some key elements include:

- The minimum turnover threshold for government intervention has been removed (it was previously £1m).

- The Government is also free to intervene regardless of the sector, revenue or market share of the companies involved, if the condition of a potential national security risk is met. This makes the Bill a clear departure from merger control based almost entirely on antitrust regulations.

1. BEIS (Nov 2020), *National Security and Investment White Paper*. Link.

## PRIORITY SECTORS

Whilst the Bill empowers Ministers to act across all sectors, the screening regime particularly targets seventeen sectors in which M&A activities will automatically trigger mandatory 'notifications'. Those sectors are:

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Critical Suppliers to the Emergency Services
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Engineering Biology
- Military or Dual-Use Technologies
- Quantum Technologies
- Satellite and Space Technologies
- Transport.

- The Bill broadens the ability of the Government to take into account assets owned by an entity, particularly intellectual property, and not just the entity itself. Ministers could, for example, prevent the sale or licensing of certain technologies in some circumstances.

- Companies in seventeen identified sectors (see list on previous page) will be mandated to submit a "notification" if any merger, acquisition or takeover qualifies as a "trigger event". These "triggers" cover any substantial increase in control over an entity or asset, whether that be a full takeover or an acquisition of shares or voting rights above 15%.

- The Government will have the power to "call in" transactions for assessment following any notification. Importantly, Ministers will have the right to exercise this power retrospectively for up to five years in cases with no mandatory or initial voluntary notification.

- Any merger or acquisition covered by mandatory notification which is completed without the approval of the Secretary of State will be legally void.

- Even outside of the core sectors, companies will be encouraged to submit voluntary notifications if a trigger event occurs and there is a potential national security concern.

- Penalties for compliance failure include fines of up to £10 million or imprisonment of up to five years for individuals, and five percent of global turnover for companies.

## IMPACT

The Government estimates an administrative cost to businesses of around £43 million per year, including everything from early engagement with government regarding familiarisation and early advice, to legal and other costs arising from a detailed national security assessment.

The Government expects there to be between 1,000 and 1,800 notifications every year, with 70 to 95 of those resulting in detailed national security assessments. Based on analysis of M&A data and the screening regimes of other nations, the Government estimates that roughly ten cases each year will require remedies of some description, with the proviso that the security landscape is constantly changing.[2]

This represents a significant increase in such interventions. Since 2002, there have been only 12 public interest interventions on national security grounds.

2. BEIS (Nov 2020), *National Security and Investment Bill Impact Assessment*. Link.

# ABOUT HELMSLEY PARTNERS

Helmsley Partners is a political risk and strategy consultancy based in London. We have deep expertise in UK political decision-making, drawn from our senior team's experience as former UK government ministers and policy advisors.

We provide our clients with in-depth analysis of their political and policy risks, and we offer strategies to manage and mitigate those risks.

Our services include transaction due diligence, corporate political strategy, C-Suite political counsel, quantitative and qualitative polling, crisis advisory, policy development and thought leadership.

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## KEY RISKS POSED BY THE NSI BILL

We believe the Bill represents a significant source of political risk for those wishing to invest in UK entities or assets, including:

- **Transactional:** The NSI legislation would present an obvious additional risk of ministerial intervention in M&A transactions, particularly across borders. Interventions could include oversight measures (including 'golden shares' for government in capital structure), limitations on access to sensitive information, behavioural conditions on the participants or even prohibition of the transaction.

- **Administrative:** The added regulatory burden presents risks to the critical path of the transaction. Where a transaction is subject to mandatory notifications, it will be reviewed in 30 working days, with the potential for a 45-day "additional period", then a possible "voluntary period" by arrangement between the Secretary of State and the investor. The Secretary of State will also have the right to demand information or interviews with key personnel. Failure to comply includes heavy fines and penalties, meaning that over-compliance could add to administrative burdens.

- **Immediate *ex post facto* legal risk:** The Bill includes the ability to call in transactions that have taken place since 12 November 2020, i.e. before the Bill has become law. Such an *ex post facto* law would be exceptionally unusual and presents wider concerns around the rule of law, but also the suggestion that the current Government is aware of a particular, imminent transaction that it intends to target.

- **Changes in security priorities:** The Bill allows for retrospective review of transactions, meaning that transactions with minimal security impact today could be undone or severely altered in later years, based on currently unknowable future security priorities. This risk would apply not only to the security situation in the UK, but also to its future relationships with the home countries of investors.

- **Changes in political priorities:** It is feasible that future governments may use the NSI legislation to act retrospectively to meet their own political ends. The legislation requires the use of a 'Statement of Policy Intent', which will set out how the Secretary of State intends to apply the NSI powers. The Statement will be reviewed every five years. However, it is easy to imagine these being applied to evolving political priorities. For example, the former Labour leader Jeremy Corbyn was hostile towards the ownership structures of utilities companies in the UK, particularly where foreign ownership reduced transparency, and he threatened to renationalise them should he come to power. A similarly minded politician might instead use the NSI powers to alter previously completed transactions and thereby undermine foreign ownership of key assets.