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BEIS ISSUES ANTICIPATED NATIONAL SECURITY & INVESTMENT ACT MARKET GUIDANCE NOTES

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SUMMARY

Following on from its first annual report on the National Security and Investment Act ("NSIA") in June 2022), on 19 July 2022 the UK's Department for Business, Energy & Industrial Strategy ("BEIS") published its first set of "market guidance notes" on the NSIA regime (see here). These guidance notes are based on BEIS's analysis of notifications received to date since the regime came into force in January 2022, as well as feedback from stakeholders on their experiences with the nascent regime to date. In this short article, we summarise the new guidance and advice from the Government as set out in the market guidance notes and what this means for parties active in M&A.

As a reminder, the NSIA came into force on 4 January 2022. The new regime gives the UK Government (through BEIS) extensive powers to review and intervene in certain acquisitions of businesses and assets that may give rise to national security concerns. The regime requires mandatory notifications of acquisitions of control over entities active in 17 "sensitive areas" of the economy and a "call-in" regime, whereby the Government can call in any transaction in any sector for an in-depth review where that deal could give rise national security concerns.

The Market Guidance Notes

The market guidance notes complement other guidance published by BEIS, and are intended to reflect experience gained by BEIS over the first six months of the regime's operation. Rather than focussing on substantive questions, such as how the Government assesses national security issues, the notes focus on procedural and jurisdictional questions.

A large section of the guidance notes focus on practical questions relating to the completion of the notification form. More interestingly though, the notes also provide further guidance on whether a number of common scenarios involving the temporary acquisition of control could trigger NSIA notification obligations. Although these scenarios had been addressed in BEIS' original guidance,

there has been some uncertainty over the application of the NSIA and so this guidance is somewhat welcome. More specifically:

- **Insolvency:** The NSIA explicitly excludes the appointment of an administrator as a notifiable acquisition. However, the appointment of liquidators and receivers is not excluded from the operation of the regime. In the guidance notes, BEIS makes clear that in some situations the appointment of liquidators or receivers could constitute a qualifying acquisition and could require mandatory notification in some circumstances. For example, if a liquidator is appointed, but the insolvent entity has shares in a solvent entity, and the liquidator has voting rights over those shares, this could amount to a notifiable acquisition if the entity is active in one of the sensitive areas. If a mandatory notification is required, this will be subject to the same 30 working day timeline as any other mandatory notification.

- **Security over shares:** The guidance notes make clear that the granting of security over shares (e.g. by way of a mortgage) is not a notifiable acquisition, even if it involves an entity carrying on activities in the sensitive areas. This is because, generally speaking, such security does not give the secured party any control over those shares until it is exercised. As such, when giving share security, it is not mandatory to notify, and receive approval from, BEIS. Of course, if there is a transfer of title or control through the granting of the security, then the application of the NSIA regime should be examined more closely. For example, if the security becomes exercisable, in circumstances where the entity is engaged in activities covered by the Notifiable Acquisition Regulations, the legal transfer of title to the security holder, would still require mandatory (and suspensory) notification.

- **Internal Reorganisations:** One of the more surprising elements of the NSIA regime is confirmed by the guidance notes. The Government considers that internal re-organisations can be notifiable acquisitions where they result in an acquisition of control over a qualifying entity, even if the ultimate beneficial owner of the entity does not change. This means that if, for example, a company transfers direct ownership of a subsidiary from one wholly owned subsidiary to another wholly owned subsidiary, this could amount to a notifiable acquisition if the transferred company is active in a sensitive area. This is the case even though overall control rests with the same company throughout. The guidance notes highlight that the Government recognises that most acquisitions of this kind are simply products of internal corporate restructuring and efficiency, but that there may be cases where the acquisition of control over an entity by a person in the same business group raises national security risks. As such, any businesses active in sensitive areas should consider the application of the NSIA regime, even if they are only carrying out internal corporate reorganisations.

- **Other aspects of control:** The guidance notes also discuss a number of other aspects of control, such as the application of regime to entities that adopt different thresholds for passing and blocking resolutions to the standard Companies Act thresholds, minority shareholder protections and also instances when indirect acquisitions of control can trigger

notification obligations. This commentary highlights that NSIA questions should be considered in any instance where an interest in a company in a sensitive area (including minority interests) is being acquired.

- **Publishing information:** In addition, BEIS has also provided some clarification on when it may publish information relating to the NSIA. The Government is required to make public any final order it makes prohibiting an acquisition – in fact, the first such order was published on 20 July 2022 (see here). However, there are no requirements for the Government to make public details of other acquisitions under review, although it can exercise its discretion and make announcements when it considers there to be a good reason to do so. Generally, the Government will not publish information relating to the fact of notifications, but may publicise "call in" notices (when a transaction is called in for a more in depth review) or clearances. They would most likely do this when the parties have made their own announcements or when the acquisition is otherwise in the public domain. The Government will usually give advance warning to the parties before making any such public announcements.

BEIS and the wider UK Government continue to monitor the application of the NSIA regime, and we would expect further guidance to be provided as more experience is gained, and more stakeholder feedback is received. The Government is also analysing trends and risks with a view to determining whether any exemptions to the mandatory notification requirements may be merited. While any such exemptions would be subject to the scrutiny of Parliament, there may be some hope that the burden of the NSIA regime could be reduced through the application of specific exemptions in the future.

If you require any input or assistance regarding the NSIA regime and how it might affect you, then do not hesitate to get in touch with any member of our team.

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