SOME EARLY OBSERVATIONS ON THE NSIA

The UK's National Security and Investment Act (**NSIA)** has been in force for a couple of months now, quickly becoming part of business-as-usual for UK transactions. The expansive nature of the Act (and its even more expansive accompanying guidance!) has led to a significant number of notifications from our firm alone. We understand that more than one deal has already been "called in" by the ISU for its more in-depth process.

There have been some really positive developments. The Investment Security Unit (**ISU**) at BEIS appears to be sticking by its commitment to review deals at a relatively early stage in proceedings (in contrast to merger control, where the bar for a "genuine intention to proceed" is quite high). It is also moving quite quickly to accept notifications after submission of the form on the portal (although it took a little longer in January, we are now seeing forms accepted the next day, as long as there is no missing information). Clearances for uncontroversial deals are coming through as soon as they are available, rather than waiting until the 30 working day deadline.

Still, plenty of uncertainty remains, for example:

- The online portal for notification has been designed for vanilla trade deals. It does not contemplate e.g. a private equity structure involving a General Partner, various Limited Partners and a tax stack. Whilst the ISU has made it clear that it views the "acquirer" as the Bidco, this makes it difficult to make sense of the separate request (para 37, Schedule 1 to the Content of Notices Regulation) for certain information "where the acquirer will be acquiring indirect control over the qualifying entity". In reality, at this point most practitioners simply upload the full transaction structure as a standalone document, to ensure they are fully transparent.

- Acquisitions by entities which are, themselves, owned by the UK government are currently caught by the Act. As a matter of principle, it is hard to see how such transactions can raise issues, even potentially. The Secretary of State does have powers to make exemptions that could address this – but it does not seem to be a priority for now.

- The dynamics of whether or not to file are driven by s.13(1) of the Act: *"A notifiable acquisition that is completed without the approval of the Secretary of State is void"*. That means that, unlike in the UK's voluntary merger control system, the parties' incentives are largely aligned. It's not clear, though, what this means. Is the whole SPA void or just the clauses effecting the transfer? What of related documents such as lending arrangements? And if the transaction is retrospectively validated under the s.16 process, what is the precise effect of that? One for the courts in due course, we suspect.

Some traps for the unwary:

- The online form asks for details of a contact at the "qualifying entity" (i.e. the target) rather than at the seller. The ISU then adopts the practice of copying the target in on correspondence with the purchaser and its lawyers. Think carefully about who to name on your form!

- According to the published guidance, intra-group reorganisations of a group structure above a "qualifying entity" are caught by the notification requirement, even where the ultimate owner remains the same. If the re-org is in preparation for a divestment, it is likely the ISU will require two separate notifications, meaning the clearances may arrive at different times – so make sure your condition precedent is drafted with this in mind.

- If there is a genuinely sensitive agreement, it is likely that the purchaser will not have received it as part of due diligence – so it will not be able to supply the document as part of the notification. So, when drafting the SPA, think about how you oblige the target to provide such documents directly to ISU (or use best endeavours to persuade the counterparty to release them).

As a result of all of that we are starting to see a few themes emerge, as parties seek to cover off their NSIA risk:

- Lenders are starting to think about how they address the requirements in their documents. Borrowers or sponsors are being asked for representations on their NSIA analysis. In some cases, lenders are mandating that non-mandatory transactions be brought to the attention of the ISU, in order to ensure the five-year period (within which the ISU may call-in the transaction) is reduced to six months (by s.2(2)(a) of the Act).
- Buyer, seller, target and their advisers are performing a familiar dance on each new deal, to determine whether the target has activities in a mandatory sector and who should be responsible for certifying that. Ultimately, there may be little difference between due diligence questions and warranties, given the risks of voidness and criminal sanctions. In practice, the best results tend to come from pragmatic discussions between both sides, recognising it is in both parties' interests to find the right answer.

If you would like to discuss these points further or have any questions please contact:

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