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UK NATIONAL SECURITY & INVESTMENT BILL - THE POTENTIAL RAMIFICATIONS FOR INSOLVENCY PRACTITIONERS

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SUMMARY

The new National Security and Investment Bill, which aims to provide the Government with the necessary powers to scrutinise and intervene in business transactions to protect national security, will introduce a mandatory notification regime across 17 sectors in the UK economy. Although the Bill provides a carve-out for rights exercisable by administrators, insolvency practitioners will still need to be mindful of the risks that the Bill may have on distressed M&A transactions, which may be rendered void if captured by the regime and the notification requirements not complied with.

The regime

The new regime, which is currently still going through the House of Lords but scheduled to be enacted in Spring 2021, would then take retrospective effect from 12 November 2020 and is far more wide-reaching than anticipated. The regime:

- enables the Secretary of State to issue “call in” notices to call in acquisitions of qualifying sensitive entities and assets (“trigger events”) in order to carry out a national security assessment;
- creates a mandatory notification system for proposed acquirers of qualifying sensitive entities in sectors perceived to be high risk (including data infrastructure, energy and transport) to seek authorisation and to obtain approval from the Secretary of State before completing their acquisition; and
- creates a voluntary notification system for others to encourage notifications from parties who consider that their trigger event may raise national security concerns.

The 17 key sectors which are perceived to be high risk are set out in the table below.

1) Advanced Materials	2) Advanced Robotics	3) Artificial Intelligence
4) Civil Nuclear	5) Communications	6) Computing Hardware
7) Critial Suppliers to Government	8) Critical Suppliers to the Emergency Services	9) Cryptographic Authentication
10) Data Infrastructure	11) Defence	12) Energy
13) Engineering Biology	14) Military and Dual Use	15) Quantum Technologies
16) Satellite and Space Technologies	17) Transport	

The “trigger events” which enable the Secretary of State to issue “call in” notices are:

1. where the acquirer would gain control of more than 25%, 50% and 75% of votes or shares in a qualifying entity, would be able to block or pass a corporate resolution or would be able to materially influence the policy of the entity; and

2. where the acquirer would gain control of a qualifying asset.

Failure to notify and obtain pre-approval for a transaction which is subject to the mandatory filing obligation will render the relevant transaction void and expose the parties to substantial fines and/or potential imprisonment. For detailed commentary on the scope of the Bill (as currently drafted) please see this blog (entitled “Highly impactful - UK National Security & Investment Bill introduces mandatory Government review of a wide range of transactions”).

The potential ramifications for Insolvency Practitioners

The acquisition of companies heading for insolvency or that are already in insolvency proceedings, often referred to as “distressed M&A”, may face additional hurdles under the new regime, as insolvency practitioners will need to consider whether their current and future transactions could be ‘called in’ under the regime and if they fall within the key sectors identified above.

The Bill provides a carve-out for insolvency practitioners and creditors in an administration (or similar proceedings under the insolvency laws of another country), so that the acquisition of any “rights” that are exercisable by an administrator or creditor in such insolvency proceedings will not constitute a notifiable ‘trigger event’ under the Bill. Crucially, this carve-out only applies to administrators and will therefore not apply to officeholders appointed in respect of other insolvency processes, such as liquidations, or any enforcement action taken by a secured party, including the appointment of receivers.

Notwithstanding the administrator’s carve-out, insolvency practitioners should still be mindful of the steps that a third-party purchaser may need to take to obtain pre-approval of acquisitions within the Key Sectors that are subject to the mandatory filing obligation, and the effects this may have on the timetable of a deal.

As the Bill will only impact a transaction where an insolvency practitioner is selling the requisite number of shares or voting rights held in an entity, as opposed to a “cherry picking” asset sale (as is often the case in an insolvency process), the Bill will only have an indirect effect on the majority of transactions conducted by insolvency practitioners. Given that the obligation to obtain clearance under the Bill will always fall on the buyer, the insolvency practitioner (who is more often than not the “seller” in an insolvent transaction) will not themselves be required to obtain pre-approval. Nevertheless, the acquirer will need to notify and then wait up to 30 business days for either clearance or for the Government to formally “call-in” the transaction for review. As a sale cannot complete until this process has concluded, this is likely to have a significant impact on insolvency practitioners transacting distressed M&A, which is urgent by its very nature.

Insolvency practitioners will also need to be cautious of the risk of a transaction being declared void if the sale of an entity is notifiable and the purchaser has failed to obtain prior clearance. Insolvency practitioners should therefore keep a close eye on transactions that may be caught by the regime and monitor the acquirer’s steps to obtain pre-approval, otherwise the insolvency practitioner may be forced to unwind the transaction and take back what it has sold.

The Secretary of State expects to “call in” asset deals (which are not subject to mandatory notification) very rarely and to call in a deal sitting outside of the ‘Key Sectors’ would be highly exceptional. The transaction would also have to be considered to be a threat to national security on the basis of the nature of the acquirer, asset and trigger event. Whilst insolvency practitioners will be comforted by the exceptional policy nature underpinning this new Bill, they will still need to be alert to any transactions that may be caught under the Bill to ensure that the acquirer is taking active steps to obtain clearance on any notifiable sale and the impact that this may have on the timetable of the deal.

What next?

The Bill is currently going through Parliament and is scheduled for a second reading in the House of Lords on 4th February 2021, where all aspects of the Bill will be debated. The Bill is scheduled to be enacted in Spring 2021, although it is currently uncertain when exactly.

We will continue to monitor the progress of the Bill and provide updates when available.

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